PERSist

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The Voice for Public Pensions

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Message From the President

Entering the New Year Aware, Renewed, and Enthusiastic… it's who we ARE.

It has been quite an eventful year as our nation was teetering on the precipice of economic and financial Armageddon. This time last year, we were in the middle of one of the worst stock market falls in modern history, the economy was contracting, and ordinary Americans were clearly scared about the future.

Fast forward to the present and things don't look so dire. The equities markets have made great grounds since the low reached in March, the economy seems to have stabilized, and while the unemployment numbers are not good, the trend is looking better.

While we may be heading towards a recovery, the fiscal and budgetary outlook for states and localities will be tough for at least the next year. And there will be renewed calls by those who have political agenda to eliminate defined benefit plans for public servants. They will use incomplete and misleading data to portray a crisis, all the while hiding the truth that on the whole public plans are in good shape. While the Great Recession is a source of concern, as long-term investors with 30 years or more time horizon we will not have a knee-jerk reaction to it. And for those that are facing some difficulties, our opponents won't acknowledge that relatively small changes will bring these plans back to fiscal health.

Therefore, this organization must be prepared to vigorously defend against any attacks on our benefits. NCPERS is the Voice for Public Pensions and we will not be drowned out by our opponents who don't know about public pensions and who don't care about the 21 million hard-working middle-class public servants.

NCPERS is commitment to our industry's defense. In 2010 we will continue to lobby at the federal level and we continue to work with like minded folks in every state so that we can fight the battles and provide support where they are needed. We will finance more research publications that show the true value of public pensions. And we will continue to provide the best education to our members so that they will have the tools to help their plans sail smoothly in rough waters.

2010 will not be only about playing defense. I plan to make sure that NCPERS explore opportunities that become available. One opportunity that we will be exploring in 2010 is expanding our great association into Canada. It is in our interest to take NCPERS to our colleagues to the north. I firmly believe that we have the knowledge and the resources to effect this transformation and I am excited about the opportunities it represents.

One of my goals is to increase our effectiveness as a service organization to our main constituents, the trustees and funds that provide retirement security for America's public servants. At the Annual Conference, we debuted a customer service survey that will serve double duty in providing us information that will help us continue to grow as an organization. The data we have collected from the survey will tell us what we are doing well, what we need to work on, and what services our members would like us to provide that we don't currently provide. Additionally, the survey will give us some surface level data—size, assets under management, portfolio allocations, etc.—on plan members who respond.

Again, it is important to note that despite these trying economic times, we are continuing to carry out the work for which this organization was created nearly 70 years ago. And we are working to do so with purpose and with an eye toward making NCPERS better. As always, I appreciate your efforts on behalf of the nation's public funds, trustees, and the public servants that they represent, and I welcome your continued input on the direction of this great organization. As we enter 2010, let us reflect on those who sacrifice everyday and look toward a positive future in protecting public pensions. ❖

Pat McElligott
NCPERS President

Custodians Leave Investor Money on the Table

Recently several of my pension fund clients have referred their fellow pension fund friends to our law firm. Many of these funds had not previously engaged the services of an outside law firm to monitor their investment portfolios. Some of them knew of the free services that our firm, and others like ours offered, but many of them were not fully familiar with the extent of our legal services and more importantly: Why they needed these services. They were referred to my firm because, in light of the economic crisis, investment portfolios everywhere were losing money. They were trying, more diligently then ever, to recoup some of these losses; and in an effort to do so, many of them found that when they relied solely on their custodian bank to monitor for class action settlements, money was going unclaimed. I had long suspected this and began to investigate; what I found was shocking: The lack of participation by institutional investors in U.S. securities class-action lawsuits has left nearly $12 billion in unclaimed funds on the table between 2000 and 2007. Of that amount, $8.4 billion has been left unclaimed by U.S. investors.

In a pilot study published several years ago, nearly two-thirds of the institutional investors with financial losses in fifty-three settled securities class actions failed to submit claims. As a result, the substantial sums that these investors were entitled to receive were given to other investors. By asking institutional investors about their claim-filing practices, i.e., who was responsible for such tasks, how such tasks were performed, and what, if any, performance monitoring was done, the study concluded that most institutions "relied on their custodian banks to file claims for them in securities fraud class action settlements, that many of these institutions did little monitoring of whether the custodian actually performed these services, and that custodians had financial disincentives to file claims on behalf of their clients." One commentator estimated that more than $1 billion was left on the settlement table by non-filing institutional investors annually.

Some explanations for why institutions are not filing claims include: 1) the institutional investor's frequent change of its custodian banks, 2) the institutional investor's failure to receive notices of settlement, and 3) the custodian bank's potential financial disincentives for filing claims on behalf of their clients.

The first explanation for the institutional investor's failure to file claims may lie in how frequently it changes custodian banks. An institutional investor's change in its custodian bank is significant because it is often the custodian bank that is expected to file claims for the institutional investor. A departing custodian bank does not customarily forward to the institutional investor, or the custodian's successor, the trading records for the portfolio the departing custodian had previously managed. This can be problematic because the length of time between the trade that qualifies the investor for membership in the class and the date the settlement notice is received can be very long. Without the institutional investor's prior trading records, a succeeding custodian or the institutional investor itself will not have access to sufficient information to evaluate whether the institutional investor has a provable claim that can be submitted to the settlement administrator.

Additionally an institutional investor may not be able to gain access to it's trading records at a terminated custodian to determine if it is eligible to participate in a securities fraud class action settlement. Although custodian banks generally retain records for their current clientele, the appeal of preserving trading records for former clients is much weaker. And even if the prior trading records had been retained, technological advancement may have rendered such records inaccessible at any reasonable cost. For example, electronic records kept on an outdated system may no longer be machine-readable by new software systems. Although hand tabulation may still be possible, it is extremely expensive.

A second explanation for an institutional investor's failure to file claims may be that the institutional investor never received the notices of settlement; as when the Notice of Settlement was sent to a terminated

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Note on the Author: ***Ms. Hirsch*** *heads the client relations and development team at Abraham, Fruchter & Twersky, LLP ("AF&T"). As head of the department, she regularly meets with institutional investors, including trustees of private and public pension funds to discuss securities fraud litigation and shareholder rights generally and to inform them of the services our firm provides. She contributes regularly at institutional investor conferences and has authored articles in this area. Ms. Hirsch is also responsible for AF&T's securities portfolio monitoring program and consequently meets with institutional investors to inform them of potential securities fraud claims that arise from investment losses and counsels them on their legal rights and potential courses of action. Ms. Hirsch is an attorney admitted to practice in both State and Federal courts in NYC.*

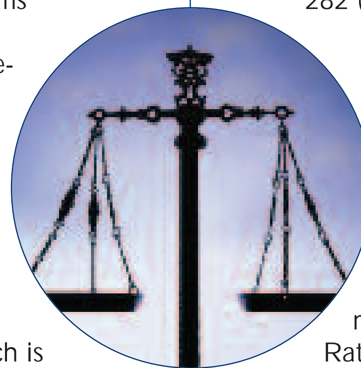
Massachusetts Firefighters Challenge Reductions in Benefits

Earlier this summer, the Massachusetts Legislature adopted Senate Bill 2079 which radically altered the definition of covered compensation for retirement purposes. The bill, particularly sections 8,and 23-25 constitute a direct attempt to alter the benefit levels for current as well as future employees. These provisions impair the vested retirement benefits and property rights of firefighters in violation of the impairment of contract provisions of the Massachusetts and U.S. Constitutions.

Section 8 effectively eliminated the entire disability benefit by removing the protection of current salary levels upon which the service connected disability benefit is based. This clearly runs counter to longstanding Massachusetts judicial precedent. The leading case on this subject is *Opinion of the Justices*, 364 Mass. 847, 303 N.E.2d 320 (1973). This case traces the history of retirement rights in Massachusetts and clearly holds that a contract is formed under the statutes relating to contributory retirement systems for public employees when the employee first becomes a member of the system. As a result, the employee is entitled to have the level of rights and benefits in force on the day employment began preserved in the employee's favor without downward modification.

The provisions of Section 8 are a direct, unequivocal, and unconstitutional reduction of the benefits and rights to be accorded to firefighters. While legislation may be presumptively valid if applied only to persons hired after the effective date, it is presumptively invalid if made applicable to current employees.

Section 23 is similarly defective. It eviscerated the definition of regular compensation by removing a substantial number of elements form the overall definition salary; most of which were the product of collective bargaining. The fact that it carries through current collective bargaining agreements does not relieve the provision of its constitutional infirmity. In defined benefit retirement systems such as those in Massachusetts, the benefit is based on the compensation received while an employee. The change in the definition of compensation directly and adversely affects the superannuation (service retirement) benefit which is the ultimate goal following a lifetime of fire service.



The nature of this analysis is demonstrated by the decision in ***Massachusetts Retired Police and Firefighters Association v. Retirement Board of Belmont***, 445 N.E.2d 160 (Mass. App. 1983) In ***Belmont***, the issue was whether discretionary cost-of-living adjustments would be counted as part of the base benefit for future enhancements. While nothing required the city to adopt the enhancements, once granted, an increase in the retirement allowance becomes vested and constitutionally protected under the rationale expressed in *Opinion of the Justices*.

The importance of a clear definition of regular compensation is to inure against adventitious salary elements which can unfairly spike retirement benefits in a manner not contemplated by actuarial projections. It was for that reason that early retirement incentives were rejected by the Boston Retirement Board as regular compensation. See, ***Boston Association of School Administrators and Supervisors v. Boston Retirement Board***, 383 Mass. 336, 419 N.E.2d 277 (1981); ***Massachusetts Teachers Association v. Teachers' Retirement Board***, 383 Mass.45, 419 N.E.2d 282 (1981).

The distinction made in *Opinion of the Justices* is critical. Cited by state supreme courts in numerous states, the essence of the constitutionally-protected retirement benefit is more than merely benefit levels.1 Rather, it is "the whole complex of provisions." The breadth and need for flexibility of the concept of "regular compensation" is demonstrated by ***Shafer v Contributory Retirement Appeal Board***, 20 Mass.L.Rptr 517, 2005 WL 3790490 (Mass. Super. 2005). In ***Shafer***, the court reviewed the entitlement of certain public safety chiefs to claim the value of an employer-provided vehicle as part of regular compensation. The question is partly whether or not an element of pay is recurrent or repeated. More importantly, the element of pay, and particularly the word "regular" imports the idea or ordinariness or normality. The provisions of Section 23 threaten this well-established principle. The judicial history of the term "regular compensation" has been inexorably tied to the collective bargaining process. Section 23 destroys this connection

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by limiting regular compensation to base wages, thereby substantially lowering the basis upon which retirement benefits are based. Accordingly, this section impairs the obligation of contract.

Section 24 makes the limits described above effective for current as well as future employees. This is in direct contravention of the holding in *Opinion of the Justices*. The promise which induced firefighters to a lifetime of service and which was not to be lowered has been taken without any offsetting economic advantage. While arguably these changes may be made effective for persons first hired on or after July 1, 2009, there is no basis on which they may be lawfully and constitutionally applied to current firefighters. The material expectations generated on behalf of firefighters by their employers are now no longer respected. In other words, the pension contract has been clearly and unambiguously violated.

Lastly, Section 25 falls into the same untenable category. This section limits pension rights of certain workers earning less than a specified amount. While there is no guarantee that employment will be in a position covered by a retirement plan if that is the condition under which the employment was accepted, this section seeks to disenfranchise the retirement rights of persons already employed on the effective date from earning retirement credit. Again, the state could legitimately prohibit creditable service for persons hired on or after July 1, 2009 in positions earning $5000 or less. Application of this provision to persons already employed on the effective date is no less a deprivation of constitutionally-protected property rights than firefighters employed on a full-time basis.

As a result of these changes, the Massachusetts firefighters have sued in both state and federal court to vindicate the constitutional rights of their members. The action in Massachusetts is likely the first of many such challenges as state and local governments react to increased retirement contributions resulting from the severe declines in plan earnings due to the poor performance of the capital markets last year and into the first quarter of 2009.

While lower tiers of benefits for newly hired workers have been common occurrences in prior economic downturns, this statute represents a significant departure in its attempt to affect the rights of current employees which are constitutionally protected against impairment or diminution. While NCPERS encourages cooperation between retirement plans and plan sponsors to address the economic concerns of the day, solving the issue through the retroactive reduction of benefits repsents a direct threat to the retirement security of all public workers.

California Supreme Court Sets Oral Argument in San Diego Pension Criminal Case

Nearly two years after agreeing to review the case, the Supreme Court of California will hear the long awaited case involving criminal charges against former San Diego City Employees Retirement System trustees, on October 6, 2009 in Los Angeles.

In 2005, six former trustees of the $4.8 billion City of San Diego Employees Retirement System (SDCERS) were charged with multiple felony counts for violating California's conflicts of interest law. The case is currently on appeal to the California Supreme Court and has attracted national attention.

Section 1090 of the California Government Code prohibits public officers from participating in a government contract in which they are financially interested. The lower appellate court refused to set aside criminal indictments against the defendants alleging that they obtained personal gain by allowing the city to underpay its contributions to the retirement system. At its heart, the case involves the question of whether trustees should be criminally liable for trying to serve a constructive role as plan fiduciaries, or whether they are responsible for under funding the pension in exchange for a negotiated increase in pension benefits. A related question is whether it matters that the trustees were acting in good faith consistent with the advice of counsel.

The San Diego SDCERS board is composed of thirteen trustees, including ex officio positions for the city manager, treasurer, and auditor. Other trustees are elected by the active membership or appointed by the city counsel. The defendant trustees in the case include the firefighter union president, the president of the municipal employee union, the HR director, the city treasurer and an assistant auditor and comptroller. To the extent that each of these trustees wears several hats, this dynamic was built into the structure of the pension board, as is not uncommon. Criminal liability for trustees based on official public pension determinations, which are of general applicability to the entire plan, runs contrary to this objective.

Beginning in 1996, the city contributed to the retirement system pursuant to an agreement referred to as the City Manager's Proposal 1 ("MP 1"). Under MP1, the city contributed at a set budgeted rate, pursuant to an agreed upon schedule, which was less than the actuarially-assumed rate. As part of MP1, an agreed safety value "trigger" required a substantial balloon payment by the city if the funded ratio dropped below 82.3%.

Fast forward to the 2002 contract negotiations. By late 2001, following the events of September 11,

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NCPERS Members Double Shareholder Activism Efforts in 2010

NCPERS believes that public funds and institutional investors who engage in corporate governance activism should be commended for reigning in corporate excesses and for promoting best boardroom practices, thus it is delighted to report that three of its members—Kansas City Fire Fighters, Miami Fire Fighters, and Philadelphia Public Employees—plan to file 24 shareholder proposals for the 2010 proxy season to combat excessive executive compensation and to have better disclosure and board oversight of political contributions.

These funds, working in coordination with broad coalitions of institutional investors coordinated by AFSCME, the AFL-CIO and the Center for Political Accountability, had significant success with the 12 shareholder proposals they filed for the 2009 proxy season.

In 2009, three companies agreed to adopt proposals filed by the funds. Both Johnson & Johnson and Metlife agreed to use compensation consultants in the future who would not render any non-compensation services to the companies and Occidental Petroleum agreed to submit any future golden coffins (lavish death benefits to the estates of executives) to shareholders for approval. A proposal at Pulte seeking a shareholder advisory vote on executive compensation received 53% of the vote. Impressive vote totals were also received on proposals the funds submitted at: Merck, 46% for an advisory vote on pay; Citigroup, 40% for greater disclosure and board oversight of political contributions; Lockheed Martin, 38% for shareholder approval of golden coffins, Verizon, 37% for shareholder approval of golden coffins; and Allstate, 31% for greater disclosure and board oversight of political contributions.

In 2010, the main focus of the proposals being filed by the Kansas City Fire Fighters, Miami Fire Fighters and Philadelphia Public Employees will be executive compensation. They plan to file proposals:

- Requiring executives to hold a significant amount of their equity compensation until two years after retirement to promote long-term performance and discourage excessive risk-taking at Amgen (Philadelphia), Chevron (Kansas City), EMC (Kansas City), EOG (Miami), Freeport-McMoran (Kansas City) and Kindred Healthcare (Kansas City).
- Not allowing CEO's of publicly-traded companies, who typically are already receiving excessive pay, to serve on compensation committees of other publicly-traded companies at Alleghany Technologies (Miami) and Medtronics (Philadelphia),
- Requiring bonuses to be paid out over a three-year period with payments reflecting the company's performance during that period in order to tie the payments to longer term performance and to discourage unnecessary high-risk taking at Chesapeake Energy (Philadelphia) and Devon Energy (Miami).
- Requiring an advisory shareholder vote on executive compensation at Pulte (Miami), which received 53% of the vote in 2009 but has not yet been implemented by the company.
- Requiring shareholder approval of any golden coffins, which are lavish death benefits to executives' estates, at Verizon (Kansas City).

Proposals seeking greater board oversight and disclosure of political contributions will be filed at Allstate (Kansas City), Amazon (Philadelphia), Boston Sciences (Philadelphia), Citigroup (Kansas City), Express Scripts (Miami),Gilead Sciences (Kansas City), Lowe's (Philadelphia), Southwestern Energy (Kansas City), Wal-Mart (Kansas City) and Wells Fargo (Miami). This has been an issue of concern for NCPERS members ever since corporations were large contributors to California Governor Arnold Schwarzenegger's 2005 referenda to abolish defined benefit plans for public employees, weaken teacher tenure, cap state spending, replace legislators with judges to reapportion legislative districts, and limit political contributions by public employee unions. Of the Fortune 100 companies, 44 now comply with this proposal.

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Note on the Author: Greg A. Kinczewski *provides the Marco Consulting Group with legal counsel and is in charge of its proxy voting service. The Marco Consulting Group is a registered investment to more than 300 institutional investors with an aggregate asset valuation in excess of $100 billion. Its proxy voting service analyzes and votes on shareholder issues at more than 7,000 U.S. and foreign companies each year. Upon client request, the Marco Consulting Group will also assist clients in actively engaging companies on shareholder issues through shareholder proposals and at annual and informal company meetings.*

Massachusetts Firefighters *from page 4*

the plan's funded ratio had dropped from 97% to 90%. The city was concerned that the 82.3% trigger would be reached. As the collective bargaining agreement negotiations began, the city's negotiating team conditioned any increase in benefits upon the city obtaining relief from the trigger. As a result, the pension board was put in an awkward position where negotiations and fiduciary decisions were brought together.

When asked to review the city's proposals, the Board shared its concerns with the city and unions. The Board specifically observed that the outcome of negotiations should not be conditioned on the Board's future funding decisions. Based on input from the trustees, the city's 2002 proposal ("MP2") was modified by the city. From a plan funding standpoint, MP2 had advantages over MP1. For example, MP2 doubled the city's contribution rate and included a date certain by which the city had to obtain full funding. Ultimately, as a result of the Board's earlier objections, the MOUs were not made contingent upon action by the Board. The city council unanimously approved the MOUs which were also adopted by the unions.

Interestingly, Article 16, Section 17 of California's constitution provides that trustees shall discharge their duties solely in the interest of and for the exclusive purpose of providing benefits and "minimizing employer contributions". The obligation to minimize employer contributions is unusual language which some argue runs contrary to the traditional and well developed "exclusive benefit" rule.

Legal issues which have been raised in the case include the following questions:

- Whether the defendants were required to consider the City's contribution relief proposal because of Constitutionally-required fiduciary duties?
- Whether the doctrines of abrogation, dual capacity and preemption preclude this section 1090 prosecution where the City Charter required the defendants to serve on the SDCERS Board and necessarily make decisions affecting their own interests?
- Whether the Government Code section 1091.5(a)(9) non-interest exception precludes this prosecution where the only arguable interest in the contract consisted of governmental pension benefits?

Not surprisingly, the Lexin case has attracted national attention and has prompted concerned California pension trustees to avoid participating in pension board decisions. Other California trustees have decided to vote on pension matters, but are putting lengthy disclosures of possible conflicts of interest into the record in hopes of insulating themselves from future prosecution. As reported in ***Pension and Investments***, if allowed to stand, Lexin could make trustees second guess their investment decisions. For example, trustees in plans with 13th checks or variable COLA's could worry that decisions affecting returns could impact benefits or contributions. At the end of the day, baked into the structure of public pension boards is the representation and involvement by the membership.

The above leads to the following questions:

- Does potential criminal liability for trustees making good faith decisions, consistent with the

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Register Now for the NCPERS 2010 Legislative Conference

February 7–9, 2010
Hyatt Regency Hotel
Washington, DC

To register now, visit
www.ncpers.org/legconf

Registration deadline is **January 11.**

A Debit Card Christmas: Special Holiday Edition

The following is an excerpt from Diane Swonk's monthly publication Themes on the Economy. To view the article in its entirety and to sign up to receive her monthly publication via e-mail, visit http://www.mesirowfinancial.com/media/dswonk/default.jsp.

A Fragile Recovery

Real GDP rebounded at a 3.5% rate in the third quarter, marking what very well could be the end of the recession and the start of the recovery. Many questions remain, however, about the durability of the gains that we are now experiencing.

This special report takes a closer look at the consumer and the outlook for holiday sales.

The Holiday Outlook: Better than Last Year

The *Holiday Outlook Table* provides the forecast for ritual sales in November and December. A rebound in sales over the summer, coupled with the sharp deterioration we saw in sales a year ago, leaves little place to go but up during the holiday season. Total retail sales are expected to rise 1.6% from a year ago, as consumers dip their toes back into the retail pool. General merchandise and apparel store sales (GMA), which more closely track seasonal spending patterns, are expected to rise 1.3%. After adjusting for inflation, both series essentially will be flat from a year ago.

The quality of spending this holiday season, however, will still be dismal when compared to Christmases past. Indeed, pent-up demand is expected to be a larger driver than improving economic fundamentals during the holiday season. This suggests a pick-up in consumer electronics, particularly computers, and some rebound in housing-related durables. We could also see some move back into discretionary apparel and entertainment.

Table 1: The Holiday Outlook[1]

	'07	'08	'09(f)
Total Retail Sales	4.5	-10.7	1.6
Adj. for inflation	0.2	-10.2	-0.4
GMA[2]	4.0	-1.6	1.4
Adj. for inflation	-0.7	-1.1	-0.6

[1] November/December data, year-over-year percent change
[2] General merchandise and apparel store sales

Retailers that plan to scale back on sales and special promotions this holiday season, however, might be disappointed with the results. Consumers were already playing chicken with retailers to get better discounting ahead of the recession and there is no reason to believe they won't be even more cautious about paying full prices now given the sorry state of their balance sheets.

The Bottom Line

Holiday sales will improve relative to last year, but that is not saying very much given the losses that we have already endured. It will take years, not quarters, to climb our way out of the hole we have dug.

Moreover, constraints on consumer credit markets, coupled with ongoing slack in labor markets and the need to eventually raise taxes to service the debt that we are accruing in the public sector, suggest that consumer spending will remain constrained relative to the rest of the economy for some time to come (i.e., consumer spending is not only likely to grow at a slower pace over the next five-to-ten years than it has in the past, but also to shrink as a share of the total economy).

As a result, the era of consumerism, where the U.S. played "buyer of last resort" for producers both at home and abroad, has come to an end. We are entering a more austere phase of development, which means that our trading partners will have to do more to stimulate their own demand. Are you listening, China? ❖

To view the article in its entirety and to sign up to receive Diane's monthly publication via e-mail, visit www.mesirowfinancial.com/economics/swonk/default.jsp

Note on the Author: ***Diane Swonk*** *is chief economist and senior managing director for Mesirow Financial. She is one of the most sought-after economists in the world, and among the most quoted in the financial press. Diane was named one of the top forecasters in the country by The Wall Street Journal. She can be seen regularly on national and international television, and her commentaries can be read in top financial news publications throughout the world. Diane was re-appointed to serve on the Congressional Budget Office's panel of economic advisors, and serves as an advisor to the Federal Reserve Board and regional Reserve banks. With more than 20 years of experience in the financial services industry, Diane is considered an invaluable resource for policy makers and business leaders from Washington to Tokyo.*

Custodians Leave Investor *from page 2*

custodian and not forwarded to the institutional investor.

The final explanation for an institutional investor's poor claims-filing record may lie in a custodian bank's financial disincentives for filing claims on behalf of their clients. One cannot be sure how custodian banks treat an institutional investor's instruction to file all claims; it is possible that custodians ignore their client's instruction and, instead, file only cost-justified claims. Of more concern is that if the custodian receives a fixed fee for its services but pays all of the costs for filing claims without reimbursement from the institutional investor, then the bank's financial interests would seem to be to do as little claims-filing as possible. This result could lead to a potential conflict of interest between the custodian and its client, the institutional investor. As minimal fund monitoring appears to be the norm, a problem like this could remain undetected if the client fund gives the custodian bank full discretion and does little or no monitoring of securities fraud class-action settlements.

Thus, in light of the fiduciary obligations of institutional investors and their trustees, it is imperative, most especially in the current economic environment, that institutional investors not rely solely on their custodian banks and, instead, monitor for securities fraud class-action settlements that may entitle them to a financial recovery as well as monitor for potential securities fraud claims that have not yet been prosecuted. Taking such action will help ensure both that custodians will not leave an institutional investor's money on the table and that institutional investors maximize the value of their securities portfolio. ❖

NCPERS Members *from page 5*

The Miami Fire Fighters have also filed a proposal at Honeywell seeking an independent chairman of the board. In the U.S., the chairman of the board of a company is usually an insider—typically the chief executive officer ("CEO"). One of the prime responsibilities of the chairman is to monitor and supervise the key executives on behalf of shareholders. Obviously that monitoring and supervising is not going to be very effective if the chairman and the CEO is the same person.

NCPERS urges its members to alert their proxy voting agents to these 2010 shareholder proposals filed by the Kansas City Fire Fighters, Miami Fire Fighters, and Philadelphia Public Employees. ❖

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advice of counsel, have a chilling effect?

- Whether criminal liability for expressing trustee viewpoints undermines the inherent structure and makeup of many retirement systems?

What is the effect of California's specific constitutional provision in Article XVI, Section 17(b), of the California Constitution which provides that the members of the pension board "shall discharge their duties with respect to the system solely in the interests of, and for the exclusive purposes of providing benefits to, participants and their beneficiaries, **minimizing employer contributions thereto**, and defraying reasonable expenses of administering the system"? How does this language compare with other state constitutions which impose fiduciary duties in their state constitutions? This California provision is unusual, in that it specifically requires consideration of employer contributions – exactly what the pension board did at the city's request.

Lastly, consider the following policy argument. The city placed the board in a very tenuous position by tying together fiduciary decisions with negotiations. In particular, the city's negotiation position from the outset was that benefit enhancements were contingent on approval of contribution relief for the city. By doing so, the Board was placed into the "middle of benefit determination"/labor negotiations. As a general rule, pension boards should be insulated from actual negotiations. Likewise, negotiations and benefits should ordinarily not be made contingent on pension board decisions and should never be based on contribution relief by the plan sponsor.

Lexin v. Superior Court of San Diego County, 65 Cal.Rptr. 3d 574 (Cal. App. 2007); Review Granted, 171 P.3d 546 (Cal.2007). ❖

1There are scores of decisions in sister jurisdictions finding similar actions and restrictions as an unconstitutional impairment of the pension contract. For example: ***Wisconsin Retired Teachers v. Employee Trust Funds***, 558 N.W.2d 83 (Wis 1997)(reduction in COLA formula); ***McDermott v. Regan***, 624 N.E.2d 985 (NY 1993)(change in actuarial methods to lower employer contribution); ***Flisock v. State***, 818 P.2d 640 (Alaska 1991)(change in definition of regular compensation); ***Board of Administration v. Wilson***, 61 Cal.Rptr.2d 207 (Cal. App. 1997)(any change in benefits must be offset by corresponding new benefits).

This article is a regular feature of PERSIST. ***Robert D. Klausner,*** *a well-known lawyer specializing in public pension law throughout the United States, is General Counsel of NCPERS as well as a lecturer and law professor. While all efforts have been made to insure the accuracy of this section, the materials presented here are for the education of NCPERS members and are not intended as specific legal advice. For more information go to* ***www.robertdklausner.com***

The Voice for Public Pensions

PERSist National Conference on Public Employee Retirement Systems

Calendar of Events 2010

Legislative Conference
February 7-9, 2010
Hyatt Regency Capitol Hill
Washington, DC

Trustee Educational Seminar (TEDS)
May 1-2, 2010
Wynn Las Vegas Hotel
Las Vegas, NV

Annual Conference & Exhibition
May 2-6, 2010
Wynn Las Vegas Hotel
Las Vegas, NV

Program for Advances Trustee Studies (PATS)
July 26 -28, 2010
Harvard Law School
Boston, MA

Public Safety Conference
October 10 -13, 2010
Hotel Zoso
Palm Springs, CA

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