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Eric M. Madiar

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# ILLINOIS PUBLIC EMPLOYEE RELATIONS REPORT

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**The Illinois Public Employee Relations Report provides current, nonadversarial information to those involved or interested in employer-employee relations in public employment. The authors of bylined articles are responsible for the contents and for the opinions and conclusions expressed. Readers are encouraged to submit comments on the contents, and to contribute information on developments in public agencies or public-sector labor relations. The Illinois Institute of Technology and the University of Illinois at Urbana-Champaign are affirmative action/equal opportunities institutions.**

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# ILLINOIS PUBLIC PENSIONS: WHERE TO FROM HERE?

By Eric M. Madiar

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Recent Developments is a regular feature of the Illinois Public Employee Relations Report. It highlights recent legal developments of interest to the public employment relations community. This issue focuses on developments under the public employee collective bargaining statutes, the equal employment opportunity laws and the pension provision of the Illinois Constitution.

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## ILLINOIS PUBLIC PENSIONS: WHERE TO FROM HERE?

By Eric M. Madiar

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### I. OVERVIEW

Mark Twain once said, “It ain’t what you don’t know that gets you into trouble. It’s what you know for sure that just ain’t so.” For quite some time, the “ain’t so” in Illinois has been its enormously underfunded pension system and its obligation to pay pension benefits when they become due.[1] Indeed, as a 2009 legislative report explained, underfunding of the pension system occurred because the State’s fiscal system failed to generate sufficient revenue to both maintain public services, such as education, healthcare, and public safety, as well as cover the State’s actuarially required pension contributions.[2] As a result, the pension system was used for decades as a proverbial credit card to fund public services and stave off the need for tax increases or service cuts.[3]

To tackle its mounting unfunded pension liabilities, the General Assembly passed legislation in 2010 that cut the pension benefits provided to future public employees and officials entering service after January 1, 2011. The legislature also enacted a temporary income tax increase in 2011 to help retire unpaid bills and make timely pension contributions. And in 2013, the legislature passed two pension reform bills that *unilaterally* cut the pension benefits of retirees and current employees. The first bill applied to participants in four of the State’s five pension systems, while the second bill applied to participants in two of the City of Chicago’s four pension systems.

While passing these bills was heralded as a bipartisan political success, it was short-lived. In the last twelve months, the Illinois Supreme Court issued two unanimous decisions invalidating both bills as violative of the Pension Clause of the Illinois Constitution. In both decisions, as explained below, the court held that the Clause bars the legislature from *unilaterally* reducing the pension benefits of

current public employees and retirees. Given this outcome and the State's wider fiscal challenges, this Article assesses the legal options the Illinois General Assembly may pursue to mitigate the fiscal impact of funding its public pension obligations.

This Article is organized as follows: Part II begins with a primer on the Pension Clause of the Illinois Constitution (Article XIII, Section 5). Part III reviews the Illinois Supreme Court's May 2015 decision, which found that the 2013 Pension Reform bill—Public Act 98-0599—violated the Clause.[4] Part IV reviews the court's March 2016 decision, which similarly found that Chicago's 2013 Pension Reform Bill—Public Act 98-0641—violated the Clause. Part V assesses the options that the General Assembly may pursue to mitigate its financial burden of funding the pension system based on the Clause's background and the two recent court decisions. The Article concludes that the use of ordinary contract principles—as suggested by this author five years ago—provides a means to reduce pension benefits of current employees and thereby mitigate this financial burden.[5] The proposal offered by Senate President John J. Cullerton, in particular, provides one viable means of mitigation, as does forging an agreement with public sector labor unions through the collective bargaining process. Municipal bankruptcy and amending the Pension Clause, however, are not plausible options.

## **II. A BRIEF RECAP OF THE SCOPE OF THE ILLINOIS CONSTITUTION'S PENSION CLAUSE**

The Pension Clause of the Illinois Constitution has long been understood to present a serious legal obstacle to any efforts by the General Assembly to *unilaterally* reduce the pension benefits of current employees and retirees.[6] The Clause, after all, plainly provides that: "Membership in any pension or retirement system of the State, 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." [7]

Indeed, the Clause safeguards from *unilateral* reduction not only the benefit rights contained in the Illinois Pension Code when a person joins a pension system,[8] but also those benefits found, at that time, in other state statutes that are "limited to, conditioned on, and flow directly from membership in one of the State's various public pension systems," including subsidized healthcare premiums.[9] The Clause's protection also extends to benefit increases added during an employee's term of service,[10] and most likely to existing employee contribution rates.[11]

The “benefits” receiving protection reflects a plain language analysis of the Clause and tracks the dictionary definition of the term “benefits.”[12] Dictionaries define the term “benefits” as meaning not only the specific annuity payments a public employee is eligible to receive, but also other entitlements of membership that advantage the employee.[13] This definition mirrors how New York courts define the same term under its nearly verbatim constitutional provision, which served as the model for our Pension Clause.[14] New York Court decisions state that the term refers to “pecuniary matters” and prohibits “any action which would impair or diminish the member’s rights to payment of pensions, annuities, and related monetary advantages.”[15]

The Clause, however, does not require a pension system be funded at a particular funding percentage or according to a specific funding schedule.[16] Rather, it guarantees that pensions will be paid to participants when those payments become due.[17] In addition, the Clause grants pension recipients a cause of action to compel the payment of pensions if the pension system is on the verge of default or in default.[18]

Finally, while the Clause bars the General Assembly from *unilaterally* reducing pension benefit rights, these rights are “contractual” in nature.[19] As a result, pension benefits can be reduced through usual contract modification principles of offer, acceptance, and consideration.[20]

Pension benefits rights are also “governed by the actual terms” of the statute or legislative enactment establishing the pension plan.[21] To that end, these rights are subject to any contingencies, consistent with public policy, found in the pension plan at the time of the participant’s membership.[22] Indeed, the convention delegates both sponsoring and opposing the Clause agreed that benefits could be later reduced pursuant to a contingency built into the pension plan at the time of the participant’s membership.[23] As the Illinois Supreme Court observed, if “[m]embership in the System was sought with knowledge of [a] condition [built into a pension plan to lower benefits] it clearly cannot be said to impair or diminish the benefits within the meaning of the [Clause].”[24]

In sum, while the Pension Clause protects pension benefits of current employees (and retirees) from adverse *unilateral* changes and that protection begins once a person attains membership in the pension plan, pension benefits rights are deemed *contractual* in nature. Accordingly, pension benefit rights are subject to change through usual contract principles as well as any contingencies contained in the pension plan at the time of membership based on the Clause’s drafting history and relevant court decisions construing the Clause.

### III. THE *PENSION REFORM* DECISION

As detailed below, the Illinois Supreme Court's recent *Pension Reform* decision considered whether the General Assembly possessed the power to unilaterally cut pension benefits protected by the Pension Clause pursuant to the State's so-called "reserved" or "police" powers. Specifically, the court addressed whether the 2013 Pension Reform Bill (Public Act 98-0599) could be sustained under that defense, which is allowed under court decisions interpreting the Illinois and U.S. Constitutions' Contract Clauses. Well before the Act became law in December 2013, however, this author determined that the Clause posed an *absolute* legal barrier to any *unilateral* efforts by the General Assembly to reduce the pension benefits of current employees and retirees.[25]

In May 2015, the court confirmed this conclusion, and unanimously found that the Clause is not subject to a "police powers" defense. The court explained that the Clause provides *absolute* protection to pension benefit rights based on its plain language, drafting history, constitutional convention debates, and prior decisions interpreting the Clause.[26] Accordingly, the Court concluded that Public Act 98-0599 could not be sustained under a "police powers" defense. The Court also concluded that even if the Clause were subject to a "police powers" exception, the Act did not qualify as a permissible invocation of that exception based on the State's sordid history in failing to properly fund the pension system.[27]

#### A. The Act's Provisions

The *Pension Reform* case involved Public Act 98-0599's reduction of the pension benefits of retirees and current Tier 1 employees participating in the Teachers Retirement System (TRS), State Universities Retirement System (SURS), State Employees' Retirement System (SERS), and General Assembly Retirement System (GARS).[28] As detailed elsewhere, the Act was the product of three years of aggressive lobbying efforts by Illinois' business community and broke a political stalemate over competing bills and views on how to address the State's underfunded pension systems.[29]

Among other things, the Act unilaterally reduced the pension benefits of Tier 1 employees and retirees in these systems in five different ways.[30] First, the Act delayed, by up to five years, when participants under the age of 46 were eligible to receive their retirement annuities.[31] Second, it imposed a cap on the maximum salary that would be deemed pensionable income when calculating a participant's retirement annuity.[32] Third, it replaced the 3 percent compounded annual increase in a participant's retirement annuity with a formula that capped increases at a lower rate based on the participant's years of service.[33] Fourth, it eliminated



at least one and up to five of the annual annuity increases depending on the participant's age at the time the Act took effect.[34] Finally, with respect to the TRS and SURS systems, the Act adversely changed how the basic annuity amount is calculated for participants in these systems under the "money purchase" formula.[35]

Aside from benefit cuts, the Act reduced by 1 percent of salary the amount current employees contributed to the pension system as a trade-off for replacing the 3 percent compounded annual increase with lower increases.[36] The Act also made other changes, such as: (1) restricting collective bargaining rights; (2) allowing limited participation in a new defined contribution plan; (3) barring non-governmental employees from participating in the pension system; and (4) prohibiting new hires from using accumulated sick or vacation time to boost their pension benefits.[37]

Finally, the Act replaced the funding schedule enacted in 1995 to achieve 90 percent funding by fiscal year 2045 with one to achieve 100% funding by fiscal year 2043.[38] The new schedule also earmarked certain additional amounts for payment into these pension systems.[39] The new funding schedule further included a so-called statutory "funding guarantee" whereby if the State Comptroller failed to make the State pension contributions required by law to a relevant State pension system, then the governing board for that pension system could file a *mandamus* action before the Illinois Supreme Court to order payment of the required contribution amount.[40] Since the "funding guarantee," *mandamus* action, and additional pension contributions were merely statutory provisions, the General Assembly retained the authority to alter or repeal these provisions in the future.[41]

### **B. Procedural History**

Shortly after the Act became law, participants in TRS, SURS, SERS, and GARS filed five consolidated lawsuits challenging the constitutionality of the legislation and moved to enjoin it.[42] Collectively, the lawsuits claimed that the Act's benefit cuts violated various provisions of the Illinois Constitution, including the Pension Clause.[43] The circuit court entered a preliminary injunction staying the Act's implementation pending a decision on the merits one month before the Act took effect.[44]

The Illinois Attorney General defended the Act as a justified use the legislature's "police powers." [45] Specifically, the Attorney General argued that plaintiffs' claims should be rejected as a matter of law: (1) because the legislature possesses the inherent power to override and modify obligations imposed on it by the Illinois

Constitution when it is reasonable and necessary to advance an important public purpose; (2) because of the dramatic squeeze on the State's finances caused by the Great Recession, the strain on the State revenues which would result from having to meet current pension obligations, the poor condition of the State's economy, and the continued deterioration of the State's credit rating despite taking earlier action to reduce public spending, raise taxes, defer State vendor payments, and enact a second tier of pension benefits for new hires; and (3) because the benefit reductions found in the Act were fair and reasonable under these circumstances.[46]

Plaintiffs' moved to strike the State's "police powers" affirmative defense and separately moved for summary judgment that the Act was void under the Pension Clause because that provision was not subject to a "police powers" exception based on its plain language, drafting history, and relevant court decisions.[47] The Attorney General countered with her own cross motion for summary judgment that the "police powers" exception was a valid defense that defeated all of plaintiffs' claims.[48]

After conducting an argument on the parties' motions, the circuit court issued its decision in late November 2014 granting plaintiffs' summary judgment motion that the Act violated the Clause and entered a permanent injunction against enforcement of the Act.[49] The decision also denied the Attorney General's motion.[50]

The circuit court found that the Act, on its face, would diminish plaintiffs' protected pension benefits in the five ways described above. The court further found that neither the Clause's plain language, nor court decisions interpreting the Clause supported the conclusion that the provision is subject to a "police powers or reserved powers" exception.[51] If anything, the circuit court explained, Illinois courts have rejected that argument.[52] Finally, the circuit court concluded that because the Act was an integrated legislative package it was inseverable and therefore unnecessary to consider plaintiffs' remaining claims.[53]

The Illinois Attorney General appealed the circuit court decision to the Illinois Supreme Court and requested an expedited briefing and argument.[54] The court granted that request. While the parties submitted their respective appellate briefs in due course, the court rejected the proposed *amici curiae* briefs filed by pension reform advocates in support of the Act's constitutionality.[55] These briefs, as with the State's, rehashed the same "police powers" argument the Commercial Club of Chicago had advanced back in 2011, which this author thoroughly countered in 2014.[56]

### ***C. The Illinois Supreme Court's Analysis and Holding***

After providing a basic outline of the defined pension benefits State employees may receive, detailing Illinois' history of failing to properly fund its pension systems, and reviewing the Act's legislative history as well as the case's procedural history, the court stated there were three issues set for review: (1) does the Act's reduction of retirement annuities for TRS, SURS, SERS, and GARS members violate the Pension Clause; (2) if so, then can those reductions be upheld under the State's police power; and (3) if not, then are the invalid provisions of the Act severable?[57] As detailed below, the court answered "Yes" to the first question, and "No" to the second and third questions.

#### **1. Public Act 98-0599 violates the Pension Clause**

On the first issue, the court explained that it was "easily resolved" that the Act's benefit reductions violated the Clause.[58] The court stated that its recent *Kanerva* decision made clear that the Clause's plain language means "what it says" and "if something qualifies as a benefit of the enforceable contractual relationship resulting from membership . . . [then] it cannot be diminished or impaired." [59] The court further stated that *Kanerva's* interpretation of the Clause "was not a break from prior law" but rather "a reaffirmation" of what was articulated in previous decisions of the court and appellate court.[60]

Under these decisions, the court explained, the Clause provides members of the pension system with "a legally enforceable right to receive the benefits they have been promised." [61] The court further explained that the Clause's protection of benefits begins "once an individual first embarks upon employment in a position covered by a public retirement system, not when the employee ultimately retires." [62] In addition, the court noted that the Clause's protection extends to benefit increases added during an employee's term of services so long as he or she "complies with any qualifications imposed when the benefits were first offered[.]" [63] "Accordingly, once an individual begins work and becomes a member of a public retirement system, any subsequent changes to the Pension Code that would diminish the benefits conferred by membership in the retirement system cannot be applied to that individual." [64]

Based on these principles, the court found that the plaintiffs' retirement annuities were protected benefits, including the 3 percent annual compounded increases, and that the Act would diminish these benefits by directly reducing their value in at least five different ways.[65] The court further found that because the provisions of the Act at issue could not be squared with the Clause's plain language, "the

General Assembly overstepped the scope of its legislative power” and the Court was “obligated to declare those provisions invalid.”[66]

Finally, the court observed that its conclusion was supported by a 2014 Arizona Supreme Court decision.[67] The Arizona decision involved a provision in the Arizona Constitution virtually identical to the Pension Clause and a challenge to legislation that reduced the payments retirees would receive under the statutory formula providing benefit increases.[68] The Arizona court found that its constitution’s pension clause protected not only the base pension amount, but also benefit increases because they were both derived from the same statutory formula.[69]

## **2. The Pension Clause is not subject to a “police powers” exception**

*On the second issue*, the court made two holdings with respect to the State’s “police powers” argument. First, the court acknowledged that while contract rights were subject to a so-called “police powers” under decisions interpreting the Contract Clause of the Illinois and U.S. Constitutions, the Act was not a valid invocation of that exception. Second, the court held that based on the Pension Clause’s plain language, drafting history, constitutional convention debates, and relevant court decisions interpreting it, the Clause is not subject to a “police powers” exception. As a result, the Pension Clause provides *absolute* protection to pension benefit rights. Each of these holdings is detailed below.

At the outset, the court first rejected the proposition that an unambiguous provision of the Illinois Constitution, like the Pension Clause, yields to the State’s fiscal necessity or a financial emergency.[70] The court stated that each time the General Assembly had passed legislation “to reduce or eliminate expenditures protected by the Illinois Constitution,” it had “clearly and consistently found [these attempts] to be improper.”[71]

The court illustrated this point by recounting the facts and holdings of its decisions in *People ex rel. Lyle v. City of Chicago* in 1935 and *Jorgensen v. Blagojevich* in 2004.[72] In both its *Lyle* and *Jorgensen* decisions, the court noted that it had compelled the payment of judicial salaries despite claims of fiscal necessity because the Illinois Constitution unambiguously barred mid-term salary reductions.[73] Both decisions, according to the court, made clear that exigent circumstances alone do not create exceptions to unambiguous constitutional provisions.[74] Rather, “any departure from the law is impermissible unless justification for that departure is found within the law itself.”[75] These decisions, the court explained, instructed

that “[n]o principle of law permits us to suspend constitutional requirements for economic reasons no matter how compelling the reasons may seem.”[76]

Next, the court rejected the proposition that the Act was a permissible exercise of the State’s “police powers” under relevant Contract Clause decisions.[77] As a preliminary matter, the court noted that past Illinois court decisions had found that legislation reducing pension benefits was not defensible under such a theory.[78]

The court also found that, for several reasons, the Act could not clear the threshold established under contemporary Contract Clause jurisprudence as a valid exercise of the General Assembly’s so-called “police powers.” First, the Act was not a response to an unknown or unforeseeable problem, but rather a response to “a crisis for which the General Assembly is largely responsible.”[79] Indeed, the court observed that the State was well aware of the havoc market forces could have on the fiscal health of the public pension system and the repercussions of decades of pension underfunding.

It was also aware of the long-term costs associated with the pension benefits at issue and how the benefits were designed to operate.[80] In addition, the State was well aware that these benefits were constitutionally-protected by the Pension Clause, that the Clause required the payment of these “promised benefits,” and that “the responsibility for providing the State’s share of necessary funding fell squarely on the legislature’s shoulders.”[81]

Second, the court found that the Act was not the least restrictive means to address the problem because less drastic alternatives were available, especially since the legislature had allowed the temporary income tax increase to sunset.[82] If anything, the court observed, based on its legislative history, the Act “was an expedient to break a political stalemate.”[83]

Finally, the court equated the Act to a taking of private property, and observed that the U.S. Constitution’s Takings Clause “bar[s] the Government from forcing some people alone to bear public burdens, which in fairness and justice, should be borne by the public as a whole.”[84] The court noted how the General Assembly made no effort to distribute the burdens of pension funding evenly among Illinoisans let alone the State’s contract partners.[85] As a result, the court found that “the State could prove no set of circumstances that would satisfy the contract clause.”[86]

### **3. The Pension Clause provides absolute protection to covered benefits**

In addition to finding the Act failed under a “police powers” analysis, the court concluded that the Pension Clause was not even subject to a “police powers” exception.[87] The court based this conclusion principally on the Clause’s plain language and drafting history at the constitutional convention.[88] The court observed how the Clause, unlike other constitutional guarantees in the 1970 constitution, was not made expressly subject to the State’s “police powers.”[89] The absence of such a reservation, the court continued, “was not inadvertent.”[90]

Indeed, the court detailed how an attempt was made during the convention to protect pension benefits by simply adding language to the Illinois Constitution’s Contract Clause.[91] That attempt was rejected “in favor of the separate, more specific provisions” found in the Pension Clause.[92] Those provisions, the court instructed, made clear that pension benefits could not be impaired or diminished.[93] Use of the term “diminished” was legally significant, the court noted, because Article VI, section 14 of the Illinois Constitution uses the same term to protect judicial salaries, and that term had long been interpreted to bar mid-term salary reductions “notwithstanding the state’s claims of economic hardship.”[94]

The court also recounted the two failed attempts by the Illinois Public Employees Pension Laws Commission, an agency of the legislature, to have the Clause’s sponsors amend the provision during the convention so that pension benefits were subject to unilateral legislative modification.[95] Given the Clause’s plain language and drafting history, the court concluded, there was “no possible basis for interpreting the [Clause] to mean that its protections can be overridden if the General Assembly deems it appropriate.”[96] To interpret the Clause in that fashion, the Court determined, would render it “a nullity” and “allow the legislature to do the very thing the [Clause] was designed to prevent it from doing.”[97]

The court next addressed the State’s claim that interpreting the Clause as affording *absolute* protection to pension benefits was tantamount to a surrender of sovereign authority, which it may not do.[98] The court rejected the State’s claim because the Clause represents “a restriction the people of Illinois had every right to impose.”[99]

The court explained that unlike Great Britain, where sovereignty is vested in Parliament, “sovereignty or transcendent power of government resides in or with the people.”[100] “The people of Illinois,” in turn, “give voice to their sovereign authority through the Illinois Constitution.”[101] And, “[w]here rights have been

conferred and limits on governmental action have been defined by the people through the constitution, the legislature cannot enact legislation in contravention of those rights and restrictions.”[102] After all, “[i]n contrast to a constitutional mandate, a legislative act is but the will of the legislature, in a derivative and subordinate capacity. The constitution is their commission, and they must act within the pale of their authority, and all their acts, contrary or in violation of the constitutional charter, are void.”[103]

Based on these principles, the court stated that the State’s police powers yielded to the Illinois Constitution, including the Pension Clause.[104] “Through this provision, the people of Illinois yielded none of their sovereign authority.[105] They simply withheld an important part of it from the legislature because they believed, based on historical experience, that when it came to retirement benefits for public employees, the legislature could not be trusted with more.”[106]

Indeed, the court reiterated that the Clause was adopted because the delegates “were mindful” that the legislature had treated pension funding as a “political football,” and used State pension contributions as a revenue source “to help balance budgets.” Those actions, in turn, jeopardized the financial resources ultimately needed to pay benefits. As a result, the delegates added the Clause to protect pension benefits “irrespective of the financial condition of a municipality or even the state government.”[107]

The delegates’ distrust of the legislature, the court explained, had unfortunately “proven to be well founded.”[108] The court observed that despite the Clause’s protections, the “General Assembly has repeatedly attempted to find ways to circumvent its clear and unambiguous prohibition against the diminishment or impairment of the benefits of membership in a public retirement system.”[109] The Act, the court remarked, was simply “the latest assault in this ongoing political battle against public pension rights.”[110] Accordingly, because “the General Assembly may not legislate on a subject withdrawn from its authority by the constitution,” it could not “rely on police powers to overcome this limitation” for there is simply “no police power to disregard the express provisions of the constitution.”[111] Therefore, the circuit court was “entirely correct when it declared [the Act] void and unenforceable.”

The court concluded its opinion by finding that the Act’s invalid provisions were inseverable, and by reaffirming the rule of law. The court stated emphatically:

The financial challenges facing state and local governments in Illinois are well known and significant. In ruling as we have today, we do not mean to minimize

the gravity of the State's problems or the magnitude of the difficulty facing our elected representatives. It is our obligation, however, just as it is theirs, to ensure that the law is followed. That is true at all times. It is especially important in times of crisis when, as this case demonstrates, even clear principles and long-standing precedent are threatened. Crisis is not an excuse to abandon the rule of law. It is a summons to defend it. How we respond is the measure of our commitment to the principles of justice we are sworn to uphold.[112]

#### ***D. The Take Home Message of the Pension Reform Decision***

In its *Pension Reform* decision, the court confirmed the import of prior decisions and scholarship that the Pension Clause is *not* subject to a "police powers" defense. The court explained that the Clause provides *absolute* protection to pension benefit rights based on its plain language, drafting history, constitutional convention debates, and prior decisions interpreting the Clause. The court also found that even if the Clause were subject to a "police powers" defense, the legislation at issue did not qualify as a valid invocation of that defense based on the State's history in failing to properly fund the pension system.

The court indicated, however, in footnote 12 and its discussion of the 2014 Arizona Supreme Court decision that benefit increases extended to persons who were already retired or who offered no additional service or consideration after the increase became law were not protected by the Clause.[113] Finally, the court reaffirmed the broader point that the Pension Clause, as with other state constitutional restrictions, represents a sovereign limitation the people of Illinois imposed on the General Assembly, and the legislature has no legal authority to circumvent that restriction.

### **IV. The Chicago Pension Reform Decision**

#### ***A. Background***

Shortly after the trial court found the 2013 Pension Reform Bill unconstitutional in November 2014, two lawsuits were filed by participants of the Chicago Municipal Employees' Annuity and Benefit Fund ("Municipal Fund") and Laborers' Annuity and Benefit Fund ("Laborers Fund") challenging the constitutionality of the Chicago Pension Reform Bill.[114] The legislation was introduced as Senate Bill 1922 as a pension reform proposal initiated by the City of Chicago and signed into law as Public Act 98-0614 on June 9, 2014.[115] The legislation was the product of negotiations between the City of Chicago and leaders of 28 of the 31 labor unions representing employees participating in the Municipal and Laborers Funds.[116] The bill took effect on January 1, 2015.



Much like the public act found unconstitutional in the Supreme Court's *Pension Reform* decision, Public Act 98-0614 also unilaterally reduced the pension benefits of retirees and Tier 1 employees participating in the two Chicago pension funds. Specifically, the Act diminished pension benefits in at least three ways: (1) it reduced the rate of the members' annual, automatic annuity increases from 3 percent compounded to no more than 3 percent simple; (2) it eliminated those annuity increases altogether in certain years; and (3) it increased the required contributions of current employees from 8½ percent to 11 percent of salary depending on the funding ratio of the respective pension fund.[117]

Public Act 98-0614 also included provisions regarding the City of Chicago's obligation to contribute to the Municipal and Laborers Funds. The Act required the City, after a five-year phase in period, to begin making contributions on an actuarial basis to achieve 90 percent funding for the two funds by 2055.[118] The new statutory funding obligation was a departure from prior law, which had no actuarial basis and simply required the City to make pension contributions according to a multiple of the amount contributed by employees.

Along with the new funding schedule, the Act set forth two statutory enforcement mechanisms should the City fail to make its required pension contributions. First, if the City did not make a required contribution within the time specified by statute, then the governing board of the affected pension fund could petition the State Comptroller to intercept and redirect the amount due from moneys otherwise appropriated by the legislature to the City of Chicago. Second, if the City did not make a required contribution, then the governing board of the affected fund could bring a *mandamus* action to compel the City to make the required contribution.[119]

The statutory right of action, however, was qualified in two ways. The governing board had the discretion on whether or not to file the action. Also, the court hearing the action had the authority to establish a reasonable payment schedule in order to avoid "imperiling the public health, safety or welfare." [120]

### ***B. Procedural History***

After the filing of the two lawsuits challenging the constitutionality of Public Act 98-0614 under the Pension Clause, the City of Chicago and State of Illinois intervened in both cases to defend the Act. In January 2015, the plaintiffs moved for a preliminary injunction against the Act and the trial court received evidence and testimony from both parties. The City presented evidence that Public Act 98-0614 was a proper exercise of the legislature's so-called "police powers." Before the evidentiary hearings concluded, however, the trial court stayed the proceedings

pending the outcome of the *Pension Reform* case before the Illinois Supreme Court.

After the Illinois Supreme Court issued its *Pension Reform* decision in May 2015, trial court proceedings resumed on an expedited schedule to decide the constitutionality of the Chicago Pension Reform Bill. Given the *Pension Reform* decision, the City of Chicago advised the trial court that it would no longer pursue a “police powers” defense.[121] Instead, the City offered two other arguments to uphold the Act, which were adopted by the Illinois Attorney General and the two pension fund boards.

*First*, the City claimed that the Act provided participants with a “net benefit” that did not diminish pension benefits when the Act was viewed as a whole. To support this proposition, the City pointed to Section 22-403 of the Pension Code. Section 22-403 states that the obligation to pay pension benefits is an obligation of the relevant pension fund itself, and not the “legal obligation or debt” of the government entity that employs (or employed) fund participants.[122]

Based on this statutory provision, the City asserted that its only obligation was to contribute to the two pension funds the amounts required by the Pension Code—nothing more and nothing less. And since the General Assembly had not required the City to contribute to these systems on an actuarially-sound basis, pension benefits need only be paid so long as the pension fund itself was solvent. The City, therefore, had no obligation to step in and continue paying benefits if a pension fund became insolvent. Under this logic, the City argued, the Act actually provided a “net benefit” to the plaintiffs because the Act now committed the City to fund these systems on an actuarial basis with correlating enforcement provisions. In short, in the City’s view, the Act ensured that participants would continue to be paid benefits—albeit at a reduced level.

*Second*, the City argued that Public Act 98-0614 was the product of a “bargained-for exchange” between the City and the employees and retirees participating in the two pension funds supported by legal consideration. The City stated that the leaders of 28 of the 31 labor unions representing employees participating in both pension funds negotiated with the City to reduce employee and retiree pension benefits in exchange for the City assuming new funding obligations to prevent the funds’ inevitable insolvency.

In July 2015, the trial court conducted an oral argument and issued its decision later that month finding the Act violated of the Pension Clause. On the City’s “net benefit” argument, the trial court found it flawed for several reasons.

The trial court found that, contrary to the City’s position, the Pension Clause itself provides an enforceable guarantee that pension benefits are to be paid when they became due.[123] The Clause establishes the obligation to pay benefits, the trial court explained, by creating a contractual relationship between the employer and employee. Any statute, according to the trial court, that “would purport to subtract from this obligation is not consistent with the rights established by the [Clause].”[124]

In addition, the court explained that not all provisions of the Pension Code were part of the contractual relationship established by the Clause—only those pertaining to benefits were part of it. Prior Illinois Supreme Court decisions, according to the court, made it clear that Pension Code provisions concerning pension funding were not part of that relationship. As a result the trial court concluded that the legislature could not trade statutory funding and enforcement provisions for benefits cuts, especially when the General Assembly could change or repeal those provisions at any time. To allow such a result, the court observed, “would render the rights guaranteed by the [Clause] illusory.”[125]

On the City “bargained for exchange” argument, the trial court held that the argument failed under basic contract principles. The trial court observed that while the leaders of 28 of the 31 labor unions representing affected employees supported the agreement reached with the City, there was no evidence that the unions’ members had actually agreed to and ratified the agreement. Indeed, there was no evidence that the legislation was the result of the collective bargaining process. In addition, there was no evidence demonstrating that the union leaders were authorized agents who could bind the other three unions (or their members), let alone retirees. As a result, the trial court concluded that the legislation did not constitute a “bargained for exchange,” but rather a unilateral reduction in benefits violative of the Pension Clause.

Based on these conclusions, the trial court entered a permanent injunction against the entire Public Act due to its express inseverability clause, and denied the City’s motion to stay the decision pending appeal. The City and the two municipal pension funds appealed the trial court decision, and the Illinois Supreme Court held oral argument on the case in November 2015.

### ***C. The Illinois Supreme Court’s Analysis and Holding***

On March 24, 2016, the Illinois Supreme Court issued its decision in the Chicago Pension Reform case. The court stated that the issue before it was whether the legislation—Public Act 98-0614—violated the Pension Clause. In a succinct opinion authored by Justice Mary Jane Theis, the court unanimously answered

“Yes” and found that the Act unconstitutional. As detailed below, the court first found that the Act could not be squared with its recent *Pension Reform* decision before turning to and rejecting the City’s “net benefit” and “bargained for exchanged” defenses.

### 1. Public Act 98-0614 was inconsistent with the *Pension Reform* decision

The court began its analysis by briefly recounting the scope of the Pension Clause based on its *Kanerva* and *Pension Reform* decisions. Drawing on its review of these decisions, the court explained, the Clause creates “an enforceable contractual relationship, and the employee has a constitutionally protected right to the benefits of that contractual relationship . . . at the time an individual begins employment and becomes a member of the public pension system.”[126]

The Clause’s plain language, in turn, bars “the General Assembly from *unilaterally* reducing or eliminating the pension benefits conferred by membership in the system.”[127] The *Pension Reform* decision, according to the court, reaffirmed these principles by holding that the legislature could not *unilaterally* diminish “the value of retirement annuities” for current members, including the annual annuity increases they were entitled to receive in retirement.[128]

On its face, the court observed, Public Act 98-0614 had the same impact as the legislation found unconstitutional in the *Pension Reform* decision.[129] The Act not only reduced the value of annual annuity increases, but it also eliminated increases entirely for certain years. As a result, the court found that the Act contravened the Clause’s “absolute prohibition against diminishment of pension benefits, and exceed[ed] the General Assembly’s authority.”[130]

The fact that the legislature enacted Public Act 98-0614 to address the City’s undisputed exigent circumstances, the court explained, was legally irrelevant because the same justification was rejected in the *Pension Reform* decision.[131] Quoting its *Pension Reform* decision, the court reiterated that there was “no possible basis for interpreting the provision to mean that its protections can be overridden if the General Assembly deems it appropriate.”[132] To do so, the court reiterated, “would require that we allow the legislature to do the very thing the [Clause] was designed to prevent it from doing.”[133]

### 2. The City’s “net benefit” argument was illusory

Turning to the City’s “net benefit” argument, the court described it as claiming that “the Act’s new promise of financial stability offsets the diminishment of benefits”

and thereby confers a benefit on affected participants when the Act is viewed as a whole.[134] As detailed below, the court rejected the City's argument based on three reasons.

*First*, the court stated that the argument proceeded "from the flawed premise that the provisions of the Act that enhance the City's funding obligation or change the method of funding to fully fund the pensions are 'benefits' entitled to constitutional protection." [135] This premise, according to the court, "conflict[ed] with settled precedent." [136]

According to the court, its *Pension Reform, Lindberg*, [137] *McNamee*, and *Sklodowski* decisions all instructed that "[l]egislative funding choices . . . remain outside the protections of the" Clause and the provision does "not control funding." [138] As a result, "passing a funding statute that aims to provide full funding by increasing the multiplier used to determine the City's contribution, or by changing the method of funding to an actuarially based funding requirement to ensure the Funds reach 90 percent by 2055 and beyond does not create a 'benefit' protected by the [Clause]." [139]

*Second*, the court found that the Act contained no clear and unmistakable language indicating that the General Assembly intended to create "an enforceable contractual right to full actuarial funding that would be protected against impairment by subsequent legislation." [140] The court explained that legislation does not normally create contractual or vested rights, unless the legislature expressed "clear and unequivocal" intent to do so. [141] Nothing in the Act's operative language, the court found, expressed such intent even though the General Assembly's "stated purpose in enacting the legislation [was] to save the Funds from insolvency." [142] Accordingly, the Act's "statutory funding provisions [were] not a 'benefit' that can be 'offset' against an unconstitutional diminishment of pension benefits." [143]

*Third*, "and most importantly," the court rejected the City's claim that the Act's funding provisions created a "benefit" "because they replace[d] an illusory set of unfunded statutory promises" derived from Section 22-403 of the Pension Code. [144] According to the court, adopting the City's view that Section 22-403 of the Code only gave participants "a right to the money available in their respective funds upon retirement" "would be inconsistent with the plain meaning of the [Clause], and would undermine our holding in [the *Pension Reform* decision], and would lead to an absurd and unjust result." [145] The Court explained that the Clause itself "mandates that members of the Funds have 'a legally enforceable right

to receive the benefits they have been promised’—not merely to receive whatever happens to remain in the Funds.”[146]

Indeed, the court remarked, the “whole purpose of establishing the clause was ‘to eliminate any uncertainty as to whether state and local governments were obligated to pay pension benefits to their employees.’”[147] Furthermore, the General Assembly and City had been put on notice since the 1970 Constitution’s ratification “that the benefits of membership must be paid in full, and that they must be paid without diminishing or impairing them.”[148] As a result, the notion that the General Assembly could somehow offer a purported “offsetting benefit” of actuarially sound funding and fund solvency was absurd because it was “merely an offer to do something” the Clause already mandated when participants joined the pension fund.[149]

The court concluded that to the extent Section 22-403 of the Pension Code purported to establish that members of the two City funds only had the right to amounts in the Fund itself “by virtue of the legislatively-prescribed funding choices, that section cannot overcome the [Clause’s] constitutional guarantee.”[150] The court noted how Section 22-403 was enacted prior to the 1970 Constitution and before the Clause established “a contractual relationship between employer and employee” and its corollary legal obligation to pay pension benefits to employees.[151]

The court further noted that to the extent Section 22-403 conflicted with the Clause’s mandate, “it did not survive ratification of the Illinois Constitution.”[152] The new constitution’s Transition Schedule provision, the court found, invalidated any pre-1970 statutes conflicting with provisions of the 1970 Illinois Constitution.[153]

The court concluded its rejection of the City’s “net benefit” argument by finding that the Act’s salutary goal of solvency simply could not justify the unconstitutional means used to achieve that end.[154] To permit such a result, the court admonished, would require it to abdicate its own obligation to invalidate unconstitutional laws, and create “an end run around the reserved sovereign powers argument” the court rejected in its *Pension Reform* decision.[155] Simply put, the Clause “removed the option of *unilaterally* diminishing benefits as a means of attaining pension stability.”[156]

The court further admonished that the Clause was intended to foreclose the ability of the General Assembly to “create the very emergency conditions used to justify its suspension of the rights conferred and protected by the constitution.”[157] In

sum, the General Assembly could not unilaterally decide whether pension participants were “better off” under the Act because that “determination must be made, if at all, according to contract principles by mutual assent of the members, not by legislative dictates.”[158]

### 3. The City’s “bargained for exchange” argument failed under basic contract principles

Turning to the City’s final argument, the court rejected the claim that the Act was not a product of unilateral action, but rather “codified a bargained for exchange made between the City and the unions representing the Funds’ participants.”[159] The court observed that while the Act may have been the product of negotiations and promoted as an agreement with the City’s labor unions, it was not the result of a “bargained for exchange.”[160]

“To be sure,” the court recognized, “ordinary contract principles allow for the modification of pension benefits in a bargained for exchange for consideration.”[161] In addition, the court stated that prior decisions made clear that the Clause neither “prohibits the legislature from providing ‘additional benefits’ and requiring additional employee contributions or other consideration”, nor prohibits “an employee from knowingly and voluntarily agreeing to modify pension benefits from an employer in exchange for valid consideration from the employer.”[162]

In the collective bargaining context, though, the court noted that under Illinois law public employees designate a particular union as their exclusive agent to conduct collective bargaining negotiations.[163] And the New York court decisions the City relied on to support its “bargained for exchange argument” all involved agreements where pension benefit rights were changed through completion of the collective bargaining process.[164]

In this case, however, the court observed, it was “undisputed that the unions were not acting as authorized agents within a collective bargaining process.”[165] Accordingly, the negotiations the City engaged in with the unions “were no different from legislative advocacy on behalf on any interest group supporting collective interests to a lawmaking body.”[166] As a result, the court found that the plaintiffs had done nothing to “unequivocally assent” to the Act’s benefit changes, and that “nothing in the legislative process” that led to the Act “constituted a waiver of the Funds members’ constitutional rights under the [Clause.]”[167]

**D. *The Take Home Message of the Chicago Pension Reform Decision***

The court's recent *Chicago Pension Reform* decision reaffirmed and clarified several points with respect to the protective scope of the Pension Clause. First, the court reiterated that adhering to usual contract principles offers an avenue to modify (i.e., reduce) pension benefits protected by the Clause. Nothing in the Clause's jurisprudence supports a contrary proposition. Second, as an analogue to contract principles, the court indicated that pension benefits of public employees belonging to a union may be changed by a labor union through the collective bargaining process when acting as the exclusive bargaining agent under the State's public sector labor relations laws.

Third, the court also reiterated that the General Assembly lacks the *unilateral* power to reduce the value of the pension benefits participants are entitled to receive under the plan in place when they joined the system, including covered benefit increases. As the court put it, there was "no possible basis for interpreting the [Pension Clause] to mean that its protections can be overridden if the General Assembly deems it appropriate." [168]

Finally, with respect to pension underfunding, the court made clear that the Clause itself guarantees that pension benefits must be paid when they become due and that the insolvency of a particular pension fund could not obviate that obligation. The court explained that this obligation derives from the Clause through its creation of a contractual relationship between public employees and their employer, which absolutely safeguards the benefits of that relationship from diminishment or impairment. The court further explained that the funding provisions found in the Illinois Pension Code are not deemed part of the contractual relationship that forms the basis of the Clause's scope of protection. As a result, the notion that the General Assembly could somehow offer a purported "offsetting benefit" of fund solvency was absurd because it was "merely an offer to do something" already mandated by the Clause when participants joined the pension fund.



## V. WHERE TO NEXT?

In light of the Pension Clause's background and the Illinois Supreme Court's two recent decisions, the obvious question is what can the State legitimately do to address its plight? As detailed below, there are four permissible options. It is also worthwhile to discuss two other proposals that are offered by certain stakeholders, but lack plausibility as detailed below.

### A. Permissible Options

#### 1. Senate President John J. Cullerton's contractual proposal

##### a. *The proposal and its legal rationale*

The first option the General Assembly may pursue is the proposal outlined by Senate President John J. Cullerton to reduce pension benefits in a constitutional manner through contract principles. The core of this approach was set forth in Senate Bill 2404,[169] which passed the Senate 40-16-0 in May 2013 with bipartisan and labor union support.[170] Despite that support, Senate Bill 2404 was never called for a vote in the House of Representatives. The proposal offers a pragmatic constitutional path to mitigate the pension underfunding problem and its impact on the State budget.

The proposal offers Tier 1 employees in the three largest State pension systems—TRS, SURS, and SERS—a choice of either *agreeing* to a lower annual annuity increase (i.e., “COLA increase”) or *rejecting* the requested change.[171] Specifically, the legislation provides an election process wherein Tier 1 employees are expressly asked in the legislation to agree to waive their right to the current annual 3 percent compounded COLA increase they would otherwise receive in retirement, and instead receive the Tier 2 COLA increase. The Tier 2 COLA increase would annually increase a participant's retirement annuity amount by the lesser of 3 percent simple or half the rate of inflation, and delay the receipt of those increases to the earlier of five years after retirement or age 67.

Tier 1 employees who *agree* to the lower COLA increase will receive, at a minimum, one item of legal consideration for giving up their current compounded 3 percent COLA. In the legislation itself, the State expressly and irrevocably promises, as an employer, to never offer *future* salary increases on a *non-pensionable* basis. The waiver of this right creates a new legal detriment on the State, as an employer, that benefits employees who accept the offer.

Tier 1 employees who *reject* the COLA change will continue to keep their current annual 3 percent compounded COLA increases in retirement. For these

employees, however, the State will exercise its legal right as an employer and only offer *all future* salary increases to these employees on a *non-pensionable* basis. Put differently, a Tier 1 employee rejecting the COLA change will still be offered salary increases in the future, but only on the express condition that the increases, if accepted, will not apply in the calculation of the employee's pension at retirement. This option reflects the status quo because an employee will continue to keep their compounded COLA while the State may exercise the legal right it currently has, as explained below, to tie conditions to future salary increases.

For example, if a Tier 1 employee rejects the COLA change and currently has an actual salary of \$50,000, then the employee's *pensionable* salary amount will remain frozen at \$50,000 even though the employee later receives increases on a *non-pensionable* basis that raise his or her actual salary to \$75,000 at the time of retirement. The Tier 1 employee in this example, though, would not pay pension contributions on salary amounts above \$50,000.

The Senate President's proposal is based on the premise that pension benefits protected by the Pension Clause are "contractual" in nature and subject to modification "in accordance with usual contract principles."<sup>[172]</sup> As confirmed by the Illinois Supreme Court's *Chicago Pension Reform* decision, while pension benefits cannot be reduced *unilaterally*, they can be reduced or otherwise modified so long as the employee "knowingly and voluntarily" agrees to the modification "in exchange for valid consideration from the employer."<sup>[173]</sup>

Illinois courts define the term "consideration" as "some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other."<sup>[174]</sup> Under Illinois law, "any act or promise which is of benefit to one party or disadvantage to the other is a sufficient consideration to support a contract."<sup>[175]</sup> A promise, however, to do what a person is already bound to do by contract or statute does not constitute legal consideration.<sup>[176]</sup>

On the issue of what may serve as "consideration," the Illinois Appellate Court has indicated that work hours, salary levels, and other terms of employment are generally *not* protected by the Clause even though changes to these terms would indirectly affect the pension amount a person would ultimately receive in retirement.<sup>[177]</sup> Indeed, as to salaries, Illinois courts have long held that public employees do not have a vested right in the expectation of the continuance of a specific rate or method of compensation, even where they are employed prior to the amendment of an enacted salary schedule.<sup>[178]</sup>

In addition, the Illinois Appellate Court has noted that New York court decisions have found it permissible for a public employer to offer future salary increases on the condition that the increases not qualify as pensionable income if accepted by the employee.[179] The New York decisions instruct that since a public employer has no obligation to offer public employees salary increases—unless otherwise required by statute or contract—the employer has the power to offer future salary increases *either* without condition—and thereby count toward the employee’s pension—*or* on a *non-pensionable* basis.[180] In turn, when employees accept future salary increases on an express *non-pensionable* basis, they cannot later claim that these increases are includable for pension purposes because a waiver has occurred and the increases are thereby excluded from the pension calculation formula.[181]

Recast in the light of these decisions, the Senate President’s proposal harnesses the discretionary power of the State, as an employer, to condition or not condition its offering of future salary increases to each Tier 1 employee in order to obtain a pension benefit reduction. The legal consideration the proposal offers to each Tier 1 employee who agrees to lower COLA increases in retirement is the State’s irrevocable promise, as an employer, to never offer him or her future salary increases on a *non-pensionable* basis. A Tier 1 employee, of course, is free to reject this offer. If he or she does, then the employee would do so with the full knowledge that all future salary increases will only be offered to him or her expressly on a *non-pensionable* basis—a right the State, as an employer, may exercise.

According to news reports, the Senate President’s proposal is estimated to save the State about \$1 billion a year.[182] In sum, the Senate President’s proposal offers a basic framework that can be enhanced with other forms of consideration to achieve the same objective of savings to the State.

*b. The arguments against the Senate President’s proposal are unfounded*

Critics claim that the Senate President’s proposal fails to follow contract principles on four main grounds and therefore violates the Pension Clause.[183] Ironically, some of the critics of this proposal are the same labor unions that supported and characterized Senate Bill 2404 from 2013 as “constitutional”[184] even though the proposal contains the same pensionable salary choice as Senate Bill 2404.[185] None of these grounds are compelling and dispositive as explained below.

**i. The proposal provides legal consideration**

Critics first contend the proposal does not offer Tier 1 employees any legal consideration because every time employees receive a salary increase it must count for pension purposes and this is something that the Pension Code already protects. This contention is wrong as a matter of law.

As noted earlier, relevant New York court decisions that Illinois courts rely upon hold that increased compensation only constitutes pensionable salary when the employer grants it *unconditionally*.<sup>[186]</sup> The same argument that critics advance today failed in New York long ago.<sup>[187]</sup> Illinois courts find New York court decisions construing that state's virtually identical pension clause persuasive.<sup>[188]</sup>

In addition, the critic's contention is not supported by the Pension Code's plain language. The relevant provisions of SERS, SURS, and TRS defining pensionable compensation all refer to compensation that has already been earned and does not expressly foreclose the public employer's right to offer future salary increases on a *non-pensionable* basis.<sup>[189]</sup> If the critics' contention were true, then a public employer could only avoid the actuarial impact of salary increases by giving no increases at all.

To be sure, Illinois and New York court decisions have equally invalidated legislation that *unilaterally* narrowed the statutory definition of pensionable salary.<sup>[190]</sup> None of these decisions, however, involved an express offering of future salary increases on a *non-pensionable* basis.<sup>[191]</sup> As a result, these decisions simply cannot be mined to create a far broader rule of law for factual circumstances not even before the court. Any attempt to do so reflects, at best, wishful thinking.

Despite the critics' protests, the Senate President's proposal does, indeed, offer employees legal consideration. As discussed previously, the State is irrevocably promising, as an employer, to *never* offer them future salary increases on a *non-pensionable* basis. The waiver of this legal right is a new benefit that employees accepting the offer would obtain and do not possess today. Illinois courts state that any "act or promise which is of benefit to one party or disadvantage to the other is a sufficient consideration to support a contract."<sup>[192]</sup> The Senate President's proposal is a far cry from the circumstances where Illinois courts have found the offered consideration grossly inadequate and illusory.<sup>[193]</sup>

Moreover, the claim that the offered consideration is "not meaningful" or "inadequate" because it is not equivalent to the financial value of what employees

are giving up is not compelling. As the Illinois Supreme Court recently explained, “principles of contract law do not require that the value [the parties] exchange be equivalent.”[194] Indeed, courts do not generally inquire into the adequacy of the consideration for a contract, just that it be present, which is the case with the Senate President’s proposal.[195]

**ii. The proposal reflects a “bargained-for” exchange**

Critics next contend that the benefit reduction resulting from the proposal does not reflect a “bargained-for exchange” between the State and Tier 1 employees. Critics complain that Tier 1 employees have no ability to individually bargain for the “consideration” they may deem most valuable to agree to lower annual COLA increases in retirement. Instead, the proposal purportedly presents employees with a “take-it-or-leave-it” offer leading only to negative financial outcomes.

The critics’ argument proceeds from a fundamental misapprehension of Illinois contract law. Illinois courts do not invalidate contracts where parties have unequal bargaining power—even contracts presented on a “take-it-or-leave-it” basis—and consent is secured through hard bargaining and the pressure of financial circumstances.[196] Indeed, the “bargained-for exchange” requirement neither prohibits “take-it-or-leave-it” offers,[197] nor insists upon the ability to individually negotiate the terms of the offer.[198]

Rather, under general contract principles, a “bargained-for exchange” exists if one party’s promise induces the other party’s promise or performance.[199] The Senate President’s proposal adheres to the “bargained for” exchange requirement by expressly offering the State’s irrevocable promise in exchange for employees agreeing to lower annual COLA increases in retirement.

**iii. The proposal has ample case law support**

Critics further contend that the New York court decisions that support the proposal only dealt with the notion that a public employer can offer a “bonus,” not regular salary as *non-pensionable*, and even then only on a one-off basis. Aside from admitting the legal premise that a public employer has the right to offer compensation on a *non-pensionable* basis, the argument blatantly ignores the factual and legal context of these decisions.

The primary New York case supporting the Senate President's proposal is *Carroll v. Grumet*.<sup>[200]</sup> In *Carroll*, the court held that a plan adopted by New York City granting firemen "emergency cost-of-living-increases" designed to foster continued employment by increasing take-home pay, without affecting their pensions, squared with the New York Constitution's Pension Clause.<sup>[201]</sup> The plan provided cost of living adjustments of "\$420 *per annum* upon [the] condition that such increase should not constitute salary for the purpose of computing his pension upon retirement."<sup>[202]</sup>

The plaintiff in the case received and accepted one of the \$420 annual increases, retired, and later filed suit to have that increase included in his pensionable salary.<sup>[203]</sup> The plaintiff claimed that the exclusion of the increase he received violated his pension rights because the relevant pension statute stated that his pension would be "not less than one-half his full salary or compensation at the date of his retirement from service."<sup>[204]</sup> The plaintiff asserted that "full salary or compensation" included the \$420 annual "bonus."

The court tersely responded that "[i]f the increased compensation had been *unconditionally granted* by the City without question it would have constituted salary or compensation for pension purposes."<sup>[205]</sup> In other words, the fact that the increase was called a "cost-of-living increase" or "bonus" was legally irrelevant. What was relevant, the court observed, was that the plaintiff voluntarily accepted the so-called "bonus" under the express condition that it "not be regarded as salary for pension purposes," and that the plaintiff was not otherwise legally-entitled to receive the increase.<sup>[206]</sup> Taken together, the court concluded that plaintiff's acceptance of the increase under the stated condition constituted a waiver of his pension rights for valid consideration, and was consistent with the New York Constitution's pension provision.

Simply put, the *Carroll* decision does *not*, as critics claim, represent a circumstance where the public employer offered a *one-time* compensation increase on a *non-pensionable* basis to employees. Rather, the public employer *categorically* made *all* increases subject to that condition when offered each year. In addition, the fact that the increase was called a "cost-of-living increase" or "bonus" was legally irrelevant because the court recognized that, absent the condition, the increase would have constituted pensionable "salary or compensation" under the governing pension statute.

Indeed, the Illinois Appellate Court relied on the *Carroll* decision long ago as an example of action public employers could take consistent with our Pension Clause.<sup>[207]</sup> In addition, in *Ballentine v. Koch*, New York's highest court

construed the *Carroll* case (and its progeny) as allowing “funds ordinarily included in the calculation of pension benefits” to be offered on a *non-pensionable* basis.[208] This is the same *Ballentine* decision the Illinois Supreme Court favorably cited in its recent *Chicago Pension Reform* decision.[209]

In short, the Senate President’s proposal squares with the New York court decisions Illinois courts have relied upon to construe our Pension Clause. Furthermore, the proposal itself is no different from what occurred in *Carroll*: it too *categorically* offers future compensation increases otherwise qualifying as pensionable income on a *non-pensionable* basis. Critics of the proposal can make no valid or compelling claim to the contrary.

#### **iv. The proposal is not tantamount to duress**

Critics finally contend that the proposal is coercive and void as economic duress. This is so, critics claim, because the proposal’s offered choice is coupled with the threat that all future increases will only be offered on a *non-pensionable* basis if employees reject the offer. This argument is without merit and can be dispatched quickly.

Under Illinois law, economic duress exists when a person is induced to enter into a contract by a “wrongful act” or threat of such an act by another person that, in turn, deprives the person entering into the contract of his or her free will.[210] “Wrongful acts” are acts that are criminal, tortious, in violation of a contractual duty or wrong in a moral sense.[211] Illinois courts have held that a claim of duress cannot be predicated on hard bargaining or the financial pressure it places on the person having to make the choice.[212] In addition, the fact that the a proposal presents a person with choices that all entail negative outcomes when compared to his or her existing circumstances does not render the proposal a “wrongful act.”[213]

More importantly, the fact that an offer is structured in a way that includes a threat by the person making the offer to take action that the person has a legal right to exercise does *not* constitute economic duress or coercion.[214] Since the Senate President’s proposal is premised on the State’s threat to exercise a legal right it possesses there is no “wrongful act” to support the critics’ claim of duress.

## 2. Collective Bargaining

Aside from the Senate President's contractual proposal, the Illinois Supreme Court's *Chicago Pension Reform* decision strongly indicates that pension benefits may also be modified by public sector labor unions acting as authorized agents within the collective bargaining process for their members under Illinois law.[215] The court found that the legislation at issue violated the Pension Clause because the labor unions "were not acting as authorized agents within the collective bargaining process." [216] To support this proposition, the court referenced two New York court decisions cited by the City of Chicago.

In these decisions, the New York Court of Appeals held that duly designated labor unions could bind their members to the terms of collective bargaining agreements that waived the constitutional protections the members enjoyed under the New York Constitution's pension clause.[217] As another New York court succinctly explained, the purpose of its pension clause "was merely to insure that pension and retirement benefits would not be subject to the whim of the Legislature or the caprice of the employer." [218] The court continued that:

Whereas unilateral action by the employer or the Legislature may not impair such benefits, the parties are not prevented from negotiating a reduction. *The Union is free to waive any right of its members to certain benefits in exchange for other consideration* and the parties are free to negotiate less beneficial terms for new employees hired after the agreement expires. As long as the contractual benefits are not unilaterally diminished, there is no constitutional violation.[219]

In short, New York court decisions indicate that duly authorized unions may collectively bargain over and waive the protected pension benefit rights of their members in exchange for consideration.

Whether Illinois courts will reach the same broad conclusion as New York courts with respect to Illinois public sector labor unions under our Pension Clause remains to be seen. Mayor Rahm Emanuel of Chicago, however, has expressed interest in not waiting long to find out.

Shortly after the Illinois Supreme Court issued its decision, Mayor Emanuel stated that he intends to restart negotiations with the City's labor unions to forge a pension reform agreement through collective bargaining given "the opening" provided by the decision.[220] If a new accord with labor unions cannot be reached, then Mayor's office may pursue "work-rule changes, lower break-in pay for new employees, another round of health care reforms, and other cost-saving concessions and dedicate those savings to pensions." [221]



It is important to note that as this Article went to press the Illinois Supreme Court issued its decision in *Matthews v. Chicago Transit Authority*.<sup>[222]</sup> In that decision, the court further confirmed that ordinary contract principles may be used to modify the existing pension benefits of current employees, and that public sector labor unions have the authority to modify the existing pension benefits of its active members through the collective bargaining process.<sup>[223]</sup> The *Matthews* decision appears to provide a clear path for the use of the collective bargaining process as a contractual means to modify the pension benefits of current public employees who belong to unions.

### 3 . Buyout Proposals

Aside from pursuing the above contractual proposals, legislators are also considering proposals that would offer to buy out Tier 1 employees of their pension benefits by giving employees an immediate lump sum amount at retirement.<sup>[224]</sup> Unlike the buyout plans prevalent in the private sector, though, legislators are advancing proposals that offer lump sum payments that are less than the net present value of these benefits and thereby reduce State pension contributions.

House Bill 4427, the best studied of these proposals, sponsored by Representative Mark Batinick, offers a one-time payment option equal to 75 percent of the net present value of benefits.<sup>[225]</sup> Employees need not seek a discounted buyout of their entire pension, but may seek a partial buyout. For example, they can choose to receive 50 percent of their normal pension payment, and then receive a lump sum payment that is equal to 75 percent of the net present value of the remaining benefit.<sup>[226]</sup> Aside from saving the State money by discounting the liability, the proposal shifts the investment risk now borne by the State to the employees taking the buyout.

It is difficult to estimate the financial impact of the proposal since the savings are directly related to each member's decision, which is difficult to predict. Some have stated that the rate of participation would mirror the participation rates in private sector buyouts, but that is highly unlikely to occur for two reasons.

*First*, private sector employees receive buyout proposals equal to 100 percent of the net present value of their benefit.<sup>[227]</sup> *Second*, private sector buyouts are calculated with interest rates between 4 and 5 percent. <sup>[228]</sup> The proposed buyouts in House Bill 4427 are calculated with the pension system's assumed rate of return, which is 7.5 percent for TRS and 7.25 percent for SERS and SURS.<sup>[229]</sup> The higher the interest rate, the lower the buyout payment. Because of these differences, the participation rate in this proposed buyout should be considerably lower than that of private pension plans.

To that end, actuaries for TRS performed an actuarial analysis assuming ten or twenty percent of employees would elect to receive a full buyout at retirement.[230] If ten percent of employees participating in TRS made that election, then the State will save \$3.5 billion in contributions between now and 2045, [231] and reduce the State's pension contribution by \$79 million the first year after it takes effect.[232] If twenty percent make the election, then buyout savings would essentially double.[233] And as a rule of thumb, the potential savings associated with the proposal as applied to SERS and SURS should be equal to TRS.[234] As a result, House Bill 4427 could save the State approximately \$7 billion in pension contributions through 2045,[235] and reduce the State's next annual pension contribution of nearly \$7 billion by \$160 million after it takes effect.[236]

#### **4. Restructuring Pension System Funding**

As noted above, the Illinois Supreme Court has held that the Pension Clause guarantees that pensions are to be paid when they become due and that the obligation to pay benefits exists irrespective of the pension system's funding ratio.[237] With that said, how the State could meet these obligations presents a serious political problem because current revenues are insufficient to also pay for competing fiscal priorities. This task has become even more difficult with the expiration of the 2011 income tax increase,[238] and a continuing State budget stalemate in its eleventh month as of this writing.[239] As a result, aside from pursuing different contractual options, the General Assembly may also attempt to mitigate the immediate and long-term financial burden of funding the pension system by restructuring its current statutory funding schedule.

To that end, the Center for Tax and Budget Accountability (CTBA) has offered a proposal that has garnered some attention. [240] The CTBA proposal would replace the current statutory funding schedule for the State's five pension systems. That schedule seeks to achieve 90 percent funding by FY 2045. The CTBA proposal would re-amortize that scheduled to seek to achieve 80 percent funding by FY 2055.[241]

Unlike the current back-loaded funding schedule that increases State contributions each year, the CTBA proposal places the State on a schedule of making level-dollar contributions to the pension systems, much like fixed mortgage payments.[242] CTBA states that a level dollar payment plan would make State pension contributions more predictable and become a declining financial obligation over time in real, inflation-adjusted dollars.[243] The proposal, however, would require the State to make higher pension contributions

than under current law.[244] It is also premised on policymakers restructuring how the State raises revenue through higher income taxes and an expanded sales tax on services so it can afford the new level dollar funding schedule and other spending priorities.[245]

Beyond the CTBA proposal, there continues to be strong interest in shifting the employer's portion of the "normal cost" of pension benefits paid by the State for downstate and suburban school teachers and university and community college employees, respectively, to local school districts, universities, community colleges.[246] The "normal cost" represents the cost of pension benefits earned by public employees for their service in the current year. [247] For TRS and SURS participants, the total "normal cost" of benefits for FY 17 is about \$2.5 billion.

Employees pay their share of the total "normal cost" through pension contributions derived from salary deductions, which is about \$1.2 billion for FY 2017. SURS employees contribute 8 percent of salary and TRS employees pay 9.4 percent of salary. The remaining \$1.3 billion of the total "normal cost" represents the employer's portion and is currently paid by the State for downstate and suburban school districts, universities and community colleges. In other words, even though downstate and suburban school districts, universities, and community colleges are the direct employers of their employees, the State pays the employer's portion of the total "normal cost" of pension benefits earned by downstate and suburban school teachers and university and community college employees.

Placed into context, the State's annual pension contribution is comprised of the employer's portion of the total "normal cost" plus an amount to pay down past unfunded liabilities.[248] For FY 2017, the State's pension contribution from General Revenue Funds for SURS and TRS is about \$5.5 billion,[249] with the employer's share of the total "normal cost" consisting of about \$1.3 billion of that total.[250] If the General Assembly were to shift the employer's portion of the total "normal cost" of benefits currently paid by the State to local school districts, universities, and community colleges, then the State would free up about \$1.3 billion that could be spent on other priorities, such as education and public safety. [251]

### ***B. Other Proposals***

While the Court's recent rulings strongly signal that the State and local governments must inevitably come up with money needed to pay their pension obligations, some stakeholders view the rulings as a call to action and an impediment to the State's fiscal recovery. [252] In their view, the rulings have

saddled the state with an “unsustainable burden” that can only be met through draconian tax increases and services cuts that will cause taxpayers to leave Illinois.[253] These stakeholders view State and local pension obligations as an unfair burden. As Ty Fahner of the Chicago’s Commercial Club stated, “It is fundamentally unfair to ask 95 percent of us—all of us those who are not in one of the state’s five pension systems—to pay for the 5 percent who benefit from these plans.”[254] As a result, some stakeholders support amending the Pension Clause to permit unilateral legislative reductions in benefits, and to allow Illinois municipalities to file for Chapter 9 bankruptcy and discharge their pension obligations. Both proposals are discussed below and face significant political and legal obstacles rendering them implausible.

### **I. Amend the Pension Clause to Permit Unilateral Legislative Reductions in Pension Benefits**

Shortly after the Illinois Supreme Court issued its *Pension Reform* decision in May 2015, the Civic Federation of Chicago stated that now was the time to amend the Pension Clause to “clarify” that it only applies to “accrued benefits” so the General Assembly could unilaterally reduce the benefits existing employees could accrue through future service.[255] Calls for the amendment were renewed after the Illinois Supreme Court issued its *Chicago Pension Reform* decision.[256]

The Civic Federation contends the amendment is necessary because the present level of benefits for current employees is unaffordable and jeopardizes “essential government services and the solvency of the pension funds.”[257] While the Civic Federation states that it is not supporting any specific benefit cuts, the amendment should be adopted so that the ideas of stakeholders who want unilateral benefits cuts “can be legislated.”[258] The proposed amendment was one of many recommendations found in the Civic Federation’s comprehensive “road map” to fix Illinois’ finances, which also recommended an income tax increase and expansion of the State’s sales tax to services.[259]

While the Civic Federation did not unveil the text of its proposed constitutional amendment, there is little likelihood the amendment will become law for a couple reasons. The first reason relates to the process of proposing amendments to the Illinois Constitution. An amendment to the Illinois Constitution must first be proposed by the General Assembly and receive the approval of three-fifths of the members the Senate and House of Representatives.[260] That legislative approval must also occur at least six months prior to the next general election, which was May 9 for the November 2016 Election. In addition, the amendment must be ratified by either three-fifths of those voting on the question or a majority of those voting in the election.[261]

Since no member of the General Assembly sponsored the Civic Federation's proposed amendment, it was not in a position to receive legislative approval. In addition, even if it had been filed, there was little prospect that the proposed amendment would have gained the needed supermajority support for legislative approval. The 2013 Pension Reform Bill discussed earlier in this Article passed the General Assembly with slim majorities in both chambers and was strongly opposed by legislators in both political parties.[262] The Civic Federation appears to have accepted this reality and observed that its next opportunity to include its proposed constitutional amendment on ballot would be at the November 2018 Election.[263]

Even if the Civic Federation's proposed amendment received legislative approval and was ratified by Illinois voters, it is unlikely that the proposal would survive a legal challenge. As noted above, the amendment is premised on the same economic necessity and police power theory that the Illinois Supreme Court rejected in its *Pension Reform* decision.

In that decision, the court rejected the State's "police powers" argument because Public Act 98-0599 was *not* a response to an unknown or unforeseeable problem, but rather a response to "a crisis for which the General Assembly is largely responsible." [264] The court further found that the Act was not the least restrictive means the State could have used to address the problem, but "an expedient to break a political stalemate." [265] In addition, the court indicated that the Act was tantamount to a taking of private property because the Act failed to distribute the burdens of pension funding evenly among Illinoisans let alone the State's contract partners.[266] The court explained that the U.S. Constitution "bar[s] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." [267]

In short, whether under a Contract Clause[268] or Takings[269] theory, the same arguments that prevailed in the *Pension Reform* decision against Public Act 98-0599 would equally apply to the Civic Federation's proposed amendment. As a result, the proposal amendment does not offer a plausible path to *unilaterally* reduce the fiscal burden of State and local pension obligations.

## **2. Municipal Bankruptcy**

A final proposal receiving some attention is allowing municipalities to file for bankruptcy under Chapter 9 of the U.S. Bankruptcy Code as a means to discharge all or part of the pension benefits owed to municipal employees and retirees. The proposal is inspired by rulings from federal bankruptcy court judges in California and Detroit, which held that public pension benefits protected under California

and Michigan law were subject to discharge under a court-approved restructuring plan.[270]

Representative Ron Sandack filed the proposal as House Bill 4214.[271] The proposal would do three things as part of specifically authorizing Illinois municipalities to file for Chapter 9 bankruptcy to discharge debt. First, it establishes a neutral evaluation process whereby a mediator can evaluate the scope of the municipality's financial obligations, the available means to pay those obligations, and assemble the municipality's creditors to renegotiate its debts and thereby avoid the need to file for Chapter 9 bankruptcy. [272] If the neutral evaluation process fails to produce a settlement within 90 days after beginning or an impasse is reached within that period, the municipality is free to file for Chapter 9 bankruptcy.[273]

Second, the proposal allows a municipality to file for Chapter 9 bankruptcy without exhausting the neutral evaluation process if it declares a fiscal emergency as outlined by the proposal.[274] The proposal permits a municipality to declare a fiscal emergency by adopting a resolution by majority vote of its governing board finding that its fiscal condition "jeopardizes the health, safety, or well-being of [its] residents."[275]

Third, and most important, the proposal includes a provision establishing statutory lien rights for municipal general obligation and revenue bondholders.[276] The purpose of creating these rights is to ensure that these bondholders will continue to receive full and timely debt service payments during and after a municipal bankruptcy proceeding.[277] Generally, the filing of a Chapter 9 bankruptcy petition terminates the "full faith and credit" pledge a municipality makes to general obligation bondholders to repay them through the full exercise of the municipality's taxing power.[278] The filing, in turn, enables the municipality to spend revenues otherwise used for debt service for other public purposes. A statutory lien permits a municipality to continue making uninterrupted payments to bondholders during and after the bankruptcy.[279]

In addition, the proposal seeks to classify the revenues dedicated to repay revenue bonds issued by Illinois municipalities as "special revenues" under Section 902 of the Bankruptcy Code.[280] Under certain circumstances, the Code insulates revenues specifically dedicated to repay revenue bonds, such as water and sewer user fees, from being diverted for other purposes during and after the bankruptcy proceeding.[281] The bond rating agency, Fitch, explained that the power of this protection "was evident in both the Stockton bankruptcy and the Detroit bankruptcy where water system bondholders were continuously paid debt

service.”[282] Taken together, the proposal’s creation of statutory lien rights for general obligation bondholders and classification of dedicated revenues to repay revenue bondholders as “special revenues” are intended to insulate bondholders from taking a “haircut” should an Illinois municipality file for bankruptcy, which is what occurred in the Detroit and other recent municipal bankruptcies.[283]

Much like the Civic Federation’s proposal to amend the Pension Clause, the municipal bankruptcy proposal faces stiff *political* and *legal* opposition. On the *political* front, the measure is opposed by Mayor Rahm Emanuel of Chicago and by public sector labor unions.[284] At an August 2015 hearing held by the House Pension and Personnel Committee, a bankruptcy expert observed in his testimony that by creating statutory lien rights the proposal was designed to protect municipal bondholders and allow municipalities to reject labor contracts and pension obligations.[285] Representative Sandack responded that municipal bankruptcy would only be used as a last resort, and that the main idea behind the proposal is to give municipalities more leverage for when they are negotiating labor contracts.[286] Given the current political composition of the General Assembly and opposition from the Mayor of Chicago, the proposal has not and is not expected to advance.[287]

On the *legal* front, as detailed below, the proposal is untenable because the General Assembly simply lacks the legal power to statutorily authorize its municipalities to file for bankruptcy where the result is the *unilateral* discharge of their pension obligations. This conclusion stems from the fact that before an Illinois municipality is eligible to file a petition under Chapter 9 of the Bankruptcy Code, the General Assembly must first enact a state law providing specific authorization.[288]

The state law authorization requirement derives from the U.S. Supreme Court’s decision in *United States v. Bekins*, which upheld Congress’ power to enact municipal bankruptcy legislation.[289] The requirement balances the constitutional difficulties of allowing municipalities to shed their debt obligations through a bankruptcy court-approved plan without running afoul of U.S. Constitution’s Contract Clause,[290] while also preserving the State’s sovereign control over its fiscal affairs and its municipalities without federal interference under the Tenth Amendment.[291] The *Bekins* decision upheld the municipal bankruptcy statute, in part, by emphasizing that the statute did *not* affect “any restriction on the powers of States or their arms of government in the exercise of their *sovereign rights and duties*.”[292]

Importantly, federal courts construing the state authorization requirement have found that the state law purporting to provide authorization must in fact be *valid* under state law.[293] Indeed, as one federal bankruptcy court observed, while “Congress has made bankruptcy available to municipalities,” “states retain their concomitant rights to limit access by their political subdivisions to bankruptcy relief.”[294]

Under our system of government, State rights and powers derive from the people who, in turn, can delegate it to representative instruments they create or reserve it to themselves.[295] The powers they have reserved are shown in the prohibitions set forth in State constitutions.[296] And as the Illinois Supreme Court recently noted, “which reserved powers a state government may exercise is a question for the people of that state, not the federal courts.”[297]

This conclusion is reinforced by the *Bekins* decision. In that decision, the court observed that States, like sovereign governments entering into treaties, are at liberty to make agreements “with Congress *if the essence of their statehood is maintained without impairment.*”[298] Indeed, the very legal authority[299] the *Bekins* court relied upon stated that sovereign governments were unable to enter into treaties that violate their own constitutions.[300] The U.S. Supreme Court, of course, agrees.[301]

Given that framework, it is important to note that the Ninth Circuit Court of Appeals held long ago that California’s state law authorizing its municipalities to file for bankruptcy did not violate the Contracts Clause of the California Constitution because that Clause was construed in lock-step with the Contracts Clause of the U.S. Constitution, and because the *Bekins* decision had found that the state law did not violate the federal Contracts Clause.[302] The same logic was employed in the Detroit bankruptcy case. In that case, the court rejected the argument that the Michigan statute authorizing municipal bankruptcy violated the Michigan Constitution’s Pension Protection Clause because there was nothing in that Clause’s drafting history or jurisprudence to suggest that it was intended, as an independent matter of state law, to provide greater protection to pension benefits rights than that afforded under the U.S. Constitution’s Contracts Clause.[303] This is simply not the law in Illinois.

The recent Pension Clause decisions discussed in this Article make clear that “when it came to retirement benefits for public employees,” the people of the Illinois, through the limits found in the Illinois Constitution, determined that “the legislature could not be trusted.”[304] To that end, the people of Illinois withdrew from the General Assembly the legal authority to take any action that unilaterally



diminishes or impairs the pension benefit rights of members of the pension systems.[305]

As the Illinois Supreme Court put it, there was “no possible basis for interpreting the Pension Clause to mean its protections can be overridden if the General Assembly deems it appropriate.”[306] Indeed, according to the court, the Pension Clause “removed the option of unilaterally diminishing benefits as a means of attaining pension stability.”[307] As a result, the Pension Clause withdraws from the General Assembly the legal power to pass any statute authorizing municipal bankruptcy as a means to unilaterally discharge public pension obligations. To allow the General Assembly to enact such a state law would simply be an end run around the Pension Clause and be inconsistent with its purpose.[308] “Municipal governments,” after all, “are creatures of the Illinois Constitution. They have no other powers.”[309]

This conclusion is made all the more necessary given the holdings of two recent municipal bankruptcy court decisions.[310] In both cases, the bankruptcy court judges found that once a state legally authorizes a municipality to file for Chapter 9 bankruptcy, the municipality is free to discharge its pension obligations through a bankruptcy court-approved plan regardless of any state law obstacles to the contrary.[311] Whether these decisions would equally apply to an Illinois municipality in light of the Pension Clause is beyond the scope of this Article, but it appears highly uncertain in this author’s view based on the *Bekins* decision and Chapter 9’s plain language and legislative history.[312]

## VI. CONCLUSION

Bismarck once said, “Politics is the art of the possible, the attainable.” Through its recent *Pension Reform* and *Chicago Pension Reform* decisions, the Illinois Supreme Court delivered a clear message that the politics of pension reform requires fidelity to the Illinois Constitution, making unilateral reductions in benefits both impossible and unattainable. Politics without such fidelity is ineffectual and comes at tremendous public expense. We are, after all, a government of laws, not men and women.

As detailed in this Article, the Illinois Supreme Court’s recent decisions reveal a viable path to enact pension reform legislation that results in savings to the State and squares with the Illinois Constitution’s Pension Clause. That path is adherence to usual contract principles and Senate President John Cullerton’s proposal provides one approach consistent with those principles. Another more collaborative approach is engaging public sector labor unions and forging an

agreement that reduces pension benefits of current union employees through the collective bargaining process.

Lawmakers may also restructure the current statutory funding schedule and pursue some form of a buyout proposal. In addition, lawmakers may shift the employer's portion of the "normal cost" of pension benefits paid by the State for downstate and suburban teachers and university and community college employees, respectively, to local school districts, universities, and community colleges. Finally, while amending the Pension Clause to permit unilateral benefit cuts and allowing Illinois municipalities to file for Chapter 9 bankruptcy to discharge their pension obligations are portrayed by its supporters as viable options, this Article shows that is simply not the case.

In the end, while contract principles and other permissible options discussed in this Article can help mitigate the financial burden of State and municipal pension obligations, the State must still restructure its revenue system so its fiscal obligations are met, not simply deferred. That, of course, will require political courage and entail tax increases. Welching on public pensions, however, is *still* not an option.

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[1] Eric Madiar, *Illinois Public Pension Reform: What's Past Is Prologue*, 31 ILL. PUBLIC EMPLOYEE RELATIONS REPORT, Summer 2014, at 11 and nn. 64-66 (Summer 2014) [hereinafter "Madiar Prologue Article"] (detailing Illinois' long history of failing to properly fund public pensions) available at: [http://www.nasra.org/Files/State-Specific/Illinois/IL%20open sion%20 history.pdf](http://www.nasra.org/Files/State-Specific/Illinois/IL%20open%20sion%20history.pdf).

[2] Illinois General Assembly, Report of the Pension Modernization Task Force, 48 (revised Mar. 30, 2010) [hereinafter "Pension Task Force Report"] available at: <http://cgfa.ilga.gov/Upload/112009PensionTaskForceReport.pdf>.

[3] *Id.*

[4] *In re Pension Reform Litigation*, 2015 IL 118585, 32 N.E.3d 1.

[5] See Eric Madiar, *Is Welching on Public Pension Promises an Option for Illinois? An Analysis of Article XIII, Section 5 of the Illinois Constitution*, at 3, 59-66, 77 (Mar. 1, 2011), available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1774163](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1774163) [hereinafter *Madiar, Welching on Public Pensions*] (comprehensively reviewing the origins and drafting history of the Clause, the court decisions construing the provision, and assessing the legal arguments made by various stakeholders regarding the Clause's scope, including the use of contract principles). A revised version of this Article was published under the same title in the Fall of 2014 by John Marshall Law School of Chicago. Eric Madiar, *Is Welching on Public Pension*

*Promises an Option for Illinois? An Analysis of Article XIII, Section 5 of the Illinois Constitution*, 48 JOHN MARSHALL L. REV. 167 (2014) [hereinafter Madiar Pension Article].

[6] See *In re Pension Reform Litigation*, 2015 IL 118585, at ¶ 40, 32 N.E.3d at 15; Madiar, *Past is Prologue*, *supra* note 1, at notes 64-66 and accompanying text (observing how the 1971, 1973 and 1975 Reports of the Illinois Public Employees Pension Laws Commission stated that pension benefits could not be “removed or repealed” under the Pension Clause once they were enacted by the General Assembly). For a comprehensive discussion of the drafting history and origins of the clause, see Madiar Pension Article, *supra* note 5).

[7] Ill. Const. of 1970, art. XIII, § 5.

[8] Madiar Pension Article, *supra* note 5, at 234-235.

[9] *Kanerva v. Weems*, 2014 IL 115811, at ¶ 40, 13 N.E.3d 1228, 1240.

[10] See *In re Pension Reform Litigation*, 2015 IL 118585, at n. 12, 32 N.E.3d at 17 n.12 (“However, once the additional benefits are in place and the employee continues to work, remains a member of a covered retirement system, and complies with any qualifications imposed when the additional benefits were first offered, the additional benefits cannot be unilaterally diminished or eliminated.”); Madiar Pension Article, *supra* note 5, at 262-64.

[11] See Madiar Pension Article, *supra* note 5, 289-95 (discussing how the Clause bars the General Assembly from unilaterally increasing existing employee contribution rates for the same level of benefits).

[12] Madiar Pension Article, *supra* note 5, at 173-74, 234 (referring to the dictionary definition of the term “benefit” and placing it into the context of the Clause).

[13] *Id.*

[14] *Felt v. Board of Trustees of the Judges Retirement Sys.*, 107 Ill.2d 158, 167-68, 481 N.E.2d 698, 700 (1985); Madiar Pension Article, *supra* note 5, at 184-205, 217, 222 (discussing the origins and drafting history of the Illinois Constitution’s Pension Clause and how the Clause was based on the nearly verbatim provision found in the New York Constitution).

[15] Madiar Pension Article, *supra* note 5, at 234 (quoting *Brown v. N.Y. State Teachers Ret. Sys.*, 296 N.Y.S.2d 649, 650 (N.Y. App. Div. 1966), *aff’d*, 279 N.Y.S.2d 532 (N.Y. 1967)).

[16] Madiar Pension Article, *supra* note 5 at 235-42, 280-89.

[17] *Id.*

[18] *Id.*; *In re Pension Reform Litigation*, 2015 IL 118585, at n.3, 32 N.E.3d at 8 n.3.

[19] *Buddell v. Bd. of Trustees of the State Univ. Retirement Sys.*, 118 Ill.2d 99, 104-05 (1985).

[20] *Id.*; *Kraus v. Board of Trustees of the Police Pension Fund*, 72 Ill.App.3d 833, 849-50, 390 N.E.2d 1281, 1293 (1979). See *In re Pension Reform Litigation*, 2015 Ill. at ¶1185 at 46 & n. 12, 32 N.E.3d at 16-17 & n.12 (favorably citing *Buddell* and *Kraus*).

[21] *People ex rel. Sklodowski v. State*, 182 Ill.2d 220, 229, 695 N.E.2d 374, 377 (1998); *McNamee v. State*, 173 Ill. 2d 433, 438, 672 N.E.2d 1159, 1162 (1996); *DiFalco v. Bd. of Trustees*, 122 Ill. 2d 22, 26 21 N.E.2d 923, 925 (1988); *Kerner v. State Employees' Retirement Sys.*, 72 Ill.2d 507, 515, 382 N.E.2d 243, 247 (1978); *Kraus*, 72 Ill. App. 3d at 849-50, 390 N.E.2d at 1293.

[22] *Kerner v. State Employees' Retirement Sys.*, 72 Ill.2d 507, 515, 382 N.E.2d 243, 247 (1978); *Kraus*, 72 Ill.App.3d at 850, 390 N.E.2d at 1293; *Kerner v. State Employees' Retirement Sys.*, 53 Ill.App.3d 747, 753, 368 N.E.2d 1118, 1122 (4th Dist. 1977) *aff'd*, 72 Ill.2d 507 382 N.E.2d 243 (1978). Accord *Matthews v. Chicago Transit Authority*, 2016 IL 117638 at ¶¶61 (stating “where a public employee becomes a member of a retirement system under a statute that includes a provision which may operate to deny him benefits in the future, that provision does not become an unconstitutional impairment of his retirement benefits because he agreed to it as a condition of his membership in the system.”).

[23] 4 Record of Proceedings, Sixth Illinois Constitutional Convention 2931-32 (Del. Kinney) (stating the she and Delegate Henry Green, the Clause's other principal sponsor, agreed that “it would be quite fair if a person undertook employment under a statute that provided for a contingency for lowering the benefits at some future time, that this was, indeed, the contract he had accepted. All we are seeking to do is to guarantee that people will have the rights that were in force at the time they entered into the agreement to become an employee, and as Mr. Green has said, if the benefits are \$100 a month in 1971, they should be not less than \$100 a month in 1990.”); *Id.* at 2930 (Del. Green) (“In answer to Delegate Parkhurst's question with regard to the diminishing aspect of it—the cost of living—any of you who know when you buy an insurance policy you're going to get back what the contract says. Now if the dollar isn't worth but 27 cents when you get it back, there is absolutely no reason why you have any recourse against that insurance company.”); *Id.* (Del. Whalen) (stating in opposition that pension benefits, as contractual rights, “may be subject to any contingency built into the contract.”).

[24] *Kerner v. State Employees' Retirement Sys.*, 72 Ill.2d 507, 515, 382 N.E.2d 243, 247 (1978).

[25] Madiar, *Welching on Public Pension*, *supra* note 5.

[26] *In re Pension Reform Litigation*, 2015 IL 118585, ¶¶71-75, 32 N.E.3d 1, 23-26.

[27] *Id.* at ¶ 60, 32 N.E.3d at 20-21.

[28] *Id.* at ¶ 5, 32 N.E.3d at 4-5.

[29] See Madiar *Past is Prologue*, *supra* note 1, at notes 3-8 and accompanying.

[30] *In re Pension Reform Litigation*, 2015 IL 118585, ¶ 27 32 N.E.3d at 11.

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] Madiar, *Past is Prologue*, *supra* note 1.

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *In re Pension Reform Litigation*, 2015 IL 118585, ¶¶ 32-35, 32 N.E.3d at 13-14.

[43] *Id.* The plaintiffs asserted that the Act violated the Illinois Constitution's Pension, Contract, Takings and Equal Protection Clauses. *Id.*

[44] *Id.* at ¶ 38, 32 N.E.3d at 15.

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.* at ¶39 32 N.E.3d at 15.

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.* at ¶40, 32 N.E.3d at 15.

[54] *Id.* at ¶41 32 N.E.3d at 15-16.

[55] Order, *In re Pension Reform Litigation*, 2015 IL 118585 (Jan. 22, 2015).

[56] Madiar, *Past Is Prologue*, *supra* note 1, at text accompanying notes 257-96.

[57] *In re Pension Reform Litigation*, 2015 IL 118585, at ¶43, 32 N.E.3d at 16.

[58] *Id.* at ¶45, 32 N.E.3d at 16.

[59] *Id.* (citing *Karnerva v. Weems*, 2014 IL 115811, 13 N.E.3d 1228).

[60] *Id.* at ¶46, 32 N.E.3d at 16.

[61] *Id.*

[62] *Id.*

[63] *Id.* at n. 12, 32 N.E.3d at 17 n.12.

[64] *Id.*

[65] *Id.* at ¶47, 32 N.E. 3d at 17-18.

[66] *Id.*

[67] *Id.* at ¶¶48-50, 32 N.E.3d at 18 (citing *Fields v. Elected Officials Retirement Plan*, 320 P.3d 1160 (Az. 2014)).

[68] *Id.*

[69] *Id.*

[70] *Id.* at ¶52, 32 N.E.3d at 18-19.

[71] *Id.* at ¶¶52-53, 32 N.E.3d at 18-19.

[72] *Id.* at ¶¶53-58, 32 N.E.3d at 19-20 (citing *Jorgensen v. Blagojevich*, 211 Ill. 2d 286, 811 N.E.2d 652 (2004); *People ex rel. Lyle v. City of Chicago*, 360 Ill. 25, 195 N.E. 451 (1935)).

[73] *Id.*

[74] *Id.* at ¶¶56-57, 32 N.E.3d at 19-20.

[75] *Id.* at ¶56 32 N.E.3d at 19.

[76] *Id.* at ¶58, 32 N.E.3d at 20.

[77] *Id.* at ¶59, 32 N.E.3d at 20.

[78] *Id.* at ¶¶59-61, 32 N.E.3d at 20-21.

[79] *Id.* at ¶¶64-66, 32 N.E.3d at 21-22.

[80] *Id.* at ¶66, 32 N.E.3d at 22.

[81] *Id.*

[82] *Id.* at ¶67, 32 N.E.3d at 22.

[83] *Id.* at ¶¶67-68, 32 N.E.3d at 22.

[84] *Id.* at ¶69, 32 N.E.3d at 22-23.

[85] *Id.*

[86] *Id.*

[87] *Id.* at ¶70, 32 N.E.3d at 23.

[88] *Id.*

[89] *Id.*

[90] *Id.* at ¶71, 32 N.E.3d at 23.

[91] *Id.* at ¶72, 32 N.E.3d at 23.

[92] *Id.*

[93] *Id.*

[94] *Id.*

[95] *Id.* at ¶¶73-74, 32 N.E.3d at 24.

[96] *Id.* at ¶75, 32 N.E.3d at 24-25.

[97] *Id.*

[98] *Id.* at ¶76, 32 N.E.3d at 35.

[99] *Id.*

[100] *Id.* at ¶77, 32 N.E.3d at 25.

[101] *Id.* at ¶78, 32 N.E.3d at 25.

[102] *Id.* at ¶79 32 N.E.3d at 25-26.

[103] *Id.* at ¶80, 32 N.E.3d at 26.

[104] *Id.* at ¶¶81-82, 32 N.E.3d at 26-27.

[105] *Id.*

[106] *Id.* at ¶82, 32 N.E.3d at 26-27.

[107] *Id.*

[108] *Id.* at ¶84, 32 N.E.3d at 27.

[109] *Id.*

[110] *Id.*

[111] *Id.* at ¶85, 32 N.E.3d at 27-28.

[112] *Id.* at ¶87, 32 N.E.3d at 28.

[113] *See id.* at n. 12 & ¶49, 32 N.E.3d at 17 n.12 & 18 (noting the Illinois Appellate Court’s *Kuhlmann* decision, which found that a member was not eligible for an “increase in benefits where he had ceased contributing to the pension fund prior to the change in the law,” and the 2014 Arizona Supreme Court decision, which stated that a participant “has a right in the existing formula by which his benefits are calculated as of the time he began employment and any beneficial modifications *made during the course of employment.*”). The *Kuhlmann* decision explained that providing such a benefit increase would be tantamount to “an unconstitutional expenditure of public funds for a private purpose” in violation of Article VIII, Section 1(a) of the Illinois Constitution. *Kuhlmann v. Bd. of Trs.*, 106 Ill.App.3d 603, 607, 435 N.E.2d 1307, 1311 (2d Dist. 1982). *See* Madiar Pension Article, *supra* note 5, at 261-262 & n. 510 (discussing the *Kuhlmann* decision and collecting cases in the public pension context). Article VIII, Section 1(a) states that “[p]ublic funds, property or credit shall be used only for public purposes.” Ill. Const. of 1970, art. VIII, § 1(a). While the General Assembly may have broad discretion to in determining what constitutes a “public purpose” under Article VIII, Section 1(a), that discretion is not unlimited and courts will intervene when public property or funds are devoted to a purely private use. *Wright v. City of Danville*, 174 Ill.2d 391, 400, 675 N.E.2d 110, 116-17 (1996). Accordingly, Article VIII, Section 1(a) provides Illinois courts with authority to determine whether pension benefits were constitutionally afforded in the first place, especially where the person receiving the benefit merely provided nominal or token consideration. *See McCord v. Pike*, 121 Ill. 288, 296 (1887) (voiding an attempted sale of county property for inadequate or nominal consideration); *Perkins v. Reservoir Park Fish. & Boat Club*, 130 Ill.App. 128, 1906 WL 2292 (3d 1906) (same); Ill. Att’y Gen. Op. S-691, at 66-67 (Jan. 30, 1974) (discussing the *McCord* and *Perkins* decisions); Ill. Att’y Gen. Op. S-797, at 233 (Feb. 7, 1974) (same). Indeed, this very issue is now pending before a trial court in Sangamon County, Illinois and involves a provision found in Public Act 94-1111, which was enacted in 2007. The provision, among other things, allowed a non-public employee who worked for a public sector labor union to purchase pension service credit in the Teachers Retirement System (TRS) for the ten years he spent working as the union’s legislative lobbyist merely by working one day as a substitute public school teacher. Ray Long, *Lobbyist Sues to Regain Big Pension He Got From 1 Day as Substitute Teacher*, CHI. TRIB. (Mar. 18, 2015), *available at*: <http://www.chicagotribune.com/news/ct-pension-lawsuit-lobbyist-met-20150318-story.html>; Complaint, *Piccioli v. Bd. of Trustee of the Teachers Retirement System*, No. 2015 MR 43 (Cir. Ct. Sangamon County) *available at*: <https://drive.google.com/file/d/oB4Bi-iePG1O6OVYtV3ZpaEtkMUE/view?pref=2&pli=1>. In 2012, the General Assembly later retroactively repealed this provision in Public Act 97-0651, which declared that the 2007 provision violated, among other things, Article VIII, Section 1(a) of the Illinois Constitution. Laws of Illinois, Public Act 97-0651, § 97, at 77, *available at*: <http://www.ilga.gov/legislation/publicacts/97/PDF/097-0651.pdf>. The plaintiff who filed suit contends that the 2012 repeal of the 2007 provision



violates the Pension Clause. Complaint, *Piccioli v. Bd. of Trustee of the Teachers Retirement System*, No. 2015 MR 43, at 4-6. The outcome of this case should be interesting.

[114] See *Jones v. Mun. Employees' Annuity & Ben. Fund of Chicago*, No 14 CH 20027, 2015 WL 4662009, (Cir. Ct. Cook County July 24, 2015), available at: <http://pensionlitigation.org/wp-content/uploads/2014/12/IL-Jones-v.-MEABF-circuit-court-decision-July-24-2015.pdf>. [hereinafter *Jones* Circuit Court decision].

[115] *Jones v. Mun. Employees' Annuity & Ben. Fund of Chicago*, 2016 IL 119618, at ¶¶14, 19.

[116] See *id.* at ¶¶ 49-52.

[117] *Id.* at ¶¶17, 18.

[118] *Id.* at ¶15.

[119] *Id.* at ¶16.

[120] *Id.*

[121] *Id.* at ¶20.

[122] 40 ILCS 5/22-403.

[123] *Jones* Circuit Court decision, *supra* note 114, at 23.

[124] *Id.* at 24.

[125] *Id.* at ¶27.

[126] *Id.* at ¶29.

[127] *Id.*

[128] *Id.* at ¶30.

[129] *Id.* at ¶31.

[130] *Id.*

[131] *Id.* at ¶32.

[132] *Id.*

[133] *Id.*

[134] *Id.* at ¶35.

[135] *Id.* at ¶36.

[136] *Id.*

[137] 60 Ill. 2d 266, 326 N.E.2d 749 (1975).

[138] *Jones*. 2016 Ill. 119618 at ¶¶36-37.

[139] *Id.* at ¶38.

[140] *Id.* at ¶39.

[141] *Id.* at ¶40.

[142] *Id.*

[143] *Id.* at ¶41.

[144] *Id.* at ¶42.

[145] *Id.* at ¶43.

[146] *Id.*

[147] *Id.*

[148] *Id.*

[149] *Id.* at ¶44.

[150] *Id.* at ¶45.

[151] *Id.*

[152] *Id.* at ¶46.

[153] *Id.*

[154] *Id.* at ¶47.

[155] *Id.*

[156] *Id.*

[157] *Id.*

[158] *Id.* at ¶47.

[159] *Id.* at ¶49.

[160] *Id.* at ¶¶51-53.

[161] *Id.* at ¶53.

[162] *Id.*

[163] *Id.* at ¶54.

[164] *Id.*

[165] *Id.* at ¶55.

[166] *Id.*

[167] *Id.*

[168] *Id.* at ¶32.

[169] 98th Ill. Gen. Assemb., Senate Bill 2404 (engrossed version), *available at*: <http://www.ilga.gov/legislation/98/SB/PDF/09800SB2404eng.pdf>; Monique Garcia & Kim Geiger, *Senate President Cullerton Offers New Pension Plan*, CHI. TRIB. (May 13, 2015) *available at*: <http://www.chicagotribune.com/ct-illinois-pension-reform-cullerton-met-0513-20150512-story.html>; Eric Zorn, *Ok, What About This Idea on Pensions?*, CHI. TRIB. (Sept. 8, 2015) *available at*: <http://www.chicagotribune.com/news/opinion/zorn/ct-tough-choice-pension-reform-perspec-0909-20150908-column.html>.

[170] 98th Ill. Gen. Assemb., Senate Bill 2404 (bill status), *available at*: <http://www.ilga.gov/legislation/BillStatus.asp?DocNum=2404&GAID=12&DocTypeID=SB&LegID=74021&SessionID=85&SpecSess=&Session=&GA=98>.

[171] The proposal would also apply to Tier 1 participants in the General Assembly Retirement System (GARS).

[172] *Jones v. Mun. Employees' Annuity and Ben. Fund of Chicago*, 2016 IL 119618 at ¶53; *Buddell v. Bd. of Trustees of the State Univ. Retirement Sys.*, 118 Ill.2d 99, 105, 514 N.E.2d 184, 187 (1987).

[173] *Jones*, 2016 IL 119618 at ¶¶53 and 47.

[174] *Carter v. SSC Odin Operating Co., LLC*, 2012 IL 113204 at ¶23, 976 N.E.2d 344, 352 (quoting *Lipkin v. Koren*, 392 Ill. 400, 406, 64 N.E.2d 890, 893 (1946)).

[175] *Doyle v. Holy Cross Hosp.*, 186 Ill.2d 104, 112, 708 N.E.2d 1140, 1145 (1999).

[176] *Watkins v. GMAC Fin. Servs.*, 337 Ill. App. 3d 58, 64, 785 N.E.2d 40, 44 (1st Dist. 2003); *Boyle v. Whipple*, 62 Ill. App. 2d 448, 453, 211 N.E.2d 113, 115 (3d Dist. 1965).

[177] *Kraus v. Bd. of Trustees*, 72 Ill.App.3d 833, 849, 390 N.E.2d 1281,1292-93 (1979); Madiar Pension Article, *supra* note 5, at 235, 276. As one Illinois court put it, “statutes governing the wages, working conditions, or employment benefits of public employees do not create any vested

rights in the continued existence of those laws.” *Gust v. Village of Skokie*, 125 Ill.App.3d 102, 107 (1st Dist. 1984).

[178] *Chicago Patrolmen’s Ass’n v. City of Chicago*, 56 Ill.2d 503, 508 (1974).

[179] *Kraus*, 72 Ill. App. 3d at 849-50, 390 N.E.2d at 1293; Madiar Pension Article, *supra* note 5, at 273, 279, & n. 565.

[180] *Carroll v. Grumet*, 117 N.Y.S.2d 553, 555 (App. Div. 1953), favorably cited in *Kraus*, 72 Ill.App.3d at 850, 390 N.E.2d at 1293.

[181] *Id.* at 555-56. *Accord Ballentine v. Koch*, 674 N.E.2d 292, 296 (N.Y. 1996); *Schacht v. City of New York*, 346 N.E. 2d 518, 31-32 (N.Y. 1976); *McGarrigle v. City of New York*, 803 N.Y.S.2d 529, 531 (App. Div. 2005); *Rosen v. New York City Teachers’ Retirement Bd.*, 122 N.Y.S.2d 485, 486-88 (App. Div.), *aff’d*, 116 N.E.2d 239 (N.Y. 1953); *White v. Hussey*, 87 N.Y.S.2d 252 (App. Div. 1949), *aff’d* 95 N.Y.S.2d 539 (1950); *Schwartz v. Simpson*, 114 N.Y.S.2d 730, 736-38 (Mun. Ct. 1952).

[182] Monique Garcia & Kim Geiger, *Senate President Cullerton Offers New Pension Plan*, CHI. TRIB. (May 13, 2015) available at: <http://www.chicagotribune.com/ct-illinois-pension-reform-cullerton-met-0513-20150512-story.html>.

[183] See Greg Hinz, *State, City Study New Pension Solutions After Supreme Court Slap*, CRAIN’S CHI. BUS. (Apr. 8, 2016) available at: <http://www.chicagobusiness.com/article/20160408/BLOGS02/160409859/state-city-study-new-pension-solutions-after-supreme-court-slap>; Eric Zorn, *Ok, What About This Idea on Pensions?*, CHI. TRIB. (Sept. 8, 2015) available at: <http://www.chicagotribune.com/news/opinion/zorn/ct-tough-choice-pension-reform-perspec-0909-20150908-column.html>.

[184] Michael T. Carrigan, *Cullerton Pension Bill Best For Workers*, CHI. TRIB. (May 23, 2013, available at: [http://articles.chicagotribune.com/2013-05-23/opinion/chi-20130523-carrigan\\_briefs\\_1\\_pension-system-savings-retirement-system\(describing Senate Bill 2404 as “constitutional”\)](http://articles.chicagotribune.com/2013-05-23/opinion/chi-20130523-carrigan_briefs_1_pension-system-savings-retirement-system(describing%20Senate%20Bill%202404%20as%20constitutional))).

[185] *Compare We Are One, Coalition Reaches Pension Agreement with Senate President – Support SB 2404, Oppose SB 1*, available at: <http://www.weareoneillinois.org/news/coalition-reaches-pension-agreement-with-senate-president>; We Are One, Summary of Negotiated Agreement between We Are One Illinois and Senate President John Cullerton, available at: <http://www.weareoneillinois.org/documents/Negotiated-Agreement.pdf> (detailing the provisions of Senate Bill 2404 and pensionable salary choice) with Eric Zorn, *Ok, What About This Idea on Pensions?*, CHI. TRIB. (Sept. 8, 2015) available at: <http://www.chicagotribune.com/news/opinion/zorn/ct-tough-choice-pension-reform-perspec-0909-20150908-column.html> (quoting the spokesperson for AFSCME who now describes the pensionable salary choice as “unconstitutional” and “coercive”); We Are One, Statement On So-Called Consideration Model Pension Changes, (May 26, 2016) available at: <http://www.weareoneillinois.org/news/statement-on-so-called-consideration-model-pension-changes>; We Are One, Summary—The Proposed “Consideration”-Based Plan Is Unconstitutional Because It Offers No

Consideration In Exchange For Reducing Pension Benefits, (May 26, 2016) *available at*: [http://www.weareoneillinois.org/documents/WA\\_OI\\_consideration\\_memo.pdf](http://www.weareoneillinois.org/documents/WA_OI_consideration_memo.pdf).

[186] *Carroll v. Grumet*, 117 N.Y.S.2d 553, 555 (App.Div.. 1952) cited in *Kraus*, 72 Ill.App.3d at 850, 390 N.E.2d at 1293.

[187] *See Rosen v. New York City Teachers' Retirement Bd.*, 122 N.Y.S.2d 485, 486-88 (App. Div.), *aff'd*, 116 N.E.2d 239 (N.Y. 1953) (reversing lower court decision (115 N.Y.S.2d 263, 266) which held that the New York Pension Clause gave employees the legal right to receive salary increases without condition and therefore count for pension purposes). *Accord Schwartz v. Sampson*, 114 N.Y.S.2d 730, 736-37 (Mun. Ct.1952).

[188] *See Felt*, 107 Ill.2d 167-68; 481 N.E.2d at 702 *Kraus*, 72 Ill. App. 3d at 846, 390 N.E.2d at 1290.

[189] *See* 40 ILCS 5/14-103.10 (defining "compensation" as "all remuneration for services performed"); 40 ILCS 5/15-111 (defining "earnings" as an amount "paid"); 40 ILCS 5/16-121 (defining "salary" as "actual compensation received").

[190] *See e.g., In re Pension Reform Litigation*, 2015 IL 118585 at ¶¶27 (imposing a unilateral cap on pensionable salary definition); *Felt*, 107 Ill.2d 162-63 481 N.E.2d at 700 (unilateral changing of pensionable salary definition from *last day* of service to the *average salary for the final year* of service); *Bardens v. Bd. of Trustees of Judges Retirement Sys.*, 22 Ill.2d 56, 59, 174 N.E.2d 168, 170 (1961) (unilateral changing of pensionable salary definition from last day of service to the average of the last four years of service); *Kraus*, 72 Ill.App.3d at 836, 390 N.E.2d at 1283-84 (unilateral changing of pensionable salary from 50% of the salary associated with the employee's rank at the time of retirement to 50% of the applicable salary in place when the employee went on disability); *Kleinfeldt v. New York City Employees' Retirement System*, 324 N.E.2d 865 (N.Y. 1975) (imposing a unilateral 20% limit on the amount of increased compensation received by a State employee deemed pensionable in any given year).

[191] Indeed, at least one New York court has found this distinction dispositive and described it as unlike the circumstance where the legislature unilaterally narrows the statutory definition pensionable salary. *Kleinfeldt v. New York City Employees' Retirement Sys.*, 341 N.Y.S.2d 784, 789-90 (App. Div. 1973), *aff'd*, 324 N.E.2d 865 (N.Y.1975).

[192] *Doyle v. Holy Cross Hosp.*, 186 Ill.2d 104, 112, 708 N.E.2d 1140, 1145 (1999).

[193] *See e.g., Mimica v. Area Interstate Trucking, Inc.*, 250 Ill. App. 3d 423, 424-25, 620 N.E.2d 1328, 1331-32 (1st Dist. 1983) (holding, *inter alia*, that an at-will employee was offered grossly inadequate consideration for the assignment of his patent rights to his employer where the employee made the assignment under the threat of termination in exchange for not being immediately fired, but was fired two weeks later).

[194] *Carter v. SSC Odin Operating Co., LLC*, 2012 IL 113204 at ¶24, 976 N.E.2d at 352.

[195] *Gallaher v. Lenart*, 226 Ill.2d 208, 243, 874 N.E.2d 43, 64 (2007); *Chandra v. Chandra*, 2016 IL App. (1st) 143858 at ¶16.

[196] *Koveleskie v. SBC Capital Markets, Inc.*, 167 F.3d 361, 367 (7th Cir. 1999) (applying Illinois law) (citing and quoting *Kewanee Prod. Credit Ass'n v. G. Larson & Sons Farms*, 146 Ill. App. 3d 301, 305, 496 N.E.2d 531, 534(1986)).

[197] *Boomer v. AT&T Corp.*, 309 F.3d 404, 416 (7th Cir. 2002) (applying Illinois law) (cited favorably by *Ross v. May Co.*, 377 Ill. App. 3d 387, 391, 880 N.E.2d 210, 215 (1st Dist. 2007)).

[198] *Carbajal v. H&R Block Tax Servs., Inc.*, 372 F.3d 903, 906 (7th Cir. 2004) (applying Illinois law); *Chandler v. AT&T Wireless Servs., Inc.*, 358 F. Supp. 2d 701, 704-05 (S.D. Ill. 2005) (applying Illinois law). Employees, of course, had no opportunity to haggle over their potential pension benefit rights when they entered public employment, but were presented with a preset offer as to what their rights would be.

[199] *Boomer*, 309 F.3d at 416; *Ross*, 377 Ill.App.3d at 391, 880 N.E.2d at 215. In *Ross*, the Illinois Appellate Court held that the employer's purported modification of an employment contract was not part of a bargained for exchange where the employer provided additional benefits to all employees without actually offering those benefits in exchange for the modification. 377 Ill.App.3d at 391-92, 880 N.E.2d at 215-16.

[200] 117 N.Y.S.2d 553 (App.Div. 1952).

[201] *Id.* at 554.

[202] *Id.* (emphasis added).

[203] *Id.* at 555.

[204] *Id.*

[205] *Id.*

[206] *Id.*

[207] *Kraus*, 72 Ill.App.3d at 849-50, 390 N.E.2d at 1293 (stating that "[i]t has also been held that an agreement whereby a cost of living allowance is paid and accepted by a public employee on condition that it will not be regarded as salary for pension purposes was valid and binding on the employee).

[208] 674 N.E.2d 292, 296 (N.Y. 1996).

[209] *Jones v. Mun. Employees Annuity & Ben, Fund*, 2016 IL 119618 at ¶54.

[210] *Hurd v. Wildman, Harrold, Allen & Dixon*, 303 Ill.App.3d 84, 91-92, 707 N.E.2d 609, 614-15 (1st Dist. 1999).

[211] *Id.*

[212] *Id.*

[213] *See e.g., Johnson v. IBM*, 891 F. Supp. 522, 529 (N.D. Cal. 1995) (employer did not commit a “wrongful act,” for duress purposes, by requiring an employee, subject to termination, to choose between (1) accepting a lower paying job, (2) accepting two weeks of severance pay, at the employer’s discretion, or (3) accepting 26 weeks of enhanced severance with additional health and job-placement in consideration for signing a release.)

[214] *Id.*; *Alexander v. Standard Oil Co.*, 97 Ill.App.3d 809, 812, 815-16, 423 N.E.2d 578, 580, 582-83 (1st Dist. 1981); *Higgins v. Brunswick Corp.*, 76 Ill.App.3d 273, 278, 395 N.E.2d 81, 85 (1st Dist. 1979).

[215] *Jones v. Mun. Employees Annuity & Ben. Fund*, 2016 IL 119618 at ¶54.

[216] *Id.* at ¶55.

[217] *See Ballentine v. Koch*, 674 N.E.2d 292, 296 (N.Y. 1996) (“[B]ecause plaintiffs designated the PBA as their agent for the collective bargaining negotiations at issue here and were thus bound by its actions taken on their behalf during the negotiations process[citation], the PBA’s waiver of the constitutional protections of [New York’s pension protection clause] is valid as to plaintiffs . . . .”); *Schacht v. City of New York*, 346 N.E.2d 518, 519 (N.Y. 1976) (“Plaintiff, having designated the union to be her agent for collective bargaining purposes, is bound by agreement made by that union on her behalf.”).

[218] *Village of Fairport v. Newman*, 457 N.Y.S.2d 145, 148 (App. Div. 1982) cited favorably in *Ballentine*, 674 N.E.2d at 294.

[219] *Id.* (emphasis added and citations omitted).

[220] *See* Fran Spielman, *Illinois Supreme Court Strikes Down Chicago Pension Rescue Plan*, CHI. SUN-TIMES (Mar. 24, 2016) available at: <http://chicago.suntimes.com/politics/ill-supreme-court-strikes-down-rescue-plan-for-2-chicago-pension/>; Fran Spielman, *Emanuel determined to craft new pension deal after court ruling*, CHI. SUN-TIMES (Apr. 7, 2016) available at: <http://chicago.suntimes.com/politics/emanuel-determined-to-craft-new-pension-deal-after-court-ruling/>.

[221] Fran Spielman, *Emanuel Determined to Craft New Pension Deal After Court Ruling*, CHI. SUN-TIMES (Apr. 7, 2016) available at: <http://chicago.suntimes.com/politics/emanuel-determined-to-craft-new-pension-deal-after-court-ruling/>.

[222] 2016 IL 117638.

[223] *See id.* at ¶54 (recognizing that its Jones decision found that ordinary contract principles may be used to modify public employee pension benefits); *id.* at ¶¶65-75 (detailing the authority of public sector labor unions to modify the pension benefits of its members through the collective bargaining process, and rejecting the claim that a labor union must obtain the individual consent of each member of the bargaining unit).

[224] HB 4427, 99th Gen. Assembly, Reg. Sess. (Ill. 2016); H.B. 56.25, 99th Gen. Assemb., Reg. Sess. (2016).

[225] *Id.*

[226] *Id.*

[227] See Nat'l Retiree Legislative Network, A Defined Pension Benefit Buyout Information Sheet 1-2 (2012), <http://www.nrln.org/documents/NRLN%20PENSION%20BENEFIT%20BUYOUT%20INFORMATION%20SHEET.pdf>.

[228] See Steve Vernon, *Pension buyouts: Who wins and who loses?*, CBS MONEYWATCH, (Oct. 29, 2012), <http://www.cbsnews.com/news/pension-buyouts-who-wins-and-who-loses/>.

[229] H.B. 4427, 99th Gen. Assemb., Reg. Sess. (Ill. 2016).

[230] Doug Finke, *State Lawmakers Explore Implications of a Pension Buyout Proposal*, PEORIA J. STAR (Apr. 10, 2016), available at: <http://www.pjstar.com/news/20160410/state-lawmakers-explore-implications-of-pension-buyout-proposal?page=3>.

[231] *Id.*

[232] COMM'N ON GOV'T FORECASTING AND ACCOUNTABILITY, PENSION IMPACT NOTE 99th General Assembly 3 (2016), available at: <http://cgfa.ilga.gov/Upload/99HB4427%20REV.pdf>.

[233] *Id.*

[234] *Id.* at 1.

[235] Finke, *supra* note 230.

[236] COMM'N ON GOV'T FORECASTING AND ACCOUNTABILITY, *supra* note 232, at 3.

[237] *In re Pension Reform Litigation*, 2015 IL 118585, ¶189, 32 N.E.3d at 28-29.

[238] LYMAN STONE, ILLINOIS CONSIDERS FURTHER INCOME TAX INCREASES AS TEMPORARY TAX NEARS EXPIRATION, TAX FOUNDATION (2014), available at: <http://taxfoundation.org/article/illinois-considers-further-income-tax-increases-temporary-tax-nears-expiration>.

[239] Ivan Moreno, *Rauner-Madigan Rivalry Hamstrings Illinois Budget Talks*, ST. LOUIS POST-DISPATCH, Apr. 17, 2016, available at: [http://www.stltoday.com/news/state-and-regional/illinois/rauner-madigan-rivalry-hamstrings-illinois-budget-talks/article\\_12b3cd50-e4fb-5558-8148-e394a38e69ec.html](http://www.stltoday.com/news/state-and-regional/illinois/rauner-madigan-rivalry-hamstrings-illinois-budget-talks/article_12b3cd50-e4fb-5558-8148-e394a38e69ec.html).

[240] CTR. FOR TAX AND BUDGET ACCOUNTABILITY, IT IS ALL ABOUT REVENUE: A COMMON SENSE SOLUTION FOR ILLINOIS' FISCAL SOLVENCY(2015), available at: <http://www.ctbaonline.org/reports/it-all-about-revenue-common-sense-solution-illinois'-fiscal-solvency>.

[241] *Id.* at 12-14.

[242] *Id.*



[243] *Id.* at 13.

[244] *Id.*

[245] *Id.* at 13.

[246] Madeleine Doubek, *School Districts' Spending, Pension Spiking Deepen State's Geographic Fault Lines*, REBOOT ILLINOIS, (Aug. 7 2015), <http://www.rebootillinois.com/2015/08/17/editors-picks/madeleinedoubek/school-districts-spending-pension-spiking-deep-en-states-geographic-fault-lines/43905/>.

[247] Inst. for Illinois' Fiscal Sustainability, *What Would it Mean to Shift More Illinois Teacher Pension Costs to School Districts?* (2011), *available at*: <https://www.civicfed.org/iifs/blog/what-would-it-mean-shift-more-illinois-teacher-pension-costs-school-districts>.

[248] *Id.*

[249] Comm'n on Gov't Forecasting and Accountability, *supra* note 232, at iii.

[250] Teachers' Retirement System of the State of Illinois, *Actuarial Valuation Report: June 30, 2015 Actuarial Valuation of Pension Benefits*, at 60, *available at*: <http://trs.illinois.gov/pubs/actuarial/2015ValuationRept.pdf>; State Universities Retirement System of Illinois, *Actuarial Valuation Report as of June 30, 2015*, at 1, *available at*: <http://www.surs.com/pdfs/invinfo/avr15.pdf>.

[251] *Id.*

[252] *See e.g.*, Ted Dabrowski & John Klingner, *Pension 101: Understanding Illinois' Massive, Government-Worker Pension Crisis*, Illinois Policy Institute, (opining "The growing cost of pensions has trapped the state, the city of Chicago, and hundreds of municipalities in financial crises, forcing many governments to raise taxes and shortchange programs on which lower-income Illinoisans rely. \* \* \* The crisis threatens to burden taxpayers with massive, ever-escalating taxes to bail out a system that is not sustainable – government-worker pensions consume a fourth of the state's budget") *available at*: <https://www.illinoispolicy.org/reports/pensions-101-understanding-illinois-massive-government-worker-pension-crisis/>; Greg Hinz, *Illinois Has Had Its Pension Day of Reckoning. Now What?*, CRAIN'S CHI. BUS. (May 15, 2015), *available at*: <http://www.chicagobusiness.com/article/20150509/ISSUE05/305099977/illinois-has-had-its-pension-day-of-reckoning-now-what>; Brief for the Civic Federation of Chicago as Amicus Curiae in Support of Defendant-Appellants, *In Re Pension Reform Litigation*, No. 118585, at 23, 25, 27, 29 (claiming that Illinois is unable, not unwilling, to its pension obligations, that these obligations are "unsustainable and unaffordable" and block "the funding of essential government services and infrastructure necessary for the health, safety and welfare of the State's citizens," and that without unilateral cuts in benefits there will be "associated negative effects on the business climate and the State's economy" with an "unwillingness to locate or expand business in Illinois") *available at*: [http://www.illinoiscourts.gov/supremecourt/specialmatters/2015/118585\\_amicus\\_mot\\_civic\\_fed\\_011415.pdf](http://www.illinoiscourts.gov/supremecourt/specialmatters/2015/118585_amicus_mot_civic_fed_011415.pdf).

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[256] Kerry Lester, *Illinois Legislators Skeptical About New Pension Deal This Spring*, CHI. TRIB. (May 13, 2015), available at: <http://www.chicagotribune.com/suburbs/daily-southtown/news/ct-sta-illinois-pensions-st-0514-20150513-story.html>.

[257] Civic Federation, State of Illinois FY 2017 Budget Roadmap: State of Illinois Budget Overview, Projections and Recommendations for the Governor and the Illinois General Assembly 4, 44-45 (Feb. 11, 2016) [hereinafter Civic Federation Report] available at: <https://www.civiced.org/sites/default/files/ReportRoadmapFY2017.pdf>.

[258] John O'Connor, *Illinois Supreme Court Strikes Down Chicago Pensions Plan*, Associated Press (Mar. 24, 2016), available at: <http://bigstory.ap.org/article/b7a533dfb58449438247bc53a19cc0e5/illinois-supreme-court-strikes-down-chicago-pensions-plan>.

[259] Civic Federation Report, *supra* note 257, at 3-4.

[260] Ill. Const. of 1970, art. XIV, § 2(a).

[261] *Id.* at § 2(b).

[262] See 98th Ill. Gen. Assemb., Conference Committee Report No. 1 to Senate Bill 1 (bill status) available at: <http://www.ilga.gov/legislation/BillStatus.asp?DocNum=1&GAID=12&DocTypeID=SB&LegId=68366&SessionID=85&GA=98>.

[263] Civic Federation of Chicago, State of Illinois: FY 2017 Recommended Operating and Capital Budgets: Analysis and Recommendations, at 21 (May 3, 2016) available at: [https://www.civiced.org/sites/default/files/Report\\_FY2017RecommendedBudget.pdf](https://www.civiced.org/sites/default/files/Report_FY2017RecommendedBudget.pdf).

[264] *In re Pension Reform Litigation*, 2015 IL 118585, at ¶66, 32 N.E.3d at 22.

[265] *Id.* at ¶¶67-68, 32 N.E.3d at 22.

[266] *Id.* at ¶69, 32 N.E.3d at 22.

[267] *Id.*

[268] *Russell v. Sebastian*, 233 U.S. 195, 202-05 (1914) (observing that a state constitutional amendment qualifies as a “state law” for purposes of determining whether contracts rights are impaired under the federal Contracts Clause).

[269] *Horne v. Dept. of Agriculture*, 135 S.Ct. 2419, 2427-28, 2431-33(2015) (holding that the appropriation of personal property by the government constitutes a *per se* taking requiring the payment of just compensation based on the fair market value of the property at the time of the taking); *Lynch v. U.S.*, 292 U.S. 571, 579 (1934) (contract rights are property rights for purposes of the Fifth Amendment of the U.S. Constitution and applying Fifth Amendment protection to contract rights repudiated by the federal government); *U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1, n. 16 (1977) (noting that “[c]ontract rights are a form of property and as such may be taken for a public purpose provided that just compensation is paid.”); *U.S. v. Larnioff*, 431 U.S. 864, 878 (1977) (holding that a servicemen had “already earned” the contractual right to receive a military bonus upon agreeing to reenlist in the Navy even though the bonus program was repealed by Congress before the serviceman began to serve his re-enlistment, and indicating that Congress would have effectuated a taking if the repeal of the bonus program was intended to “divest” the serviceman of his bonus); *U.S. v. Security Indus. Bank*, 459 U.S. 70, 77 (1982) (“[T]he Fifth Amendment commands that, however great the Nation’s need, private property shall not be thus taken even for a wholly public use without just compensation. If the public interest requires, and permits, the taking of property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain; so that, through taxation, the burden of the relief afforded in the public interest may be borne by the public.”) (quoting *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 602 (1935)). See also *United States v. Winstar Corp.*, 518 U.S. 839, 885 (1996) (characterizing the government’s repudiation of one of its contracts as a breach of contract, rather than a taking, and triggering the payment of damages as a traditional remedy).

[270] See, e.g., *In re City of Detroit*, 504 B.R. 97 (Bankr. E.D. Mich. 2013); *In re City of Stockton*, 478 B.R. 8 (Bankr. E.D. Cal. 2012).

[271] 99th Ill. Gen. Assemb., House Bill 4214, available at: <http://www.ilga.gov/legislation/99/HB/PDF/09900HB4214lv.pdf>. Representative Sandack refilled House Bill 4214 as House Bill 4500 in January 2016. See 99th Ill. Gen. Assemb., House Bill 4500, available at: <http://www.ilga.gov/legislation/billstatus.asp?DocNum=4500&GAID=13&GA=99&DocTypeID=HB&LegID=93477&SessionID=88>.

[272] *Id.* at 1-4, 6-13.

[273] *Id.* at 12.

[274] *Id.* at 13-14.

[275] *Id.* at 13.

[276] *Id.* at 15-16.

[277] Chapman and Culter LLP, Primer on Municipal Debt Adjustment, Chapter 9: The Last Report for Financially Distressed Municipalities at 30 (explaining the purpose of a statutory lien

in the Chapter 9 bankruptcy context) *available at*: [http://www.afgi.org/resources/Bankruptcy\\_Primer.pdf](http://www.afgi.org/resources/Bankruptcy_Primer.pdf).

[278] *Id.*

[279] 11 U.S.C. § 926.

[280] 99th Ill. Gen. Assemb., House Bill 4214, at 16 *available at*: <http://www.ilga.gov/legislation/99/HB/PDF/09900HB4214lv.pdf>.

[281] Chapman and Culter LLP, Primer on Municipal Debt Adjustment, Chapter 9: The Last Report for Financially Distressed Municipalities at 26-29 (explaining “special revenue bonds” and their treatment in the Chapter 9 bankruptcy context) *available at*: [http://www.afgi.org/resources/Bankruptcy\\_Primer.pdf](http://www.afgi.org/resources/Bankruptcy_Primer.pdf).

[282] Fitch, *U.S. Municipal Ratings Higher Than GO Ratings Not Usually Warranted*, BUSINESS WIRE, (Sept. 22, 2015) *available at*: <http://www.businesswire.com/news/home/20150922005817/en/Fitch-U.S.-Municipal-Ratings-Higher-Ratings-Warranted>.

[283] Randle B. Pollard, *Feeling Insecure—A State View of Whether Investors In Municipal General Obligations Bonds Have a Mere Promise to Pay or a Binding Obligation*, 24 WIDENER L. J. 19, 26-35 (2015) (discussing different types of municipal bond and financial obligations and reviewing how general obligations bonds fared in the Detroit, Stockton, California, and Jefferson County, Alabama bankruptcies); Gunjan Benerji, *Illinois Bankruptcy Bills Steal Pages From California and Learn From Detroit*, DEBTWIRE (Feb. 3, 2016) (same) *available at*: [http://www.clarkhill.com/uploads/medium/resource/1429/Illinois\\_bankruptcy\\_bills\\_steal\\_pages\\_from\\_California\\_and\\_learn\\_from\\_Detroit.pdf](http://www.clarkhill.com/uploads/medium/resource/1429/Illinois_bankruptcy_bills_steal_pages_from_California_and_learn_from_Detroit.pdf).

[284] See Kim Geiger, *Gov. Rauner Suggests Bankruptcy for Towns to Fight Pension Woes*, CHI. TRIB. (Feb. 4, 2015), *available at*: <http://www.chicagotribune.com/ct-bruce-rauner-municipality-bankruptcy-met-20150204-story.html>; Yvette Shields, *Displaying Stark Divisions, Illinois Lawmakers Talk Chapter 9*, BOND BUYER (Sept. 1, 2015), *available at*: <http://www.bondbuyer.com/news/regionalnews/displaying-stark-divisions-illinois-lawmakers-talk-chapter-9-1083552-1.html>.

[285] See Yvette Shields, *Displaying Stark Divisions, Illinois Lawmakers Talk Chapter 9*, BOND BUYER (Sept. 1, 2015), *available at*: <http://www.bondbuyer.com/news/regionalnews/displaying-stark-divisions-illinois-lawmakers-talk-chapter-9-1083552-1.html> (discussing the testimony of William Brandt); Brian Mackey, *Legislators Debate Whether Illinois Cities Can Declare Bankruptcy*, PEORIA PUBLIC RADIO (Aug. 25, 2015), *available at*: <http://peoriapublicradio.org/post/legislators-debate-whether-illinois-cities-can-declare-bankruptcy#stream/o> (same).

[286] Brian Mackey, *Legislators Debate Whether Illinois Cities Can Declare Bankruptcy*, PEORIA PUBLIC RADIO (Aug. 25, 2015), *available at*: <http://peoriapublicradio.org/post/legislators-debate-whether-illinois-cities-can-declare-bankruptcy#stream/o>; Amanda Robert, *In Illinois, Some Push Bankruptcy As Solution To Troubled Public Budgets*, FORBES MAGAZINE (Apr. 19, 2016) (same) *available at*: <http://www.forbes.com/sites/legalnewsline/>

2016/04/19/in-illinois-some-push-bankruptcy-as-solution-to-troubled-public-budgets/#63d95d06122e. See also Henry J. Feinberg, *Commentary: Pass A Bankruptcy Law, Give Taxpayers A Chance*, CHI. TRIB. (May 5, 2015) (noting how a statutory lien would “make sure bondholders are first in line to get their money back” and put municipalities filing under Chapter 9 in the position “to modify labor contracts”).

[287] Yvette Shields, *Displaying Stark Divisions, Illinois Lawmakers Talk Chapter 9*, BOND BUYER (Sept. 1, 2015), available at: <http://www.bondbuyer.com/news/regionalnews/displaying-stark-divisions-illinois-lawmakers-talk-chapter-9-1083552-1.html>.

[288] 11 U.S.C. § 109(c)(2) (requiring a municipality to be “specifically authorized to be a debtor under such chapter by *State law*, or by a governmental officer or organization empowered by *State law* to [so] authorize.”) (emphasis added).

[289] 304 U.S. 27 (1937). See *Franklin California Tax-Free Trust v. Puerto Rico*, 805 F.3d 322, 327-28 (1st Cir. 2015) (describing the origins of the state law authorization requirement as necessary to avoid “a Tenth Amendment problem”); *In re City of Bridgeport*, 128 B.R. 688, 692 (Bankr. D.Conn. 1991) (stating that it “is beyond peradventure that municipalities are political subdivisions of states from which they derive all of their rights and powers. Chapter 9 does not disturb that arrangement, that is, it does not give a city rights and powers independent of the state. Thus, chapter 9 does not give a city the power to file a bankruptcy petition. Rather, it is the state which must decide whether to empower its cities to file.”); *In re City of Harrisburg, PA*, 465 B.R. 744, 753-54 (Bankr. M.D.Pa., 2011) (same).

[290] *Id.* at 53-54 (discussing that the purpose of the municipal bankruptcy statute was simply to remove the obstacle posed by the U.S. Constitution’s Contract Clause to state legislation impairing existing contracts because only Congress had the power to remove the obstacle via its bankruptcy power); *Hanover Nat’l Bank v. Moyses*, 186 U.S. 181, 188 (1902) (“The grant to Congress [regarding bankruptcies] involves the power to impair the obligation of contracts, and this the states were forbidden to do.”).

[291] 304 U.S. at 51-53 (explaining how the statute preserved state control over its fiscal affairs and its because the municipality had to have state law authority to carry out the plan approved by the bankruptcy court, and because the states, like sovereign governments entering into treaties, were at liberty to make agreements “with Congress if the essence of their statehood is maintained without impairment.”).

[292] *Id.* at 49-53 (quoting H.R.Rep. No. 75-517, at 2 (1937); S.Rep. No. 75911, at 2 (1937)) (emphasis added). Seven years after its *Bekins* decision, the U.S. Supreme Court emphasized that it upheld the municipal bankruptcy statute “only because Congress had been ‘especially solicitous to afford no ground’ for the ‘objection’ that an exercise of federal bankruptcy over political subdivisions of the State ‘might materially restrict (its) control over its fiscal affairs’ whereby states would no longer be ‘free to manage their own affairs’.” The statute was ‘carefully drawn so as not to impinge on the sovereignty of the State. The State retains control of its fiscal affairs. The bankruptcy power is exercised \* \* \* only in a case where the action of the taxing agency in carrying out a plan of composition approved by the bankruptcy court is authorized by state law.’” *Faitoute Iron & Steel Co. v. City of Asbury Park*, 312 U.S. 502, 508 (1942) (quoting *Bekins*, 304 U.S. at 50-51).

[293] See *In re Suffolk Regional Off-Track Betting Corp.*, 462 B.R. 397, 417-421 (Bankr. E.D.N.Y. 2011) (finding that a public benefit corporation established under New York law was ineligible to file a Chapter 9 bankruptcy petition because the New York county that authorized the filing through a county resolution lacked the state constitutional authority to enact such a resolution, and noting that court could not turn “a blind eye to New York law governing the scope of a county’s authority”); *In re New York City Off-Track Betting Corp.*, 427 B.R. 256, 268-71 (Bankr. S.D. N.Y. 2010) (stating that “courts must look to *state law*” when determining whether valid authorization is given to a municipality to file a Chapter 9 provision and looking to relevant provisions of the state constitution); *In re Sullivan County Reg’l Refuse Disposal Dist.*, 165 B.R. 60, 73 and n. 41 (Bankr. D.N.H.1994) (same, and stating a “municipality has only those powers granted by the state. Unless *state law* has authorized the municipality to seek protection under federal law, use of the Bankruptcy Code would implicate the Tenth Amendment to the U.S. Constitution.”); *In re Summer Lake Irr. Dist.*, 33 F. Supp. 504, 506 (D. Or. 1940) (“The question of the technical validity of state consent is a question of *state law* for the determination of state courts.”). See also, *Brief for the U.S. as Intervenor-Appellee, In re: City of Detroit*, 2014 WL 2555744 at \*39-\*40 (6th Cir. 2014) (stating that a “state law that purports to authorize commencement of bankruptcy proceedings but that is invalid under the State’s own constitution would not satisfy this statutory requirement” and that “the question of whether the Michigan Pension Clause does in fact render invalid the state law authorizing commencement of these proceedings turns solely on issues of state law.”); Vincent S.J. Buccola, *Who Does Bankruptcy? Mapping Pension Impairment in Chapter 9*, 33 Rev. Banking & Fin. L. 585, 606-07 (observing that “if within the meaning of a state’s constitution the act of [a municipality] petitioning [under Chapter 9]—or perhaps the act of petitioning plus proposing to adjust debts—were understood to constitute ‘impairment,’ then statutory authorization to petition would be void as *ultra vires*.”). McConnell & Picker, *When Cities Go Broke: A Conceptual Introduction to Municipal Bankruptcy*, 60 U. CHI. L. REV. 425, 457 & n. 143 (1993) (“Looming in the background of this issue [i.e., the state law authorization requirement], but not resolved in litigation, is whether general state constitutional provisions requiring municipalities to make adequate provision for the payment of debts should be interpreted as barring bankruptcy filings.”) (cited favorably in *Puerto Rico v. Franklin Cal. Tax-Free Trust*, Nos. 15-233, 15-255, — S.Ct. —, 2016 WL 3221517, at \*8 (U.S., June 13, 2016)).

[294] *In re City of Harrisburg, Pa.*, 465 B.R. 744, 753 (Bankr.M.D.Pa. 2011). Moreover, it is beyond doubt that “municipalities are political subdivisions of states from which they derive all of their rights and powers. Chapter 9 does not disturb that arrangement, that is, it does not give a city rights and powers independent of the state.” *In re City of Bridgeport*, 128 B.R. 688, 692 (1991). Under Illinois law, “[m]unicipal governments, whether home rule or nonhome-rule, are creatures of the Illinois Constitution.” *AT&T v. Village of Arlington Heights*, 156 Ill.2d 399, 414, 620 N.E.2d 1040, 1047 (1993).

[295] *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 672, (1976); *McPherson v. Blacker*, 146 U.S. 1, 25 (1892) (“legislative power is the supreme authority, except as limited by the constitution of the state, and the sovereignty of the people is exercised through their representatives in the legislature, unless by the fundamental law power is elsewhere reposed.... What is forbidden or required to be done by a state is forbidden or required of the legislative power under state constitutions as they exist”).

[296] *Munn v. Illinois*, 94 U.S. 113, 124 (1876).

[297] *In re Pension Reform Litigation*, 2015 IL 118585, at n. 14, 32 N.E.3d 1, n. 14. Accord *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (“Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign.”); *Highland Farms Dairy v. Agnew*, 300 U.S. 608, 612 (1937) (“How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself.”); *Schuettee v. Coalition to Defend Affirmative Action*, 134 S.Ct. 1623, 1646-47 (2014) (Scalia, J. concurring) (“So it would seem to go without saying that a State may give certain powers to cities, later assign the same powers to counties, and even reclaim them for itself.”).

[298] *Bekins*, 304 U.S. at 53.

[299] *Id.* at 52 (citing 1 OPPENHEIM, INTERNATIONAL LAW §§ 493, 494 (4th ed.); 2 HYDE, INTERNATIONAL LAW § 489).

[300] See 1 OPPENHEIM, INTERNATIONAL LAW § 497 (4th ed.) (“Such treaties concluded by heads of States, or representatives authorised [sic] by these heads, as violate constitutional restrictions are not real treaties, and do not bind the State concerned, because the representatives have exceeded their powers in concluding the treaties.”); 2 HYDE, INTERNATIONAL LAW § 494 (“An independent State is deemed to possess the broadest right to enter into international agreements. Its constitution may, however, in various ways limit and regulate the exercise of the right, restricting the conclusion of treaties designed to effect certain objects, or prescribing the method by which the State shall give its consent to certain classes of engagements. An unconstitutional treaty must be regarded as void.”).

[301] See *Reid v. Covert*, 354 U.S. 1, 16-19 (1957) (finding that Congress cannot legally bind itself to a treaty with another nation that violates the Bill of Rights).

[302] *In re Merced Irr. Dist.*, 114 F.2d 654, 665 (9th Cir. 1940). See *United Firefighters of Los Angeles v. City of Los Angeles*, 259 Cal.Rptr. 65, 68-75 (Cal. App.1989) (noting that public pension benefits are protected under both the State and Federal Contracts Clauses); *Birkhofer v. Krumm*, 81 P.2d 609, 620-21 (Cal. App. 1938) (construing the California Contract Clause in lockstep with the federal Contract Clause). As a question of federal law, the U.S. Supreme Court is the ultimate expositor of whether a state law violates the U.S. Constitution. *Dodge v. Bd. of Educ. of City of Chicago.*, 302 U.S. 74, 78-79 (1937). When it comes to whether a state law violates the Illinois Constitution, however, the Illinois Supreme Court, not a federal court has the last word. *Hope Clinic for Women, Ltd. v. Flores*, 2013 IL 112673, at ¶79, 991 N.E.2d 745, 765.

[303] *In re City of Detroit, Mich.*, 504 B.R. 191, 244-48 (Bankr. E.D.Mich. 2013).

[304] *In re Pension Reform Litigation*, 2015 IL 118585, at ¶82, 32 N.E.3d at 26-27.

[305] *Id.* at ¶¶82-87, 32 N.E.3d at 26-28. See *McPherson v. Blacker*, 146 U.S. 1, 25 (1892) (observing that the “legislative power is the supreme authority, except as limited by the constitution of the state, and the sovereignty of the people is exercised through their

representatives in the legislature, unless by the fundamental law power is elsewhere reposed. \* \* \* What is forbidden or required to be done by a state is forbidden or required of the legislative power under state constitutions as they exist.”). *Cf. IBM v. Evans*, 99 S.E.2d 220, 222-23 (Ga. 1957) (holding that the Georgia legislature could not exempt property from state taxation in violation of the state constitution when providing consent to exclusive federal jurisdiction over that property under Article I, Section 8, Clause 17 of the U.S. Constitution).

[306] *Jones*, 2016 IL 119618, at ¶32 (quoting *In re Pension Reform Litigation*, 2015 IL 118585, at ¶75).

[307] *Id.* at ¶47.

[308] *Id.*

[309] *AT&T v. Village of Arlington Heights*, 156 Ill.2d 399, 414, 620 N.E.2d 1040, 1047 (1993).

[310] *In re City of Stockton, Cal.*, 526 B.R. 35, 56 (Bankr. C.D. Cal. 2015); *In re City of Detroit, Mich.*, 504 B.R. 191, 254-55 (Bankr. E.D. Mich. 2013); *In re City of Stockton, Cal.*, 475 B.R. 720, 727-29 (Bankr. C.D. Cal. 2012)

[311] *In re City of Stockton, Cal.*, 526 B.R. 35, 56 (Bankr. C.D. Cal. 2015); *In re City of Detroit, Mich.*, 504 B.R. 191, 254-55 (Bankr. E.D. Mich. 2013); *In re City of Stockton, Cal.*, 475 B.R. 720, 727-29 (Bankr. C.D. Cal. 2012).

[312] See Hon. Thomas B. Bennett, *Consent: Its Scope, Blips, Blemishes, and a Bekins Extrapolation Too Far*, 37 CAMPBELL L. REV. 3, 17-18, 22-23 (2015) (for a well-reasoned criticism of the current view taken by some bankruptcy court judges that once a state authorizes its municipalities to file a Chapter 9 bankruptcy case neither the state, the municipality, nor anyone else may reject the use of any parts of Chapter 9 along the road to readjustment of municipal debts).



## RECENT DEVELOPMENTS

By, Student Editorial Board:

**Marko Cvijanovic, Jenna Kim, Zachary Jordan, and Mary M. Pietrzak**

Recent Developments is a regular feature of the Illinois Public Employee Relations Report. It highlights recent legal developments of interest to the public employment relations community. This issue focuses on developments under the public employee collective bargaining statutes, the equal employment opportunity laws and the pension provision of the Illinois Constitution.

### I. IELRA DEVELOPMENTS

#### A. *Strikes*

In *Chicago Board of Education and Chicago Teachers Union, Local No. 1, IFT-AFT*, 32 PERI ¶ 194 (IELRB 2016), the IELRB granted the Chicago Board of Education's (CBE) request for preliminary injunctive relief pursuant to Section 16(d) of the IELRA. The IELRB found reasonable cause to believe that the Chicago Teachers Union (CTU) authorized and conducted a one-day strike which may have violated Sections 14(b)(3) and 13(b) of the IELRA when the Union had not given 10 days' notice of its intent to strike and had not exhausted statutory impasse procedures. The IELRB also held that preliminary injunctive relief was just and proper under the circumstances.

The CTU and the CBE's most recent collective bargaining agreement expired on June 30, 2015. On April 1, 2016, the union engaged in a one-day strike to protest an alleged unfair labor practice for the CBE's refusal to bargain in good faith and to protest the State of Illinois's failure to fund public education in Chicago adequately.

Under Section 13(b) of the IELRA, for a strike against CPS to be lawful, a minimum of 30 days must elapse after a fact-finding report has been made public and a minimum of 10 days must elapse after a notice of intent to strike is given by the union to the employer. At the time of the strike, neither condition was satisfied and the IELRB concluded that the April 1, 2016 strike did not meet the Section 13(b) requirements.

Section 14(b)(3) of the IELRA makes it an unfair labor practice for a union to fail to bargain in good faith. The IELRB cited its prior decisions recognizing that engaging in an unlawful strike violates Section 14(b)(3). The IELRB rejected the

CTU's argument that, in accordance with *Maestro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956), strikes over unfair labor practices are not subject to statutory notice requirements. The IELRB reasoned that the private sector precedent did not apply under the IELRA which has carefully crafted pre-requisites for a strike to be lawful and which abrogated the common law rule that all public employee strikes are illegal. The IELRB observed that statutes in derogation of the common law are construed strictly in accordance with their express language.

The CTU also argued that its trike was lawful because it was aimed at the legislature and not at the CBE's bargaining position. The IELRB rejected that argument, observing that accepting the CTU's position "would completely eviscerate the very carefully constructed statutory scheme for when strikes can be lawful." Accordingly, the IELRB concluded that there was reasonable cause to believe the Union's April 1, 2016 strike violated Section 14(b)(3) of the Act.

This was the first time the IELRB has faced a situation where (1) a union claimed the right to strike without regard to the requirements of the IELRA and where (2) a union voluntarily placed a one day limit on a strike. The IELRB found that preliminary injunctive relief was just and proper due to the probability that the CTU could engage in another strike prior to satisfying the Section 13(b) requirements. The IELRB reasoned that the conditions which motivated the April 1, 2016 strike still existed and the CTU had not acknowledged that its conduct had been unlawful.

The IELRB acknowledged that CTU President Karen Lewis wrote a letter to CBE Director of Labor Relations Joseph Moriarity assuring that the CTU would not engage in another strike without exhausting the statutory impasse procedures and providing the statutorily-required notice. The IELRB, nevertheless, found injunctive relief just and proper because Ms. Lewis did not have authority to bind the CTU, only the CTU's House of Delegates and its membership had such authority; the CTU continued to maintain that its strike was lawful; and the matter was one of substantial public interest.

IELRB Member Syred dissented. She argued that injunctive relief was not appropriate because the law governing whether the Section 13(b) requirements applied to unfair labor practice strikes was unsettled and the likelihood of a reoccurrence of the April 1 strike was speculative.

## II. IPLRA DEVELOPMENTS

### A. *Arbitration*

In *State of Illinois v. AFSCME*, 2016 IL 118422 (2016), the Illinois Supreme Court vacated an arbitrator's award enforcing a bargained-for wage increase. The court held that because the General Assembly had not appropriated funds, as required by Section 21 of the IPLRA, to pay for the wage increases, the award ordering the State to pay the increases was against public policy. The court emphasized that its holding only applied to the enforcement of multi-year collective bargaining agreements with State employees, which, according to the IPLRA, are negotiable "subject to the appropriation power of the employer." The court did find that, as a matter of law, the arbitrator's award enforcing the wage increases "drew its essence" from the contract but rejected AFSCME's argument that allowing wage increases to be subject to appropriations rendered bargaining for wage increases meaningless; the State convinced the court that enforcing the award would violate a clear public policy that the State may not spend public money without legislative authorization to do so.

In 2008, AFSCME and the State negotiated a multi-year collective bargaining agreement covering more than 40,000 State employees. The agreement was set to expire on June 30, 2012, and included wage increases in each year. As time went on, the State of Illinois' financial situation declined considerably. AFSCME agreed to changes which afforded the State hundreds of millions of dollars in cost savings, including delaying part of the wage increases scheduled for the 2012 fiscal year. The Governor's proposed budget for that year would have covered the delayed wage increases, but the General Assembly's approved budget left 14 State agencies without enough funds to pay the increases. AFSCME took this to arbitration, arguing that the State was nevertheless obligated to pay the bargained-for increases. Basing his decision on the four corners of the collective bargaining agreement and declining, on lack of jurisdiction grounds, to consider the State's arguments based on Section 21 of the IPLRA, the arbitrator ordered the State to pay the wage increases. The State appealed to the Illinois courts. At issue in the lower courts was the effect of Section 21, which makes collective bargaining for multi-year agreements "subject to the appropriation power." The Appellate Court upheld the arbitrator's award and reiterated the State's obligation to pay the wage increase, saying that the unavailability of the funds at a particular time does not erase the bargaining obligation and the State should pay the increases as it could

The Illinois Supreme Court reversed and vacated the award as against public policy. The court rejected AFSCME's arguments that (1) making wage increases

subject to appropriations renders bargaining over wage increases meaningless, and (2) since other contracts have expressly made wage increases subject to appropriations and this contract did not, the exclusion of such a provision means the raises were not subject to appropriation. Instead the court found that Section 21 of the IPLRA implies that all multi-year collective bargaining agreements are subject to appropriations by the General Assembly. A partial dissent took issue with this line of reasoning, saying that allowing the State to get out of its bargaining obligations by failing to appropriate funds is itself a public policy violation. However, the majority limited its holding, consistent with Section 21 of the IPLRA, to say that only multi-year agreements are subject to appropriations by the General Assembly.

### ***B. Supervisors***

In *Water Pipe Extension, Bureau of, Engineering, Local 1092 v. City of Chicago, Department of Water Management*, Case No. L-RC-15-009 (ILRB Local Panel 2016), the Local Panel affirmed the Administrative Law Judge's decision, finding that the Chief Dispatcher employed by the City of Chicago, Department of Water Management was not a supervisor within the meaning of Section 3(r) of the IPLRA.

Central Dispatch processed all calls and complaints regarding the City of Chicago's water and sewer system. Chief Dispatcher Joe Pusateri oversaw all operations and employees of the Central Dispatch.

Under Section 3(r) of the Act, employees are supervisors when they: (1) perform principal work that is substantially different from the work of their subordinates; (2) have the authority, in the interest of the employer, to perform any enumerated supervisory functions or effectively recommend such action; (3) use independent judgment consistently when performing those functions; and (4) spend a preponderance of their time exercising that authority.

When faced with an errant employee, Pusateri was able to either discuss matters with the employee or request a pre-disciplinary hearing. At a pre-disciplinary hearing, the hearing officer determined if the employee would be subject to discipline. In finding that Pusateri was not a supervisor under Section 3(r), the ALJ noted that Pusateri could not actually initiate discipline against his subordinates. Rather, Pusateri was only able to *recommend* discipline by requesting a pre-disciplinary hearing. The ALJ found that the ability to *recommend* discipline was not the same as being able to *effectively recommend* disciplinary action. Because the record lacked evidence of how frequently Pusateri's recommendations were followed, the ALJ concluded that the City failed to prove that Pusateri had the power to effectively recommend discipline. The ILRB affirmed the ALJ's decision.

Board Member Anderson dissented. He argued that Pusateri did have the authority to effectively recommend discipline. Board Member Anderson noted that Pusateri implicitly had the authority to effectively recommend discipline because he had the authority to choose between selecting a non-disciplinary approach, discussing matters with the employee, or initiating a formal disciplinary process.

### **III. EEO DEVELOPMENTS**

#### **A. *Constructive Discharge***

In *Green v. Brennan*, 136 S. Ct. 1769 (2016), the U.S. Supreme Court held that the statute of limitations for a constructive discharge claim begins to run only when the employee gives notice of his resignation, not on the last date of the employer's allegedly discriminatory act.

Marvin Green worked for the U.S. Postal Service for 35 years. In 2008, he applied for a promotion but was passed over. Green alleged that he was denied the promotion because of his race. In 2009, Green's supervisors accused him of intentionally delaying the mail, which is a criminal offense. On December 16, 2009, Green and the Postal Service signed an agreement (the "Agreement"). The Agreement promised that the Postal Service would not pursue criminal charges in exchange for Green's promise to leave his current postmaster position. The Agreement also gave Green the choice to retire or accept a different position at a location with significantly lower pay. Green chose to retire. On February 9, 2010, Green submitted his resignation effective March 31, 2010.

On March 22, 2010 – 41 days after submitting his Resignation, but 96 days after signing the Agreement, Green initiated counseling with the Equal Employment Opportunity (EEO) office to report an unlawful constructive discharge in violation of Title VII. Unlike a private sector employee, who generally has 180 or 300 days to file a charge of discrimination, before a federal civil servant can sue his employer, he must contact an EEO counselor within 45 days of the "matter alleged to be discriminatory." 29 C.F.R. § 1614.105(a)(1).

Green filed suit in federal court. However, both the district court and U.S. Court of Appeals for the Tenth Circuit agreed that Green's claim against the Postal Service was time-barred and dismissed his claim. Both courts agreed that the limitations period for Green's constructive discharge claim began to run on the date of the last alleged discriminatory act by the Postal Service, which was the signing of the Agreement on December 16, 2009.

The U.S. Supreme Court reversed. The Court held that the 45-day period for initiating counseling begins to run on the date an employee resigns, not on the date of the employer's last allegedly discriminatory act giving rise to the resignation. The court relied on the "standard rule" canon, where a limitations period starts to run only when a plaintiff has "a complete and present cause of action" upon which he can file suit and obtain relief. The Court noted that a complete and present cause of action for a constructive discharge claim has two elements:

(1) discrimination that becomes so intolerable that a reasonable person in the plaintiff's position would have felt compelled to resign; and (2) actual resignation.

The Court determined that a complete and present cause of action for a constructive discharge claim necessarily includes the employee's resignation. In support of the decision, the Court noted that practical considerations support applying the "standard rule" because "[s]tarting the limitations clock ticking before a plaintiff can actually sue for constructive discharge serves little purpose in furthering the goals of a limitations period."

Green and the Postal Service, however, disagreed on the actual date of resignation. Green argued that he resigned when he submitted his retirement paperwork on February 9, 2010. The Postal Service argued that Green resigned on December 16, 2009, when he signed the Agreement. The Court remanded the case to the Tenth Circuit to determine the date on which Green gave notice that he would resign.

### ***B. Pension Developments***

In *Jones v. Municipal Employees' Annuity & Benefit Fund*, 2016 IL 119618, the Illinois Supreme Court affirmed the Circuit Court of Cook County's decision that Public Act 98-641's reduction of retirement annuities to members of the Municipal Employees' Annuity and Benefit Fund and the Laborers' and Retirement Board Employees' Annuity and Benefit Fund (collectively the Funds) violated Article XIII, Section 5 of the Illinois Constitution.

Article XIII, Section 5 of the Illinois Constitution is commonly known as the Pension Protection Clause. It states, "Membership in any pension or retirement system of the State, any unit of local government or school district, or agency or instrumentality thereof, shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired." Public Act 98-641 reduced the value of annual annuity increases, eliminated them entirely for certain years, postponed the time at which they began, and completely eliminated the compounding component of the increases. It also increased employee contributions and provided for gradual increases in City contributions until the

funds achieved 90 percent funding in 2055. It also contained provisions for enforcement of the City's funding obligations.

Defendants argued that the Act provided an offsetting benefit to its members because it would rescue the funds from becoming insolvent. However, the court reasoned that passing a statute that looked to changing funding methods to ensure the Funds would reach 90 percent funding by 2055 did not create a "benefit" protected by the Pension Protection Clause. The court rejected the City's assertion that the funding provisions in the Act must be viewed as a "benefit" because they replaced a number of illusory promises. The court broke down the City's contention by reasoning that promising solvency cannot be netted against the "unconstitutional diminishment of benefits." The court concluded that the General Assembly could not unilaterally implement new terms of the Act.

The City contended that the Act was a bargained-for exchange with its unions and not a unilaterally-produced change. The court found that the unions were not acting as authorized agents within a collective bargaining process, and the negotiations were no different than legislative advocacy on behalf of an interest group. The court affirmed the circuit court's decision that the Act was unenforceable in its entirety.

In *Matthews v. Chicago Transit Authority* 2016 IL 117638, the Illinois Supreme Court held that current employees lacked standing to challenge the enforceability of the Chicago Transit Authority's (CTA) 2007 collective bargaining agreement (CBA) which changed retiree health insurance, but employees who had retired prior to the 2007 CBA had standing to challenge its enforceability. Furthermore, the court held that the provision of health care benefits to the retirees who retired under the 2004 CBA constituted an enforceable, vested right that survived the expiration of that agreement.

Under prior CBAs, including the 2004 CBA which ran through December 31, 2006, retirees received health insurance at no cost to them. The contracts further provided, "This benefit terminates when the retiree attains age 65." The 2004 CBA also provided, "Either of the parties hereto shall have the right to open this Agreement for modification and/or additions to be effective January 1, 2007 . . ." The parties were unable to reach agreement on the terms of the 2007 CBA and

they submitted their dispute to interest arbitration. The arbitrator awarded that a trust would be created which would become solely responsible for retiree health care, that the trust would be empowered to charge retirees up to 45 percent of their health care costs and to assess a 3 percent payroll tax on current employees to fund the trust. The General Assembly enacted legislation implementing the arbitration award and the trust.

The current and retired former employees brought putative class actions against the CTA and its retirement plan following the changes to health care benefits. The five individual plaintiffs were named on behalf of themselves and as representatives of two putative classes. In Class I, Williams represented former employees who were members of Amalgamated Transit Union Local 308 and retired under the 2004 CBA. In Class II, the remaining plaintiffs represented a class of CTA employees and retirees who retired after January 1, 2007, or remained current employees of the CTA.

The court held that the current employees and those who retired after January 1, 2007, lacked standing to sue. The court noted that only the parties to a CBA may dispute an arbitration award in court; therefore, only the employer and the designated representative of the bargaining unit may bring suit to challenge an arbitration award. In this case, the CBA provided that the CTA recognized the transit union as the sole and exclusive collective bargaining agent for the bargaining unit employees. The individual members of a bargaining unit may not bring suit against an employer to challenge an arbitration award unless the court finds that the union breached its duty of fair representation. In this case, the Class II plaintiffs were represented by the Transit Unions during the bargaining and arbitration process that resulted in the 2007 CBA. Additionally, there was no allegation that the union breached its duty of fairly representing the Class II plaintiffs. Therefore, those plaintiffs lacked standing.

In contrast, following expiration of the 2004 CBA, Williams and the Class I retirees were no longer employed by the CTA and were not represented in the subsequent collective bargaining and arbitration proceedings. Therefore, the court held, they had standing to pursue claims for enforcement of benefits granted under the 2004 CBA.

The court distinguished the case before it from its prior cases involving changes to retirement benefits. In prior cases, the benefits were set by statute and the changes were made by amending the relevant statute. In the instant case, the benefits were created by collective bargaining agreements and were subject to the terms of the CBAs. The court reasoned that the Pension Protection Clause of the Illinois



Constitution protects the retirement benefits as provided for in the CBA but does not preclude modification of those benefits if modification is allowed under the CBA. The court wrote:

For those public servants whose employment is governed by a contract, such as a CBA, the pension protection clause guarantees the retirement benefits that are provided in their employment contract. The terms of such an agreement are subject to negotiation between the public employer and the designated collective bargaining representative and are implemented by the applicable provisions codifying the agreement in the Pension Code. If the terms of the agreement provide for vested retirement benefits, those benefits are constitutionally protected by [the Pension Protection Clause]. However. . . if the underlying contract allows for the modification of certain retirement benefits, the pension protection clause does not preclude modification or alter the essential nature of the rights granted under the contract. Therefore, neither the language of the pension protection clause nor our prior case law presents an obstacle to a contractual provision that permits subsequent modification of public retirement benefits.

The court then turned to the terms of the 2004 CBA. Focusing on the provision that the retiree health benefit terminated when the retiree turned age 65, the court concluded that the 2004 CBA reflected the intent to provide health care benefits to former employees during their retirement and to specify the type of benefit that would be provided based on the age of each retiree. Thus, although retiree health care benefits could be changed by agreement upon expiration of the 2004 CBA, Williams' and other retirees' contractual right to retiree health care benefits under the 2004 CBA was fully accrued and not modified by agreement or the 2007 arbitration. Therefore, the Court held that the provision of health care benefits to Williams and the other Class I plaintiffs who retired under the 2004 CBA constituted an enforceable, vested right that survived the expiration of that agreement. The court held that they stated a claim for breach of the Pension Protection Clause of the Illinois Constitution.