

PENSION WARS: ROUND 1 TO SUAA

The Cases

- ⦿ In Re Pension Litigation
 - Challenge to the Constitutionality of SB1

- ⦿ *Kanerva v. Weems*
 - Health Insurance Premiums Case

IN RE PENSION LITIGATION

Challenges Public Act 98-599
a/k/a Senate Bill 1

The Statute

- ⦿ Passed in late 2013 to deal with \$100 Billion Pension Crisis
- ⦿ Attacked:
 - COLA's
 - No Compounding
 - Skips in certain years
 - Caps the amount of a COLA
 - Raised the Retirement Age
 - Attacked the Money Purchase Formula
 - Changed the Effective Rate of Interest from 7%-10% to Treasury bond plus .75% (something less than 4%)

The Cases

- ⦿ Heaton — TRS
- ⦿ Harrison — We Are One Illinois Coalition
- ⦿ RSEA — SERS members
- ⦿ ISEAR — SERS members
- ⦿ SUAA — SURS members

Why SURS Members Are Different

- ◎ The Money Purchase Formula
 - An identifiable amount in your pension based on contributions and interest.
- ◎ Plan Choices
 - Traditional Defined Benefit
 - Portable
 - Self Managed

Money Purchase Formula: The Refund

Annuity will equal pension fund \div Life Expectancy
(in months).

Problem: You can only get 80% of final rate
of earnings.

Solution: Refund of Excess Contributions.

SUAA Needs an Injunction

- The law threatened to take away the Money Purchase Formula refunds if people did not retire immediately.
- Most retirees with more than 30 years would lose a refund.
- In one case it was as much as \$400,000.

As a result, we determined that we had to move for an injunction.

Objections to Injunction

- Other Groups, particularly the Heaton Group, objected to the motion for injunctive relief.
- We Are One Illinois Coalition wanted an injunction, but they took an extra two weeks to prepare and file their motion and did not have the support for it that SUAA had.
- SUAA had more than 20 sworn declarations and another 9 exhibits.

Injunction Granted

SUAA filed its Motion for an Injunction in spite of the objections of other groups.

On May 14, 2014, the Court entered an injunction, barring the State from implementing the law.

SUAA's Challenges

- Pension Protection Clause, Article XIII, Sec. 5.
- Contracts Clause, Article I, Sec. 16.
- Takings Clause, Article I, Sec. 15.

Pension Clause

Membership in any pension or retirement system of the State, any unit of local government or school district, or any agency or instrumentality thereof, shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired.

Contract Clause

No ex post facto law, or law impairing the obligation of contracts or making an irrevocable grant of special privileges or immunities, shall be passed.

By virtue of the Pension Clause, the pension is a contract.

In addition, SURS members select a plan (Traditional Defined Benefit, Portable, or Self-Managed).

- This means that unlike other groups, SURS member have a contract independent of the pension clause.

Contract Clause Views

Other Groups

The Pension Clause creates the contractual right.

Therefore, if we lose on the Pension Clause, we have no Contract Clause claim.

Some groups abandoned the Contract Clause claim.

SUAA

SURS members have a contractual right in their pensions for reasons beyond the Pension Clause.

Therefore, even if we lose on the Pension Clause, we still have a contract clause claim.

SUAA filed a Contract Clause claim as a back-up

State's Argument: The Police Power

All Constitutional provisions are subject to a police power.

The police power is that power a government must always have in order to preserve the welfare of the people.

SB1 was an exercise of police power to save the State's economy.

Pension Clause v. Contract Clause: Plaintiffs' Views

Pension Clause

- ⦿ Not subject to the police power at all.

Contract Clause

- ⦿ Subject to the police power in some contexts
- ⦿ SUAA: Not subject to the police power in this situation

Proposed Procedure

Plaintiffs

- ⦿ Determine whether the police power applies to the Pension Clause first.
- ⦿ Delay considering other claims.
- ⦿ Delay exploring whether the State meets its burden to exercise the police power.

State

- ⦿ Take the entire case as a whole.
- ⦿ This means going through seven expert reports on budgets and thousands of pages of exhibits.
- ⦿ Send the whole case to the Supreme Court at once.

Trial Court Result

The Pension Clause is not subject to the police power.

State's Motion for Summary Judgment Denied.

Plaintiffs Motions Granted:

SUAA's Motion to Strike Affirmative Defense

Others' Motion for Judgement on Pleadings

Case set for appeal

Supreme Court

- ⦿ State sought expedited review
- ⦿ Plaintiffs objected
- ⦿ Court granted expedited review — but gave us our full 35 days for briefing
- ⦿ State obtains 10 amicus briefs
- ⦿ Plaintiffs seek more time in light of the amicus briefs calling the abbreviated schedule into question
- ⦿ Court denies amicus briefs
- ⦿ Plaintiffs set about briefing — but go in different directions

Issues of Contention between SUAA and Others

- ⦿ “The Pension Clause is absolute.”
- ⦿ “This is a problem of the State’s creation.”
- ⦿ The economy cycles from expansion to contraction
- ⦿ The Contract Clause is an important argument
- ⦿ We must address the State’s “inseverability clause” argument.

The Pension Clause is

Absolute

State challenges a claim by the Plaintiffs that “the benefits of which shall not be diminished or impaired” makes the Pension Clause Absolute.

State says that “shall be an enforceable contractual relationship” must mean that pensions can be renegotiated and therefore, Plaintiffs must be wrong.

General Argument

The State is wrong.

“the benefits of which shall not be diminished or impaired” overrides “enforceable contractual relationship.”

SUAA Argument

The State misunderstands.

The clauses are consistent.

One of “the benefits” of a contractual relationship is the right to renegotiate.

This is a problem of the State's Creation

General View

- ⦿ This is a minor point which is not relevant to the legal issues.

SUAA View

- ⦿ True, it is not legally relevant.
- ⦿ State is not arguing legal issues, but rather trying to persuade the Court with fear and necessity.
- ⦿ We must note that this is not true necessity, it is the result of choices.

Supreme Court Says:

[I]t is a crisis for which the General Assembly itself is largely responsible.

(¶66)

The Economy is Cyclical

“Then the Great Recession, an economic crisis of a size and duration not seen since the Great Depression of the 1930s, derailed that plan [to save pensions] and wreaked havoc with the State’s finances.” (St. Br. 6)

“the Act reduces future COLAs *only* to recover a portion of the liability attributable to the Great Recession” (St. Br. 10)

General Argument

Ignore this point as irrelevant.

SUAA Argument

Today the State blames its problem not on its lack of fiscal discipline, but on its feigned surprise that, after an economic boom in the 1990’s and early 2000’s, it faced a “Great Recession” from 2008-2010. *** [A]s though retired State employees are somehow responsible for the State being caught unaware that the economy has cycles. But history repeats itself. An economic boom in the early 1830’s was followed by the recession of 1837, another boom was followed by the recession of 1873, and of course the roaring ‘20’s were followed by the Great Depression. **But mankind has known about economic cycles at least as early as Joseph’s interpretation of Pharaoh’s dreams. Genesis 41.**

Supreme Court Says:

[O]ur economy is and has always been subject to fluctuations, sometimes very extreme fluctuations. Throughout the past century, market forces have periodically placed significant pressures on public pension systems.

The General Assembly had available to it all the information it needed.

Accordingly, the funding problems which developed were entirely foreseeable. (¶66)

The Contract Clause Claim

“[T]he State’s pension crisis caused a progressive deterioration in its credit rating, resulting in higher financing costs for its debt in the bond market.” ([St. Br. 9\)](#))

General Argument

Do not argue it in the lower court because the police power applies to contracts.

Do not make an issue of it in the Supreme Court because it is a weak argument.

SUAA Argument

This argument is the key response to the States’ complaint about its [economic condition](#).

As the Court in *U.S. Trust* notes: “the instant case involves a financial obligation and thus as a threshold matter may not be said to automatically fall within the reserved powers that cannot be contracted away.” 431 U.S. at 25. The Court goes on to note that the promise involved in that case was “purely financial and thus not necessarily a compromise of the State’s reserved powers.” *Id.*

[T]he Supreme Court in *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 439 (1933) noted that “This principle precludes a construction [of the police powers doctrine] that would permit a state to adopt as its policy the repudiation of debts or the destruction of contracts or the denial of a means to enforce them.” *Id.*

Supreme Court Says:

Under the State's reasoning, the only limit on the police power would be the scope of the emergency. The legislature could do whatever it felt it needed to do under the circumstances. And more than that, through its funding decisions, it could create the very emergency conditions used to justify its suspension of the rights conferred and protected by the constitution. **If financial markets were rational, this prospect would not buoy our economy, it would ruin it. (¶85)**

The Inseverability Argument

Public Act 98-599 has an *inseverability clause*, the changes to the AAI's are tied together. Everything else is not.

Many of the Act's provisions, ***including changes to the ERI***, are not diminishments.

General Argument

A severability clause is not dispositive. Severability is up to the courts.

The law is inseverable and since the AAI adjustments are clearly diminishments, the law falls.

Do not respond to the idea of an "inseverability clause".

SUAA Argument

Because of the Money Purchase Formula, the ERI is ***critical*** to SURS members.

The State's argument that there is an inseverability clause is an original one. If the Court were to buy it, since the ERI is not part of the AAI, the Court could sever those provisions and the rest could stand.

Therefore, we must argue that a provision outside of the AAI's is also inseverable e.g. increase in retirement age.

We also add that the law passed with a single vote margin in the Senate and two vote margin in the House. Clearly it would not have passed if anything were changed.

SUAA as the Voice of Pension Members

- SUAA has now become a major voice on Pensions.
- SUAA has proven that it can and will fight a constitutional legal battle.
- SUAA has shown that it can mobilize plaintiffs and declarants to support cases and motions for injunctions.
- SUAA is going to have to be consulted in the future.

SUAA and We Are One: Different Positions

SUAA

- SUAA has never taken a position contrary to the Pension Clause.
- SUAA argued this case to the Supreme Court — and had no vulnerability.
- While SUAA has the ability to be a kind of mouthpiece for SURS members, and has influence with them, it cannot bind them.

We Are One Illinois Coalition

- The State quoted We Are One as willing to sacrifice pensions: There is no doubt that *a long-term pension solution is a long-term fiscal solution and that **must involve truly shared sacrifice.*** (St. Br. 10)
- Fortunately, We Are One did not argue to the Supreme Court, and therefore did not have to face that question.
- Unions have the power to bind their membership through collective bargaining and are therefore vulnerable to efforts by the legislature to negotiate.

The health insurance battle

KANERVA. V. WEEMS

The Issue

- Pursuant to P.A. 97-695 the State began deducting 1% or 2% of pensions to apply to health insurance premiums.
- This money was taken from the pension funds with each pension check.
- The argument was that health insurance premiums were pension benefits protected by the Pension Protection Clause.

The Parties

- ◎ *Maag* —
 - Two brothers representing their father, a former judge, on contingency, and claiming a class of every pension member.
- ◎ *Kanerva* —
 - Brought on contingency by attorneys associated with ISEAR and RSEA, claiming to represent a class of SERS members.
- ◎ *McDonal*—
 - Brought by an Indiana attorney, on contingency, claiming a class of every pension member, but with no SURS members as named plaintiffs.
- ◎ *Bauer* —
 - Brought by AFSCME on behalf of union members. They had no SURS members as named plaintiffs.

Pleadings Filed

- ⦿ The cases were filed in early 2013.
- ⦿ They were consolidated in Springfield
- ⦿ The State moved to dismiss the cases arguing that Health Insurance was not a pension benefit.
- ⦿ The Court agreed. Case was dismissed.
- ⦿ Appeal was taken to the Supreme Court.
- ⦿ In July of 2014, the Supreme Court reversed and sent the case back to the circuit court.

SERS Funds Segregated

- In July of 2013, after the case was dismissed, the ISEAR and RSEA team filed a motion to segregate funds being deducted from pension checks. They did this *only* for SERS members.
- The reason is that the state court cannot order money returned — that has to be done by the Court of claims which can only ask the legislature to do it and takes many years.
- The ISEAR and RSEA attorneys told all other attorneys what they had done and implicitly suggested that they do the same thing.
- The other attorneys failed to act.

Deductions Doubled

- ⦿ In July of 2014, by emergency rule, the State doubled the amount of money that was being deducted.
- ⦿ In light of the Supreme Court's ruling, SUAA contacted the Governor's Office, the Department of Central Management Services (CMS), and the Joint Committee on Administrative Rules of the General Assembly (JCAR) to get this stopped.
- ⦿ The Emergency Doubling Rule was placed on the JCAR Agenda in August and CMS withdrew the rule.
- ⦿ Only SUAA stepped up to do this. The other groups ignored it.

SUAA joins the case

- ⦿ After the case was returned to the circuit court, SUAA joined.
- ⦿ We filed:
 - Petition to Intervene
 - Class action complaint
 - Motion for Certification of a class of SURS retirees
 - Motion for judgment and injunction to stop the State from making any further deductions

The Injunction Motions

- ⦿ *Kanerva* — on behalf of SERS members
- ⦿ *Bauer* — on behalf of union members
- ⦿ **SUAA** — on behalf of SURS members

- ⦿ *Maag* — on behalf of all retirees — BUT
 - Continue the deductions
 - Segregate the money
 - Take attorney's fees from it

SUAA is the only team to represent the interests of SURS members

- ① *Kanerva* team did not segregate funds for anyone other than SERS members.
- ① No one else stepped up to segregate funds for SURS members.
- ① Only SUAA filed an injunction on behalf of SURS members.
 - Except for *Maag* who wanted to keep money coming out.
- ① Only SUAA contacted JCAR to stop the doubling.

Monies to be Returned

- Originally, only SERS money was segregated and that would be returned.
- The rest would have to go to the Court of Claims.
- The State decided to return all the money.

Attorneys' Fees

- ⦿ Originally, *Kanerva* team wanted a percentage of the SERS money.
 - That was about \$30 Million
 - If they got 10%, that would be about \$3 Million
 - Because they had segregated SERS funds, they had indeed served the entire class of SERS members and a percentage fee of those monies might have been justifiable.
- ⦿ *Maag* and *McDonal* wanted a percentage fee of everything — \$60 Million.
 - They originally wanted 25%
 - \$15 Million

Class Certification

- Eventually *Kanerva, Maag, and McDonal* sought to certify a class of everyone.
- This was troubling because the sole purpose for their doing so was to be able to collect a fee.
 - *SUAA* and *Baur* (unions) could have formed such a class for the purpose of getting money returned without taking a fee.
 - This is a conflict of interest
 - *Kanerva, Maag, and McDonal*, never made an effort to represent SURS members interests before
 - Their justification was that they had taken the case to the Supreme Court on behalf of non-SURS members

Efforts to Negotiate Fees

- SUAA expended considerable effort trying to get the attorneys for *Kanerva*, *Maag*, and *McDonal* to negotiate a reasonable fee.
- *Kanerva* counsel had segregated \$30 Million of SERS funds and that was the only thing that militated in favor of a percentage fee. (They wanted 10% or \$3 Million and we may not have objected to that.)
- These attorneys refused to negotiate with us, instead working together to file a fee petition to which they knew we would object.
- They took the view that SUAA had nothing to say.

Fee Fight

- ⦿ We challenged the idea of a percentage fee.
- ⦿ On December 18, 2014, SUAA argued to the Court that a 15% fee would amount to \$9 Million to which we objected.
- ⦿ The Court determined that it would award fees based on a lodestar (i.e. rates x time)
- ⦿ The Court also asked for everyone's time records.

Outrageous Time Records

- ⦿ Thousands of hours for a complaint, response to a motion to dismiss, and appeal.
- ⦿ Time billed for travel to discuss how to split fees.
- ⦿ Block billing.
 - In one case 62 hours for reviewing pension laws in other states
- ⦿ Attorneys in the same office billing vastly different amounts of time to attend the same hearing.
- ⦿ Billing 6 minutes each to review every notice of filing or appearance.
- ⦿ Billing a first year attorney at \$350/hr to do nothing but travel and sit in the pews at court. (\$11,000 worth)
- ⦿ Hundreds of emails with no descriptions.

The Court heard SUAA's Complaints

SUAA Argues

- ◉ There are a number of instances in which multiple attorneys attend the same hearing and each billed their full hourly rate. ... there is little justification for charging for more than one attorney at a hearing in this matter for each attorney group.
- ◉ One must question how 2,000 hours were spent on a case that was limited to the filing of pleadings, resolving a motion to dismiss, and an appeal of a relatively simple (though admittedly important) legal issue.

Court Finds

- ◉ Three lawyers travelling hours to Springfield to appear on behalf of a single client, without saying a word during the proceedings, can be construed as over-billing. The time-billing Affidavits submitted to the court are replete with unnecessary duplication of effort over and above multiple lawyers travelling to a straightforward hearing.
- ◉ This case did not require significant investigation prior to filing the complaints. The research at the Circuit Court level was straightforward. There was not an investment in experts or opinion witnesses for complex economic or actuarial issues. There was virtually no pre-trial motion practice. All of the issues were addressed in a Motion to Dismiss, which required one brief. No discovery was conducted. No deposition costs were incurred.

Fees Awarded

- ⦿ Plaintiffs requested \$9 Million
- ⦿ SUAA suggested \$1,442,216.25.
- ⦿ Court awarded \$1,494,300.
- ⦿ 3.5% more than SUAA suggested
- ⦿ 2.37% of what the attorneys demanded
- ⦿ Irony: ISEAR and RSEA attorneys got approximately \$619,000 when we may not have objected to a number closer to \$3 Million from SERS funds because they did segregate those monies ... if only they had negotiated with us.

The Future

Pension Wars are NOT over

- ⦿ The State still has a \$100 Billion pension problem.
- ⦿ Health Insurance Programs are already under attack.
- ⦿ Governor Rauner still seems to be arguing for a plan that would change benefits going into the future for work done after his new legislation is implemented.
 - We still believe this to be unconstitutional, but it appears that those plans may go forward anyway.

SUAA is More Relevant than Ever

- SUAA has become a strong voice in both the legislature and courts.
- SUAA has to watch legislation carefully with a two-fold approach:
 - Challenge inappropriate legislation in the General Assembly
 - Prepare for litigation to challenge the constitutionality of legislation that gets passed
- SUAA has to maintain its current place in the headlines and manage its PR well.
- SUAA must refresh its litigation fund and be prepared for the future.

Congratulations and Thank You

Congratulations on battles well fought and tactics carefully considered.

Congratulations to you on managing the public relations.

Thank you for the honor of representing such a great organization and such worthwhile goals.