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NATIONAL CASE LAW UPDATE

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CONSTITUTIONAL CASES

Law changing pension fund from non-contributory to contributory held constitutional.

In 2011, the Florida Legislature enacted legislation that converted the statewide Florida Retirement System from a non-contributory to a contributory system, requiring all current members to contribute 3% of their salaries and eliminated future cost-of-living adjustments. The Legislature also prospectively eliminated the plan's

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COLA for all active members. Members of the system challenged the legislation and prevailed at the trial court. The trial court found that the legislation violated Florida's constitutional right to collectively bargain, the constitutional protection against impairment of contract, and the constitutional prohibition on taking private property for public use without just compensation. The state appealed and the case was certified as a question of great public importance, fast tracking the case to the Florida Supreme Court. In January 2013, the Florida Supreme Court issued its ruling and reversed the trial court. The Florida Supreme Court ruled that because the changes to the plan were prospective, they did not violate constitutional protections. The court held that "the preservation of rights statute was not intended to bind future legislatures from prospectively altering benefits for future service performed by all members of the FRS."

Scott v. Williams, 107 So. 3d 379, 2013 WL 173955 (Fla. Jan. 17, 2013)

Law requiring withholding of pension contributions declared unconstitutional.

In mid-August, 2012, the Michigan Court of Appeals determined that a Michigan law requiring that public school districts withhold 3% of employee wages as an employer contribution was unconstitutional. The court found that the law violated the contracts clause, was a taking of private property without just compensation, and a violation of substantive due process. Essentially, the court held that the employees had a property right in the salary that had been earned which the state wrongly took to pay its own obligations. The court found that "[t]he prohibition against governmental impairment of contracts is violated because the statute requires that school employees be paid three percent less than the amount they and their employers freely agreed on in contracts." The state has asked the Michigan Supreme Court to review the matter.

AFT Michigan v. State, 825 N.W.2d 595 (Mich. Ct. App. 2012)

Ordinance reducing benefits struck down by court.

Recently, a federal court in Baltimore struck down a City ordinance reducing benefits for both active and retired members of the police and fire pension plans. The court found that the city could prospectively alter benefits for active members, as long as they were not yet eligible to retire (which in Baltimore is when members vest). The court disapproved the elimination of a COLA based on reserved earnings which was replaced by a COLA from 0% to 2% depending on age. The court found that the

change was not "reasonable and necessary" to preserve public welfare. But, because the court found the provisions of the ordinance could be treated separately, the entire ordinance was struck down.

Cherry v. Baltimore, Case No. 1:10-CV-01447 (D.Md. September 20, 2012)

Federal Court Finds Pension Contract Can Be Implied From Past Practice

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 of

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.

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

Colorado Appeals Court Reinstates COLA Challenge

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. The Supreme Court of Colorado granted review in August.

Justus v. State, 2012 COA 169 (Colo. App. 2012)

Washington Trial Court Upholds Pension Law Challenge

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. The matter is now pending review in the Washington Supreme Court.

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

U.S. Territory Legislator Bonus Granted Even Though Unconstitutionally Enacted

While its retirement system teetered on the brink of insolvency, the Commonwealth of the Northern Mariana Islands Court considered a constitutional challenge to the repeal of a retirement bonus limited to a small class of officers. A provision of Northern Mariana Islands law was enacted in 1989 to provide certain high-ranking

government employees with a retirement bonus of an "additional three percent times average annual salary times years of service." This bonus was repealed in 2003. A public employee retired in 2009 and did not receive the bonus, even though a portion of his service took place while the bonus was in effect. The Supreme Court of the Commonwealth of the Northern Mariana Islands held that the bonus violates a Northern Mariana Islands constitutional provision that a "member of the Legislature 'may not debate on or vote on' a bill in which the member has a financial or personal interest." Because the bonus applied to legislators, the court held that it was unconstitutionally enacted. However, the court found that because "the Fund and members of the Fund acted in good faith when they respectively distributed and received funds pursuant to an unconstitutional statute[,]" and members who had already received the bonus are entitled to retain it.

Bd. of Trustees of the Northern Mariana Islands Retirement Fund v. Ada, 2012 MP 10, 2012 WL 3779318 (N. Mar. I. Aug. 30, 2012)

Constitutional Protection of Health Care Benefits

A more recent trend in establishing a right to guaranteed retiree health care on the same basis as pension benefits has been a claim of implied contract. The theory is that governmental behavior and assurances over an extended period of time have created an implied right of contract. Courts which have recognized the theory have cautioned plaintiffs of their heavy burden in establishing a constitutionally protected right.

After a county passed a resolution that limits the amount of money that could be spent on retiree healthcare, an association representing the retirees filed suit. The association alleged various causes of action, including breach of express and implied contract. The association argued that the county's course of conduct over many years created an implied contract. Because the association was unable to identify any resolutions or ordinances that created a contractual relationship, the trial court dismissed the association's claims, with leave to amend. The association proceeded to file an amended complaint, which attached copies of numerous resolutions, memoranda of understanding, and ordinances upon which it relied. However, the trial court determined that none of these documents contained the county's express agreement not to reduce retiree healthcare benefits and dismissed the case with prejudice. On appeal, the court ruled that the association should have been given another chance to amend its complaint. In so holding, the court recognized recent judicial decisions holding that "a court can infer contractual rights from legislation when the legislature's intent is clear . . . ." In light of recent

jurisprudence allowing a court to infer contractual rights from legislation, the court ruled that the association should have been given another opportunity to amend its complaint. However, the court noted that "a plaintiff claiming the existence of a contract with implied terms carries the heavy burden of establishing, from statutory language or relevant circumstances, that the public entity intended to create a compensation contract by ordinance or resolution. It also bears the equally heavy burden of establishing that implied terms in that contract provide vested healthcare benefits."

Following the decision in *Sonoma County*, a similar suit in another federal court survived a motion to dismiss.

In both of the cased discussed, the issue was the ability to present the claim; not whether the claim will succeed. Time and more litigation will ultimately settle the question.

Sonoma County Ass'n of Retired employees v. Sonoma County, 708 F.3d 1109 (9th Cir. 2013)

Retiree Support Group v. Contra Costa County, ___F.Supp.2d___, 2013 WL 1915661 (N.D. Cal. May 8, 2013)

ADMINISTRATIVE CASES

Municipal pension fund required to reimburse statewide pension for employer contributions received for member who was erroneously enrolled in the fund.

A public employee was mistakenly enrolled in a municipal pension fund when he should have been enrolled in the statewide teachers' retirement system. Once the error was discovered, the employee was transferred into the statewide teachers' retirement system, but the municipal system refused to transfer employer contributions for the employee to the statewide fund. The court determined that the statute governing the transfer of funds was ambiguous. The court relied upon legislative intent in ruling that the municipal fund must transfer the employer contributions to the state fund. The court found that "[f]ailing to require full funding of the retirement system that provides the pension benefit would defeat the statutory purpose of financial stability, would visit a windfall on the system that received contributions in error, and would discourage the detection and correction of errors in administration."

Haverhill Retirement System v. Contributory Retirement Appeal Bd., 971 N.E.2d 330 (Mass. Ct. App. 2012)

INVESTMENT/SECURITIES CASES

New Mexico Teachers lack standing to recover 2008 investment losses.

During the national economic crisis in 2007-2008, the New Mexico Educational Fund ("Fund") lost approximately $40 million on certain private equity investments. The Fund holds approximately $8.5 billion in assets used to pay benefits for 95,000 teachers and other participants. Teachers brought suit against the Fund, Board members and investment advisers for breach of fiduciary duty, violation of federal and state securities laws, aiding and abetting breach of fiduciary duty, and breach of contract. Plaintiffs alleged that they were injured by defendants' improper investments due to potential increased employee contributions, reduced services, tax increases, and the increased risk that the Fund would not have sufficient assets to satisfy its obligations in the future. The court held that plaintiffs could not show that their benefits were threatened, that the system was currently underfunded, or that the challenged investment caused the underfunding.

The court recognized that altering retirement eligibility or contribution requirements would require the legislature to act. Under these circumstances, plaintiffs lacked standing to sue. Plaintiffs' allegations that they faced the risk of tax increases, potential future benefit reductions or increased contribution levels, and that they were injured by the loss of principal, income, fees, and expenses did not establish an injury in fact fairly traceable to the defendants.

State governmental entities, including public employees/trustees acting within the scope of their duties, are immune from liability for any tort, except as waived by law. The court held that breach of fiduciary duty is not one of the tort claims for which the New Mexico Legislature chose to waive governmental immunity under New Mexico's Tort Claims Act. After granting the motion to dismiss in part, the federal district court remanded the case to New Mexico state court given a lack of subject matter jurisdiction.

Hill v. Vanderbilt Capital Advisors, 2011 WL 6013025 (D.N.M 2011)

Breach of fiduciary duty claim against investment consultant is not subject to dismissal based on Florida's economic loss rule.

Three pension boards in the City of Lake Worth, Florida brought a class action lawsuit against Merrill Lynch arising out of an SEC investigation of conflicts of interest and inadequate disclosure. The suit alleged a single count for breach of

fiduciary duty. Plaintiffs asserted that Merrill sought and created a relationship of trust and confidence while serving as a gatekeeper. The complaint alleged that Merrill breached its duties by acting in its own interest and for its own benefit, using plan assets for its own profit without adequate disclosure.

Merrill moved to dismiss, arguing that the claim was barred by the economic loss rule, as it arises out of, or is intertwined with, a series of contracts between plaintiffs and Merrill Lynch. According to Merrill, the claim for breach of fiduciary duty is a camouflaged breach of contract claim. Merrill Lynch argued that regardless of how plaintiffs labeled their claim as one for breach of fiduciary duty, the duties Merrill Lynch allegedly failed to perform arose from, and are inextricably intertwined with, the obligations outlined in the parties' written agreements. The plaintiffs responded that Merrill Lynch's fiduciary duties existed separate and apart from the parties' contracts and that the mere existence of a contract does not immunize Merrill or provide a free pass to cavalierly repudiate its fiduciary duties and enrich itself through self-dealing at the expense of the class.

The economic loss rule is a judicially created doctrine that sets forth the circumstances under which a tort action is prohibited if the only damages suffered are economic losses. The rule applies when the parties are in contractual privity and one party seeks to recover damages in tort for matters arising out of the contract. The rule is designed to prevent parties to a contract from circumventing the allocation of losses set forth in the contract by bringing an action for economic loss in tort.

Nevertheless, where the duties breached do not arise under the contract, an action for an independent tort may exist even though the parties are in contractual privity. Accepting all factual allegations in the complaint as true and construing them in the light most favorable to plaintiffs, the court held that the complaint alleged facts which are distinct from a breach of contract claim. At this stage in the case, the court determined that the claim was both adequately pled and not barred by the economic loss rule. To the extent that discovery demonstrated that the duties allegedly breached by Merrill Lynch are in fact based on or inextricably intertwined with the parties' written agreements, the court indicted that it would revisit the issue.

Ultimately the case settled. The underlying issue of the application of the economic loss rule in fiduciary duty cases is currently pending on appeal at the Florida Supreme Court in an unrelated case.

Board of Trustees of the City of Lake Worth Employees' Retirement System v. Merrill Lynch Pierce Fenner & Smith, 2011 WL 2144658 (M.D.Fla. 2011)

BENEFITS CASES

City committed unfair labor practice when it unilaterally terminated partial lump sum distribution option.

The International Association of Firefighters filed a charge of unfair labor practices with Pennsylvania Labor Relations Board after the City of Erie unilaterally eliminated a partial lump sum distribution option (PLSDO). The union alleged that the city's actions violated the duty to collectively bargain. The Labor Board entered an order holding that the city's unilateral elimination of the PLSDO violated the city's statutory duty to bargain since pensions are a mandatory subject of bargaining. The city appealed. The lower court reversed, holding that the city did not violate its bargaining obligations by unilaterally rescinding the PLSDO because the parties' agreement was not sufficiently clear. The union sought discretionary review to the Pennsylvania Supreme Court.

The city argued that it did not commit an unfair labor practice when it unilaterally repealed an ordinance. According to the city, the benefit was not contained in the parties' collective bargaining agreement or incorporated by reference therein. The city argued that it was permitted to rescind a benefit that was implemented independent of the collective bargaining process, so long as it demonstrated that the term was not bargained for and the city did not gain a bargaining advantage as a result.

In its opinion, the Court stated that it was useful to summarize foundational principles that underlie the case. The applicable statute, Act 111, provided that "Policemen or firemen ... shall ... have the right to bargain collectively with their public employers concerning the terms and conditions of their employment, including compensation, hours, working conditions, *retirement, pensions and other benefits*."

The Court held that the parties are required to bargain over mandatory subjects of bargaining before a party may unilaterally change such benefits. The fact that a city changes benefits through the enactment or repeal of an ordinance does not alter this calculus. Indeed, if this were the case, a public employer could grant benefits through ordinances and simply unilaterally repeal them at will. Accordingly, the city committed an unfair labor practice when it, by ordinance, unilaterally eliminated firefighters' PLSDO pension benefit without first collectively bargaining with union.

City of Erie v. Pennsylvania Labor Relations Board, 32 A.3d 625 (Pa. 2011)

Retiree Benefits Tied to Labor Contract Can Be Reduced if Active Member Benefits Reduced

A group of retired firefighters were receiving disability benefits for line-of-duty injuries. Pursuant to local law, the city was required to pay the firefighters "the difference between such benefits and their 'regular salary and wages.'" During the course of their retirement, the city and union entered into a new collective bargaining agreement, which included a 5% salary reduction applicable to "all 'bargaining unit members,' except as otherwise 'required by law.'" After the collective bargaining agreement was ratified, the city notified the firefighters receiving disability benefits that their benefits would be reduced accordingly. The firefighters filed suit, arguing that they are not "bargaining unit members" within the meaning of the collective bargaining agreement and that they have a vested interest in the higher salaries which cannot be reduced. The city argued that the retirees would receive the benefit of any salary increases and therefore must be subject to any salary reductions. Noting that this was a case of first impression, the court ruled that because the payments owed to the retired firefighters is directly tied to the salaries of active firefighters, the retirees are subject to any reduction in salary paid to active firefighters.

Whitted v. City of Newburgh, 961 N.Y.S.2d 727 (N.Y. App. 2013)

Equitable Distribution of Military Pension

A retired military officer was married to his former spouse for approximately ten years while he was serving in the military, and accruing applicable pension benefits. At the time of the divorce, the trial court awarded the ex-spouse one-half of ten years' worth of the officer's pension benefits. However, because the officer had not yet vested, the trial court did not determine the specific amount owed to the ex-spouse. One issue on appeal was whether the officer's pay grade at the time of the divorce, or at the time of his retirement, should be used in calculating his ex-wife's benefit. The officer argued that "using his pay grade at the time of retirement allows [his ex-wife] to unjustly reap the benefits of rank advancements that he achieved – without her help – after the parties' divorce." On the other hand, the ex-wife took the position that the officer's service during the course of their marriage established the foundation for future promotions and that she should receive her share based upon the officer's pay grade at the time of his retirement. The court agreed with the ex-wife and ruled that her share of the benefit should be determined by using the officer's pay grade at the time of his retirement. The parties also disagreed over whether the percentage of the benefit the ex-wife is entitled to receive should be

applied before or after taxes. Ultimately, the court held that the ex-wife's portion of the benefit must be calculated after deducting taxes owed.

Johnson v. Johnson, 270 P.3d 556 (Utah Ct. App. 2012)

SURVIVORSHIP CASES

Absence of Beneficiary Designation Eliminates Benefits to Girlfriend

A deceased public employee's adult children brought an action against the pension fund and the employee's girlfriend, challenging the girlfriend's receipt of survivor benefits. The employee's girlfriend was listed as the employee's beneficiary on his beneficiary designation form. However, the form was not personally completed by the employee. Rather his attorney, acting without a written power of attorney, submitted the form on the member's behalf. The court ruled that the only exceptions to a member filing his own beneficiary designation is where there is a court-appointed guardian or a written power of attorney. Because there was no court-appointed guardian or written power of attorney in this case, the court determined that the employee's girlfriend could not legally receive the benefits.

Farmer v. Berry, 981 N.E.2d 929 (Ohio Ct. App. 2012)

Failure to Inform Does Not Revive Untimely Death Benefit Application

The widow of a public employee contacted the pension fund shortly after the member's death requesting information regarding benefits. The pension fund sent the widow the application for survivor benefits, but did not inform her that there was a one year deadline to apply for the benefits. After the widow failed to submit her application within one year of her spouse's death, her claim for benefits was denied. The widow sued, claiming a host of constitutional violations. However, the court agreed with the pension fund that the widow was precluding from receiving any survivor benefit due to her failure to timely file an application. The court concluded that "her right to survivor benefits was governed by the terms of the Act and it terminated when she failed to comply with the Act's application requirements within one year of her husband's death."

Martinez v. Public Employees Retirement Ass'n of New Mexico, 286 P.3d 613 (N.M. Ct. App. 2012)

DISABILITY CASES

Board's action in refusing to allow employee to amend application for disability retirement was arbitrary and capricious.

After suffering a heart attack, a public employee filed an application for disability retirement benefits and was denied. It appears that the board denied the employee's application because the employee was not diagnosed until after he had retired. However, at the time the employee filed his application for disability retirement, he had already suffered a heart attack and was incapacitated. The court found that even though the employee was not diagnosed until after he retired, the board's refusal to allow the employee to amend his application was arbitrary and capricious, and was therefore reversed.

Diaz v. Kelly, 98 A.D.3d 425 (N.Y. App. Div. 2012)

Pension board's denial of disability application upheld when pension board stated with particularity its reasons for disregarding medical opinion.

A pension board denied a police officer's application for disability benefits and the officer appealed. The officer's application for disability benefits was based upon injuries suffered as a result of two separate accidents. In one incident, the officer was hit in the head by the side mirror of a passing car. In the other incident, the officer fell out of her chair and hit her head on a metal cabinet. The pension board, relying on an independent medical examination conducted by a neurologist, determined that the officer was not totally and permanently disabled. The officer requested an administrative appeal of the board's decision. At the time of the administrative appeal, the neurologist who performed the independent medical examination became unavailable to testify. Therefore, the board sent the officer for another independent medical examination. This second independent medical examination, also performed by a neurologist, concluded that the officer was not totally and permanently disabled.

At the administrative hearing, the officer presented three fact witnesses, including the chief of police, who testified that over the past ten years they had noticed a deterioration of the officer's memory, cognitive abilities, and ability to keep focused. The police chief specifically testified that the officer is unable to perform the duties of a police officer due to her memory problems. The officer also presented reports

by doctors she had previously seen stating that she was unable to perform the duties of a police officer due to memory problems. However, the board's medical witness testified that in his medical opinion, the officer's problems were not caused by neurological issues. Rather, the board's medical expert believed that the officer's issues may be caused by depression, which is treatable and not permanent. The administrative law judge recommended that the officer's application for service-connected disability be denied, but that her application for non-duty disability be granted. The board, however, again voted to deny any disability benefits to the officer. The officer proceeded to appeal the board's denial. The appellate court recognized that "[a]gency decisions are given a strong presumption of reasonableness, and we will generally not reverse such a decision unless it is arbitrary, capricious, or unreasonable, or it is not supported by evidence in the record." Because the pension board stated with particularity its reasons for rejecting certain medical opinions and accepting others, the appellate court found that the board's decision was reasonable and supported by substantial evidence.

Bailey v. Police and Firemen's Retirement System, 2013 WL 11705 (N.J. Ct. App. Jan. 2, 2013) (Unpublished)

Evidence Fails to Rebut Presumption of In Line of Duty Disability

A police officer who responded to the World Trade Center to provide assistance following the September 11th terrorist attacks later developed a respiratory disability. The officer had worked 75 hours over 5 days between September 11 and 27, 2001. A triage form filled out on September 15, 2001 showed that she was coughing and complained of rib pain. The officer applied for disability retirement in February, 2002, which was denied. The officer then appealed the denial of the disability retirement. The court noted that normally the claiming filing for disability retirement bears the burden of proving causation. However, an applicable ordinance creates a presumption in favor of disability retirement for police officers who performed duties at specified locations, including the World Trade Center immediately following the September 11th terrorist attacks. The court noted that "[a]lthough the WTC presumption is not a per se rule mandating enhanced accidental disability retirement benefits for first responders in all cases, the Pension Fund bears the initial burden of coming forward with affirmative evidence to disprove causation." Thus, while a disability applicant ordinarily bears the burden of establishing causation between a disability and his job duties, in the case of September 11th responders, the Pension Fund bears the burden of demonstrating that the disability was not caused in the line of duty. The pension fund had initially denied the disability by relying on a medical

opinion that her medical condition was not related to the 9/11 exposure. The court ruled that there was no credible evidence in the record to deny the disability.

McAuley v. Kelly, 959 N.Y.S.2d 482(N.Y. App. 2013)

Board Errs in Refusing Disability Application without Mayoral Resignation

A public employee applied for disability retirement benefits from a transportation authority, while still intending to maintain his position as township mayor. A statute that allowed a public employee to retire from one public employment position while retaining an elected office was repealed several months after the employee filed his application for disability retirement. However, the pension fund board applied the law in effect at the time of its consideration of the employee's application and determined that it was unable to consider the employee's application unless he resigned his position as township mayor. The employee challenged the pension board's refusal to consider his application unless he resigned as mayor. The court determined that the board should have applied the law in effect at the time the employee's application for benefits was filed. Ultimately, the court ruled that the board's refusal to consider the employee's application for disability retirement was erroneous and that the application must be considered by the board.

Chiarello v. Bd. of Trustees, Public Employees Retirement System, 57 A.3d 567 (N.J. Ct. App. 2012)

FORFEITURE CASES

Assaulting fellow police officer constitutes forfeitable offense.

A municipal police pension board forfeited a police officer's pension benefit after the officer was convicted of assaulting a fellow officer. The officer appealed the forfeiture and the appellate court ultimately upheld the forfeiture. The officer was off-duty, wearing civilian clothing, and carrying his department-issued firearm in his off-duty holster. After consuming numerous alcoholic beverages, a fellow officer invited to drive the officer and suggested that he sleep at his house. The officer agreed, but when they arrived at the fellow officer's house, he began walking away from the house. The fellow officer followed the officer on foot and asked him to come back to his house. From a distance of five to six feet, the officer drew his firearm, shot his fellow officer once near his hip, and left the scene. The officer subsequently pleaded guilty to assault and battery with a dangerous weapon. The

nexus required for pension forfeiture under state law "is not that the crime was committed while the member was working, or in a place of work, but only that the criminal behavior be connected with the member's position." The court found that the officer "engaged in the very type of criminal behavior he was required by law to prevent." The court upheld the forfeiture, finding that "this violation was directly related to his position as a police officer as it demonstrated a violation of the public's trust as well as a repudiation of his official duties."

Durkin v. Boston Ret. Bd., 83 Mass. App. Ct. 116, 981 N.E.2d 763 (Mass. Ct. App. 2013)

Forfeiture requires return of benefit payments made prior to conviction.

After being convicted for larceny for stealing paving supplies from the city's highway department, a municipal pension board ordered the forfeiture of the employee's pension. In the first level judicial review, the court ruled that the pension forfeiture did not constitute an excessive fine, but that the employee could keep any benefit payments he received prior to the date of his conviction. Upon further judicial review, the next level court affirmed the forfeiture and held that the employee could not keep any benefits in excess of his actual contributions. The employee appealed, and effectively obtained a third appellate review. Upon further review, the court ultimately held that the forfeiture was proper, rejecting the employee's argument that the forfeiture violated the Excessive Fines Clause of the Eighth Amendment to the United States Constitution. Further, the court also ruled that the pension statute required that the former employee repay all pension benefits that he received in excess of his actual contributions, even those funds received prior to his conviction.

Flaherty v. Justices of the Haverhill Div. of the Dist. Ct. Dept. of the Trial Ct., 83 Mass. App. Ct. 120, 981 N.W.2d 745 (Mass. Ct. App. 2013)

Off-duty sexual abuse of another firefighter's child found not to be a forfeitable offense.

A former firefighter pled guilty to numerous counts involving sexual abuse of minors. One of the firefighter's victim's was another firefighter's son. Following his initial indictment, the firefighter applied for retirement benefits, which were granted. However, after he was convicted of various related offenses, the pension board decided to forfeit his pension benefits. The firefighter appealed the board's decision. On the first level of appellate review, the court reversed the board's decision and

found that there was not a significant nexus between the firefighter's offenses and his position as a firefighter. The pension board proceeded to appeal that decision. Upon further review, the court analyzed numerous forfeiture cases and found that the firefighter's pension was improperly forfeited. The court reasoned that the crimes did not occur at the fire station, the firefighter was never on duty when the crimes occurred, and he never used his position, uniform, or equipment in the commission of his crimes. While noting that the firefighter's crimes were reprehensible, the court found that they were personal in nature and not sufficiently connected to his duties as a firefighter to warrant forfeiture of his pension benefits.

Retirement Bd. of Maynard v. Tyler, 981 N.E. 2d 740 (Mass. Ct. App. 2013)

Even if there is a money judgment against a public employee for a bribery conviction, pension board cannot refuse to return employee's contributions.

A federal grand jury indicted a public employee on multiple felony counts related to accepting bribes. After pleading guilty to the charges, the employee was ordered by the criminal court to forfeit to the government the funds he illegally obtained. About one month prior to entering his guilty plea, the employee resigned and requested a return of his pension contributions. The pension board refused to return the employee's contributions based upon the fact that a money judgment for restitution had been entered against the employee. The employee filed suit, arguing that the board wrongfully refused to return his pension contributions. The trial court agreed with the employee that the pension board cannot lawfully refuse to return his contributions. The pension board appealed. On appeal, the court analyzed applicable law and concluded that the board could refuse to return the employee's contributions if there was a "restitution" order against the employee. However, the court determined that the judgment at issue did not constitute a restitution order, but was rather a forfeiture order, because the debt was not owed to the victim of the employee's crimes. Therefore, the court held that the pension board could not lawfully refuse to return the employee's contributions.

Zambarano v. Retirement Bd. of Employees' Retirement System of the State of Rhode Island, 61 A.3d 432 (R.I. 2013)

Child Pornography on Work Computer Warrants Forfeiture

After pleading no contest to multiple counts of possession of child pornography, a pension board voted to forfeit a public employee's pension benefits. The employee

appealed the forfeiture, arguing that his crimes were not connected to his employment. The court noted that under Florida law, in addition to certain specified forfeitable offenses, there is a "catch-all" of criteria that lead to pension forfeiture. "In order to constitute a 'specified offense' under [Florida law], the criminal acts must be: (a) a felony; (b) committed by a public employee; (c) done wilfully and with intent to defraud the public or the employee's public employer of the right to receive the faithful performance of the employee's duty; (d) done to obtain a profit, gain or advantage for the employee or some other person; and (e) done through the use or attempted use of the power, rights, privileges, duties, or position of [the employee's] employment." The court found that by viewing pornographic materials on his work computer, there was "competent, substantial evidence in the record to support the [administrative law judge's] conclusion that [the employee] committed the felony of possession of child pornography willfully and with intent to defraud the public of the right to receive the faithful performance of his duties . . . ." The employee also argued that "the evidence failed to show that he realized or obtained a profit, gain, or advantage for himself or some other person." The court, however, rejected that argument and found that economic gain is not necessarily required in order to show that the employee obtained a personal gain. In this case, the court ruled that the employee's own personal sexual gratification constitutes a personal gain sufficient to permit pension forfeiture.

Bollone v. Dep't of Management Services, Div. of Retirement, 100 So. 3d 1276 (Fla. 1st DCA 2012)

OTHER PENSION LITIGATION

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

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

strike down the ordinance as being in violation of the U.S. and Texas Constitutions as applied to vested and retired members.

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

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

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

B. **Cincinnati Pension Litigation** - In 2012, the City of Cincinnati cut pension benefits for active employees. In addition, the balance of representation on the Board of Trustees was altered to place the City in effective control. A federal class action has been filed by vested members of the plan challenging the benefit cuts, including the alteration of the retirement board. A motion to dismiss is pending. The parties have recently entered mediation. At the same time, a ballot measure sponsored by the Arnold Foundation to close the plan will appear on the ballot in November.

C. **Omaha Pension Litigation** - The Board of Trustees of the Omaha Police and Fire Retirement System has sued the City of Omaha in state court over the City's failure to observe the fiduciary independence of the Board. At issue is whether the Finance Department must follow the dictates of the Board on payment of outside counsel.. The City Attorney's Office, who is ostensibly counsel for the Board, has contended that it and not the Board decides who the Board's lawyer will be. The matter is pending motions for summary judgment in a Nebraska state court.

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

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

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

1) The Court agreed with Defendants and reversed the trial court as to governmental immunity/lack of PERISA standing for claims against the trustee defendants;

2) The Court affirmed the trial court's ruling that plaintiffs have standing to pursue their PERISA claims against the investment advisor defendants;

3) Plaintiffs do not have standing to pursue a declaratory judgment action against either the trustee defendants or investment advisor defendants with regard to PERISA claims;

4) Plaintiffs have standing to assert their (I) common-law and statutory conversion claims; (ii) causes of action grounded in the trustee defendants' "extravagant, unnecessary and improper trips", and (iii) constitutional claims against trustee defendants and investment advisor defendants for violation of Art 9, Section 24 which protects "accrued financial benefits";

5) Defendants' motion for summary disposition was inappropriate at the early stage of the litigation;

6) The lower court correctly denied defendants' motions for summary disposition on the basis that plaintiffs lacked standing. There is at least some independent evidence in support of the bad investment and self

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

7) The lower court properly dismissed the spoilation and waste counts;

8) The order granting class certification is affirmed. *Estes v. Adrian Anderson,* Michigan Court of Appeals (unpublished)(11/15/2012). The case is currently stayed pending the bankruptcy proceedings

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

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

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

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

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

G. **Louisiana Cash Balance Litigation** - In the 2012 legislative session, the Louisiana Legislature adopted a cash balance tier for certain employees in three of the four state retirement systems, the Louisiana State Employees Retirement System (LASERS), the Teachers' Retirement System of Louisiana

(TRSL), and the Louisiana School Employees Retirement System (LSRS) who are hired on or after July 1, 2013.

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

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

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

In August 2012, the Retired State Employees Association (RSEA) and several retired employees, including a former Senate Retirement Committee Chairman, sued on the basis that the law was not adopted with the required majority. Following a one day trial, the District Judge ruled that the Legislative Auditor's actuarial note was the only one that counted. As a result, the law was adopted in violation of the constitutional supermajority requirement and therefore invalid. By striking down the law on the basis it was invalidly adopted, the Court did not reach the question of funding for any necessary implementation cost.

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

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

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

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

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

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

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

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

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

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

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

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

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