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What happens when the pension well runs dry?

by Vladimir Shuliga, Jr.

When it comes to the Illinois public pension system, there is one thing upon which everyone generally agrees: the public pension well is not being replenished as quickly as it is being depleted. After the Illinois Supreme Court struck down the recent attempt to enact pension reform measures, policy makers appear to be at a stalemate.

In the meantime, a question that has yet to be answered is, "What will happen if a public pension fund in Illinois has less money than is necessary to pay for the benefits that are due to its beneficiaries?" One thing is clear: the beneficiaries are entitled to their benefits. The more difficult issue to address is who is liable to make the payments. Short of a constitutional amendment, the beneficiary's former municipal employer might be compelled by court action to make the payments.

The City of Chicago recently attempted to convince an Illinois circuit court that, unlike statewide pension funds, the municipalities that fund local pension funds are not guarantors of the benefits due to members of those funds. The pension reform offered by the City included a provision that would make the City a guarantor of pension benefits in exchange for a reduction in retirement benefits. Additionally, the City was seeking to reduce or eliminate the automatic annual increases to which retirees are currently entitled.

The City argued that by guaranteeing pension benefits, the fund members would receive an overall advantage even though the specific benefit amount might be reduced. Therefore, the City's position was that pension benefits were neither "diminished" nor "impaired." Circuit Court Judge Rita Novak disagreed. (*Jones v. Municipal Employees' Annuity and Benefit Fund of Chicago*, 14 CH 20027, appeal pending Docket Nos. 119618, 119620, 119638, 119639, 119644, Illinois Supreme Court)

The City's claim that it was not previously a guarantor of pension benefits prior to the adoption of the reform law was based on Section 22-403 of the Illinois Pension Code that provides:

> Any pension payable under any law hereinbefore referred to shall not be construed to be a legal obligation or debt of the State, or of any county, city, town, municipal corporation or body politic and corporate located in the State, other than the pension fund concerned, but shall be held to be solely an obligation of such pension fund, unless otherwise specifically provided in the law creating such fund. (40 ILCS 5/22-403)

The several articles of the Illinois Pension Code that create the statewide funds each have a provision specifically stating that the benefits granted by the funds are obligations of the State. (See 40 ILCS 5/2-125; 40 ILCS 5/14-132; 40 ILCS 5/15-156; 40 ILCS 5/16-158.2; 40 ILCS 18-132) However, Articles 3 and 4 of the Illinois Pension Code (downstate police and firefighter pension funds), as well as Articles 8 and 11 of the Code (City of Chicago pension funds), have no such provisions.

Based on the plain language of Section 22-403, the City appears to be correct. So, why did Judge Novak find that the City's pension reform plan violated the Illinois Constitution and that the City's claim that it was not already a guarantor of pension benefits was incorrect?

Judge Novak, relying heavily on the recent Illinois Supreme Court decision overturning the State's pension reform proposal (*In re Pension Reform Litigation*, 2015 IL 118585), found that the City was not giving the members of the local pension funds anything that they did not already have. After all, the Pension Protection Clause of the Illinois Constitution provides:

> Membership in any pension or retirement system of the State, any unit of local government or school district, or any agency or instrumentality thereof, shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired. (Ill. Const. 1970 art. XIII, § 5)

Judge Novak found that "if the state or municipal employer creates a pension system, the contractual relationship that is mandated derives from the *constitution*, as does the 'enforceable obligation' to pay the benefits." (*Jones*, at p. 23 (emphasis added)) By offering to guarantee the payment of benefits, the City offered to do precisely what the Pension Protection Clause already mandates. In essence, Judge Novak viewed the City's position as giving the pension fund members a legislative promise in place of a constitutional guarantee.

Ironically, in this respect, that is the exact opposite of what Delegate Henry Green

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intended when he sponsored the Pension Protection Clause at the 1970 Constitutional Convention: "[W]hat we are trying to do is to mandate the General Assembly to do what they have not done by statute." (4 Record of Proceedings 2931 (statements of Delegate Green))

On the issue of the guarantee under the Pension Protection Clause, Judge Novak's opinion was in lock-step with the Illinois Supreme Court's *In re Pension Reform Litigation* decision which came down less than three months prior to Judge Novak's ruling. The Illinois Supreme Court stated in unequivocal terms that the Pension Protection Clause "served to eliminate any uncertainty as to whether state and local governments were obligated to pay pension benefits to employees." (*In re Pension Reform Litigation*, 2015 IL 118585, ¶ 16 (citing *People ex rel. Sklodowski v. State*, 182 Ill.2d 220, 228-29 (1998)))

Indeed, in the handful of cases in which the Illinois Supreme Court has evaluated the constitutionality of an amendment to the Pension Code, the court has consistently turned to the transcripts of the Constitutional Convention to uncover the intent of the Pension Protection Clause.

One of the co-sponsors of the Pension Protection Clause, Delegate Helen Kinney, provided the intended meaning for several of the key terms in the clause. Most importantly for the purposes of this article, Delegate Kinney stated that "[t]he word 'impaired' is meant to imply and to intend that if a pension fund would be on the verge of default or imminent bankruptcy, a group action could be taken to show that these rights should be preserved." (4 Proceedings 2926 (comments of Delegate Kinney))

This statement, on its own, is a bit cumbersome and difficult to understand. However, when viewed in light of the broader discussions at the Constitutional Convention, it becomes clear that one intent of the Pension Protection Clause was to provide a legal mechanism for beneficiaries to enforce payments of the benefits that they were promised.

Delegate Kinney stated that the most direct motivation for the Pension Protection Clause was a flood of calls from public servants who were concerned that new "home rule" provisions in the Illinois Constitution would authorize municipalities to abandon existing pension systems in order to use the money for some alternate municipal purpose. Thus, "impairment" had the direct meaning that, if (or when) municipal funding for a pension fund dried up, the beneficiaries would have a legal mechanism to enforce payment of benefits. (4 Proceedings 2926 (Delegate Kinney))

Therefore, it appears that the Pension Protection Clause was intended to prevent policy makers from taking some intentional action to defund the pension system. However, the Illinois Supreme Court also held that the protections of the Pension Protection Clause also apply in times of economic emergency in which policy makers may be making a good faith attempt to avoid a fiscal disaster.

In fact, during the Great Depression, the Illinois Supreme Court firmly held that there is no "emergency" exception to the constitution. (*People ex rel. Lyle v. City of Chicago*, 360 Ill. 25, 29 (1935) ("[n]either the legislature nor any executive or judicial officer may disregard the provisions of the constitution even in case of great emergency") Thus, the Illinois Supreme Court enforced a provision in the 1870 Illinois Constitution that prevented the compensation for circuit court judges from being diminished even though the City of Chicago withheld the funds necessary to pay the judges from its annual appropriations.

More recently, Governor Blagojevich attempted to eliminate cost of living increases for judges as part of an austerity plan. Again, the Illinois Supreme Court refused to "ignore the Constitution of Illinois." (*Jorgensen v. Blagojevich*, 211 Ill.2d 286, 316 (2004))

Clearly, the Illinois Supreme Court is not willing to ignore constitutional mandates even in times of great financial difficulty. That position was reiterated when the court struck down the most recent attempt at pension reform. If a locally funded pension fund were to run out of money, it would certainly be viewed as a dire economic situation.

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Failure to properly name defendants has consequences in administrative review cases

by Brian J. O'Connor

The recent Fourth District Appellate Court ruling in *Mannheim School District No. 83 v. Teachers' Retirement System*, 2015 IL App (4th) 140531, underscores the importance of titles and words used in governmental business and legal matters.

The dispute in the Teachers' Retirement System ruling was an appeal by the Mannheim School District No. 83 ("District") of a benefits determination made by the Board of Trustees of the Teachers' Retirement System. In August 15, 2013, the TRS Board determined that the District was required to make additional contributions for two administrators based upon contract addenda. The District took issue with that determination.

The District sought judicial review of the benefits determination under the Administrative Review Law (735 ILCS 5/3-101 –3-113). In September 13, 2013, the District filed its complaint for administrative review with the circuit court naming TRS as the defendant: the complaint did not name the Board or any TRS official. The District's complaint was filed within the 35-day statutory timeframe (735 ILCS 5/3-103). The District served the complaint and summons by certified mail to TRS's Executive Director.

Attorneys for TRS filed a motion to dismiss the District's complaint. The motion asserted the court did not have jurisdiction to consider the complaint because the District failed to identify the proper Defendant(s) required by the Administrative Review Law (735 ILCS 5/3-107(a)). The District argued that the August 2008 amendments to Section 3-107(a) permitted the court to allow the District to amend the complaint to cure the complaint's Defendant(s) identification problem.

In February 2014, the circuit court issued its determination finding that the District had made a good-faith effort to serve the complaint (735 ILCS 5/3-105), rejecting the District's arguments regarding the amendment, and granting the TRS motion to dismiss the District's complaint with prejudice (meaning it could not be brought again). The District appealed the circuit court's determination.

The Fourth District court affirmed the circuit court's determination. The Fourth District noted that when a statute confers jurisdiction for a court to consider a matter, that jurisdiction is limited to the language of the conferring statute. If that statute is not strictly complied with, then the court does not have jurisdiction to consider the matter.

The court reviewed defendant identification requirements of Section 3-107 (a) that the complaint name the administrative agency or the director or agency head in their official capacity. The court noted:

> In this case, [the District] named TRS as a defendant but did not name the Board. The Board is the administrative agency which rendered the decision [the District] sought to challenge, not TRS itself. Therefore, [the District] failed to name the necessary defendant in its review action.

In rejecting the District's arguments that the 2008 amendment to Section 3-107(a) allowed the District an additional 35 days to amend its complaint, the Fourth District noted the two situations in which amending the complaint was permitted: (1) to add a specific official in their official capacity when the administrative agency is a named defendant; or (2) to add the administrative agency when the agency's director or head is a named defendant. The court noted that because the District had named TRS but had not named the Board or any official in their official capacity the 2008 amendment to Section 3-107(a) was not applicable to save the District's complaint. ■

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Nonetheless, it appears that one or more beneficiaries could bring a mandamus action to compel the municipality to levy the necessary taxes to pay the benefits that are due to the beneficiaries. As the courts did in *People ex rel. Lyle v. City of Chicago* and *Jorgensen v. Blagojevich*, it seems likely that a court would compel the municipality to levy the taxes necessary to pay the benefits that were due.

All of the legislative history from the 1970 Constitutional Convention and subsequent case law stand quite consistently for the proposition that the employer that makes contributions to a public pension fund is liable for the payment of benefits if that pension fund runs out of money. However, none of the case law specifically addresses Section 22-403. Unfortunately, even Judge Novak avoided the apparent contradiction between the Pension Protection Clause and Section 22 -403. Her ruling was predicated solely on the Pension Protection Clause and did not address how Section 22-403 fits into the analysis.

The simple answer is that Section 22-403 and the Illinois Supreme Court's interpretation of the Pension Protection Clause cannot be reconciled. As a matter of statutory hierarchy, the Illinois Constitution is the law of the land and controls any inconsistent statutory provision. More specifically, Section 22-403 of the Pension Code was passed in 1963, seven years prior to the 1970 Constitutional Convention. According to Section 9 of the Transition Schedule for the 1970 Constitution:

> The rights and duties of all public bodies shall remain as if this Constitution had not been adopted with the exception of such changes as are contained in this Constitution. All laws, ordinances, regulations, and rules of the court not contrary to, or inconsistent with, the provisions of this Constitution shall remain in force, until they shall expire by their own limitation or shall be altered or repealed pursuant to this Constitution. (Ill. Const. 1970 Trans. Sch. § 9)

The Illinois Supreme Court has interpreted this section to mean that any statutory provision predating the 1970 Constitution that is inconsistent with the new Constitution is invalid. (*See Kanellos v. County of Cook*, 53 Ill.2d 161 (1972)) Given this background, why Judge Novak did not make a specific ruling with respect to Section 22-403 is unclear. What is clear, however, is that legislative language cannot undermine constitutional provisions. Therefore, any future attempts at pension reform that are predicated on Section 22-403 would most likely fail, just as the City of Chicago pension reform failed.

This leaves one final question: "What if the municipality or unit of local government that contributes to the pension funds goes bankrupt?" The short answer is that the current state of Illinois law makes it impossible for a municipality to file for bankruptcy. Chapter 9 of the United States Bankruptcy Code provides a mechanism for municipal bankruptcy. However, the very first requirement for municipal bankruptcy is that the municipality must be "specifically authorized" to be a debtor by state law. (11 U.S.C. § 109(c))

Illinois municipalities cannot meet that requirement because there currently is no law in Illinois that specifically authorizes a municipal bankruptcy. The Illinois Local Government Financial Planning and Supervision Act allows for the creation of a financial planning and supervision commission in times of fiscal emergency. The law only applies to municipalities with a population under 25,000 and the commission can only *recommend* the filing of Chapter 9 bankruptcy (50 ILCS 320/1 *et seq*.).

In fact, in 2006, a drainage district's attempt to file for Chapter 9 bankruptcy was dismissed because the court could not find specific authority in Illinois law for such bankruptcy. (*In re Slocum Lake Drainage District of Lake County*, 336 B.R. 387, 390 (N.D. IL 2006) ("Had the Illinois General Assembly intended to specifically authorize this Debtor or other municipalities to seek relief under Chapter 9, it could have easily drafted appropriate legislation, but has not done so.")

It is unlikely that a recommendation by a financial planning and supervision commission will meet the "specific authority" requirement of the U.S. Bankruptcy Code, so Illinois municipalities will not have authority to seek bankruptcy relief unless the state legislature chooses to specifically provide for such authority. Until that occurs, any beneficiary of a pension fund appears to have the legal authority to bring a mandamus action against the municipality to pay for the benefits that are currently due. ■

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