



Montana Legislative Services Division  
Legal Services Office

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TO: Senator Dave Lewis

FROM: David S. Niss, Staff Attorney

RE: Constitutionality of Potential Legislation Modifying the GABA for Both Current and Retired Montana State Employees

DATE: August 14, 2009

I  
INTRODUCTION

You have asked whether there could be any circumstances that would allow the Montana Legislature to amend the statutes requiring the payment of a guaranteed annual benefit adjustment (GABA), for both current and retired state employees, to tie the amount of the GABA to the investment performance of funds from which the GABA is paid. This memorandum responds to your inquiry.<sup>1</sup>

II  
DISCUSSION

A. Background

In 1998, the Committee on Public Employee Retirement Systems (CPERS) studied the creation of a defined contribution retirement system and recommended legislation, which was later enacted, creating that system. As part of that study, the CPERS staff examined a number of legal issues, including the extent to which existing retirement pension plans are protected by language in Article II, section 31, of the

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<sup>1</sup>This memorandum does not deal with Article VIII, section 15<sup>1/2</sup> of the Montana Constitution, concerning the protection of public retirement system assets because it seems clear that an obligation in statute or contract to pay a GABA cannot be considered an "asset" of a retirement system. However, any income and contributions necessary to fund the GABA could be considered "income" or a "contribution" under this article and section that may not be "reduced" and must be "held in trust to provide benefits to participants". There are no reported judicial opinions in Montana by which to gauge whether this constitutional language, in effect, prevents reduction of the GABA or any other "benefit".

Montana Constitution prohibiting interference with contracts.<sup>2</sup> That language has a federal counterpart in Article I, section 10, of the U.S. Constitution,<sup>3</sup> usually referred to as the "contract clause", which will be used in this memorandum to refer to both the federal and state provisions because the Montana Supreme Court treats those provisions as interchangeable (see below). As part of that study of the contract clauses, the CPERS staff prepared a memorandum, dated February 27, 1998 (1998 Memorandum), explaining the contract clause case law from Montana and other states. The 1998 Memorandum has been previously furnished to you, and the conclusions reached in that Memorandum will not be repeated but will be referred to in this memorandum.

The 1998 Memorandum noted that the opinions of the Montana Supreme Court treat the state retirement laws as a contract between the employee or retiree and the state or other entity administering that law.<sup>4</sup> These opinions are germane to your issue of tying the amount of the GABA to investment earnings because the GABA was originally enacted in 1997 and still exists as a percentage of a retiree's benefit payment without reference to investment earnings. A change to those statutes would unquestionably have to be made and would therefore involve a change to the terms of the statutory retirement pension contract. However, because of a dearth of case law on the subject from the Montana Supreme Court and other Montana courts, lack of clarity in existing opinions, and conflicts between those opinions, the precise effect of Article II, section 31, upon a particular provision in a statutory public retirement pension contract cannot be readily predicted.<sup>5</sup>

Since the 1998 Memorandum was written, there have been no Montana Supreme Court opinions issued concerning the application of Article II, section 31, to changes in the retirement pension contract found by the Montana Supreme Court to exist and certainly no opinions explaining the effect of that constitutional provision upon changes to the GABA, which was not enacted until 1997. Therefore, in order to answer your question, decisions of lower Montana courts, opinions from the Montana Supreme

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<sup>2</sup> Article II, section 31, of the Montana Constitution provides in pertinent part that no law impairing the obligations of contracts shall be passed by the legislature.

<sup>3</sup> Article I, section 10, of the U.S. Constitution provides in pertinent part that no state shall, without the consent of Congress, pass any law impairing the obligation of contracts ."

<sup>4</sup>1998 Memorandum, page 2.

<sup>5</sup> The statutes providing for the GABA in state retirement systems administered by the Public Employees' Retirement Board are listed in section 19-2-908(3)(b), MCA. The GABA for the Teachers' Retirement System is provided for in section 19-20-719, MCA.

Court not dealing directly with statutory public retirement pension contracts but with other types of contracts, and decisions from courts of other jurisdictions that have attempted to limit GABA-like statutory provisions will have to be considered.

B. Opinions by Lower Montana Courts on the Effect of Article II, section 31, on the Retirement Pension Contract

The only opinion by a lower Montana court dealing with the effect of the Montana contract clause upon changes to a pension retirement contract, as found by the Montana Supreme Court, that's been located is Baumgardner v. Public Employees Retirement Board, First Judicial Dist., Lewis and Clark Co., Cause No. ADV-2002-450, 2007 Mont. Dist. LEXIS 133 (2007). In that case, the court quite properly found that before it could determine the effect of the contract clause upon a statutory pension retirement contract, the court must find that a contract existed. The court found that there was no contract as to the specific method used by the Board to calculate the optional payout scheme at issue in the case. In its opinion, the District Court wrote that the Supreme Court's opinion in Clarke v. Ireland, 122 M 191, 199 P.2d 965 (1948), didn't apply because, among other reasons: (1) membership in the teachers' retirement system involved in Ireland was then voluntary; (2) two other opinions by the Montana Supreme Court, Evans v. Fire Dept. Relief Ass'n, 138 M. 172, 355 P.2d 670 (1960), and Bartels v. Miles City, 145 M 116, 399 P.2d 768 (1965), did not deal with the PERS but with other retirement systems; and (3) the statutes in question requiring membership in the PERS used the present tense, with the court stating "[t]he relevant provisions of the Public Employee Retirement Act are stated in the present tense. There is no indication that the Act provides anything other than the current policy with regard to calculation of retirement benefits".<sup>6</sup> However, the District Court's analysis in Baumgardner, leading to the conclusion that there was no contract as to the optional payout scheme, missed at least two very important points regarding these three reasons for holding that no contract existed: first, that the Evans and Bartels cases, which the District Court barely considered because "these cases did not involve PERS", did concern mandatory participation retirement systems created by state statutes (see 11-1825 and 11-1911, R.C.M., 1947), just like the PERS statute at issue in Baumgardner; and second, that under another statute governing statutory construction not considered by the court, section 1-2-105(1), MCA, "present tense includes the future as well as the present". For these two reasons at least, the opinion by the District Court in Baumgardner is suspect and, in any event, is not binding upon the Montana Supreme Court or even other Montana District Courts.

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<sup>6</sup>The District Court also found that there was no other indication in the language used in several statutory sections of a legislative intent to create a contract. Other state appellate courts have, however, found just such an intent based upon no clearer language, when read in conjunction with section 1-2-105(1), MCA. See, e.g., Strunk v. Public Employees Retirement Board, 338 Ore. 145, 108 P.3d 1058 (2005).

### C. Opinions of the Montana Supreme Court Regarding the Contract Clause and Other Types of Contracts

Most recently, in Seven Up Pete Venture v. State, 2005 MT 146, 327 M 306, 114 P3d 1009 (2005), the Montana Supreme Court applied a legal doctrine that allowed the state to interfere in a contractual relationship. In that case, the Court held that a prohibition against cyanide heap leach mining enacted by a voter-approved initiated measure did not unconstitutionally interfere with any contract rights of a joint venture mining company to mine gold and silver from land on which it held mineral leases predating the voters' approval of the initiative. One of the bases for the Court's ruling was a legal doctrine that other courts have described as the "retained power" or "reserved power" of a state to interfere with a contract.<sup>7</sup> Under this doctrine, a state may substantially interfere with a contract if the state has a significant and legitimate purpose for doing so and the "interfering" law imposes reasonable conditions that are reasonably related to achieving the legitimate and public purpose.<sup>8</sup>

Without reference to "reserved" or "retained" power, the Montana Supreme Court has applied the substance of this doctrine of contract interference in cases involving other types of contracts that are not statutory public retirement pension contracts. In Neel v. First Fed. S & L Ass'n, 207 M 376, 675 P.2d 96 (1984), the Court applied a homestead exemption statute retroactively to interfere with a mortgage contract providing for forfeiture of property and held that the exemption applied notwithstanding the contract clauses in both the federal and state constitutions. In Carmichael v. Workers' Comp. Court, 234 M 410, 763 P.2d 1122 (1988), the Montana Supreme Court, relying as it did in Neel upon case law interpreting the federal contract clause, noted that a three-step analysis is necessary to determine whether a statute violates the contract clause of the Montana Constitution. Under this analysis, a court must determine the following issues before a contract may be interfered with: (1) is the

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<sup>7</sup>See, e.g., Maryland State Teachers' Ass'n, Inc. v. Hughes, 594 F. Supp. 1353 (1984).

<sup>8</sup> While this doctrine allowing interference with contracts seems to fly directly in the face of the very language of both the Montana and federal constitutional contract clauses, the Montana Supreme Court has held that the Montana and federal contract clauses are interchangeable and that federal case law allowing interference with contracts is therefore of precedential value in Montana. See, e.g., City of Butte v. Roberts, 94 M 482, 23 P.2d 243 (1932), and Neel v. First Fed. S and L Ass'n, 207 M 376, 675 P.2d 96 (1984). In Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934), the U.S. Supreme Court held that the federal contract clause prohibition "is not an absolute one and is not to be read with literal exactness like a mathematical formula".

"interfering" law a substantial impairment of a contractual relationship; (2) does the state have a significant and legitimate purpose for the law; and (3) does the law impose reasonable conditions that are reasonably related to achieving the legitimate and public purpose? As stated, no decisions of the Montana Supreme Court have been found applying this method of analysis to statutory public retirement pension contracts. This method of analysis, when applied to statutory public pension retirement contracts, is similar to the "California Rule" allowing limited interference with those contracts, as reviewed in the 1998 Memorandum.<sup>9</sup> As stated, that rule allowing limited interference with contracts has not been adopted by the Montana Supreme Court for the purposes of statutory public retirement pension contracts.

#### D. Decisions in Other States

In other states, the three questions applied in Carmichael or some version of them has been applied to statutory retirement pension contracts that include GABA-like increases in public retirement benefits, with varying results. In Maryland State Teachers Ass'n, Inc. v. Hughes, 594 F. Supp. 1353 (1984), a federal district court found that a 3% cap on a previously unlimited cost of living adjustment (COLA) was a reasonable response under Maryland's reserved powers to save a retirement system for which actuarially sound funding was endangered. Conversely, in Strunk v. Public Employees Retirement Board, 338 Ore. 145, 108 P.3d 1058 (2005), the Supreme Court of Oregon held that the Legislature had breached its promise to provide a COLA based on the Consumer Price Index, by subsequently limiting the COLA to a maximum of 2% per year, notwithstanding an "economic necessity" defense to that breach made by the state.

#### E. Discussion

Upon examination of the courts' rulings in Maryland State Teachers Ass'n and Strunk and other similar opinions by courts of other jurisdictions dealing with impairment of a statutory public pension retirement contract for payment of GABA-like increases pursuant to that contract,<sup>10</sup> it's apparent that changes made by a legislature to the law governing a GABA-like benefit are to be treated no differently than a modification to any other provision of a statutory public retirement pension contract. Therefore, the

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<sup>9</sup>1998 Memorandum, pp. 3 - 5.

<sup>10</sup>See, e.g., Levine v. State Teachers Retirement Board, 1998 Conn. Super. LEXIS 233 (1998), Booth v. Sims, 193 W. Va. 323, 456 S.E.2d 167 (1994), United Firefighters of Los Angeles City v. City of Los Angeles, 210 Cal. App. 3d 1095, 259 Cal. Rptr. 65 (1989), Association of Blue Collar Workers v. Wills, 187 Cal. App. 3d 780, 232 Cal. Rptr. 174 (1986).

question of whether Montana courts would find unconstitutional, as a violation of the Montana and federal contracts clauses, a change in a vested right to the GABA now provided for in Montana statutes is to be answered no differently than whether Montana courts would sanction any other change to vested rights in a statutory public retirement pension contract. The issue of impairment of statutory public retirement pension contracts was examined in the 1998 Memorandum, and the conclusion there was that there was no clear indication that Montana courts were moving to adopt the "California Rule" or any other legal theory under which reasonable and necessary modifications could be made in certain situations.<sup>11</sup> If, therefore, changes to the GABA statutes were to be undertaken for the purpose of state retirees and employees (employed by the state at the time the legislative change became effective), certain things would have to happen: (1) the courts would have to recognize a theory of law allowing interference with statutory public retirement pension contracts; and (2) the contemplated "interfering" legislation must be written in a manner that comports with the Neel and Carmichael opinions and perhaps with the opinions in Maryland State Teachers Ass'n, Strunk, or other "California Rule" cases as well. That legislation should therefore consider and be responsive to the following types of issues:

- (1) Is the contract provision to be interfered with a vested right?
- (2) How substantial is the contemplated change and therefore the interference?
- (3) What does the legislation hope to achieve?
- (4) Does the legislation achieve that goal?
- (5) Was the situation creating the need for the legislation foreseeable at the time the original legislation was adopted?
- (6) What will happen if the contemplated legislative change is not passed by the Legislature?
- (7) Are there other alternatives to the contemplated legislation?
- (8) What advantage does the legislation carry for those persons to whom it applies?

The foregoing considerations are taken from the Montana and other judicial opinions previously cited using a contract interference doctrine applicable to contracts generally or to statutory public retirement pension contract interference doctrines like the "California Rule".<sup>12</sup>

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<sup>11</sup>1998 Memorandum, pages 3 through 5.

<sup>12</sup>Several of these listed considerations are particularly important because the U.S. Supreme Court has held that under the federal contract clause, states are not as free to modify their own contracts as they are to modify contracts to which the state is not a party. In United States Trust Company of New York v. New Jersey, 431 U.S. 1 (1977), the Supreme Court held that complete deference to a state legislature's decision that impairment of a contract is necessary for a public purpose will not be paid when the contract is between the state and another party because the state's own self-interest is at stake.

### III CONCLUSION

Since the 1998 Memorandum was written, there have been no decisions by the Montana Supreme Court that clearly alter the Court's previous opinions finding that a contract exists between the state and its employees governing the retirement benefits payable to those employees. However, the Montana Supreme Court has issued opinions both before and after the date of that memorandum stating the conditions under which contracts not involving statutory public retirement pensions can be altered without offending the contract clauses of the Montana and U.S. Constitutions. The circumstances that must exist in order to allow the Legislature to constitutionally amend the existing GABA provisions to require that the amount of the GABA be tied to investment earnings for current state retirees and employees are: (1) the Montana Supreme Court must hold its decisions applicable to impairment of other types of contracts to be applicable to statutory public retirement pension contracts, as found in previous decisions of the Court (in effect, adopting the "California Rule", or something like it, described in the 1998 Memorandum) and (2) the legislation that would otherwise impair the retirement contracts must consider and be responsive to those issues found in such cases as Neel and Carmichael to justify contractual interference generally or (3) the Montana Supreme Court must reverse its previous decisions such as Clarke v. Ireland and hold that statutory public retirement pension provisions are not part of a contract at all but are either: (a) a gratuity that the state may change at will; or (b) entitled to some lesser form of protection under a different theory of law that would allow the contemplated change.

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# Montana Legislative Services Division

## Legal Services Office

TO: Senator Dave Lewis

FROM: David S. Niss, Staff Attorney

RE: Addendum to Memorandum of August 14, 2009, Regarding GABA Modification

DATE: August 28, 2009

### I INTRODUCTION

After rereading Gulbrandson v. Carey, 272 M 494, 901 P.2d 573 (1995), which was not cited in my Memorandum to you of August 14, 2009, and the provisions of section 19-2-502(2), MCA, which also was not cited in my previous Memorandum, I decided to prepare this addendum to that Memorandum to discuss the Montana Supreme Court's opinion in that case and that section of law because I thought that that decision and that statute might affect my answer to your question responded to in the previous Memorandum. However, after considering the Gulbrandson opinion and that statute, I've concluded that neither Gulbrandson nor section 19-2-502(2), MCA, alter my conclusions reached in that previous Memorandum. I've set forth my reasoning below.

### II DISCUSSION

#### A. The Gulbrandson Opinion

In Gulbrandson, a retired Montana judge sued the presiding officer of the Montana Public Employees' Retirement Board (PERB) for a judicial determination on whether an enhancement to the retirement benefit paid under the Judges' Retirement System enacted by Ch. 664, L. 1989, applied to him. The Montana Supreme Court ruled that the enhanced benefit did not apply to Gulbrandson because he retired before the effective date of the enhancements.

In the course of its eight-page opinion, the Supreme Court analyzed Gulbrandson's claim that denying him the enhancement impaired a contractual obligation of the PERB to pay him that enhanced benefit. In that analysis, the Court included one sentence that read: "[u]nder the three-part test we apply to determine whether legislation violates the impairment of contracts clause, the initial inquiry is whether the law has operated as a substantial impairment of the contract", citing Matter of Yellowstone River, 253 M 167, 832 P.2d 1210 (1992). (The three-part test used by the Montana Supreme Court asks the questions: (1) Is the state law a substantial impairment of a contractual relationship? (2) Does the state have a significant and legitimate purpose for the law? (3) Does the law impose reasonable conditions reasonably related to achieving a legitimate and public purpose?)

By using the foregoing sentence and citation to its previous opinion in Matter of Yellowstone River, the Supreme Court seems to have applied a method of analysis for determining whether a statutory public retirement pension contract had been impaired in violation of Article II, section 31, of the Montana Constitution that the Court had never before applied to that type of contract (Matter of Yellowstone River concerned water rights). As explained in the August 14 Memorandum, the few decisions of the Montana Supreme Court

concerning impairment of statutory public retirement pension contracts have in the past only determined whether a contract existed and then treated the change to the contracts addressed in those decisions as impairments without discussing whether the impairment was "substantial" or whether the state's police power included the authority to constitutionally impair that type of contract. Thus, the method of analysis used in Gulbrandson is more akin to the "California Rule" than any of its prior decisions such as Clark v. Ireland, 122 M 191, 355 P.2d 965 (1948), Evans v. Fire Dept. Relief Ass'n, 138 M 172, 355 P.2d 670 (1960), or Bartels v. Miles City, 145 M 116, 399 P.2d 768 (1965). Yet, those previous opinions were not even mentioned Gulbrandson, let alone not overruled.

B. Section 19-2-502(2), MCA

Section 19-2-502(2), MCA, provides:

Benefits and refunds to eligible recipients are payable pursuant to a contract as contained in statute. The contract is entered into on the first day of a member's covered employment and may be enhanced by the legislature. Unless specifically provided for by statute, the contract does not contain revisions to statutes after the time of retirement or termination of membership.

Subsection (2) was enacted by section 19, Ch. 532, L. 1997 (HB 169), after all of the Montana Supreme Court's opinions mentioned in this Memorandum and in the Memorandum of August 14 had been decided, but that doesn't mean that the quoted subsection changed the law in any significant way. The first sentence of subsection (2) is consistent with the Supreme Court's previous opinions in such cases as Ireland, Evans, and Bartels. The first phrase of the second sentence is more or less consistent with the holding in Evans that the contract arises upon the employee's first payment into the retirement system. The second phrase of that sentence, providing that benefits may be enhanced, is not directly attributable to Montana Supreme Court opinions but does find direct support in opinions of the Montana Attorney General, specifically 35 A.G. Op. 4 (1973), wherein the Attorney General opined that the Public Employees' Retirement System had to maintain the level of benefits then established in statute and that any increase in contributions by employees must be accompanied by a corresponding increase in benefits. The third sentence is also consistent with Montana Supreme Court opinions, as in Gulbrandson, where the Court held that Gulbrandson wasn't entitled to the enhancement made to the Judges' Retirement System that became effective after Gulbrandson retired. However, in order to be entirely consistent with the second sentence, the third sentence should be read as applying to enhancements only.

The only court decision that has been located in which the issue of impairment of a statutory public pension retirement contract was at issue following the enactment of section 19-2-502(2), MCA, in 1997 is the First Judicial District Court's opinion in Baumgardner v. Public Employees' Retirement Board, first cited on page 3 of the August 14 Memorandum. In that case, which was lost and never appealed by Baumgardner, the District Court, as discussed on that same page, examined the language used in the Public Employees' Retirement Act (PERA), Title 19, chapter 2, MCA, and concluded "[t]here is no indication that the Act provides anything other than current policy with regard to calculation of retirement benefits." Curiously, the District Court arrived at this conclusion without analyzing or even mentioning the provisions of section 19-2-502(2),

MCA, which is clearly part of the PERA. The meaning and effect of this critical section and subsection has therefore never been determined by a Montana Court.

### III CONCLUSION

In the August 14 Memorandum, I stated, citing an earlier 1998 Memorandum, that there was no "clear" indication that the Montana Supreme Court has adopted the California Rule, which holds that statutory public pension retirement contracts may be invaded to some extent pursuant to the state's police power. Taking the Gulbrandson opinion into account does not change that conclusion because the effect and meaning of the above-quoted single sentence in Gulbrandson (applying something like the California Rule) upon previous Montana Supreme Court opinions is anything but clear. Nor does the language of section 19-2-502(2), MCA, change the conclusions reached in the August 14 Memorandum because those conclusions are consistent with the provisions of that section of law. However, IF we assume that opinions in such cases as Clarke v. Ireland are now overruled or at least changed by the Montana Supreme Court's opinion in Gulbrandson and if legislation were therefore to be written to modify the Montana GABA to make the amount of the GABA for existing employees and retirees dependent upon investment earnings, it's imperative that issues such as those addressed in part III E, (1) through (8), of the August 14 Memorandum be fully discussed and addressed in that legislation because it is a near certainty that that legislation, if enacted, will be judicially tested.<sup>1</sup>

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<sup>1</sup>If legislation tying the amount of the GABA for existing employees and retirees to the performance of the state's investments is written, there is a question of whether that legislation should also amend the second sentence of section 19-2-502(2), MCA. Because there is no explicit prohibition in that sentence against a reduction of a retirement benefit, that amendment would seem to be unnecessary. However, in Baumgardner, the District Court's opinion quotes the November 17, 2000, minutes of the Public Employees' Retirement Board, the agency administering the Public Employees' Retirement Act, as stating: "The terms of the retirement system are a contract with members effective on the first day of employment, As stated in the statute, the contract may be enhanced by the Legislature, but the contract cannot be impaired."



# Committee on Public Employee Retirement Systems

55th Montana Legislature

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## MEMORANDUM

FOR : MS SHERI HEFFELFINGER

FROM: DAVID S. NISS

RE : LEGAL ISSUES SURROUNDING CHANGES FROM DB TO MODIFIED DB WITH DC COMPONENT RETIREMENT PLAN

DATE: FEBRUARY 27, 1998

### I INTRODUCTION

In connection with the Committee on Public Employees Retirement Systems (CPERS) study of possible changes in the Public Employees Retirement System (PERS) from a defined benefit (DB) system to a modified DB system with a defined contribution (DC) component, you have asked three related questions regarding the character or status of retirement benefits offered by the PERS and the creation of the modified DB system. Your questions are as follows:

A. To what extent are PERS retirement benefits protected from change by Art. II, sec. 31, of the Montana Constitution?

B. May PERS retirement benefits of current PERS members be transferred to a modified DB system with a DC component?

C. May future PERS members be required to join a retirement system consisting of a modified DB system with a DC component?

prohibiting the interference with contract rights.<sup>2</sup> Public employee pensions are therefore protected by Art. II, sec. 31 of the Montana Constitution. The extent of that protection is the subject of the remainder of this memorandum.

B. May PERS retirement benefits of current PERS members be transferred to a modified DB system with a DC component?

1. Vesting and pension plan modifications -- the "California rule".

Because transfer of members and benefits from the current PERS plan to a new or modified retirement plan would necessarily involve a modification of the current contract with employee parties to the contract, your question must be analyzed in terms of the modifications to the contract that the courts may allow. With this in mind, it is important to note first that the "contract" to provide a pension of some sort is formed immediately upon employment. In *Evans*, the Supreme Court said that "the contract arises when the fireman pays into the fund" and in *Sullivan* the Supreme Court held that the "terms of the teachers' retirement benefit contract in Montana are determined by the controlling provisions of the teachers' retirement system statute in effect at the time the teacher becomes a member of the Montana Teachers' Retirement System." Thus, under the rationale of *Evans* and *Sullivan*, there is no point in time when transferral of an employee's benefits may be made free from consideration of principles of contract law as applied by Montana courts to a public retirement plan<sup>3</sup>.

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<sup>2</sup>This area of Montana law is not entirely free from doubt. In the case of *Casey v. Brewer*, 107 M 550, 88 P2d 49 (1939), the Montana Supreme Court held that retirement benefits provided by a pension system requiring mandatory membership were a "gratuitous allowance in the continuance of which the pensioner has no vested right and that pension is accordingly terminable at the will of the sovereign." This view, as it applies to mandatory contributions to a retirement system, was repeated in *Clarke v. Ireland* but was not repeated in either *Evans* or *Bartles*, both of which involved mandatory contributions to a retirement system. Nor were the Court's prior opinions in *Casey v. Brewer* or *Clarke v. Ireland* even mentioned by the Court in the *Evans* and *Bartles* opinions. The opinions of the Montana Attorney General concerning retirement issues have followed *Evans* and *Bartles* and disregarded the fact that the contributions to the retirement system were required by statute. See footnotes no. 5 and 6 and accompanying text.

<sup>3</sup>However, in *Gulbrandson v. Carey*, 272 M 494, 502, 901 P2d 573 (1995), the Montana Supreme Court ruled in a case in which a retired District Court judge attempted to take advantage of a Judges' Retirement System benefit enhancement that became law two years after the judge's retirement. Without citing either the opinions in *Evans* or *Sullivan* or any other authority, the Montana Supreme Court held that "[t]he terms of Gulbrandson's retirement benefit

limitations. If the legislature is convinced of the need to safeguard and protect the fiscal base of the retirement system and plans changes to maintain the solvency of the system it must legislate within the framework of the Constitution.

The foregoing language from *Clarke* sounds like the "California rule" as discussed in the *Valdes* case. However, the language quoted from *Clarke* was not central to the Court's holding and might therefore be classified as dicta. Only litigation of specific changes made to retirement statutes will tell whether the Montana Supreme Court will permit some types of changes to the pension contract of an active member, under which the right to a specific benefit payment has not yet vested, while prohibiting other types of changes.

## 2. Opinions of the Montana Attorney General and cases from other states

Montana has seen few cases litigating the effectiveness of changes to its public retirement systems. However, several opinions have been issued by the Montana Attorney General which shed some light on the legality of several types of changes to pension contracts. In a 1973 opinion<sup>5</sup>, Attorney General Woodahl gave his opinion as to whether the Game Wardens' Retirement System had to maintain the level of retirement benefits for present members of the system without raising the percentage contribution by members and, if it had to maintain those benefits, the options available to the Game Wardens' Retirement System. The Attorney General began by summarizing the *Clarke v. Ireland* opinion, noting that the rights of the members of the system were contractual in nature, the terms of the contract being "dependant upon statutes in force at the time the relationship was entered into". The Attorney General then summarized the *Evans* decision and noted, as pointed out above, that in *Evans*, the Supreme Court did not make its decision concerning the contractual nature of the benefit depend upon whether contribution to and membership in the retirement system was mandatory or voluntary. The Attorney General concluded that PERS had to maintain the level of benefits for current members that was then specified in statute, that to maintain that level of benefits the System had to either increase its present contribution or make up any difference at a later time, and that the employee contribution then specified in statute could not be increased "without a corresponding increase in benefits which will accrue to members at retirement." The Attorney General also pointed out that the state could always increase its contribution to the system without increasing benefits to the members of the System.

In 1982, the Montana Attorney General gave his opinion concerning the right of members of the former firefighters' retirement system who had transferred to the new

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<sup>5</sup>35 A.G. Op. 4 (1973).

their contributions from a county administered retirement system to a separate state-administered retirement system. Milwaukee County refused to transfer money to the state system, contending that the transfer would be a misappropriation of money held in trust for the benefit of vested employees and retirees. The Wisconsin Supreme Court held two statutes pursuant to which nonvested prosecutors could transfer employer contributions, and interest, made on their behalf from the county to the state fund and receive a service credit for county employment depending upon the amount transferred to constitute a "taking" of property without due process of law and prohibited by the 5th Amendment to the U.S. Constitution. In its opinion, the Wisconsin Supreme Court discussed the distinction that the Association tried to make between some previous Wisconsin judicial opinions and the current case on the basis that the former opinions involved defined contribution systems, whereas the case before the Court involved a defined benefit plan. The Supreme Court noted that "[a]ny pension plan's ability to meet its obligations can be jeopardized when funds are taken from it, since every dime is arguably part of a management strategy dependent upon spreading the fund's monies as broadly as possible."

As previously noted<sup>7</sup>, Montana is not one of the states that subscribes to the "property" theory of protection of public pension money but rather one of the group of states that applies the "contract" theory of protection of those funds. For this reason it's likely that the Association of State Prosecutors opinion would not be applied *per se* by Montana courts. Nevertheless, the opinion is helpful in that Montana courts could, by application of the contract theory of protection of actuarial funding as expressed in Board of Administration of the Public Employees' Retirement System v. Wilson, reach the same conclusion that the value of all contributions to a retirement system, when actuarial funding is required, is so great that members transferring to another retirement plan may not physically take all of those contributions and their earnings with them upon transfer to the new plan.

A note of caution should, however, be raised at this point about the conclusions reached by the court in the Association of State Prosecutors opinion. For whatever reason, the Wisconsin Supreme Court failed to address a significant issue in its opinion. The issue it failed to address is the fact that when a member leaves a retirement system and removes both employee and vested employer contributions from that system, the former member of the system takes with him or her not only pension system assets but system liabilities as well, those system liabilities being the duty of the system to pay the retirement benefit in the amount and at the time specified in the "contract". Whether a pension system therefore needs "every dime", as the Wisconsin Supreme Court suggested, to make the system left by the former member actuarially sound depends upon how the assets removed, the assets left behind, and the remaining liabilities of the system are valued. If, for example, the remaining liabilities are no greater than the remaining assets, it is difficult to see how the contract of remaining members would be impaired. For these reasons, valuation of assets and liabilities is critical.

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<sup>7</sup>See footnote no.1 and accompanying text.

components. However, taken literally, the language of section 15 would seem to prevent such a transfer. This seems especially true because of the potential for the adverse effect of the valuation of transferred assets in times of a falling stock market if there is no protection applied to the value of those transferred assets.

### III CONCLUSIONS

The application of Montana Supreme Court opinions, 35 A.G.Op. 4, 39 A.G.Op. 51, the Board of Administration and Association of State Prosecutors opinions, and Article VIII, sec. 15, of the Montana Constitution to the PERS means that:

1. Members of the PERS have a contractual right to retirement benefits. The terms of the contract are probably governed by the laws applicable that were in effect when they became members. However, members of the PERS must await actual retirement before the right to a specific retirement benefit payment becomes fully "vested".<sup>8</sup>

2. The Legislature may not, without consent of the members of the PERS, make changes to the contractual rights of PERS members to a retirement benefit unless the modification is necessary to make sure that the members have the benefits they contracted for or the amendments are otherwise necessary to strengthen the retirement system.

3. Contributions by or for current members of the PERS retirement plan and any new or modified plan cannot be used for any other purpose than retirement benefits and cannot be used as the basis of a loan or be decreased or terminated for current or future members once established by the employment contract.

4. Members of the current PERS retirement plan who voluntarily transfer from the DB plan to a new or modified plan must, through a system of credits, cash payments, or otherwise, be given credit for benefits earned under the current hybrid DB retirement plan.

5. Members of the current PERS retirement plan and members of a new or modified retirement plan are entitled, both before and after any current members are transferred to that new or modified plan, to have their retirement benefit funded on an actuarially sound basis.

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<sup>8</sup> It is believed that the only way that the Montana Supreme Court's opinions in the *Evans* and *Sullivan* cases can be reconciled with the Court's opinion in *Gulbrandson* is to say, like the California Court of Appeals in *Valdes*, that upon commencement of employment a member of the PERS is vested with a nonspecific right to payment of a retirement benefit under the statutes that apply to that member but that the member must await actual retirement for the right to a specific payment to become "vested".



# Committee on Public Employee Retirement Systems

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## 55th Montana Legislature

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### MEMORANDUM

FOR : MS SHERI HEFFELFINGER

FROM: DAVID S. NISS

RE : LEGAL ISSUES SURROUNDING CHANGES FROM DB TO MODIFIED DB WITH  
DC COMPONENT RETIREMENT PLAN

DATE: FEBRUARY 27, 1998

### I INTRODUCTION

In connection with the Committee on Public Employees Retirement Systems (CPERS) study of possible changes in the Public Employees Retirement System (PERS) from a defined benefit (DB) system to a modified DB system with a defined contribution (DC) component, you have asked three related questions regarding the character or status of retirement benefits offered by the PERS and the creation of the modified DB system. Your questions are as follows:

A. To what extent are PERS retirement benefits protected from change by Art. II, sec. 31, of the Montana Constitution?

B. May PERS retirement benefits of current PERS members be transferred to a modified DB system with a DC component?

C. May future PERS members be required to join a retirement system consisting of a modified DB system with a DC component?

## II DISCUSSION

A. To what extent are PERS retirement benefits protected from change by Art. II, sec. 31, of the Montana Constitution?

Article II, sec. 31, Mont. Const. provides:

No ex post facto law nor any law impairing the obligation of contracts, or making any irrevocable grant of special privileges, franchises, or immunities, shall be passed by the legislature.

Courts and legislatures in the United States have generally taken one of several approaches in defining the legal status of retirement benefits offered by state employee retirement systems. Some states treat those benefits as "property" that is protected by those state and federal constitutional provisions prohibiting the taking of property without due process of law. Other states treat those retirement benefits as gratuities that may be changed at the will of the state legislature. Other states treat those benefits as a right that is subject to promissory estoppel (an equitable remedy, not important to this discussion, that courts use to enforce promises by a person even though no actual contract exists). Still other states treat public retirement benefits as a matter of contract governed by the state law is of contracts.<sup>1</sup>

Montana is among those states that treat the right to a public pension as a contract right. The Montana Supreme Court has held in Clarke v. Ireland, 122 M 191, 199 P2d 965 (1948), Evans v. Fire Dept. Relief Ass'n 138 M 172, 355 P2d 670 (1960), Bartles v. Miles City, 145 M 116, 399 P2d 768 (1965), and Sullivan v. State, 174 M 482, 571 P2d 793 (1977), that benefits provided by public retirement systems are governed by a contract between the public employer and the employee to provide retirement benefits and that attempts to change the benefits agreed to in the contract are generally prohibited by Art. II, sec. 31, of the Montana Constitution,

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<sup>1</sup>60A Am. Jur. 2d Pensions and Retirement Funds sec. 1620 and 1626 through 1628; Til Death Do Us Part: Pennsylvania's "Contract" With Public Employees for Pension Benefits, Dwyer, 59 Temple L.Q. 553, 370 (1985); Public Employee Pensions in Times of Fiscal Distress, 90 Harvard L. R. 992 (1977). Most states that do not subscribe to the gratuity theory appear to treat public retirement system assets as protected by either the "property" theory or the "contract" theory. The West Virginia Supreme Court applies both theories and has held pension assets to be "contractually vested property rights". Dadisman v. Moore, 384 SE2d 816, 827 (W.Va. 1989).

prohibiting the interference with contract rights.<sup>2</sup> Public employee pensions are therefore protected by Art. II, sec. 31 of the Montana Constitution. The extent of that protection is the subject of the remainder of this memorandum.

B. May PERS retirement benefits of current PERS members be transferred to a modified DB system with a DC component?

1. Vesting and pension plan modifications -- the "California rule".

Because transfer of members and benefits from the current PERS plan to a new or modified retirement plan would necessarily involve a modification of the current contract with employee parties to the contract, your question must be analyzed in terms of the modifications to the contract that the courts may allow. With this in mind, it is important to note first that the "contract" to provide a pension of some sort is formed immediately upon employment. In Evans, the Supreme Court said that "the contract arises when the fireman pays into the fund" and in Sullivan the Supreme Court held that the "terms of the teachers' retirement benefit contract in Montana are determined by the controlling provisions of the teachers' retirement system statute in effect at the time the teacher becomes a member of the Montana Teachers' Retirement System." Thus, under the rationale of Evans and Sullivan, there is no point in time when transferral of an employee's benefits may be made free from consideration of principles of contract law as applied by Montana courts to a public retirement plan<sup>3</sup>.

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<sup>2</sup>This area of Montana law is not entirely free from doubt. In the case of Casey v. Brewer, 107 M 550, 88 P2d 49 (1939), the Montana Supreme Court held that retirement benefits provided by a pension system requiring mandatory membership were a "gratuitous allowance in the continuance of which the pensioner has no vested right and that pension is accordingly terminable at the will of the sovereign." This view, as it applies to mandatory contributions to a retirement system, was repeated in Clarke v. Ireland but was not repeated in either Evans or Bartles, both of which involved mandatory contributions to a retirement system. Nor were the Court's prior opinions in Casey v. Brewer or Clarke v. Ireland even mentioned by the Court in the Evans and Bartles opinions. The opinions of the Montana Attorney General concerning retirement issues have followed Evans and Bartles and disregarded the fact that the contributions to the retirement system were required by statute. See footnotes no. 5 and 6 and accompanying text.

<sup>3</sup>However, in Gulbrandson v. Carey, 272 M 494, 502, 901 P2d 573 (1995), the Montana Supreme Court ruled in a case in which a retired District Court judge attempted to take advantage of a Judges' Retirement System benefit enhancement that became law two years after the judge's retirement. Without citing either the opinions in Evans or Sullivan or any other authority, the Montana Supreme Court held that "[t]he terms of Gulbrandson's retirement benefit

However, case law from other states indicates that the prohibition against impairment of contract rights provided by Art. II, sec. 31, of the Montana Constitution and the analogous federal provision in Art. 1, sec. 10, of the U.S. Constitution should not be taken too literally. There exists in some of the judicial opinions of those states adopting the contract theory of protection an exception to the prohibition against modification of pension contracts known as the "California rule", which provides that prior to retirement, an employee is vested immediately upon employment with a "limited" contract right to a "reasonable pension", that that limited right becomes a fully "vested" right to a specific pension benefit only upon retirement of the employee, and that the initial right to a "reasonable pension" is limited because the legislature may, before the employee's retirement, make "reasonable modifications" to the retirement plan. To be a "reasonable modification", a modification must bear some material relation to the theory of a pension system and its successful operation, and changes in a pension plan which result in disadvantage to employees must be accompanied by comparable new advantages. Valdes v. Cory, 139 Cal.App.3d 773, 189 Cal.Rptr. 212 (1983).<sup>4</sup>

The "California rule", allowing certain modifications to an employee retirement plan, has not been specifically adopted in Montana, but in the Clarke opinion, the Montana Supreme Court stated:

It is true that the public interest in retirement funds and retirement programs for employees and public officers alike demands that those in charge of the funds be constantly watchful of the integrity of the fund. Changes in interest rates, increases in the life span of the employees, experience in the operation of the retirement program, may require changes to insure that all the members of the system have the benefits which they contracted for. Great latitude should be permitted the legislature in making alterations to strengthen the system. But such changes are subject to the above constitutional

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contract are determined pursuant to the statutes in effect at the time of his retirement on August 31, 1989." In making this statement, I believe that the Supreme Court assumed, without stating so, that the statutes they referred to are those that apply in the first instance to the person in question.

<sup>4</sup>Modifications have also been allowed by some state courts and by the U.S. Supreme Court, pursuant to Art. 1, sec. 10, of the U.S. Constitution, even if the modification results in a change that does not advantage the employee, under the conditions that (1) the modification must serve to protect basic interests of society, (2) there is an emergency justification for the enactment, (3) the enactment is appropriate for the emergency, and (4) the enactment is designed as a temporary measure. Sonoma County Organization of Public Employees v. County of Sonoma, 23 Cal.3d 296, 152 Cal. Rptr 903, 591 P2d 1 (1979).

limitations. If the legislature is convinced of the need to safeguard and protect the fiscal base of the retirement system and plans changes to maintain the solvency of the system it must legislate within the framework of the Constitution.

The foregoing language from *Clarke* sounds like the "California rule" as discussed in the *Valdes* case. However, the language quoted from *Clarke* was not central to the Court's holding and might therefore be classified as dicta. Only litigation of specific changes made to retirement statutes will tell whether the Montana Supreme Court will permit some types of changes to the pension contract of an active member, under which the right to a specific benefit payment has not yet vested, while prohibiting other types of changes.

## 2. Opinions of the Montana Attorney General and cases from other states

Montana has seen few cases litigating the effectiveness of changes to its public retirement systems. However, several opinions have been issued by the Montana Attorney General which shed some light on the legality of several types of changes to pension contracts. In a 1973 opinion<sup>5</sup>, Attorney General Woodahl gave his opinion as to whether the Game Wardens' Retirement System had to maintain the level of retirement benefits for present members of the system without raising the percentage contribution by members and, if it had to maintain those benefits, the options available to the Game Wardens' Retirement System. The Attorney General began by summarizing the *Clarke v. Ireland* opinion, noting that the rights of the members of the system were contractual in nature, the terms of the contract being "dependant upon statutes in force at the time the relationship was entered into". The Attorney General then summarized the *Evans* decision and noted, as pointed out above, that in *Evans*, the Supreme Court did not make its decision concerning the contractual nature of the benefit depend upon whether contribution to and membership in the retirement system was mandatory or voluntary. The Attorney General concluded that PERS had to maintain the level of benefits for current members that was then specified in statute, that to maintain that level of benefits the System had to either increase its present contribution or make up any difference at a later time, and that the employee contribution then specified in statute could not be increased "without a corresponding increase in benefits which will accrue to members at retirement." The Attorney General also pointed out that the state could always increase its contribution to the system without increasing benefits to the members of the System.

In 1982, the Montana Attorney General gave his opinion concerning the right of members of the former firefighters' retirement system who had transferred to the new

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<sup>5</sup>35 A.G. Op. 4 (1973).

Firefighters' Unified Retirement System (FURS) their benefits accrued under the old system<sup>6</sup>. After the opinion noted that the legislation creating FURS had failed to address whether a certain class of firefighters was entitled to a certain "adjustment allowance" (guaranteeing a certain minimum retirement payment) as they had been under the old system, the Attorney General pointed out that section 19-13-107, MCA, stated legislative intent that members of the old system transferring to FURS were to retain "all rights and benefits accrued under a prior plan" and that this section actually codified the contractual rights protected by Art. II, sec. 31, of the Montana Constitution. The Attorney General held:

A firefighter's pension constitutes an element of compensation, and a vested contractual right to pension benefits, which are stated in the retirement plan during the firefighter's employment, accrues when he begins paying into the retirement fund. \* \* \* It is clear that those firemen who have transferred to the new retirement system cannot lose any retirement benefits accrued to them under the old system.

No reported Montana cases have litigated the right of PERS members to actuarial funding of their retirement benefits or the application of that right in the context of the creation of a new or modified retirement plan. Cases from other states may therefore help clarify the rights of PERS members who transfer to a modified DB pension plan and the rights of those members who do not.

In Board of Administration of the Public Employees' Retirement System v. Wilson, 52 Cal. App.4th 1109, 61 Cal. Rptr. 207 (1997), administrators of the California PERS brought suit to invalidate two legislative appropriation measures. In the two appropriation bills, the legislature sought to change the "level contribution" form of funding the PERS, in which employee contributions were made as liability was incurred for future pension obligations, to an "in arrears" funding method, by which the employer contributions were made in the fiscal year following that in which employee services were rendered. The Court of Appeals reviewed the history and legislative intent of previous legislative funding schemes for the California PERS and concluded that "[a]ctuarial soundness of the system is necessarily implied in the total contractual commitment, because a contrary conclusion would lead to express impairment of employees' pension rights." The Court of Appeals held the two appropriation measures as not being the kind of modifications allowed to the pension plan under the "California rule" and held that the appropriation bills were unconstitutional under the provision of the California constitution prohibiting impairment of contract rights.

In Association of State Prosecutors v. Milwaukee County, 544 NW2d 888 (Wisc. Sup. Ct, 1996), a group of county prosecutors, newly designated as state employees pursuant to a reorganization of prosecution services, brought a mandamus action to compel the transfer of

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<sup>6</sup>39 A.G. Op. 51 (1982).

their contributions from a county administered retirement system to a separate state-administered retirement system. Milwaukee County refused to transfer money to the state system, contending that the transfer would be a misappropriation of money held in trust for the benefit of vested employees and retirees. The Wisconsin Supreme Court held two statutes pursuant to which nonvested prosecutors could transfer employer contributions, and interest, made on their behalf from the county to the state fund and receive a service credit for county employment depending upon the amount transferred to constitute a "taking" of property without due process of law and prohibited by the 5th Amendment to the U.S. Constitution. In its opinion, the Wisconsin Supreme Court discussed the distinction that the Association tried to make between some previous Wisconsin judicial opinions and the current case on the basis that the former opinions involved defined contribution systems, whereas the case before the Court involved a defined benefit plan. The Supreme Court noted that "[a]ny pension plan's ability to meet its obligations can be jeopardized when funds are taken from it, since every dime is arguably part of a management strategy dependent upon spreading the fund's monies as broadly as possible."

As previously noted<sup>7</sup>, Montana is not one of the states that subscribes to the "property" theory of protection of public pension money but rather one of the group of states that applies the "contract" theory of protection of those funds. For this reason it's likely that the Association of State Prosecutors opinion would not be applied *per se* by Montana courts. Nevertheless, the opinion is helpful in that Montana courts could, by application of the contract theory of protection of actuarial funding as expressed in Board of Administration of the Public Employees' Retirement System v. Wilson, reach the same conclusion that the value of all contributions to a retirement system, when actuarial funding is required, is so great that members transferring to another retirement plan may not physically take all of those contributions and their earnings with them upon transfer to the new plan.

A note of caution should, however, be raised at this point about the conclusions reached by the court in the Association of State Prosecutors opinion. For whatever reason, the Wisconsin Supreme Court failed to address a significant issue in its opinion. The issue it failed to address is the fact that when a member leaves a retirement system and removes both employee and vested employer contributions from that system, the former member of the system takes with him or her not only pension system assets but system liabilities as well, those system liabilities being the duty of the system to pay the retirement benefit in the amount and at the time specified in the "contract". Whether a pension system therefore needs "every dime", as the Wisconsin Supreme Court suggested, to make the system left by the former member actuarially sound depends upon how the assets removed, the assets left behind, and the remaining liabilities of the system are valued. If, for example, the remaining liabilities are no greater than the remaining assets, it is difficult to see how the contract of remaining members would be impaired. For these reasons, valuation of assets and liabilities is critical.

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<sup>7</sup>See footnote no.1 and accompanying text.

C. May future PERS members be required to join a retirement system consisting of a modified DB system with a DC component?

Article VIII, section 15 of the Montana Constitution provides :

(1) Public retirement systems shall be funded on an actuarially sound basis. Public retirement system assets, including income and actuarially required contributions, shall not be encumbered, diverted, reduced, or terminated and shall be held in trust to provide benefits to participants and their beneficiaries and to defray administrative expenses.

(2) The governing boards of public retirement systems shall administer the system, including actuarial determinations, as fiduciaries of system participants and their beneficiaries.

This section of the Montana Constitution was adopted as constitutional amendment number 25 as the result of a 1994 ballot measure. Because of its recent adoption, the meaning of the text of the amendment has not been the subject of any attorney general opinions or reported judicial opinions. The first sentence in (1) essentially incorporates the holding of Board of Administration. The language of the second sentence of (1) essentially means that the state may not use either employer or employee contributions and the income they generate as the basis for a loan, use those contributions and income for any purpose other than payment of retirement benefits, and may not curtail or end altogether the rate of contributions established in statute. These prohibitions seem to apply to both contributions to the current PERS retirement plan and to contributions to any new or modified plan created in the future.

All of the prohibitions contained in Art. VIII, sec. 15 are compatible with the "contract" theory of protection of pension plans adopted by the Montana Supreme Court. However, the breadth of language used in section 15 raises two further questions. These questions are: (1) whether the requirement for actuarial funding applies to all types of future retirement plans and therefore prohibits the creation of a DC plan; and (2) whether the requirements that plan assets be held "in trust" and not be "diverted" or "reduced" prohibit the transfer of an employee's assets from the current DB hybrid plan to a modified DB plan with DC components, even though the DB plan would continue to be actuarially funded or even though the creation of the DB plan with DC components and transfer of employee assets to that system constituted a "California rule" modification. As noted, no case history has developed on section 15 because it was only recently adopted. As to the first question, there is no indication in the legislative or ballot measure history of section 15 that the section was intended to prevent the creation of a DB plan with DC components. That issue was simply not addressed in the history of the section. However, taken literally, the language of section 15 would seem to prevent the creation of such a plan. The situation is the same concerning the second question; there is no indication in the section's legislative or ballot measure history that it was intended to prevent transfer of assets with a member's consent from the current hybrid DB plan to a modified DB plan with DC

components. However, taken literally, the language of section 15 would seem to prevent such a transfer. This seems especially true because of the potential for the adverse effect of the valuation of transferred assets in times of a falling stock market if there is no protection applied to the value of those transferred assets.

### III CONCLUSIONS

The application of Montana Supreme Court opinions, 35 A.G.Op. 4, 39 A.G.Op. 51, the Board of Administration and Association of State Prosecutors opinions, and Article VIII, sec. 15, of the Montana Constitution to the PERS means that:

1. Members of the PERS have a contractual right to retirement benefits. The terms of the contract are probably governed by the laws applicable that were in effect when they became members. However, members of the PERS must await actual retirement before the right to a specific retirement benefit payment becomes fully "vested".<sup>8</sup>

2. The Legislature may not, without consent of the members of the PERS, make changes to the contractual rights of PERS members to a retirement benefit unless the modification is necessary to make sure that the members have the benefits they contracted for or the amendments are otherwise necessary to strengthen the retirement system.

3. Contributions by or for current members of the PERS retirement plan and any new or modified plan cannot be used for any other purpose than retirement benefits and cannot be used as the basis of a loan or be decreased or terminated for current or future members once established by the employment contract.

4. Members of the current PERS retirement plan who voluntarily transfer from the DB plan to a new or modified plan must, through a system of credits, cash payments, or otherwise, be given credit for benefits earned under the current hybrid DB retirement plan.

5. Members of the current PERS retirement plan and members of a new or modified retirement plan are entitled, both before and after any current members are transferred to that new or modified plan, to have their retirement benefit funded on an actuarially sound basis.

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<sup>8</sup> It is believed that the only way that the Montana Supreme Court's opinions in the *Evans* and *Sullivan* cases can be reconciled with the Court's opinion in *Gulbrandson* is to say, like the California Court of Appeals in *Valdes*, that upon commencement of employment a member of the PERS is vested with a nonspecific right to payment of a retirement benefit under the statutes that apply to that member but that the member must await actual retirement for the right to a specific payment to become "vested".

Whether this requirement as a practical matter prohibits the transfer of a specific PERS member to a new or modified plan depends upon how the assets of the current PERS that are intended to be moved, the assets of remaining members, and the liabilities that remain behind are valued.

6. The employee contribution required to be made by current members of the PERS retirement plan cannot be increased, whether or not those employees elect to transfer to a new or modified retirement plan, without a corresponding increase in their retirement benefits.

7. No assurance can be given that the language of Art. VIII, sec. 15, of the Montana Constitution would not be construed by a court to prevent the creation of a modified DB plan with a DC component. Likewise, no assurance can be given that the language of the same section requiring retirement system assets to be held "in trust" and prohibiting them from being "diverted" or "reduced", would not be construed to prohibit transfer of a PERS member and the member's retirement trust fund assets from the current DB hybrid plan to a modified DB plan with a DC component.

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