5-1-2013

A Comparative Examination of Pension Reform and Subsequent Litigation in New Jersey After the Enactment of the 2011 Pension Reform Litigation

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By Charlotte Howells*

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Introduction:

With the 2011 enactment of major pension reform legislation in New Jersey, legal questions regarding the rights of public employees to their benefits have been brought to the forefront of public debate. A state-by-state analysis shows that there is a wide variety of approaches to the central legal question raised by all pension reform efforts: when and how can a state make changes to its public employee pension programs? The answers can be found in the common law, state and federal constitutions, as well as questions of statutory construction, and legislative intent. Since 2009, New Jersey legislators have taken steps to implement a new scheme for pension plans, retirement plans, and collective bargaining rights for public employees. Their efforts culminated on June 28, 2011, when Governor Chris Christie signed Senate Bill 2937 into law.[1] Due to some of the changes imposed by 2011 P.L. Ch. 78[2] ("2011 Pension Reform Legislation"), public employee unions have initiated litigation against the state.[3]

New Jersey Senate President Stephen Sweeney (D. Gloucester) helped lead in the passage of the legislation after building bipartisan support for the sweeping changes set forth in the bill. The Act repeals or amends over eighty laws and significantly alters public employee pension, retirement, and healthcare plans.[4] Notably, the law raises the age of retirement for some individuals, alters the amount of employee contributions, and eliminates the cost-of-living adjustment.[5] While the purpose and effect of the law are in dispute, the Legislature holds that it

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[1] *Senate Budget and Appropriations Committee Statement to Senate, No. 2937*, 2011 Leg., 214th Sess. 2 (N.J. 2011) [hereinafter *Committee Statement*].

[2] 2011 N.J. Sess. Law Serv. Ch. 78 (West).

[3] *See* Bill Wichert, *Dems Attacking Christie Allies Over State Union Setbacks*, STAR-LEDGER, Aug. 15, 2011, at 003, *available at* 2011 WLNR 16153221; *see also* Complaint, N.J. Educ. Assoc. v. State, No. 3:11-CV-0502 (D.N.J. filed Aug. 31, 2011), 2011 WL 3850262 [hereinafter Complaint].

[4] *See* 2011 N.J. Sess. Law Serv. Ch. 78 (West).

[5] *Committee Hearings*, *supra* note 1.

amended the law to comply with federal and state tax regimes and treasury regulations.[6] The law is meant to cut costs, although public employees allege that the new law continues the State's practice of underfunding the pension system.[7] The New Jersey Education Association, along with other interested parties, filed a complaint in federal court on August 31, 2011.[8] This Note will analyze the possibility of success in this litigation and propose an alternative approach to pension reform enactment that is more consistent with New Jersey law.[9]

This Note analyzes the recent reform in New Jersey and subsequent litigation to propose that the state adopt a concrete, contractual approach to reform, where legislators can prospectively alter pension law, but will be estopped from making retroactive changes. Part I of this Note will provide background information on federal and state regulation of pension benefits, and discuss case law analyzing prior pension reform efforts in New Jersey and in other states. Part II will provide general background information on pension reform and analyze specific details of New Jersey's 2011 Pension Reform Legislation. Finally, Part III will analyze the New Jersey litigation by looking at the policy considerations likely to guide the court, the legal merits of the claims asserted, and the likelihood of success. Additionally, Part III will suggest that New Jersey adopt a bright-line contract theory-based approach to pension reform that sets out to only make prospective changes to the law, to avoid future contract-based challenges from employees.

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[6] *Id.*
[7] Complaint, *supra* note 3.
[8] *Id.*
[9] *See* N.J. Educ. Assoc. v. State, 989 A.2d 282 (N.J. Super. 2010); *see also* Prof'l Firefighters' Assoc. of N.J. v. State, No. A-3681-08T3 (N.J. Super. Aug. 23, 2011).

I. Background on Regulation of Pension Benefits in the United States and New Jersey and Application in Case Law

Pension plans for private and public employees are regulated differently.[10] Federal laws, including the Employee Retirement Income Security Act (ERISA) and the Internal Revenue Code generally govern private employee pensions and benefits, and state laws generally govern plans for state and local government employees.[11] While regulation varies among states, in some cases drastically, federal law does sometimes also provide for the protection of public employee benefits.[12] Additionally, both public and private pensions are subject to federal constitutional constraints.

Before discussing the specifics of federal and state regulation of employee benefits, it is necessary to provide background on the most common types of pension plans. Defined benefit plans allow for employees to receive a monthly payment for life once they retire, as provided by in a defined formula.[13] Funding for these types of plans may come from employee and/or employer contributions, stock, or other investment returns.[14] Actuaries are typically responsible for setting the contribution rates for these plans and making sure that the financial risk of such a plan is properly calculated.[15]

In contrast to the defined benefit plan, the defined contribution plan does not ensure regular monthly payments for the employee, but instead accrues contributions that are stored in an account from which the employee may withdraw, in full if he desires, upon retirement.[16]

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[10] Anna K. Selby, *Pensions in a Pinch: Why Texas Should Reconsider its Policies on Public Retirement Benefit Protection*, 43 TEX. TECH L. REV. 1211, 1214 (2011).
[11] *Id.*
[12] *Id.*
[13] *Id.* at 1215.
[14] *Id.*
[15] Selby, *supra* note 10 at 1215-16.
[16] *Id.* at 1217.

Recently, some states have stopped offering definite benefit plans, and instead offered alternative defined contribution plans, or combination plans.[17]

To receive benefits from either type of plan, an employee must obtain legal rights to the payments.[18] This process is known as "vesting," which "confers upon an employee a 'complete and consummated right not contingent upon any future event.'"[19] Depending on the plan, an employee may vest his rights to benefits after a particular period during his employment.[20] Whether an employee has vested his rights to benefits may impact the amount and nature of the contributions he can receive.[21] The type of plan and whether or not it creates a vested right to benefits are extremely important factors when examining the legal issues raised by state pension reform efforts.

a. New Jersey

Pension plans and retirement benefits are regulated by New Jersey's state constitution and in Titles 18 and 43 of the New Jersey Statutes Annotated. Additionally, pensions for public employees are subject to New Jersey's Contract Clause.[22] Title 18 of New Jersey Statute governs Teachers' Pension and Annuity Fund Law (TPAF)[23] and Title 43, Chapter 15A governs the Public Employees Retirement System (PERS).[24]

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[17] Robert L. Clark, *State and Local Pensions in the United States*, Prepared for Workshop on Civil Service and Military Pension Arrangements, 11, January 20-21, 2011, *available at* http://cis.ier.hit-u.ac.jp/Japanese/society/conference1101/clark-paper.pdf.
[18] Selby, *supra* note 10 at 1217.
[19] *Id.* at 1218 (*citing* Dan M. McGill, Preservation of Pension Benefit Rights 7, 5 (1972)).
[20] *Id.*
[21] *Id.*
[22] N.J. CONST. art. IV, § 7, ¶ 3 states: "The Legislature shall not pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or depriving a party of any remedy for enforcing a contract which existed when the contract was made."
[23] N.J. STAT. ANN. § 18A:66-1 (West 2011).
[24] N.J. STAT. ANN. § 43:15A (West 2011).

Additionally, the New Jersey Legislature has amended pension statutes through yearly public laws.[25] For instance, New Jersey P.L, 1997, ch. 113 adopts a contract theory-based approach to pension reform, but only guarantees "non-forfeitable right[s]" to "vested" retirees and sets out the state's responsibility to contribute "annual normal contribution[s.]"[26] However, Chapter 113 also reserved control for the Legislature by stating that it would "not preclude the forfeiture, suspension or reduction of benefits for dishonorable service[.]"[27] Over the past ten years, the Legislature has altered eligibility requirements, actuarial formulas, and employer contributions to the public pension system.[28]

i. Case Law in New Jersey under a Contract Clause Analysis

New Jersey courts have historically been reluctant to overturn pension reform legislation. In *Spina v. Consolidated Police and Firemen's Pension Fund Commission,*[29] the Supreme Court of New Jersey held that pension reform which resulted in minor alterations to retirement eligibility requirements did not constitute a contractual impairment or taking.[30] The court reasoned that there was no explicit indication that the legislation would create a contractual obligation with the members of the fund.[31] Instead the court held, "the terms and conditions of public service in office or employment rest in legislative policy rather than contractual obligation, and hence may be changed except of course insofar as the State Constitution

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[25] *Recent Legislation*, STATE OF NEW JERSEY, DEPARTMENT OF THE TREASURY, DIVISION OF PENSION AND BENEFITS (Sept. 29, 2011, 4:03 PM), http://www.nj.gov/treasury/pensions/newlaw11.shtml.
[26] N.J.P.L. 1997, ch. 113.
[27] The law states that employees' rights to their pension will not restrict the State from amending the retirement system with future legislation. *Recent Legislation: Chapter 113*, STATE OF NEW JERSEY, DEPARTMENT OF THE TREASURY, DIVISION OF PENSION AND BENEFITS (Sept. 29, 2011, 4:03 PM), http://www.state.nj.us/treasury/pensions/lawsfy97.shtml#ch113.
[28] N.J.P.L 2003, ch. 108.
[29] Spina v. Consol. Police and Firemen's Pension Fund Comm'n, 197 A.2d 169 (S. Ct. NJ 1964).
[30] *Id.* at 170.
[31] *Id.*

specifically provides otherwise."[32] However, the court refused to adopt a defined approach to pension benefits, referring to contributions as "compensation," "reward[,]" and "noncompensatory payment to further the public employer's own interests[.]"[33] Ultimately, *Spina* declares that the legal question of pensions as a contractual obligation, property interest, or perhaps some form of gratuity does not require detailed analysis, as the issue is "too academic to be pursued, for our Legislature would not think of making off with a fund."[34] Expanding on the nature of pensions described in *Spina*, the court in *Uricoli v. Board of Trustees*, acknowledged pension plans as a kind of deferred compensation meant to provide necessary security for employees.[35] The Court noted the particular importance of protecting pension for public employees to protect "employment stability and financial security."[36]

Forty years after *Spina*, in *New Jersey Education Association v.* State,[37] members of the state's teachers union and pension fund unsuccessfully pushed for constitutional protection for a contract right to their pensions under TPAF.[38] While the lower court found that the State was contractually obligated to provide funding for the pension system as a matter of law, plaintiffs did not bear their burden to show a substantial impairment that would violate the State and Federal Contract Clauses.[39] Plaintiffs alleged that from 2004-2007, the Legislature underfunded the fund by $2.6 billion, but the court found that evidence of such underfunding was unsubstantiated.[40] The court also found that TPAF members did not have a contractual right to the "manner or method" of funding in the system, and thus did not satisfy the second prong of

[32] *Id.* at 173.
[33] *Id.* at 174.
[34] *Spina*, 197 A.2d at 175.
[35] Uricoli v. Bd. of Tr., 449 A.2d 1267, 1273 (N.J. 1982).
[36] *Id.*
[37] N.J. Educ. Ass'n v. State, 989 A.2d 282 (N.J. Super. 2010).
[38] *Id.* at 283.
[39] *Id.* at 284.
[40] *Id.* at 287.

the analysis.[41] In articulating this holding, the court cited the established rule, "a statute will not be presumed to create private, vested contractual rights, unless the intent to do so is clearly stated."[42] Citing *Spina*, the court affirmed that New Jersey defers to legislative intent, and though the state recognizes employees' property interest in earned benefits, it does not recognize a contractual obligation to ensure that pensions are paid in a certain way unless legislation clearly explicates such intent.[43] While "non-forfeitable right to receive benefits," as stated in the statute, does create a contractual obligation for the state to provide those benefits to public employees, an employee's right does not extend to the management of those funds.[44]

Finally, in the most recent ruling concerning this matter, *Professional Firefighters Association of New Jersey v. State*,[45] several unions brought suit against the state in response to 2003 legislation altering the pension scheme under PFRS by decreasing employer contribution rates.[46] While plaintiffs argued that the state should treat employees' rights to pensions as a contract, the court ultimately followed *New Jersey Education Association* by rejecting the theory.[47] This court clarified, "[u]nlike many other states, our constitution does not expressly create a contractual right to retirement benefits . . . We will not recognize such a right unless it is 'so plainly expressed that one cannot doubt the individual legislator understood and intended it.'"[48]

New Jersey courts are resistant to acknowledge a public employee's interest in his pension as a contractual right, despite examining challenges to pension reform under the

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[41] *Id.* at 284.
[42] *Id.* at 292 *citing* National R.R. Passenger Corp. v. Atchison, Topeka & Santé Fe Ry. Co., 470 U.S. 451, 465-466 (1985).
[43] *N.J. Educ. Ass'n*, 989 A.2d at 296-297.
[44] *Id.* at 297.
[45] Prof'l Firefighters Ass'n of N.J. v. State, No. A-3681-08T3 (N.J. Super. Aug. 23, 2011).
[46] *Id.* at 1.
[47] *Id.* at 3.
[48] *Id.* at 4 *quoting* Spina v. Consol. Police and Firemen's Pension Fund Comm'n, 197 A.2d 169 (S. Ct. NJ 1964).

established Contract Clause analysis. As such, New Jersey seems to adopt a hybrid-approach to pension benefits, which combines gratuity, property right, and contract theories of pension law. Consequently, public employees and employers subject to pension reform in New Jersey suffer from a lack of consistently interpreted and uniform law.

b. State Approaches

While ERISA, the Tax Code, and § 302 of the NLRA broadly protect some aspects of employees' rights to benefits, some states have gone far to create regional regulation for public employees. There is a great deal of variation among states' regulation of pensions and benefits. To understand the nature and scope of various states legislation of pension benefits, it is necessary to provide a background on the theoretical approaches to pensions in a legal framework. There are at least four theories defining the nature of an employee's right to pension benefits, including pension as gratuity, as contract, as property right, and under promissory estoppel.[49]

i. Pension as Gratuity

The theory of pension as gratuity treats public pension plans as gifts, rather than as contracted terms or compensation.[50] Therefore, under this theory, pension plans could be altered or eliminated at any time without redress by the employee.[51] In a gratuity jurisdiction, an employee does not have vested rights in his pension plan, so the Government may amend the plan freely.[52] Additionally, an employer may expressly state in its contract with the employee that the benefits are treated as gratuities and as such, the employer may dismiss the employee at

[49] Amy B. Monahan, *Public Pension Plan Reform: The Legal Framework*, LEGAL STUDIES RESEARCH PAPER SERIES, No. 10-13. 2010.
[50] *Id.* at 3.
[51] *Id.*
[52] John Martinez, 2 LOCAL GOVERNMENT LAW § 10:39 (Sept. 2011).

any time without having to confer the benefits through the plan.[53] For corporate entities in New Jersey, voluntary pension plans that the employee does not contribute to do not create contractual obligations, but are treated as gratuities, and the employee does not hold vested rights until he has actually received benefits.[54] The gratuity approach has been rejected by most states based on constitutional conflicts or policy changes; however Indiana, Texas, and Arkansas still adhere to this approach to some extent.[55]

ii. Pension as Contract

Contractual jurisdictions suggest that a pension plan creates a contract between the entity and the employee.[56] The contract may be implied by the circumstances of employment or explicitly declared by state constitution.[57] Modifications to a pension plan are applied in a contract law context.[58] When the contract is implied, the court must look to the United States Constitution's Contract Clause, or the state constitution's version.[59]

The Contract Clause prohibits states from passing legislation that impairs existing contracts, whether they are public or private.[60] Determining whether amending employee pension plans or benefits violates the Contract Clause requires a three-step analysis. First, the court must examine whether a contractual relationship exists.[61] It must then determine whether the change in law constitutes a substantial impairment to the employee's rights.[62] Finally, it must

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[53] W.E. Shipley, Annotation, *Rights and Liabilities as between Employer and Employee with Respect to General Pension or Retirement Plan*, 42 A.L.R. 2d 461 (1955).
[54] William Meade Fletcher, *Employee Benefit Plans*, in 6 FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS, ch. 24, § 2522.10; *see also* Dolan v. Heller Bros. Co., 104 A.2d 860 (N.J. Super. 1954).
[55] Monahan, *supra* note 49 at 3.
[56] Shipley, *supra* note 53 at ch. II, § 4.
[57] Monahan, *supra* note 49 at 3.
[58] *Id.*
[59] *Id.*
[60] U.S. CONST. art. I, § 10, cl. 1.
[61] Terry A.M. Mumford, Mary Leto Pareka, Ice Miller Donado & Ryan. *The Employer's (In) Ability to Reduce Retirement Benefits in The Public Sector*, SC14 ALI-ABA 27, 35 (1997).
[62] *Id.*

determine if the impairment is reasonable and necessary to achieve the Government's goals.[63] Effectively, states adhering to the contract theory are limited in their reform options because of the stricter constitutional analysis.

Within the contract theory approach, there are three general directions a state may take when offering protection. First, a state may provide constitutional protection of past and future benefit accruals.[64] Under this approach, adopted in New York, Alabama, Illinois, and Arizona, states have the greatest challenge in successfully reforming pension rights.[65] In these states, changes to pension plans cannot result in less desirable benefits for the employee, because such a modification would violate the contractual obligation created by the plan.[66] In New York, this protection is codified in the state constitution, which explicitly provides, "membership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired."[67] While New York's broad protection provides that pension plans cannot be changed if they lessen the employee's benefits in some way, it does not limit employers from changing other conditions that may adversely affect pension benefits.[68]

Second, a state may provide constitutional protection of only past benefit accruals.[69] Under this approach, followed by Michigan, Hawaii, and Louisiana, earned benefits are protected, but future benefits are not.[70] The interpretation of this protection may mean that an employee does not have the right to benefits he would acquire through continued work (and thus,

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[63] *Id.* at 36.
[64] Monahan, *supra* note 49, at 7.
[65] *Id.* at 28-30.
[66] *Id.* at 7.
[67] N.Y. CONST. art. V, § 7.
[68] For example, an employer may reduce an employee's salary. Lippman v. Bd. of Educ. of the Sewanhaka Cent. High Sch. Dist., 487 N.E.2d 897 (N.Y. 1985).
[69] Monahan, *supra* note 49, at 10.
[70] *Id.* at 10-11.

conditions of a pension plan may be altered freely so long as the changes take place in the future), or that an employee only has rights to past benefits that were earned while vested in the plan.[71]

Finally, a state may not rely on its state constitution as a source of protection, and instead treat pensions as deferred compensation as a term of the employment contract.[72] The majority of jurisdictions treat pension benefits as a contractual obligation and adhere to an analysis based in contract theory, though it is similar to the Constitutional analysis.[73] The balancing test has three elements, and proposes to weigh the state's police power with the interests of the employee to get the benefit of their bargain.[74] The analysis considers 1) the existence and scope of the contract; 2) whether the contract has been substantially impaired; and 3) whether the impairment is reasonable and necessary to satisfy an important public purpose.[75] The first element examines whether there is a binding agreement and to what extent the parties are bound.[76] For the second element, different jurisdictions have found that formula changes, changes to funding methodology, and elimination of cost-of-living adjustments constitute substantial impairments.[77] For the third element, a court may determine the reasonableness of the impairment based on intent, foreseeability, and the extent of the resulting change.[78] To determine necessity, "a [s]tate is not completely free to consider impairing the obligations of its own contracts on a par with other policy alternatives . . . a [s]tate is not free to impose a drastic impairment when an evident

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[71] *Id.* at 11.
[72] *Id.*
[73] Martinez, *supra* note 52.
[74] *Id.*
[75] Energy Reserves Grp. v. Kan. Power & Light Co., 459 U.S. 400, 412 (1983).
[76] *Id.*
[77] *See* Betts v. Bd. of Admin., 582 P.2d 614 (1978); Valdes v. Cory, 139 Cal. App. 3d 773 (Cal. Ct. App. 1983); Bd. of Admin. v. Wilson, 61 Cal. Rptr. 2d 207 (Cal. Ct. App. 1997); Calabro v. City of Omaha, 531 N.W.2d 541 (Neb. 1995).
[78] U.S. Trust Co. v. New Jersey, 431 U.S. 1, 2, 27, 35 (1977).

and more moderate course would serve its purposes equally well."[79] Additionally, the state must show that it could not have achieved its purpose without the change to the contract.[80]

Some courts have held that, notwithstanding the three-part test, an impairment may still be constitutional if it is accompanied by some kind of new advantage.[81] Indeed, Colorado calls this theory the "partial vesting" approach, and maintains that the accompanying advantage must be: (1) of a beneficial nature; (2) actuarially necessary; or (3) strengthens and improves the pension plan.[82] Additionally, while some jurisdictions allow unilateral modifications of pension plans, this rule conflicts with most contract law.[83] Moreover, some jurisdictions hold that there is no contractual right to a particular amount of funding, so any diminution or impairment by pension law will not constitute breach.[84]

1. Case Law Under Contract Clause Analysis

In the seminal case, *Dodge v. Board of Education of Chicago*,[85] the Supreme Court dismissed the plaintiff's complaint that the Miller Law, which decreased pension payments to retired public school teachers in Chicago and applied retroactively and prospectively, was unconstitutional, pursuant to the Contract Clause of the U.S. Constitution.[86] The Court declared that "[t]he presumption is that such a law is not intended to create private contractual or vested rights, but merely declares a policy to be pursued until the Legislature shall ordain otherwise."[87] The Court further implied that the presumption will only be rebutted if there is some explicit

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[79] *Id.* at 30-31.
[80] *Id.* at 29-30.
[81] Monahan, *supra* note 49 at 18.
[82] Martinez, *supra* note 52, *citing* Peterson v. Fire and Police Pension Ass'n, 759 P.2d 720 (Colo. 1988).
[83] In Alaska, Delaware, Nebraska, Oklahoma, and West Virginia, courts permitted unilateral modification "(1) in order to enhance actuarial soundness; or (2) if the change bears a material relation to the purpose of the system and if the resultant disadvantage to the employee is accompanied by an offsetting advantage." However, Martinez acknowledges that this analysis may contradict *U.S. Trust Co. Id.*
[84] Fletcher, *supra* note 54.
[85] Dodge v. Bd. of Educ.of Chi., 302 U.S. 72 (1937).
[86] *Id.* at 75.
[87] *Id.* at 72.

language in the text of the legislation that indicates existence of a contract, or if circumstances illustrate a clear legislative intent to create a contractual obligation.[88]

While *Dodge* lays the foundation for analysis, courts that adopt the contract approach are loosening the reins. Many jurisdictions will declare legislation unconstitutional if it applies retroactively. In *Andrews v. Anne Arundel County*,[89] former county officials sought recovery and injunctive relief, pursuant to the Contract Clause and 42 U.S.C. § 1983, against legislation, which retroactively reduced pension benefits, the purpose of which was to cut costs.[90] The court ruled in favor of the plaintiffs on both counts.[91] They found that case law supported contractual rights in pension plans for vested participants and that the legislation created a substantial impairment because the elected and appointed officials relied on the terms of the contract.[92] Additionally, the court held that although the purpose of saving costs was important, the County did not show that the means taken were the least drastic available.[93]

In *Mascio v. Public Employees Retirement System of Ohio*,[94] plaintiff, Judge John Mascio, who was collecting retirement benefits while simultaneously earning a full salary as an elected official, brought a claim against Ohio's public retirement system after it enacted an amendment to prevent "double-dipping."[95] The amendment would force a retiree in plaintiff's position to receive his salary and postpone receiving his pension benefits.[96] The Sixth Circuit held that Mascio was entitled to a preliminary injunction against the State, because under Ohio law, once an individual's rights have vested in his pension, the benefits cannot retroactively be

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[88] *Id.* at 79.
[89] Andrews v. Anne Arundel Cnty., 931 F. Supp. 1255 (D.Md. 1996).
[90] *Id.* at 1257.
[91] *Id.*
[92] *Id.* at 1265.
[93] *Id.* at 1266.
[94] Mascio v. Pub. Emp. Ret. Sys. of Ohio, 160 F.3d 310 (6th Cir. 1998).
[95] *Id.* at 311-12.
[96] *Id.* at 312.

withheld.[97] Because Mascio's pension was vested and he had begun receiving benefits before the amendment was enacted, the State's forfeiture of his benefits constituted a Contract Clause violation.[98]

Some jurisdictions, however, still adhere to the *Dodge* analysis, and are hesitant to find a contractual obligation. In *Parker v. Wakelin*, the First Circuit reversed the district court's holding that amendments to the Maine State Retirement System violated the Contract Clause with regard to vested members of the system.[99] The Maine Education Association challenged the legislation, which did not affect those individuals already receiving benefits under the system, under the Contract Clause, Due Process Clause, and Takings Clause.[100] The First Circuit could not engage in the full analysis under the Contract Clause because they could not establish the existence of a contract from the legislation under the "unmistakability doctrine."[101] Similar to the standard expressed in *Dodge*, the unmistakability doctrine presumes that legislation does not create a contractual obligation.[102]

Parker is careful to point out that although many jurisdictions have drifted from the gratuity approach and adopted some version of the contract approach, a qualified approach is most appropriate. The Ninth Circuit adopted such an approach: "[t]he 'better reasoned view' recognizes that non-vested employees have contractual rights in pension plans 'subject to reasonable modification in order to keep the system flexible to meet changing conditions, and to maintain the actuarial soundness of the system.'"[103]

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[97] *Id.* at 313.
[98] *Id.* at 314.
[99] Parker v. Wakelin, 123 F.3d 1, 2 (1st Cir. 1997).
[100] *Id.* at 3.
[101] *Id.* at 5.
[102] *Id.*
[103] *Id.* at 6 (*quoting* Nev. Emp. Ass'n v. Keating, 903 F.2d 1223, 1227 (9th Cir. 1990)).

In *Koster v. City of Davenport*, the Court strongly implied that a contract was not created by pension reform legislation in Iowa, but held that even if employees had a contract right in their benefits, the legislation (which allowed municipalities discretion to use excess funds for either employees' or the city's future contributions) did not substantially impair their rights.[104]

In *Robertson v. Kulongoski*,[105] current and former public employees argued that recent amendments to the Oregon Public Employees Retirement System violated the Contract Clause.[106] Under the challenged 2003 legislation, employees would lose a variety of previous benefits under the system, and lose annual cost-of-living adjustments.[107] While the Ninth Circuit follows, for the most part, the traditional analysis under the Contract Clause, they make a departure when qualifying that the relevant question under the first prong is not the existence of the contract in general, but whether there was an agreement regarding specific terms.[108] Applying this standard, the Court found that the legislation did not create a contract in the specific terms at issue, and thus, there was no violation.[109]

iii. Promissory Estoppel

Under the theory of promissory estoppel, a promise that is otherwise not legally binding will be enforced to prevent injustice if the promisor should reasonably expect the promisee to rely on the promise and if the promisee did rely on the promise to his detriment.[110] Some states reject the contract or gratuity approach and instead adopt some version of a promissory estoppel theory. Minnesota, for example, has developed a test that determines that if there is 1) existence of a clear and definite promise, 2) the promisor intended to induce reliance, and such reliance

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[104] Koster v. City of Davenport, 183 F.3d 762, 767 (8th Cir. Iowa 1999).
[105] Robertson v. Kulongoski, 466 F.3d 1114 (9th Cir. 2006).
[106] *Id.* at 1115.
[107] *Id.* at 1116.
[108] *Id.* at 1117 (*quoting* Rui One Corp. v. City of Berkeley, 371 F.3d 1137, 1147 (9th Cir. 2004)).
[109] Robertson v. Kulongoski, 466 F.3d, at 1119.
[110] Rest. 2nd of Contracts § 90 (1981).

occurred, and 3) the promise must be enforced to prevent injustice, then the employee has the right to enforce his promise.[111] Still, this theory is limited; as several federal cases have held, the doctrine "conflicts with the rule that a surrender of reserved legislative powers is not to be inferred but, rather, can only be effectuated by a clear and unambiguous expression of legislative intent."[112] Due to the nature of the analysis, litigation using a promissory estoppel approach will have to go through a fact specific analysis for any case.

iv. Property Right

The rights in a public pension plan can be treated as property, and are protected under the Fifth and Fourteenth Amendments (or state equivalents for due process).[113] Thus, under this theory, when pension plans are reformed the legislation may qualify as unconstitutional if it is viewed as a taking without just compensation.[114] Several states, including Connecticut, Wisconsin, Maine, New Mexico, and Ohio follow this approach.[115]

1. Case Law Under Property Right Analysis

Penn Central Transportation Company v. New York defined a factor-balancing test that weighs government interests with the employee's right to property.[116] The factors include: "[t]he economic impact of the regulation on the claimant[,] 'the extent to which the regulation has interfered with distinct investment-backed expectations[,]' and 'the character of the governmental action.'"[117] The analysis from this seminal case informs other courts dealing with Takings issues with pension reform challenges.

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[111] Hous. & Redevelopment Auth. of Chisholm v. Norman, 696 N.W.2d 329, 336 (Minn. 2005).
[112] Cases include State of Indiana ex rel. Anderson v. Brand, 303 U.S. 95 (1938); Dodge v. Bd. of Educ. of Chi., 302 U.S. 74 (1937); Md. State Teachers Ass'n v. Hughs, 594 F. Supp. 1353 (D. Md. 1984). Martinez, *supra* note 52.
[113] Pineman v. Oechslin, 195 Conn. 405 (S. Ct. Conn. 1985).
[114] Monahan, *supra* note 49 at 24.
[115] *Id.*
[116] Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).
[117] *Id.*

Connecticut adopted the property right approach in *Pineman v. Oechslin*,[118] which granted employees' rights to retirement benefits after vesting.[119] The court explicitly held that a state pension plan creates a property interest for all public employees, and employees' interests are protected from "arbitrary legislative action under the due process provisions of our state and federal constitutions."[120]

In *Parella v. Retirement Bd. of Rhode Island Employees' Retirement System*,[121] retired legislators claimed that capping benefits to comply with tax laws violated Takings, Contract, and Due Process clauses.[122] Following their initial suit, Congress repealed the tax provision preceded the pension reform law, and the State duly refunded the lost benefits.[123] Ultimately, the First Circuit determined that because the retirees had no contractual right to the benefits, the claim for a violation of the Takings Clause also failed, because the benefits could not be considered property.[124]

c. Federal Regulation

Generally, federal regulation does not control public employee benefits.[125] ERISA and the Internal Revenue Code of 1986 govern private pension plans and benefits.[126] ERISA was enacted in 1974, and broadly regulates pension plans and other benefits in the private sphere.[127] Specifically, ERISA controls the extent that information is accessible, fiduciary obligations are

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[118] Pineman v. Oechslin, 195 Conn. 405 (S. Ct. Conn. 1985).
[119] *Id.* at 416.
[120] *Id.* at 416-17.
[121] Parella v. Ret. Bd. of the R.I. Emp. Ret. Sys., 173 F.3d 46 (1st Cir. 1999).
[122] *Id.* at 49.
[123] *Id.*
[124] *Id.* at 62.
[125] Pension benefits and reform are subject to the Internal Revenue Code and state counterparts to the Code. Additionally, pension reform is subject to Constitutional restrictions, most notably including the Contract Clause. *See supra* Part I(A)(ii).
[126] 29 U.S.C.A. §§ 1001-1461 (West 2011); I.R.C. § 401(West 2011).
[127] Ronald J. Cooke, *General Introduction to and Basic Polices – Employee Retirement Income Security Act of 1974*, 1 ERISA PRACTICE AND PROCEDURE § 1:1 (September 2011).

imposed upon those responsible for plans, and individuals are able to state grievances through established processes.[128]

While ERISA confers a defined scheme of protection for private employees, the Tax Code provides certain incentives for various plans, particularly retirement plans.[129] To receive the incentivized tax treatment, employers and employees must engage in a "qualified plan," which meets the specific requirements of the Code.[130] Such a plan must originate in the United States, form a plan to exclusively benefit the employee, and satisfy the listed requirements under I.R.C. § 401.[131] Should the plan fulfill these requirements, the Government will only tax the employee when money is received from the plan,[132] the Government will not tax the employer's contribution,[133] the employer can immediately deduct his contributions for the taxable year,[134] and the Government will not tax the trust's investment income.[135] For a tax benefit to apply, however, the plan cannot be amended to decrease accrued benefits of any participant, under the anti-cutback rule codified in I.R.C. § 411(d)(6).[136] The anti-cutback rule does not prevent amendments that decrease accrued future benefits, and state plans are exempted from the rule.[137]

Although ERISA and the Tax Code are the major elements of federal regulation of pension benefits, § 302 of the National Labor Relations Act is also an important aspect of federal protection, exclusively concerning collective bargaining agreements.[138] Although § 302 is less expansive than other federal regulation, as a criminal statute it is strict in its enforcement of

[128] *Id.*
[129] *Id.* at § 1:3 (September 2011).
[130] *Id.*
[131] I.R.C. § 401 (West 2011).
[132] I.R.C. § 402(a) (West 2011).
[133] *Id.*
[134] I.R.C. § 404(a)(1)-(3) (West 2011).
[135] I.R.C. §501(a) (West 2011).
[136] I.R.C. § 411(d)(6) (West 2011).
[137] Monahan, *supra* note 49, at 3.
[138] Cooke, *supra* note 127, at § 1:4.

preventing employers from deceptively controlling their employees' benefits through the manipulation of union officials.[139]

II. Background on Reform in New Jersey and the 2011 Pension Reform Legislation

The 2011 Pension Reform Legislation was signed into law by Governor Chris Christie on June 28, 2011.[140] The bill passed after months of partisan turmoil, when the bill's sponsor, Senate President Stephen Sweeney (D-Gloucester), and Assembly Speaker Sheila Oliver (D-Essex) pushed past their party's majority sentiments to come to a compromise.[141] While many of Governor Christie's goals were met in the cost-cutting legislation, it seems that Sweeney and Oliver were able to reach a meeting of the minds with some elements of the law.[142] For instance, while the law imposes new provisions concerning health care contributions, they expire in four years according to a sunset clause in the legislation.[143]

However, NJ-CAN, a group formed in opposition to the reform bill,[144] petitioned for removal of Sweeney and Oliver, alleging that they betrayed Democratic principles.[145] NJ-CAN argued that the legislation destroys collective bargaining rights, and hopes to solicit members in support of ousting "Christiecrats," or Democrats who voted for the bill.[146] Oliver released statement citing the sunset clause as a rebuttal to "destruction" of bargaining rights.[147]

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[139] NLRA § 302(a)(1), (2), (4), 29 U.S.C. § 186(a)(1), (2), (4); s*ee also* Cooke, *supra* note 127, at § 1:4.
[140] *Committee Statement*, *supra* note 1.
[141] Jarrett Renshaw, Chris Megerian, & Mary Jo Layton, *Deal Struck on Benefits*, NEW JERSEY RECORD, June 16, 2011, at A01, *available at* 2011 WLNR 12018145.
[142] *Id.*; *see also Committee Statement*, *supra* note 1.
[143] *Committee Statement*, *supra* note 1.
[144] *Our Mission*, NJ-CAN.ORG (9/23/2011), http://www.nj-can.org/ourmissionnjcan.htm.
[145] Wichert, *supra* note 3.
[146] *Our Mission*, *supra* note 144.
[147] Chris Megerian & Matt Friedman, *Democrats' Support of N.J. Employees' Pension Reform has Unions Threatening Payback at the Ballot Box*, STAR LEDGER (June 25, 2011, 9:00 pm), *available at* http://www.nj.com/news/index.ssf/2011/06/democrats_support_of_pension_r.html.

Still, strong words from Assembly Majority Leader Joseph Cryan (D-Union) days before the bill was enacted indicate the sharp division on the issue.[148] New Jersey unions also expressed opposition to the bill.[149] Barbara Keshishian, president of the New Jersey Education Association (NJEA), stated that the changes in the law would be especially detrimental to public educators, as it could require an average contribution of fourteen percent from a teacher's salary.[150]

While the NJEA and other unions have engaged in protests before the bill passed and initiated litigation challenging the bill, they also hoped to express their discontent at the legislative elections in November 2011.[151] Ultimately, election results were favorable for Democrats, who gained a seat in the state Legislature.[152] However, intra-party discontent was not absent from the election. Prior to the election, Senate President Sweeney defended his support of the law, claiming, "no one in the last 10 years has advanced more pro-labor legislation than I have. At the same time . . . I am also responsible to the taxpayers of this state."[153] Sweeney faced little opposition as a result of his involvement with the passing of the reform.[154] However, Assembly Speaker Sheila Oliver faced great opposition as a result of her support of the law, and allegedly won her second term by coming to a compromise thanks to "Democratic power brokers."[155]

a. Analysis of the Reform

[148] Cryan accused fellow Democrats of "[selling] out" the party. Renshaw, *supra* note 141.
[149] Megerian, *supra* note 147.
[150] Renshaw, *supra* note 141.
[151] Chris Megerian & Matt Friedman, *Democrats' Support of N.J. Employees' Pension Reform has Unions Threatening Payback at the Ballot Box*, STAR LEDGER (June 25, 2011, 9:00 pm), *available at* http://www.nj.com/news/index.ssf/2011/06/democrats_support_of_pension_r.html.
[152] *Id.*
[153] Richard Simon, *Democrats Help Pass N.J. Pension Measure: Law Requires Workers to Pay More for Health Care, Pensions*, CHI. TRIB., June 29, 2011, at C19.
[154] Matt Friedman, *To Stop Christie, N.J. Democrats Will Need to Come Together in Wake of Legislative Victories*, NJ.COM, (Nov. 10, 2011, 6:00 a.m.), *available at* http://www.nj.com/news/index.ssf/2011/11/to_stop_christie_nj_democrats.html.
[155] *Id.*

The 2011 Pension Reform Legislation affects public education employees, state judges, police and firemen, and other public employees.[156] The law establishes new committees for some of the pension systems, whose members will be appointed both by the Governor and by unions.[157] After meeting a "target funded ratio,"[158] the committees may modify contribution rates, eligibility requirements, disability benefits, and may reinstate cost of living adjustments.[159]

The 2011 Pension Reform Legislation increases employee contributions from 5.5% to 6.5%, and then to 7.5% after seven years[160] for TPAF and PERS.[161] Contribution rates will increase from 3% to 12% for JRS, phased in over the next seven years.[162] Members of PFRS, and prosecutors of PERS will pay a 10% contribution rate, increased from 8.5%.[163] Finally, members of SPRS will pay an increased rate of 9%, from 7.5%.[164]

Furthermore, public employees joining TPAF or PERS must accumulate thirty years of work and reach the age of 65 to retire, while members enrolled before November 1, 2008 may retire at age 60, and member enrolled between November 1, 2008 and June 28, 2011 may become eligible at age 62.[165] New PFRS members will receive 60% of final compensation, rather

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[156] Public education employees belong to the Teachers' Pension and Annuity Fund (TPAF), state judges belong to the Judicial Retirement System (JRS), police belong to the Police and Firemen's Retirment System (PFRS) and the State Police Retirement System (SPRS), firemen belong to PFRS, and other public employees belong to the Public Employees' Retirement System (PERS). *Committee Statement*, *supra* note 1.
[157] The committees are designated as follows: "one [eight]-member committee for the TPAF and one for the SPRS; two [eight]-member committees in the PERS . . . two [ten]-member committees in the PFRS[.]" The State House Commission will have analogous authority over the JRS. *Id.*
[158] "[A] ratio of the actuarial value of assets against the actuarially determined accrued liabilities expressed as a percentage that will be [seventy-five] percent in [s]tate fiscal year 2012, and increased annually by equal increments in each of the subsequent seven fiscal years, until the ratio reaches [eighty] percent at which it is to remain for all subsequent fiscal years." *Id.*
[159] *Id.*
[160] All phase-ins begin on the effective date of the bill, June 28, 2011. 2011 N.J. Sess. Law Serv. Ch. 78 (West 2011).
[161] *Id.*
[162] *Id.*
[163] *Id.*
[164] *Id.*
[165] *Id.*

than 65% upon retirement.[166] The law also eliminates the provision of law allowing a member of PERS or PFRS from retiring and receiving benefits while still maintaining a position in an elective public office and receiving full salary for the position, unless his retirement is based exclusively on that position.[167]

Finally, the 2011 Pension Reform Legislation eliminates the cost-of-living adjustment for current and future retirees and beneficiaries, unless it is reactivated as permitted by the bill.[168] While cost-of-living adjustments will not be provided unless reactivated by the system committees, those benefits that have been granted to retirees prior to the law will not be reduced.[169]

The law also provides that although the amortization method for the system's unfunded liability will change for PERS, TPAF, SPRS, PFRS, and JRS, employers for those members will be contractually obligated to pay the required annual contributions to prevent underfunding.[170] The law also provides that employees may bring a breach of contract claim should his employee fail to pay these required contributions in the Superior Court, Law Division.

Current and new public employees and some public retirees will pay increased contributions for health care, not less than 1.5% of their compensation.[171] Provisions for health care benefits become effective at varying times, according to collective bargaining agreements, and will expire four years after they become effective.[172] The bill explicitly provides that

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[166] All other benefits are unchanged. 2011 N.J. Sess. Law Serv. Ch. 78 (West 2011).

[167] However, elected officials who received retirement benefits prior to the law's effective date (June 28, 2011) may continue to receive their benefits and salary for their position. *Id.*

[168] *Id.*

[169] *Pension and Health Benefits Reform Under Chapter 78, P.L. 2011*, STATE OF NEW JERSEY, DEPARTMENT OF THE TREASURY, DIVISION OF PENSION AND BENEFITS (Oct. 8, 2011), http://www.nj.gov/treasury/pensions/reform-2011.shtml.

[170] 2011 N.J. Sess. Law Serv. Ch. 78 (West 2011).

[171] However, employees who pay for health care based upon a portion of the cost of coverage are not subject to the 1.5% floor. *Id.*

[172] *Id.*

"increased employee contributions . . . for pension benefits and the contributions for health care benefits will begin upon the implementation of necessary administrative actions for collection and will not be applied retroactively to this bill's effective date."[173] Thus, while the law does propose many changes, it does not purport to alter the rights of those public employees who have already earned their benefits.

While goals of the reform are articulated in the text of the legislation, there is evidence supporting alternative purposes as well. According to the 2011 Pension Reform Legislation, the changes that are set forth are necessary to comply with the Internal Revenue Code and Statements Numbers 43 and 45 of the Governmental Accounting Standards Board. Additionally, the legislation must comply with the Accounting and Financial Reporting by Employers for Postemployment Benefits Older than Pensions and the U.S. Department of Treasury regulations under 403(b) of Internal Revenue Code, pertaining to the Supplemental Annuity Collective Trust.[174] Seemingly, the reform was enacted in order to meet accounting, financial, and tax-related standards set forth by the Government.

Coincidentally, some sources indicate that while the reform may be necessary to comply with these regulations, it was also fueled by the necessity to reduce state expenditures. The Senate Budget and Appropriations Committee testified that increased state employee contributions to pensions could produce $3.9 billion in savings by 2021, and $120 billion by 2041.[175] Additionally, the Department of the Treasury predicted that the increases in health care contributions will provide $10 million to New Jersey, and $5 million to local boards of education and government.[176] By 2021, these savings could increase to $1.4 to 1.6 billion.[177] However, the

[173] *Id.*
[174] *Id.*
[175] *Committee Statement, supra* note 1.
[176] *Id.*

New Jersey Education Association and other unions allege, in their August 31, 2011 Complaint against the State, that the provisions for increased contributions and elimination of the cost-of-living adjustment were established to remedy underfunding that had been going on since the 1997 amendments.[178]

III. Proposal for Adoption of Uniform Contract Approach to Pension Reform in New Jersey

Approaches to pension reform vary across the United States, creating uncertainty for policy makers, employers, and employees alike. In New Jersey, the recent legislation highlights the problems that result from such a lack of uniformity. An analysis of the policy of the legislation, the subsequent New Jersey litigation, and the likely outcome of that litigation will show that the state should adopt a clear, contractual approach to pension reform, which only alters terms prospectively, rather than retroactively. As a result, future legislation will allow employees to easily understand their rights. Additionally, future legislation will withstand potential challenges under the Contract Clause.

a. Policy

As a threshold issue, it is necessary to ascertain whether the 2011 Pension Reform Legislation can stand in whole or in part. There are many aspects of the legislation that are generally not in dispute. In particular, provisions that apply prospectively will likely stand against litigation or other challenges, based on the success of past reform in New Jersey. Increased contribution rates for current and new employees, increased retirement age, and increased healthcare contributions would most likely survive primarily the changes do not threaten retirees' earned benefits. Even outside of New Jersey, litigation challenging pension

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[177] *Id.*

[178] Complaint, *supra* note 3.

reform has not succeeded on terms altering contribution amounts and other prospective terms.[179] Finally, the committees established by the legislation have the authority, once the target funded ratios are achieved, to alter the contribution percentages. This flexibility written into the law further reduces the likelihood that these aspects of the legislation would fail under litigation.

However, some aspects of the legislation are more likely to fall under scrutiny, and moreover, arguably should not stand. Specifically, the elimination of the cost of living adjustments poses distinct problems. First, the 2011 Pension Reform Legislation eliminates cost of living adjustments for new and current public employees and current public retirees. The fact that the law repeals benefits earned by retirees bolsters a Contract Clause based argument. Some cases outside of New Jersey support this inference, but New Jersey case law has not yet dealt with such a circumstance.[180] Further, the Ninth Circuit refused to find that elimination of cost of living adjustments constituted a violation under a progressive analysis, and New Jersey has exhibited deference to the Legislature.[181] While other states may have a harder time successfully passing or maintaining reform on this issue, it seems likely that New Jersey will be able to retain this part of the 2011 legislation. The ambiguity of New Jersey pension reform legislation and common-law treatment of pension reform burdens employers and employees alike. As such, by adopting a uniform contractual approach to pension reform, parties will understand their obligations and rights to benefits.

b. Litigation Outlook in New Jersey

Although many states seem to adopt the contract approach, or at least modified versions of it, New Jersey has shifted little from its stance in *Spina*. Should a federal court have to apply

[179] *Parker*, 123 F.3d at 5.
[180] *See Andrews*, 931 F. Supp. at 1255.
[181] *See Robertson*, 466 F.3d 1114; *Spina*, 197 A.2d 169; *N.J. Educ. Ass'n*, 989 A.2d 282.

New Jersey state law, it seems that it would have to defer to legislative intent, rather than adopt a more liberal stance adopted by many of the circuit courts.

Judge Paul DePascale, who sits in Hudson County Superior Court, brought his claim against the State for the changes to the Judicial Retirement System in July 2011.[182] DePascale's case was recently decided by Superior Court Judge Linda Feinberg on October 17, 2011.[183] DePascale argued that the 2011 Pension Reform Legislation violates Article VI, section six, paragraph six[184] of the New Jersey Constitution, which protects judges from reduced compensation, as his biweekly contributions to JRS would increase from "$126.44 to $697.59."[185] The opinion indicates that "salaries" and "compensation" have no significant disparity under that section, rebutting defendant's claim that pension benefits, typically regarded as compensation, were not governed by the New Jersey Constitution.[186]

Furthermore, Judge Feinberg notes that in every previous amendment before the 2011 Pension Reform Legislation, increases in contribution rates were accompanied by an increase in salary that made up for the loss.[187] Although the Court recognized New Jersey's precedential deference to legislation, it held that the 2011 Pension Reform Legislation lowers plaintiff's salary without offering a substitute increase by increasing contribution rates, thus violating New Jersey's Compensation Clause.[188] While Judge Feinberg's holding may indicate that New Jersey

[182] MaryAnn Spoto, *High Court Rejects Judge's Suit Over Benefits: Complaint is the First Legal Challenge to Health Law*, STAR-LEDGER, Aug. 16, 2011, at 016, *available at* 2011 WLNR 16222680.
[183] DePascale v. State of New Jersey, DOCKET No.:MER-L-1893-11, *available at* http://www.judiciary.state.nj.us/decisions/DePascale34_111017.pdf.
[184] N.J. CONST. Art. 6, § 6, ¶ 6, states "The Justices of the Supreme Court and the Judges of the Superior Court shall receive for their services such salaries as may be provided by law, which shall not be diminished during the term of their appointment. They shall not, while in office, engage in the practice of law or other gainful pursuit."
[185] *DePascale*, No.MER-L-1893-11 at 3-4.
[186] *Id.* at 22-24.
[187] *Id.* at 24.
[188] *Id.* at 35, 54.

is showing less deference to legislative enactments, it is important to point out that plaintiff succeeded under a constitutional source explicitly protecting his right to pension benefits.

Several unions and individuals filed suit following the enactment of the 2011 Pension Reform Legislation. In their complaint, dated August 31, 2011, The New Jersey Education Association, New Jersey State Policemen's Benevolent Association, Communications Workers of America, AFL-CIO and others alleged violations of the State Contract Clause, Due Process Clause, and Promissory Estoppel.[189] Specifically, plaintiffs claim that the elimination of the cost-of-living adjustment violates their non-forfeitable right to the benefit.[190] Additionally, they argue that the benefits current employees, vested participants, and retirees would receive under the system are guaranteed as property interests.

While previous cases in New Jersey indicate a commitment to rejecting the contract approach, *DePascale* illustrates that because of the extent of the modifications included in the 2011 Pension Reform Legislation, as compared to previous legislation, may not withstand the traditional analysis. Thus, while the latest litigation cannot rely on a direct constitutional source of protection, it may have a better chance of success because of the drastic nature of the law. Still, unlike the majority of jurisdictions where pension benefits are treated squarely as contractual rights, New Jersey has consistently held that the Legislature is free to alter the methods by which pension plans are managed, despite the fact that employees have a contractual right to receive some sort of payment.

[189] Complaint, *supra* note 3.
[190] *Id.* at 35.

On December 12, 2011, Judge Anne Thompson granted Legislative defendants New Jersey Senate and New Jersey Assembly's motion to dismiss on procedural grounds.[191] More recently, Judge Thompson granted the State of New Jersey, Governor Chris Christie, and New Jersey Treasurer Andrew Sidamon-Eristoff their motion to dismiss on jurisdictional grounds.[192] The plaintiffs are planning to appeal, as Judge Thompson did not reach the merits of the case.[193]

Conclusion:

The 2011 Pension Reform Legislation sets many changes to New Jersey's public pension system into motion. As a result, many public employees have voiced their opposition in the public arena and through the courts. By examining various approaches to pension plans in a legal framework, detailing the specific aspects of the recent reform, and analyzing relevant litigation, it is unclear how New Jersey will ultimately handle the challenge to the constitutionality of the reform. It is evident, however, that public employees in New Jersey are taking the opportunity to alter the judiciary's treatment of pension rights. The court's initial decision to grant defendant legislators' motion to dismiss illustrates the increasing likelihood that New Jersey will continue to grant deference to the Legislature concerning pension reform. However, to avoid inefficiency, lack of transparency, and uncertainty, the Legislature should execute future reform exclusively prospectively.

[191] The State of New Jersey, Governor Chris Christie and Treasurer Andrew Sidamon-Eristoff were not involved in this motion, but were granted a motion to dismiss for lack of jurisdiction on March 5, 2012. Defendants' Motion to Dismiss, N.J. Educ. Assoc. v. State, No. 3-11-cv-0502 (D.N.J. filed Dec. 13, 2011).
[192] *N.J. Public Workers Unions' Lawsuit Fighting Larger Pension, Health Care Contributions is Tossed by Judge*, NJ.COM (Mar. 6, 2011, 11:11 AM), *available at* http://www.nj.com/news/index.ssf/2012/03/nj_public_workers_union_lawsui.html.
[193] *Id.*