

Recent Developments in Pension Legislation and Litigation

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Presented by
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Main Ideas

- Since 2008 financial crisis, many states have passed legislation to reform their state pension systems
- All have been subject to court challenges
- Many laws have been upheld but some have been found unconstitutional
- Summarize legislation and litigation across states and draw trends

Background: Contract Clause

- Little used provision for 200 years
- *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934), in Depression revived its use, but Court conducted an ad hoc analysis of statute
- The U.S. Supreme Court in *U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1 (1977), outlined a three-part test
 - Is there a contract?
 - If so, was it substantially impaired?
 - If so, was the impairment reasonable and necessary to serve a legitimate public purpose?

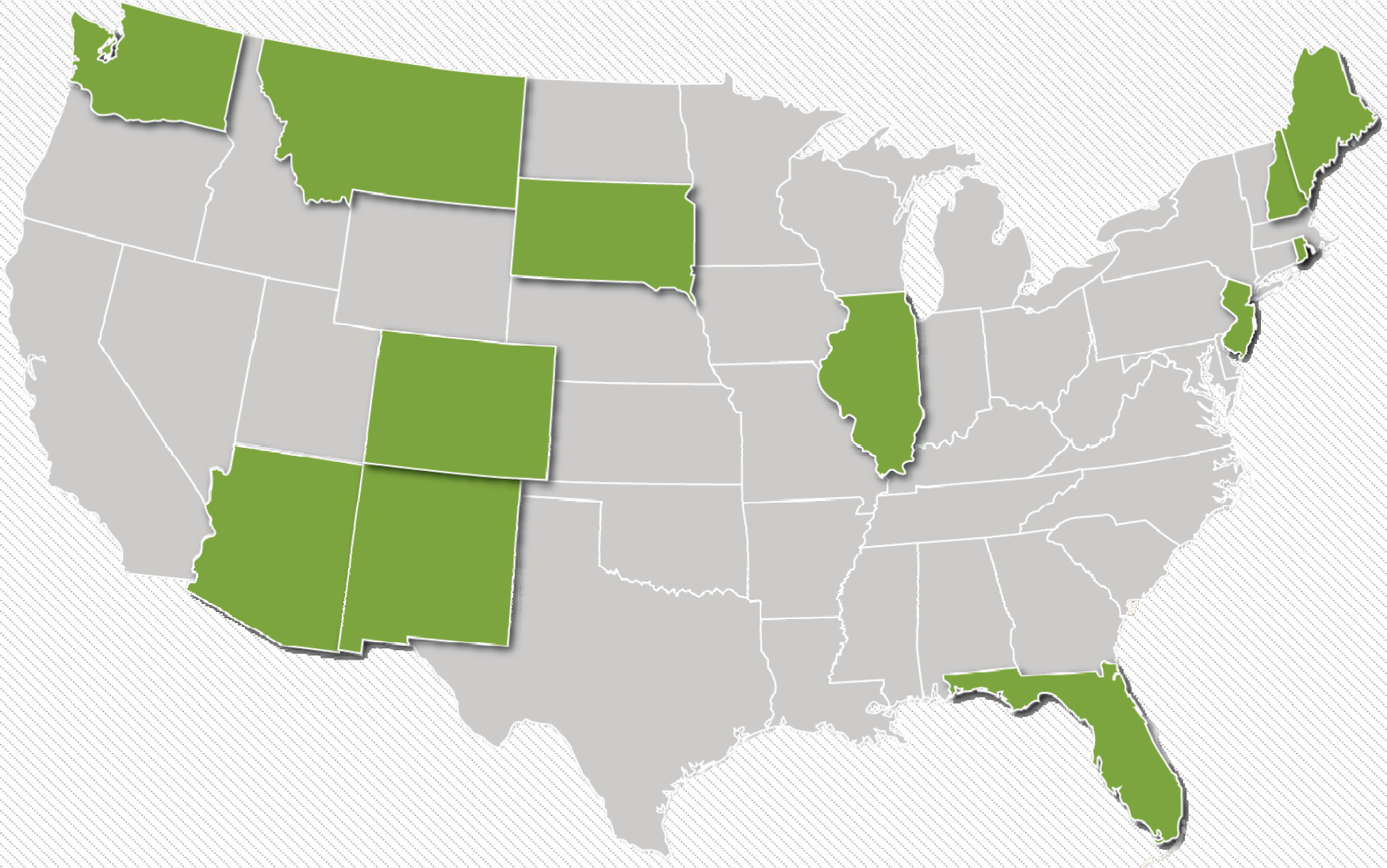
Background: Pensions

- Pre-1930s gratuity model
- Shift to entitlement model
- Result: some cases beginning in 1950s apply a *per se* test that once there is a contract right found to the pension, then no changes can be made
- The *per se* test conflicts with the later three-part *U.S. Trust* federal test

Background: COLA

- Most pension plans enacted in 1930s to 1940s did not have a COLA
- Implemented in 1960s or 1970s (or later) to address high inflation
- Often systems have changed the formula repeatedly over time
- Many states had high COLA formulas after late 1990s and early 2000s economic success
- Problem: 2008 financial crisis and worsening pension plan demographics

Result: COLA Legislation and Litigation





Colorado: Legislation

- Readjusted COLA from 3.5% to 2%, with potential to increase when plan's funded ratio improves
- Raised employer contributions and employee contributions (through foregone salary increases)
- Increased age and service requirements



Colorado: Dispute

- Retirees sued based on state and federal Contract Clause
- Argued that Colorado's Contract Clause applied *per se* test, not three-part balancing test, to public pension challenges
- Argued that COLA had always gone up in the past and that retirement system officials had promised it would never be cut



Colorado: Trial Court Ruling

- District court granted summary judgment for PERA. *Justus v. State*, No. 2010CV1589 (Colo. Dist. Ct. 2011).
- “While Plaintiffs unarguably have a contract right to their PERA pension itself, they do not have a contractual right to the specific COLA formula in place at their respective retirement, for life without change.” Order at 4.
- Recognized that COLA had repeatedly changed.
- Applied three-part test to Colorado Contract Clause, but did not proceed past first prong because found there was no contract right.



Colorado: Court of Appeals Ruling

- Court of appeals affirmed in part, reversed in part, the district court's order. *Justus v. State*, 337 P.3d 1219 (Colo. App. 2012), *rev'd*, 336 P.3d 202 (Colo. 2014).
- Affirmed application of three-part Contract Clause test to public pension cases. Suggested 1950s era Colorado Contract Clause cases applying *per se* test to public pension cases had been overruled.
- But then relied on same 1950s era Colorado cases to find that retirees did have a contract right to the COLA in place at retirement.
- Plan's prior communications as to benefits could not create contract right.
- Did not reach second or third prongs. Remanded to district court.



Colorado: Supreme Court Ruling

- Supreme court reversed court of appeals and affirmed district court's summary judgment order finding no contract right to COLA in place at retirement for life. *Justus v. State*, 336 P.3d 202 (Colo. 2014).
- Three-part balancing test applies to public pension cases.
- Distinguished 1950s era Colorado cases involving unchanging pension formula which were fully terminated whereas here the formula had repeatedly changed and was being changed once again. "By its very name, adjustments to the formula necessarily imply fluctuation with changes in the cost of living and CPI." 336 P.3d at 210.
- Court did not find language of entitlement in COLA provision, especially as compared to other provisions describing base benefit.
- Found no contract right to unchangeable COLA for life.
- Plan's prior communications as to benefits could not create contract right.
- Did not reach second or third prong.



Minnesota: Legislation and Dispute

- COLAs reduced from 2.5% to 1%-2%, with higher levels restored once funding level improves
- Employer contribution rates raised
- Vesting requirements for new employees raised
- Early retirement provisions changed
- Retirees sue under state and federal Contract Clause



Minnesota: Trial Court Ruling

- District court granted summary judgment to pension system in unpublished order. *Swanson v. State*, No. 62-CV-10-05285 (Minn. Dist. Ct. 2011).
- Found plan failed first prong of three-part test because no right to fixed COLA. “The relevant statutory language does not encompass a legislative contract or promise to refrain from amending the statutory formula, for those public employees who have retired.” Order at 3.
- “In the end, the balance achieved fully preserved retirees’ pension annuities, provided for annual adjustments to those annuities, and stabilized the financial deterioration that threatened Minnesota’s public pension Plans. There is no legal or equitable reason for the judiciary to interfere with this legislative policy decision.” Order at 3-4.
- No plain language granting retirees’ contract right and no need for legislature to reserve right to amend because it is legislature’s inherent right.
- Plan’s prior communications as to benefits could not create right.
- Applied remaining prongs and found no substantial impairment and that changes were reasonable and necessary.
- Order not appealed.



South Dakota: Legislation and Dispute

- COLA reduced from 3.1% to 2.1%
- South Dakota plan had been fully funded until 2008 crash, and dropped to 76.5% market rate valuation
- As a result, plan 100% funded again by 2011 and paid 3.1% COLA that year
- Retirees challenged under state and federal Contract Clause



South Dakota: Trial Court Ruling

- District court granted summary judgment to defendants. *Tice v. State*, Civ. No. 10-225 (S.D. Dist. Ct. 2012).
- Applied three-part balancing test.
- Found retirees had no contractual right to fixed COLA. “There is no contractual right or relationship, which guarantees Plaintiff a forever 3.1% COLA.” Order at 10.
- Found the statute “does not contain any language or any clear indication that would entitle Plaintiff to a private contractual right to a ‘forever 3.1% COLA.’” Order at 12.
- Cited the law of unintended consequences. “No legislature will make a ‘COLA bet, if they know it is a forever bet.’” Order at 16.
- Did not reach second or third prong.
- Order not appealed.



New Mexico: Legislation and Dispute

- COLA reduced by 20%
- Retirees file writ of mandamus which went directly to New Mexico Supreme Court
- Challenge under New Mexico constitutional provision that under certain conditions, a public employee “shall acquire a vested property right with due process protections” in a “retirement plan”



New Mexico: Supreme Court Ruling

- Supreme Court found COLA reduction constitutional because retirees had no property right in COLA. *Bartlett v. Cameron*, 316 P.3d 889 (N.M. 2013).
- Court distinguished between base benefit and COLA. “However, a cost-of-living *adjustment* to a retirement benefit, by its own terms, is not necessarily the same thing as the underlying retirement benefit.” 316 P.3d at 893 (emphasis in original).
- Reasoned that COLA was separate from base benefit.
- Noted that COLA had changed over time.



Florida: Legislation and Dispute

- Statute converted pension plan from noncontributory to contributory system and eliminated COLA for creditable service after 2011, applying to active employees
- Lawsuit by active employees challenged constitutionality under Contract Clause, Takings, and Collective Bargaining constitutional provisions
- Trial court found on summary judgment for challengers that act was unconstitutional impairment



Florida: Supreme Court Ruling

- Supreme Court reversed and found statute constitutional. *Scott v. Williams*, 107 So. 3d 379 (Fla. 2013)
- Court applied 3-part test to Contract Clause challenge that had been previously unsettled in Florida
- Held that Contract Clause does not bind legislatures from prospectively altering benefits and prior act did not create binding rights for existing employees to future retirement benefits



Maine: Legislation and Dispute

- Adjusted COLA for retirees from 4% previously on whole pension benefit, to 3% on first \$20,000 only, with a three-year freeze through 2013 with no increase
- Retirees argued violation of three-part balancing test for U.S. Contract Clause



Maine: Trial Court Ruling

- District court granted summary judgment to pension system. *Maine Ass'n of Retirees v. Bd. of Trustees of Maine Public Employees Retirement System*, 954 F. Supp. 2d 38 (D. Me. 2013)
- Found that retirees had no contractual right to the COLAs as previously enacted. “[W]ithholding an increase is not within the standard dictionary definition of ‘reduction.’” 954 F. Supp. 2d at 52.
- Court also found that it was not clear and unmistakable that COLA fell under the statutorily-guaranteed benefits, noting that COLA was not included on the list.



Maine: First Circuit Ruling

- Affirmed district court ruling for pension system. *Maine Ass'n of Retirees v. Bd. of Trustees of the Maine Public Employees Retirement System*, 758 F.3d 23 (1st Cir. 2014).
- Retired Supreme Court Justice Souter sat on three-judge panel.
- Found that both plaintiffs and defendants' readings of the statute were possible, and "[i]n the context of the unmistakability context, this ambiguity dooms Plaintiffs' argument." 758 F.3d at 31.



Arizona: Legislation and Dispute

- Law lowered future COLA increases for elected officials retirement plan, tying it to plan's funded status and redirecting funds previously earmarked for COLA to fund base benefits
- Retired judges sued, arguing that Arizona Constitution article 29, a voter-enacted proposition dubbed the Pension Clause, barred changes to “public retirement system benefits”



Arizona: Trial Court Ruling

- Trial court held trial and found for retired judges, applying Arizona's section 29 and finding law unconstitutional
- Trial court did not address Contract Clause claim



Arizona: Supreme Court Ruling

- Affirmed trial court ruling that statute unconstitutional. *Fields v. Elected Officials' Retirement Plan*, 320 P.3d 1160 (Ariz. 2014)
- Court held the Contract Clause did not apply because the more specific Pension Clause applied to public retirement benefits
- Held that “the term ‘benefit’ includes benefit increases.” 320 P.3d at 1165.
- Relied on precedent from other states with constitutional provisions explicitly concerning public pensions (IL and NY)



Rhode Island: Legislation

- 2009 Act: Increased age/service requirements for active employees, changed benefit formula, lowered COLA by applying it only to first \$35,000 of benefits and instituted 2-year COLA holiday upon retirement
- 2011 Act: Enacted hybrid DB/DC plan for future work, raised age/service requirements, lowered COLA to first \$25,000 of benefits; applied to active employees



Rhode Island: Trial Court Rulings

- Active employees who had worked at least ten years (partially vested) sued arguing 2009 and 2011 acts were unconstitutional under Contract Clause; cases are consolidated in front of same trial court judge.
- 2009 Act: Trial court denied State's summary judgment motion and found the act gave right to implied contract. *Rhode Island Council 94 v. Carcieri*, 2011 WL 4198506 (R.I. Super. Ct. 2011).
- 2009 Act: Trial court held "a COLA and a pension are one and the same." 2011 WL 4198506 at *12.
- 2011 Act: Trial court found implied contract and denied motion to dismiss. *Bristol/Warren Regional Sch. Employees v. Chafee*, 2014 WL 1743142 (R.I. Super. Ct. 2014).



New Jersey: Legislation and Dispute

- Suspended COLA payments to retirees and active employees until fund reaches 75% funded (system was 56% funded at time)
- Retirees sued under state and federal Contract Clause
- Trial court ruled for pension system reasoning that legislature retained right to amend pension benefits without deciding Contract Clause claim.



New Jersey: Appellate Court Ruling

- Appellate court affirmed in part and reversed in part. *Berg v. Christie*, 93 A.3d 387 (N.J. Super. Ct. 2014).
- Found plaintiffs had contract right to COLA.
- “The history of the pension statutes, including amendments to the Pension Adjustment Act, convinces us that COLAs are such an integral part of the pension system that the Legislature must have intended that they be included as part of the non-forfeitable right.” 93 A.3d at 410.
- Remanded to trial court as to second and third prongs.



Washington: Legislation and Dispute

- Froze COLA at 2010 benefit levels, though increased minimum benefit COLA for retirees
- Repealed gainsharing provision which increased COLA
- Both statutes being repealed had included a legislative reservation of right to modify/repeal
- Two separate lawsuits arguing that changes to COLA and gainsharing violated Contract Clause
- Both trial courts found for plaintiffs at summary judgment



Washington: Supreme Court Ruling

- Supreme Court reversed trial court in both cases and found statutes constitutional. *Washington Educ. Ass'n v. Washington Dep't of Retirement Sys.*, 332 P.3d 439 (Wash. 2014); *Washington Educ. Ass'n v. Washington Dep't of Retirement Sys.*, 332 P.3d 428 (Wash. 2014)
- Court agreed three-part Contract Clause applies to public pensions
- Court found no impairment of contract because both repealed statutes included reservation of right

New Hampshire: Legislation and Dispute



- Changed definition of earnable compensation to exclude “other compensation” and revised COLA formula, though unclear if applied to retirees or only active employees.
- Active employees sued under Contract Clause.
- Trial court ruled in favor of plaintiffs as to definition of compensation but for pension system as to revised COLA.

New Hampshire: Supreme Court Ruling



- Supreme Court ruled in favor of pension system on both issues. *American Federation of Teachers-New Hampshire v. State*, --- A.3d --- (N.H. 2015).
- Held that even vested employee can have terms of benefit changed prospectively, including definition of earnable compensation.
- Held that there is no statutory obligation to provide a COLA, citing New Mexico, Colorado, Maine, and Florida cases.



Illinois: Legislation and Dispute

- Lowered COLA for current retirees
- For future retirees, eliminated COLA for alternating years for varying lengths of time
- Raise retirement age for future retirees
- Capped pensionable salary at 2014 level
- Retirees and active employees sued, arguing violation of the Illinois constitution's pension provision



Illinois: Trial Court Ruling

- Trial court held law unconstitutional. *In re: Pension Litigation* (Ill. Dist. Ct. 2014).
- Held statute violated Illinois Pension Clause because the clause is absolute and without exception.
- State enjoined from enforcing the law.
- Case currently on appeal to the Illinois Supreme Court.



Montana: Legislation and Dispute

- Reduced COLA from 3% to 1%-1.5% (COLA had only been in effect since 1997)
- Increased employer and employee contributions
- Redirected coal tax severance funds to plan
- Retirees filed lawsuit under Montana contracts clause, citing state statute that public employees have contract with state



Montana: Trial Court Ruling

- District court grants summary judgment to retirees. *Ass'n of Montana Retired Public Employees v. State*, No. DDV-2013-788 (Mont. Dist. Ct. 2015).
- Applies three-part test.
- Holds that retirees have contractual right to a COLA, after surveying contrasting rulings from other states.
- Rules that promises in brochures and lack of explicit reservation of rights show intent to create contract right.
- Finds substantial impairment and change is not reasonable and necessary because legislature could have chosen other methods to deal with funding shortfall.
- Case now on appeal to Montana Supreme Court.

Final Tally



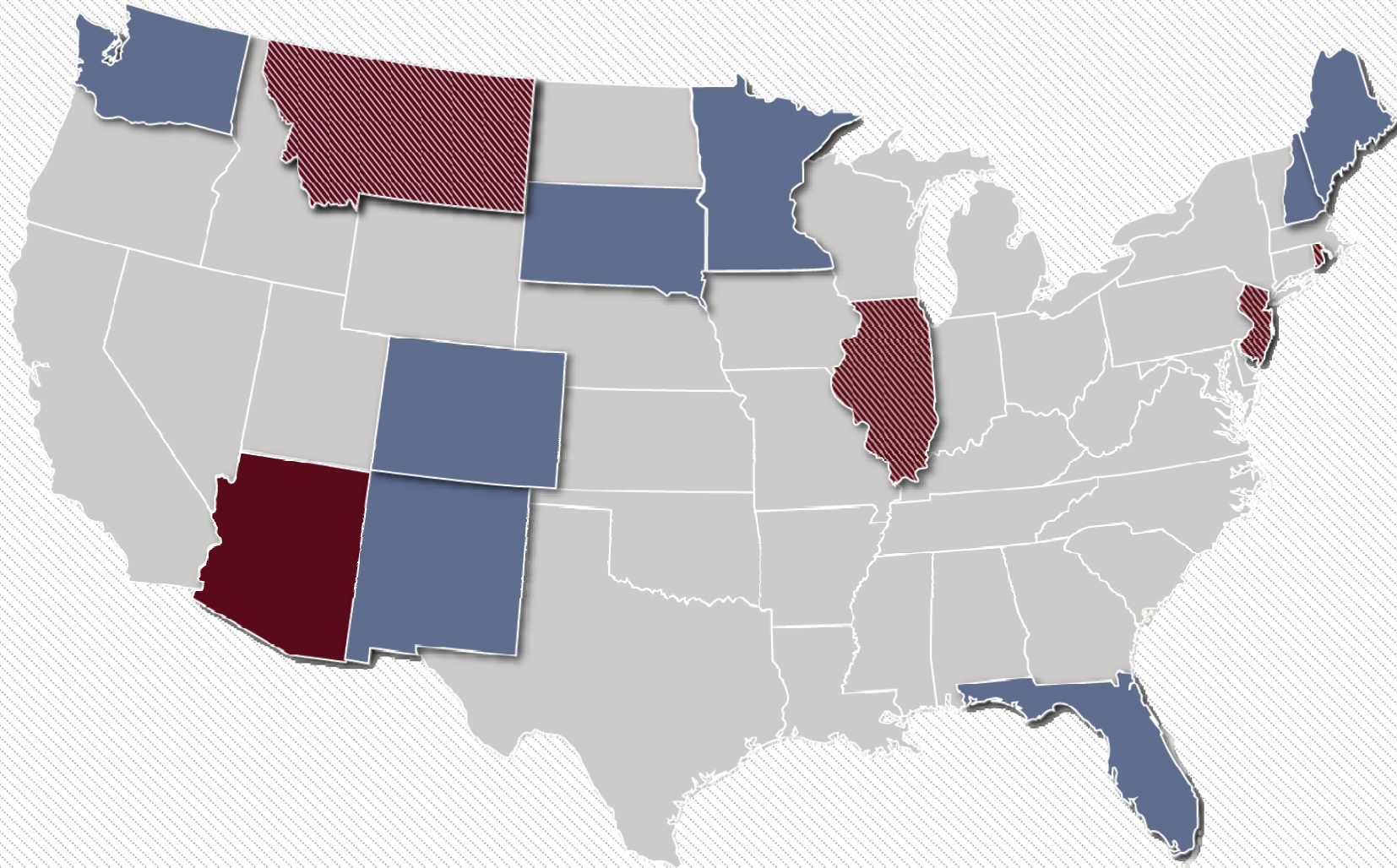
Judgment for pension system



Supreme Court judgment for retirees



Lower court judgment for retirees



Takeaways from State Legislation and Litigation

- Most state courts, particularly state supreme courts, have upheld legislative changes, including for retirees
- If changes seem fair, most courts have upheld as necessary steps
- Exceptions have been where there is explicit state constitutional pension provision (Arizona, Illinois) or where there is extreme legislation (New Jersey) that ends, rather than reduces, COLA
- Arizona is the only supreme court victory for retirees; their other victories are in lower courts
- Similarly, the three-part federal test has won out over outdated *per se* test in every state applying the Contract Clause

Concluding thoughts

- Evolving area of the law
- More systems likely to consider reform legislation and thus more state courts likely to confront it
- Improving economy but worsening demographics
- Will the federal courts end up with a larger role?

Closing

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Pension Reform Litigation Uneven Results – Uncertain Future

NAPPA Legal Education Conference
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Overview



- ▶ The recent cases addressing pension reform legislation have yielded widely varying results. The following is a review of current or recent cases illustrating the theme.



Burgos v. New Jersey (argument pending before the NJ Supreme Court)



- ▶ NJ labor unions sue challenging failure of state to fund retirement systems.
- ▶ 2011 law created a contractual right to funding.
- ▶ Governor vetoed billions in required funding claiming the funding law which he sponsored was unconstitutional.
- ▶ New Jersey trial judge orders legislature and governor to submit a plan to fund and specifically declares the law valid.
- ▶ New Jersey Supreme Court grants emergency appeal and sets oral argument for May 6.

Burgos v. New Jersey (Part Deux) NJ Superior Court – Law Division



- ▶ Immediately after receiving ruling in Burgos I, the Governor announces that 2016 budget will NOT contain required funding.
- ▶ Unions file suit for injunctive relief and enforcement of the earlier decision.
- ▶ State argues that the constitutional right to contract in the funding law cannot overcome the Governor's right to veto.
- ▶ Trial set for May 12, 2015

Boards of Trustees v. Christie NJ Superior Court – Law Division



- ▶ NJ state retirement plans are funded at less than 50% of accrued liabilities and have been warned of insolvency by actuaries.
- ▶ 2011 funding law also gave Boards of trustees enforcement authority.
- ▶ Boards filed for all unpaid and over-due contributions, in excess of \$4 billion.
- ▶ State contends that Boards have no standing to sue
- ▶ Motion to dismiss pending.

San Jose Police Officers Ass'n v. City of San Jose California Superior Court



- ▶ City placed a number of ballot measures reducing health and pension benefits on the ballot and they were adopted.
- ▶ Unions challenged the measures as violating the California Constitution
- ▶ Several aspects were upheld by the Superior Court but the court struck down increased employee contributions and COLA reductions.
- ▶ At the same time a state ALJ held the entire ballot measure violated the state meet and confer law. PERB review is pending.

Cherry v. Mayor and City Council 762 F.3d 366 (4th Cir. 2014)



- ▶ Baltimore City Code says pension membership is a contract and benefits cannot be impaired.
- ▶ Baltimore City prospectively reduced pension benefits for police and fire with less than 15 years of service.
- ▶ City abolishes gain sharing COLA fund and replaces with a tiered fixed COLA.
- ▶ U S District Court denies claims of active employees on the basis that there is no contractual right to prospective benefits
- ▶ On appeal by both parties, the 4th Circuit vacates the entire order on the basis that the state court could provided an adequate remedy, but revives takings claim
- ▶ Still pending in the District Court.

Schwegel v. Milwaukee Cnty., 859 N.W.2d 78 (Wi. 2015)



- ▶ The county provided retirees with reimbursement of Medicare Part B premiums, but in 2011, the county amended their ordinance to no longer offer the benefit to those who retired after April 1, 2011.
- ▶ Plaintiffs relied on a legislative statement that MCERS members, “shall have a vested right to such annuities and other benefits and they shall not be diminished or impaired by subsequent legislation or by any other means without his consent.”
- ▶ The court reviewed the legislative history of MCERS and ruled that the quoted legislative language referred solely to pension and death benefits .

Van Houten v. City of Ft. Worth N.D. Texas 2015 (unreported)



- ▶ Ft. Worth lowers multiplier for all police and general employees prospectively.
- ▶ Police members sue challenging the change as violating Art. XVI, Sec. 66 Texas Constitution
- ▶ Court defers to a decision by a state trial court upholding the change in a suit by the City against the Fund.
- ▶ Similar case by firefighters is pending in District Court
- ▶ Police appeal pending in 5th Circuit Court of Appeals

Wayne Cnty. Employees Ret. Sys. v. Wayne Charter Cnty., 497 Mich. 36 (Mi. 2014)



- ▶ In 2010, Wayne County faced a substantial fiscal obligation in order to satisfy its actuarially determined ARC
- ▶ Ordinance permitted the county to use the \$32 million transfer from gain sharing fund (IEF) to the defined benefit plans as an offset against its ARC obligation.
- ▶ The Michigan Supreme Court held the transfer of funds from the IEF and offset against the county's ARC obligation violated state law that the funds be for the “exclusive benefit” of the retirement system's participants and their beneficiaries and that the county used the IEF funds in violation of the “prohibited transaction rule.”

Stoker v. Milwaukee Cnty., 857 N.W.2d 102 (Wi. 2014)



- ▶ In 2011, consistent with the terms of a collective bargaining agreement Milwaukee County passed an ordinance that prospectively reduced the benefit multiplier from 2% to 1.6%.
- ▶ The court held that the amendment did not breach employee's contractual right to retirement system benefits earned and vested because it had prospective-only application to future service credits not yet earned.
- ▶ Milwaukee County could amend the formula and apply it prospectively because that prospective application did not "diminish or impair" benefits accrued from service credits already earned.

Retired State Employees Association v. State of Louisiana, 119 So.3d 568 (La. 2013)



- ▶ Legislature closed DB plans and enacted a cash balance hybrid plan.
- ▶ New plan had a higher cost than the existing DB plan.
- ▶ The Louisiana Constitution requires that any pension bill with an actuarial cost be adopted by 2/3 vote. The bill failed to pass by the requisite super majority.
- ▶ The Governor argued that he could disregard the legislative actuary's cost determination by hiring an outside actuary who produced a "no cost" valuation.
- ▶ The Supreme Court said that the legislature itself set the role of the legislative actuary and could not ignore undesirable valuation results.
- ▶ Similar case now pending in Oklahoma, set for July 2015 trial.

Mathews, et al. v. Chicago Transit Authority,
2014 IL App (1st) 123348 (Feb 7, 2014)



- ▶ Former and current employees of city of Chicago transit authority filed class action law suit against transit authority following changes to health care benefits, alleging breach of collective bargaining agreements, unconstitutional impairment of contract, and breach of fiduciary duty.
- ▶ The court determined that under Illinois law, there was a presumption in favor of retirement health care benefits being vested in the form they exist, at the time of the members' retirement.
- ▶ Retiree claims were permitted to proceed while actives were deemed bound by CBA agreement to reduce benefits.
- ▶ Supreme Court set to hear oral argument on May 14, 2015

Kanerva v. Weems, 13 N.E.3d 1228 (Ill. 2014)



- ▶ Members of the State Employees Retirement System (SERS), the State Universities Retirement System (SURS) and the Teacher Retirement System (TRS) brought four class actions challenging constitutionality of the health insurance reduction under various theories including: violation of the Illinois Constitution pension protection clause (Article XIII, Section 5).
- ▶ As framed by the Court, the question presented was whether a health insurance subsidy provided in retirement qualifies as a benefit of membership. Holding that it does, the Court observed that health benefits were provided in 1970 when the pension protection clause was adopted by the voters.
- ▶ The Court gave the pension protection clause its plain and ordinary meaning that all retirement benefits, including subsidized health care, are considered benefits of membership in the retirement system and covered by the pension protection clause. If the drafters had intended to only protect “core” pension annuity benefits they could have so specified.

Headley v. Miami, 118 So.3d 885 (Fla. 1st DCA 2013)
& Hollywood Firefighters, Local 1375 v. City of Hollywood, 133 So.3d 1042 (Fla. 4th DCA 2014)



- ▶ Florida bargaining statute provides for accelerated bargaining in cases of financial urgency.
- ▶ Miami and Hollywood used the statutes to unilaterally reduce retirement benefits.
- ▶ State labor board upheld the cities.
- ▶ In separate appeals, one appellate court held the application violated constitutional rights of bargaining and contract and another upheld the law.
- ▶ Florida Supreme Court accepted conflict jurisdiction.
- ▶ Argued April 8, 2015. Decision is pending.

New Orleans Fire Fighters Pension & Relief Fund v. City of New Orleans, 157 So.3d 581 (La. 2015)



- ▶ Trustees of the New Orleans Firefighters' Pension and Relief Fund filed a petition for mandamus to compel the City of New Orleans to make certain statutory contributions owed to the Fund. The City responded with a counter-claim against the Trustees, alleging they mismanaged the investments and assets of the Fund.
- ▶ An appellate court held that the City could avoid its statutory contribution obligations.
- ▶ The City's CFO, a trustee of the Fund, sued the other trustees for breach of fiduciary duty and a state law making it a duty to remedy a co-fiduciary's breach.
- ▶ The state Supreme Court ordered the breach of fiduciary duty claim to proceed.

Klumb v. Houston Municipal Employees Pension System, 2015 WL 1276557 (Tex. 2015).



- ▶ In an effort to lower personnel and pension costs, Houston created a private service corporation and transferred employees.
- ▶ The Fund insisted that the transferred employees remain part of the plan.
- ▶ The plan document allows the Board of Trustees to determine all questions concerning interpretation of the plan and the plan document, a state statute, provides that the Board's decisions are "final and binding."
- ▶ The Texas Supreme Court held that the decision of the trustees to retain employees in the plan was rationally related to their fiduciary duty to maintain the integrity of the System. The Court found that as a result, the Board's decision was authorized by its broad statutory powers and the Board's decision was "final and binding."

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Effective immediately please direct all further correspondence to
our new address. Our phone, fax and email addresses will all remain the same.*



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