



Ashley Dunning

What's Next After First District Court of Appeals' Vested Rights Decision in *MAPE v. MarinCERA*?

On Aug. 17, 2016, Division Two of the First District Court of Appeal issued a unanimous published decision in *MAPE et al. v. MarinCERA, et al.* (Aug.17, 2016, A139610) upholding the constitutionality of certain aspects of the Legislature's Public Employees' Pension Reform Act of 2013 (PEPRA) that apply to legacy, as opposed to new, members of California's 20-county retirement systems that operate under the County Employees Retirement Law of 1937 (CERL).

Specifically, the court held that prospective exclusions of standby type payments and in-kind conversions from retirement allowance calculations were constitutional both on their face and as interpreted and applied by the board of Retirement of the Marin County Employees' Retirement Association (MarinCERA). That result should not have been a surprise.

These specific exclusions were consistent with both the statutory "plan in effect" and the most recent case law prior to those amendments, as MarinCERA had argued, so the specific limitations on such inclusions to delineate the scope of the prior general statute did not impair the vested rights of MarinCERA members when the MarinCERA Board implemented those amendments as to post-Jan. 1, 2013, time periods only.

However, the court took a much more critical view of the plaintiff/appellants' arguments about the scope of vested rights law in California than had either the retirement system and board defendant/respondents or the state of California, which had intervened in the case to defend the constitutionality of the statute through the attorney general.

It is this ruling that has caught the attention of the press and others nationally, with Moody's Investor Service calling the ruling "a positive credit development not only for Marin County, but for the state of California (Aa3 stable) and its local governments."

Why so? Perhaps because the court directly challenged the plaintiff/appellants' assertions that the prior inclusions were vested as to current employees in perpetuity and that in order for PEPRA to have been constitutional, a "comparable new benefit" was required to be provided to any disadvantaged legacy members. The court first examined the numerous California Supreme Court and court of appeal cases on which appellants' relied and concluded that the correct statement of law on the comparable new benefit point was that a reasonable modification to a member's pension rights bearing a material relation to the theory of a pension system and its successful operation was constitutionally permissible, and that a comparable new benefit merely "should," rather than "must," be provided if an impairment was found.

Further, the court concluded that in the context of MarinCERA's implementation of PEPRA the legislative modification of the statutory definition of compensation earnable in order to curtail "pension spiking" did not qualify as a "substantial impairment of the plaintiffs' contracts of employment with its right to a 'reasonable' and 'substantial' pension," and that a "new benefit" was in fact provided in any event because the newly specified exclusions from compensation earnable rules applied to future time periods as to current employees only and would result in decreased contributions and thus more monthly cash in hand for the affected members:

The change in policy adopted by [MarinCERA] — which is not an employer of any individual plaintiff or of persons employed by other governmental entities — is not alleged to have changed [sic made a change] in the way compensation is calculated by those entities. Thus, for all we know, employees who prior to [MarinCERA] changing its policy in December 2012 collected any of the items or payments at issue ... continued to have those items or payments included in their monthly compensation. However, due to MCERA's change in policy, each of those employees' paychecks is no longer being reduced by deductions to cover those sums in funding the employee's retirement. Put simply, the new benefit is an increase in the employee's net monthly compensation. Put even more simply, it is more cash in hand every month.

Also of note, the court rejected plaintiff/appellants' estoppel arguments against the statutory changes because "Any promises or representations made to the plaintiffs could have no validity if contrary to plain statutory language forbidding



Michael Toumanoff

continues, next page

what the plaintiffs wish to have recognized." If taken literally, this statement would appear to prevent any common law equitable estoppel principles from impeding a specifically mandated legislative change that operated only prospectively regardless of how reasonable any expectations of legislative constancy may have been.

Finally, and perhaps most significantly from the perspective of potential future legal developments, the court included a long discussion of the inherent implied authority of a legislature to make "reasonable" "alterations, changes and modifications," in retirement benefit plans that result in "reducing or eliminating" certain aspects of a retirement benefit, so long as they apply to active, not retired or deferred, employees, and so long as they do not "destroy" an employee's "anticipated pension."

The court stated that neither the United States Constitution nor the California Constitution prohibit such legislative actions, nor by extension would they prohibit such actions by either public employers or retirement boards within each of their respective areas of authority, presumably if also authorized by legislation. The court did characterize the legislative changes that it was approving in this case to be limited, pointing out, "The extent of the new rule of [CERL] Section 31461 is quite modest, as is the scope of the parties' disagreement." Moreover, as the court discussed at length, an apparent legislative motivation to curb pension spiking is fully consistent with the theory of a pension system and its successful operation as is required even under the cases relied upon in its decision.

However, the potential reach of the reserved legislative power to modify future accruals of ongoing pension benefits and related rights for current public employees found in the decision's open-ended discussion is certain to be the source of future disputes, and even continuing ones as the plaintiff/appellants have now stated publicly that they will petition for review of the decision by the California Supreme Court.

The most immediate question this newest development raises for some in the California public retirement arena is what impact a grant of review of the MAPE decision may have on the other pending court proceeding challenging the constitutionality of CERL Section 31461. That proceeding involves the CERL retirement systems in Alameda, Contra Costa and Merced, which were all consolidated before the Contra Costa County Superior Court in mid-2013 (Consolidated PEPRA cases).

The consolidated PEPRA Cases involve consideration of the same standby-type payments discussed in the MAPE decision, as well as of cash received in lieu of accrued leave in excess of that which is earned and payable during each 12-month period during a final average salary period ("leave cash out" issue). The leave cash out issue had not been directly raised in the MAPE case because the MarinCERA board excluded such excess payments several years before PEPRA was enacted and had not been challenged as a result of those pre-PEPRA exclusions.

In a procedural aside, MarinCERA had defended itself against attempts to consolidate the MAPE proceeding into the consolidated PEPRA cases on the ground that one superior court had no jurisdiction to order a superior court from a different county to surrender its jurisdiction over a matter originally brought before it. The jurisdictional question arose because the parties in the Contra Costa County Superior Court actions had stipulated that the cases to be consolidated were not "complex" and hence the judicial council's authority to order consolidation of complex cases brought in different counties was not invoked.

The court of appeal agreed with MarinCERA on this point in a prior unpublished decision issued by the First District Court of Appeal (DCA) in response to a petition for an alternative writ of mandate seeking enforcement of the consolidation order and the consequent voiding of the Marin County Superior Court's judgment in favor of MarinCERA (*MAPE v. Superior Court*, Case No. A139621).

In May 2014, the Contra Costa County Superior Court issued a final statement of decision in the consolidated cases (consolidated cases decision), in which that court also held that the legislative amendments to Section 31461 were constitutional as to all of the items of pay at issue in the consolidated cases, and must be implemented, with the following two important caveats.

First, although the Superior Court held invalid those class action settlement agreements entered into by public retirement systems that provide retirement system members with benefits that are not authorized by statute, it nevertheless also held that the concept of "equitable estoppel" was an appropriate basis upon which to find that in both the Contra Costa County and Merced County retirement systems, members within a certain class of active members who accrued leave prior to Jan. 1, 2013, had a right to have leave cash outs in excess of the amounts specifically authorized by Section 31461 included in post-PEPRA

continues, next page

retirement allowance calculations, notwithstanding PEPRAs amendments to that statute forbidding that practice prospectively. As noted above, the MAPE decision is directly to the contrary on this estoppel point.

Second, in the consolidated cases decision, the superior court held that as to standby-type payments, Section 31461 previously had contained an ambiguity as to the pensionability of these types of compensation, at least where the responsibility for which it is paid is "regularly required." The court concluded that "the issue of whether or not legacy employees have become 'vested' in the prior practice will depend upon the question of whether, for each particular circumstance, the practice was allowable, i.e., in conformance with the requirement that it be within the inclusion of 'days ordinarily worked.'" On this basis, the court directed such boards:

to make a factual determination, individually as to such retirees, including such pay in 'compensation earnable' in those limited circumstances where the pay category was previously included and the amount to be included was both earned and required of the employee during his or her final compensation period. This exception, providing inclusion for such 'vested' employees, only applies where regularly applicable to the class of employees and not to employees who receive such compensation, or any part thereof, to 'enhance' the pension. (emphasis in original)

The attorney general, having intervened in all of the pending PEPRAs cases to defend the constitutionality of PEPRAs, appealed the consolidated cases' decision, challenging the use of equitable estoppel as a basis upon which to order public retirement systems to pay benefits in excess of those that Section 31461 permits. The original petitioners then cross-appealed to the extent that the superior court had upheld the new prospective statutory exclusions for legacy members not within the smaller group benefited by the estoppel.

The consolidated cases' appeal was assigned to Division Four of the First DCA (Case No. A141913); the same DCA, but a different division than Division Two, which issued the MAPE decision. The consolidated cases' appeal has been fully briefed since January 2016, and the parties are now waiting for oral argument to be set.

On Aug. 26, 2016, the attorney general submitted a copy of the MAPE decision to the panel that has been assigned to the consolidated PEPRAs cases (Hon. Ruvolo, Hon. Rivera and Hon. Reardon), and noted its applicability to the consolidated PEPRAs cases. However, Division Four of the First DCA is not bound to follow the MAPE decision if it disagrees with the manner in which that division interpreted California Supreme Court and other appellate precedent regarding the scope of vested rights law of California. In light of these developments Division Four is faced with some interesting considerations about how best to proceed.

One threshold question is whether the consolidated cases will even be set for oral argument once the petitioners file their petition for review of the MAPE decision. We suspect Division Four is most likely to wait to see if that petition is granted before setting the consolidated PEPRAs cases for oral argument. We further suspect that if the Supreme Court does grant review of the Division Two MAPE decision, then Division Four may well wait until after the Supreme Court rules before setting the consolidated PEPRAs cases for oral argument so that it may then render its own decision within the bounds set by additional Supreme Court guidance on these topics.

Thus, continued uncertainty in the potential outcomes is a given until the California Supreme Court either denies or grants the expected petition for review, and possibly until it decides the issues raised by the earlier decision if it does grant the petition for review.

What we do know for certain is that litigation over the constitutionality of PEPRAs as applied to legacy members is not over, and, depending upon the actions taken by the Supreme Court, may have only just begun.

—By Ashley K. Dunning and Michael V. Toumanoff, Nossaman LLP

Ashley Dunning is a partner and co-chairwoman of the public pension and investments group at Nossaman in the firm's San Francisco office. **Michael Toumanoff** is of counsel and a member of the public pension and investments group at Nossaman in the firm's Los Angeles office. Dunning and Toumanoff provide fiduciary and/or litigation services to many of the public retirement systems in California, and they regularly present nationally on legal issues pertinent to such systems.

Originally printed in Law360 on September 16, 2016, A Critical View Of Calif. Vested Rights Law