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1  
2 **INTRODUCTION**

3 The Oregon Public Employee Retirement System (PERS) became a self-sufficient  
4 pension plan on June 23, 1999, at a time of high asset values, by enactment of Or Laws 1999,  
5 Chapter 317, Sections 8 & 9. The so-called 2003 PERS modifications now before the court are  
6 not necessary as a remedial measure because existing Oregon law already limited actuarially  
7 calculated liability. The risk of asset depreciation, system wide, had already been substantively  
8 transferred to the PERS beneficiaries. The only consideration that is appropriate here is the  
9 actuarial soundness of the design among PERS beneficiaries, not between the government  
10 sponsors and the plan beneficiaries. The adjudication of the Contract Clause claims and the  
11 measure of damages will be incomplete if the blanket and express limit on liability is not  
12 considered here.

13 The substantive exclusion of liability has been ignored ever since the stock market  
14 downturn from 2000 to 2002 by the presumed, though not court ordered or litigated, obligation to  
15 cover an actuarially calculated deficit between accrued benefits and the value of fund assets. This  
16 transfer of many billions of dollars, of dubious legality, effects the calculations of damages  
17 presented by plaintiffs. This contributes to a potent combination of both legal uncertainty and  
18 factual uncertainty that makes summary judgment inappropriate at this stage of the process.

19  
20 **STATEMENT OF INTEREST**

21 I have an active interest in the proper allocation of finite public resources so as to enhance  
22 the general welfare of the citizens of Oregon. My concerns here pertain to issues not raised, and  
23 not likely to be raised, by governmental parties and their legal representatives. In one recent  
24 example, I brought legal action against the State Treasurer in Marion County in October 2003  
25 challenging a recent bond issuance on behalf of state PERS beneficiaries. My objections were  
26 ultimately considered mere policy disagreements, thus, by definition, I could not reach the merits  
27 of the disagreement. The resolution of that case makes clear that the best approach to assisting  
28 the court here in the instant case, on public policy matters, is as Amicus Curiae rather than as a  
29 direct intervening party. While I intend to raise issues, and defenses, not directly raised in the

1 pleadings of plaintiffs or the answer of defendants they remain within the scope of issues that the  
2 court, sua sponte, can raise and resolve on its own authority in the interest of justice. Where the  
3 government stands opposed to a discrete set of beneficiaries it should be clear that there is the  
4 possibility that some issues might not be raised before the court for purely political reasons. I  
5 believe that the public interest will be enhanced by presentation of matters that a governmental  
6 entity could raise but has exercised political discretion not to raise.

7         If the issue preclusion effect of the ultimate resolution of the instant case is limited  
8 exclusively to the parties before the court then any particular interests I, or anyone else, might be  
9 able to obtain standing upon can be fully aired such some other case. If, alternatively, issues of  
10 general policy are resolved here then my future right to raise them in a trial court would be  
11 confined by such ruling. My concerns, while generally applicable to the health and education of  
12 all Oregonians, conflict with the interests of the plaintiffs and support those of non-PERS direct  
13 beneficiaries of governmental assistance. I believe that my interest is of no greater or lesser legal  
14 significance than if this court extends a ruling in this case, beyond the named plaintiffs, to the full  
15 set of PERS beneficiaries.

16         Stated more bluntly – the plaintiffs’ acknowledged standing in this case, and resolution in  
17 their favor, threaten the ability of education and health advocates to subsequently address the  
18 constitutionality of significant monetary transfers to the private interests of private parties to the  
19 significant detriment of the ultimate beneficiaries of government funded programs. Those  
20 ultimate beneficiaries are not represented here other than through the government policy makers  
21 themselves. I wish to hold the government accountable for their actions even if that might  
22 nevertheless be financially adverse to the private plaintiffs. This potential adverseness to the  
23 plaintiffs interests should not serve as justification to deny me this opportunity to challenge the  
24 governmental actions with equal vigor to that of the PER beneficiaries – particularly if presented  
25 only as Amicus Curiae. Most advocates for the ultimate beneficiaries of health and education  
26 programs are themselves vulnerable to the largely discretionary funding acts of the PERS  
27 beneficiaries here and thus have a strong disincentive to challenge such private interests. My  
28 participation in this case, as a mere concerned citizen, is in the public interest and the issues I  
29 will raise are not otherwise represented by the present set of parties.

1 The potential prejudice against plaintiffs by issues I may raise will be no greater than that  
2 to which they are already exposed should they are raised by the governmental defendants. I do  
3 not believe that the specter of prejudice against the governmental defendants is relevant to the  
4 acceptance or rejection of my participation.

## 5 **STATEMENT OF CASE**

6 The plaintiffs introduce two main theories for recovery (among others). The first is a  
7 Contracts Clause violation under either the state or federal constitutions. The second is a claim  
8 for takings of private property for public purposes. The plaintiffs anticipate a defense based on an  
9 excusable justification, which assumes a prerequisite finding of a contract in their favor.

10 Plaintiff's claim for relief, even if confined by the legislative grant of jurisdiction, leaps  
11 over alternative non-constitutional statutory grounds for recovery. The anticipated defense makes  
12 the same leap but compounds the problem by assuming that the instant proceeding is like a class  
13 action settlement, negotiated via the legislature, where the only question is whether the highest  
14 court has any reason to object to such settlement. If the defendants in the instant case were  
15 willing to settle to the complete satisfaction exclusively of the named plaintiffs in the instant  
16 action, and wrote a check, then this court would not have occasion to opine on the merits of the  
17 settlement and generally applicable to nonparties. Additionally, this unique original appeal  
18 process, with its confined scope of inquiry, would never again be invoked because the time  
19 period would have expired.

## 20 **SUMMARY OF ARGUMENT**

21 The controversy as structured by the legislative assembly and presented by the parties is  
22 characterized more by what is excluded than by what is before the court for resolution. This is a  
23 manufactured dispute that is designed and intended to achieve indirectly what cannot be achieved  
24 directly.

### 25 ***The Defense Argument***

26 The case of United State Trust v. New Jersey, 431 US 1 (1977), sets out a sequential three  
27 part inquiry into resolving an alleged violation of the Contract Clause. The final step is  
28  
29

1 essentially a justifiable excuse defense. The government defendants here posit as their defense  
2 that this court should recognize a reasonable and necessary test and that the government here has  
3 met that standard in the 2003 PERS modifications. This posture of the government is premised  
4 upon the assumption of the existence of a contract subject to Contract Clause analysis. Their  
5 presentation, as to specific items, is largely confined to argument alone that there is no contract  
6 right as to specific items and that it is necessary and proper nevertheless to arguably restrict such  
7 rights if the they are considered part of the contract.

### 8 ***The Plaintiffs Claims***

9  
10 The Plaintiffs present Contract Clause arguments (and a Connecticut-style takings claim)  
11 that facilitate the presentation of Defendants' justification defense. This leaves the court in the  
12 position of opining on the intensity of the reasonableness of the states' conceded violation of a  
13 contract. The legal standard as presented maximizes the subjectivity for this court to nominally  
14 rule either way based on nominally concrete grounds.

### 15 ***The Two Elephants***

16 There is a Legal Elephant and Factual Elephant standing in the middle of the room. The  
17 Legal Elephant is that under United State Trust the existence and extent of the contract must first  
18 be defined under state law. The contractual bargain is confined by existing limits imposed by the  
19 Oregon Constitution upon both the legislature and their delegated bargainers alike. The results of  
20 that bargaining, in the 1999 legislative session, fundamentally restored the full self-sufficiency  
21 design of the entire public pension plan. The Factual Elephant is that many billions of dollars  
22 have been transferred from the public trust to the private and exclusive benefit of private parties  
23 between the June 23, 1999, effective date of the 1999 PERS reforms and the effective dates of  
24 the 2003 PERS modifications. The legal merits of the transfers have not been tested nor do the  
25 2003 PERS modifications offer new guidance as to their merits. The factual record forming basis  
26 of the measure of damages to the named plaintiffs, and beyond to the full class of PERS  
27 beneficiaries, assumes, by omission of any legal challenge, that such transfers were valid. But  
28 they were neither valid nor would they have been enforceable.

1 ***The 2003 PERS Modifications Are A Mere Subset Of Liability Limitations That***  
2 ***Were, and Remain, Limited by the Legislature's 1999 PERS Modifications.***

3 The 2003 PERS modifications do not restrict the contract rights of PERS beneficiaries  
4 any more stringently than already restricted by the 1999 PERS modifications. They add nothing.  
5 It would be absurd to view the 2003 PERS modifications in isolation from the preexisting and  
6 more stringent limitations on state liability.<sup>1</sup> The 2003 legislature effectively hopes to  
7 retroactively supplant a less restrictive 2003 limit on liability in place of the 1999 liability limit  
8 without drawing this courts attention to the 1999 liability limit. A non-absurd result would be to  
9 look upon the 2003 PERS modifications in the context of a pension plan that is expressly  
10 designed to be self-sufficient and to consider only the actuarial soundness, among PERS  
11 beneficiaries, of the 2003 PERS modifications.<sup>2</sup> The 1999 PERS modifications are clear and  
12 unambiguous.<sup>3</sup> Of particular note is that the 1999 PERS modifications, expressly limiting  
13 liability, remain on the books today and thus could again be raised in the future to assert that  
14 there is and was no prior or prospective liability contemporaneously with such future legislation.  
15 The 1999 PERS modifications, at the time of passage and enactment, was an allocation of the  
16 risk of loss of the value of the fund assets, and it expressly restricted accrued rights. This is the  
17 only reasonable construction.

18 ***Other Ever Present Limitations On The Legislature By The Oregon Constitution***

19 The authority of the legislative assembly is, and has always been, confined by two  
20 components of the Oregon Constitution. First, the state is prohibited from taking an interest in  
21 private enterprise.<sup>4</sup> This limits the authority of the legislature to gamble on the fortunes of the  
22 gains of business enterprises. Second, one legislature cannot make appropriations on behalf of a  
23

24  
25 <sup>1</sup> Where there are several provisions or particulars, as construction is, if possible, to be adopted that will give effect  
26 to all. All statutes on the same subject must be taken in pari materia, and read together as one law. ORS 174.010;  
27 State v. Buck, 200 Or 87 (1953); Taggart v. School Dist. No 1, 96 Or 422 (1920).

28 <sup>2</sup> Where the language of a statute admits of two constructions, one absurd and the other reasonable, the court will  
29 apply the latter construction even if such is at variance with the clear and literal language of the statute. Hollinger v.  
Blair, 270 Or 46 (1974); Wright v. Blue Mt. Hosp. Dist., 214 Or 141 (1958); Pendleton v. Umatilla County, 117 Or  
140 (1926); State v. Gates, 104 Or 112 (1922).

<sup>3</sup> Clear, unambiguous statutes are to be construed according to their plain meaning. Satterfield v. Satterfield, 292 Or  
780 (1982); Johnson v Star Machinery, 270 Or 694 (1974).

<sup>4</sup> See Sprague v. Straub, 252 Or 507 (1969).

1 future legislature. This has been litigated in the context of Certificate of Participation bonds and  
2 survived the challenge only upon the basis that a future legislature could simply choose not to  
3 pay the bonds.<sup>5</sup> The Contract Clause is classically applicable to bonds and surely the parallel to  
4 prospective pension obligations are similarly limited.

5 The Oregon Constitution also requires adequate funding for education. Just what, exactly,  
6 is adequate is not defined but must surely mean that the public schools must remain open for a  
7 minimum number of days. The legislature's recognition of the right of teachers to form unions  
8 and bargain collectively, perhaps even upon pension terms, must surely be confined by the  
9 superior command of the Oregon Constitution.<sup>6</sup> If teachers were to strike then teachers would not  
10 be contributing to PERS and employers would not be making payments upon employer  
11 contribution rates associated with presumed UAL liability. Both the salary and employer's  
12 contributions (pegged to a fractional share of salaries) would then be able for use to pay  
13 temporary replacements to meet the constitutional obligation. This would clearly be a mutual  
14 right that is retained by employers to assure the wage terms are bargained rather than set by the  
15 legislature. Whether pension terms remain bargainable does seem cloudy at best; though they  
16 surely could not exceed the duration of the bargained contracts themselves.

### 17 ***The Legislature Is Actually Seeking Legal Clarity Not A Particular Result***

18 One of the most elementary purposes of law and contracts alike – public contract and  
19 private contract – is to provide certainty. The position presented above may appear extreme at  
20 first blush but is little more than a presentation of the opposite end of the spectrum of uncertainty  
21 that has been left to the vagaries of fleeting political initiative and legal advocacy. It is that vary  
22 uncertainty that has led to this case and the posture of the parties. Yet, resolving this case based  
23 upon the motions of ambivalent and conflicted protagonists will not result in any greater  
24 prospective certainty than exists today. The urgency that spawned this original jurisdiction case  
25 reflects not so much a precise net result but rather a legislative purpose to eliminate legal  
26

27  
28 <sup>5</sup> See Kane v. Goldschmidt, 308 Or 573 (1989).

29 <sup>6</sup> It would be odd for the Supremacy Clause of the US Constitution to operate together with the right of public employees to associate and to bargain collectively to effectively trump the state's constitutional prohibition on ownership of private property and procedural steps for appropriations.

1 uncertainty. It is not the role of this court to independently weigh the legislative merits of the  
2 balance of winners and losers but to define the legal constraints and boundaries of the parties in  
3 reaching that balance. If Today's legislature can ignore Yesterday's bargain then Tomorrow's  
4 legislature could likewise ignore Today's bargain.

### 5 ***This Court Must Insist Upon Both Finality And Adversity***

6 This should not require elaboration. The present set of parties are not sufficiently adverse.  
7 Both sides are seeking reformation of legislation rather than resolution of a controversy limited to  
8 the parties before the court. The public officers that are supervised by this court have a duty in  
9 the public interest to defend the public trust by raising colorable claims in the legal context that  
10 were omitted in the legislative context.

11 The resolution of this case should be a determination of Zero liability, inclusive of post-  
12 June 23, 1999, UAL payments already made. Alternatively, the remedy should be expressly  
13 applicable only to the named parties and represent a final determination of their rights, as  
14 measured by certain dollar damages payable today, under their claimed contracts.

### 15 ***Adversarial Absurdity***

16 Consideration of the 1999 restoration of a self-sufficiency design is mandatory under both  
17 the statutory rule of construction of in pari materia and the concept that each provision of the  
18 statutes must be presumed to have some effect or meaning. The inclusion, or exclusion, of  
19 discussion of the 1999 PERS modifications also creates an inherent absurdity in the adversarial  
20 positions of the parties before the court. Let me illustrate by example here -- if the state were to  
21 point to the 1999 restoration of the self-sufficiency design of the entire plan then they would  
22 become the party insisting upon the benefit of that bargain. This is not to say that this would give  
23 the state a mutual right to protection of the Contract Clause but would convert the PERS  
24 beneficiaries Contract Clause claims into an absurdity. It is the PERS beneficiaries who would  
25 want to escape the consequences of that 1999 bargain. It would be the PERS beneficiaries who  
26 would be claiming that the legislature has the right to retroactively enhance the retirement  
27 benefits for work performed long ago. The PERS beneficiary claims to the interim transfers, and  
28 to the 2003 prospective enhancements to the investment returns for that past work, become  
29

1 nothing more than a mere claim to gifts who's sole remaining legislative purpose is based upon  
2 the settlement of potential law suits. The settlement of these law suits, even if the legislature acts  
3 a settler, in favor of PERS beneficiaries is patently unreasonable where they refuse to  
4 acknowledge the substantive allocation of risk of asset devaluation upon the beneficiaries rather  
5 than the state. This is applicable with equal force against payments made against calculated  
6 underfunding and against the consideration of the 2003 PERS modification.

7  
8 ***The 1999 PERS Modifications Substantively Restored Self-Sufficient Plan Design***  
9 ***By Limiting Accrued Liability to The Fund Assets***

10 One potential issue is whether the 1999 PERS modifications, limiting liability for  
11 otherwise accrued benefits upon termination of the plan to the fund assets, is substantive or  
12 procedural. If it is procedural then any legislature at any time can simply invoke the procedure to  
13 end the plan in its entirety without further liability whatsoever beyond the fund at that snapshot in  
14 time. Any post-1999 PERS modifications, specific or general, that purport to restrict liability  
15 could not be a compensable loss of PERS beneficiary rights unless the restriction is more drastic  
16 than that which the legislature has already established as its maximum liability. The legislature  
17 could pick and choose the timing of the termination at will. And the legislature could seemingly  
18 choose to fund or not fund the plan at will, without legal guidance or compulsion from either  
19 side. If the 1999 PERS modifications are substantive then it represents a contemporaneous  
20 bargain not only of the right to terminate but also affixes to that bargain the contemporaneous  
21 funding level and accrued benefits at the time. In Whipple v. Howser, 291 Or 475 (1981), the  
22 court noted that retroactivity would not be applied to substantive rights unless absolutely required  
23 and would not be presumed to be retroactive. Whipple, 291 Or at 485.<sup>7</sup> The defendants argue that  
24

---

25 <sup>7</sup> Oregon Appeals Court Judge Landau summarized Whipple, in Vloedman v. Cornell, 161 Or App 396 (1999) as  
26 follows:

27 The pertinent maxim of construction is that, in the absence of evidence of what the legislature  
28 actually intended, we presume that it intended retroactive effect to be given statutes that are  
29 "remedial" or "procedural," as opposed to "substantive," in nature. Whipple, 291 Or at 491-92  
(Tanzer, J., dissenting). In this case, two factors lead us to conclude that ORS 105.810(2) is  
remedial or procedural and, thus, retroactive.

1 the 2003 PERS modifications are intended to be prospective only. The 2003 PERS modifications  
2 have the flavor of a remedial measure. Yet they do not re-modify the restoration of self-  
3 sufficiency that 1999 PERS reforms created. The transfer of billions of dollars based on supposed  
4 liability for actuarially calculated underfunding is not dealt with as a new legal framework or as a  
5 remedy but rather it is just a matter-of-fact thing illuminated only by the present calculation of  
6 actuarial imbalance between accrued benefits and fair market value of the assets. As a remedial  
7 measure, independent of and certainly preceding the 2003 PERS modifications, this Factual  
8 Elephant would have to find an independent legal basis. See Wilkinson v. PERB, 188 Or App 97  
9 (2003) (the power to alter Oregon statutes is vested in the Oregon legislature).

## 11 **IMPORTANT UNANSWERED QUESTIONS**

13 Shall the determination of the constitutionality of the 2003 PERS reform legislation at  
14 issue here preclude all other potential challenges to the constitutionality thereof in other  
15 proceedings through operation of the judicial concept of issue preclusion?

16 Shall the determination of the constitutionality of the 2003 PERS reform legislation at  
17 issue here ignore alternative statutory grounds and state constitutional grounds for  
18 resolution because governmental advocates, including the legislative assembly, choose  
not to raise such issues or defenses?

19 Does the 1999 PERS reform legislation imposing a blanket limit on liability exclusively  
20 to the trust fund assets require this court to mandate a resolution of Zero liability even  
21 though the government has retroactively chosen to give many billions of unearned dollars  
22 to PERS beneficiaries based solely upon the speculative and unwarranted assumption that  
this court would rule that such payment was mandatory?

23 Does the 1999 PERS reform legislation imposing a blanket limit on liability to the trust  
24 fund assets also limit formula based minimums and rate of return minimums when  
calculating retiree payments?

25 Does the 1999 PERS reform legislation imposing a blanket limit on liability to the trust  
26 fund assets also limit application of actuarial equivalency factors to deriving the PERS  
27 beneficiary's priority or pro rata share of the limited fund assets?

---

28 Here, the legislature is expressly pointing to non-retroactive prospective substantive rights. It thus actually ignores  
29 payments made and rights during the time period between June 23, 1999 and the effective date of the 2003 PERS  
modifications. That is the legislature did not intend to modify prior rights, or payments.

1  
2 Shall contingent and speculative future events pertaining to asset appreciation or  
3 depreciation, or governmental increases or decreases in pay scale, or crediting of service  
4 credits other than through actual service, or negotiated settlements to threatened or actual  
5 lawsuits, form any part of this court's resolution to this controversy?

6 Shall the position of public trust held by governmental parties and their attorney  
7 advocates impose an affirmative duty upon them to raise colorable claims on behalf of the  
8 public or to argue that there are no such other colorable claims than as they present to this  
9 court?

### 10 **AMICUS' REQUESTED ACTION FROM THE COURT**

11 This special process for review, if it is effectively treated as a class action, exposes the  
12 general public to perhaps several hundred fold increase in costs than if the governmental  
13 defendants and their legal representatives avoid a judicial ruling altogether by writing a check to  
14 the plaintiffs. This willingness to expose the general public to extraordinary additional financial  
15 risk does not make any practical or rational sense if one assumes that the parties to any justiciable  
16 controversy must have interests that are adverse to one another. It is clear that the legislature  
17 desires legal certainty, but that alone cannot overcome the judicial prohibition on issuing  
18 advisory opinions. The remedy that plaintiffs and defendants, alike, appear to desire is confined  
19 to a reformation of the PERS statutes. Such a remedy involves prospective implementation in  
20 like manner to any routine legislative act. It lacks finality to any conceivable controversy specific  
21 to the parties before the court such that it becomes applicable only to them in some unique way  
22 not applicable to the public at large, or to PERS members at large. The special review authority  
23 and the superficial list of plaintiffs convert the entire process into a mere public policy  
24 disagreement where the anticipated result is an advisory opinion.

25 The court could instead reform the review authorization legislation alone, sua sponte, so  
26 as to preserve adversity and finality and yet still provide the legislature the certainty they desire.  
27 Conspicuously absent from the legislation is any downside risk to the plaintiffs. I call this the  
28  
29

1 Zero, Eight and Sixteen Billion dollar liability options.<sup>8</sup> The legislature apparently assumed a  
2 Contract Clause violation then worked backwards to limit the liability from Sixteen to Eight  
3 Billion dollars. The plaintiffs seek to push Eight Billion dollars back up toward Sixteen Billion  
4 dollars. There remain a host of claims that could be raised between the Zero and Eight Billion  
5 dollar liability range that have been carefully sculpted out of the legislation and therefore limited  
6 the issues raised by both the plaintiffs and defendants alike. The standard that is most applicable  
7 here is whether the local and state governmental entities, and their legal representatives, willfully  
8 and wantonly neglected their duty as guardians of the public trust by abandoning colorable claims  
9 at the first hint of possible legal challenges from representatives of PERS beneficiaries. This  
10 would inject a downside risk, in this case, upon the plaintiffs and simultaneously force the  
11 defendants to explain the glaring void in their vigor. If someone in government is writing checks  
12 approaching seven or eight billion dollars today then merely asking them to more fully explain  
13 and account for their actions seems to be a comparatively de minimus request. The public policy  
14 makers are eager to escape potential personal liability by effectuating a four year delayed  
15 ratification to gross misappropriation through the 2003 PERS so-called reform legislation and  
16 subsequent judicial acceptance by Oregon's highest court.

17 My personal opinion is that unstated political deals were made behind closed doors prior  
18 to the 2003 legislative session. Those motivations are not directly part of this judicial process.  
19 However, to the extent that the parties, particularly the governmental parties, in this proceeding  
20 restrain their vigor to effectuate those deals then it properly becomes part of this proceeding here.  
21 The appropriate response is for this court to treat this proceeding as slightly more robust than the

---

22 <sup>8</sup> Ever since the downturn in the stock market in 2000 the local governments have elected to transfer many billions of  
23 dollars, based on actuarial calculated underfunding, from tax revenue and borrowed moneys to PERS rather than to  
24 withhold such transfers pending court order. This alternative position would be a Zero liability option premised upon  
25 a concern to avoid personal prosecution for official or criminal misconduct. The mere absence of investigatory or  
26 prosecutorial activity by the Attorney General or local District Attorneys should not be considered here as conclusive  
27 that such actions might not be appropriate.

28 The selection of the Eight and Sixteen Billion dollar liability options are mere approximations of aggregate  
29 presumed liability options. The Eight Billion dollar option roughly corresponds to the Legislature's so-called 2003  
PERS reforms (including belated adjustment to actuarial equivalency factors). The Sixteen Billion dollar liability  
option roughly corresponds to the aggregate liability claimed by all PERS beneficiaries above the Zero liability  
option. The issue presented to this court arguably represents only that portion between Eight and Sixteen Billion  
dollars not yet delivered, while the legal issues presented fully overlap with an alternative fact situation where no  
actuarially calculated underfunding had been transferred up to this point.

1 slow-pitch softball match that the legislature has invited the judiciary to join. This court should  
2 shake off the blinders that the legislature has tried to strap over its' eyes.

3 **THE LOST AND FOUND BARGAIN OF 1999 (THE REAL PERS**  
4 **REFORM LEGISLATION)**

5 The fund; The trust fund and its assets; The trust fund and its assets, to the express  
6 exclusion of any calculated actuarial mismatch between assets and liabilities, were dedicated to  
7 the PERS beneficiaries on June 23, 1999, by Or Laws 1999, Chapter 317, Section 8, which reads  
8 in part:  
9

10 SECTION 8. ORS 238.660 is amended to read:

11 [ . . . ]

12 (2) Until all liabilities to members and their beneficiaries are satisfied, assets of  
13 the fund may not be diverted or otherwise put to any use that is not for the  
14 exclusive benefit of members and their beneficiaries. This subsection does not  
15 limit return of employer contributions for health benefits in the manner provided  
16 by ORS 238.410, 238.415 and 238.420 upon satisfaction of all liabilities for  
17 health benefits under those sections.

18 [ . . . ]

19 The abandonment of this right by the state to the fund's assets, below long term calculated  
20 contingent liabilities, was contemporaneously coupled with the following amendment:

21 SECTION 9. ORS 238.600 is amended to read:

22 [ . . . ]

23 (2) If the Public Employees Retirement System is terminated, or if contributions  
24 may no longer be made to the system, each member of the system has a  
25 nonforfeitable right to the benefits that the member has accrued as of the date of  
26 the termination, or as of the date that contributions may no longer be made to the  
27 system, to the extent that those benefits are funded.

28 The breadth of this 1999 reform is unmistakable and clear. The plain language, notwithstanding  
29 the extraordinary bubbling over of the stock market, substituted the assets for any and all  
otherwise guaranteed fixed rates of returns. The scope of the language is not confined to  
prospective effect but rather includes the full present value of the assets no matter when the  
deposits were made and their intervening change in value. That is, it retroactively transferred

1 resources from the public to the private interests of PERS beneficiaries.<sup>9</sup> The transfer was not of  
2 a fixed dollar amount representing the value at that snapshot of time but rather the assets from  
3 which a fleeting and contingent value could be calculated.

#### 4 **BARGAINERS REMORSE (THE 2003 PERS REFORM)**

5  
6 Whoops; Whoops, what did we do; Whoops, why did we abandon our claim to fixed rates  
7 of return? Why did we give up the right to the OSPOA<sup>10</sup> ruling that intimated that the legislature  
8 could not end the pension system and fixed rates of returns on future deposits of Tier-One  
9 employees so long as they remain part of the system? Hush hush; the stock market crashed. ORS  
10 238.660(3) contains the following phrase:

11 The State of Oregon and other public employers that make contributions to the  
12 fund have no proprietary interest in the fund or in the contributions made to the  
13 fund by them. The state and other public employers disclaim any right to reclaim  
those contributions and waive any right of reclamation they may have in the fund.

14 This escape valve from the harsh effect of the stock market crash offered the only salvation to the  
15 PERS beneficiaries. The incentive was to rapidly transfer extraordinary amounts of cash from the  
16 public to the private interests of PERS beneficiaries so as to escape the consequences of the 1999  
17 bargain. Yet, that very same subsection, ORS 238.660(3), ends with the phrase:

18  
19 This subsection does not prohibit alteration or refund of employer contributions if  
20 the alteration or refund is authorized under this chapter and is due to erroneous  
payment or decreased liability for employer contributions under the system.

21 All the government payments based on actuarially calculated underfunding from June 23, 1999,  
22 forward are just such “erroneous” payments. It is, and was, a mistake of law to ignore the 1999  
23 reforms. The treasurers of the state and local governments could not unilaterally restore  
24 guaranteed rates of returns, as a legally compellable obligation, merely by assuming that writing  
25 unauthorized checks would create the illusion of authorization. The existence or non-existence of  
26

27  
28 <sup>9</sup> There are a range of legal issues that could have been raised at that time to transfer some or even all of the PERS  
29 assets directly to the public. Such issues are not fully addressed here in this brief. The point here is just to note that  
there are sufficient claims that the abandonment of such claims via Section 8 above is enough to represent  
consideration for forming a bargain or contract.

<sup>10</sup> Oregon State Police Officers Ass’n v. State of Oregon, 323 Or 356 (1996)

1 the transfers based on the presumption of liability for covering actuarially calculated  
2 underfunding should have no effect here today upon this court to determine the validity, as a  
3 matter of law, of that presumption. The 1999 PERS reforms noted above formed an integral part  
4 of the bargain and fundamentally altered all prior existing statutes and were undertaken with full  
5 knowledge of preceding case law.

## 6 **THE 2003 REFORMS CANNOT BE INTERPRETED WITHOUT** 7 **CONSIDERATION OF THE 1999 REFORMS**

8  
9 In McGrath<sup>11</sup> the court looked to the reserved right of the legislature to terminate a  
10 pension plan in its entirety in resolving a Contract Clause claim. The 1999 PERS reforms, as

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11 <sup>11</sup> McGrath v. Rhode Island Retirement Bd., 88 F.3d 12, 18 (1st Cir. 1996)

12 Notwithstanding any apparent authority there must also be actual authority to negotiate. The actual authority is  
13 confined by other Oregon Constitutional provisions, particularly appropriations. (See note 6 below containing text of  
14 relevant portions of the Oregon Constitution on appropriations.)

15 The argument that the legislature or a delegated bargainer can promise contingent future pay in order to attract or  
16 retain employees cannot overcome the constitutional limitations on appropriations within a budget cycle. If the state  
17 chose to cut pay in half and then all the employees left in disgust then the state can use the money saved to hire a new  
18 crop of employees. This offer of pay for services remains a matter subject to new bargaining to meet the  
19 circumstances at the time. The wisdom of one option or another is not law but a bargain for a very limited period of  
20 time. No current employee obtains a judicially enforceable right to compel the legislature to raise their pay in  
21 subsequent years against the wishes of future legislative assemblies.

22 See also Local 290 v SEPTA, 145 F.3d 619, (NO. 96-1760, May 27, 1998, First Circuit) applying McGrath and  
23 collecting cases.

24 One must note, in addition to the reserved right to terminate a plan, that a public official could not agree to ignore in  
25 court proceedings laws that expressly confine bargaining authority. There is little or no legal difference here between  
26 the government simply writing checks to a bunch of folks based on past work performance and writing checks that  
27 are redeemable only after a slight bit of delay so as to characterize the illegal gift as a lawful pension couple with a  
28 promise that the government will not raise valid legal arguments opposing the gifts. The sale of service year credits  
29 in lieu of work is effectively the act of writing a check.

30 See also Parker v. Wakelin et al., (CA 1, No. 96-2225, 8/11/97), which is a follow up case to McGrath dealing with  
31 reductions in accrued (i.e., vested) benefits. The court applied United States Trust Co. v. New Jersey, 431 U.S. 1, 21  
32 (1977), to an amendment that reduced benefits in the face of a provision saying that benefits shall not be reduce.  
33 Here, Or Laws 1999, Chapter 317, Section 9, specifically amended the entire plan to expressly reserve the right to  
34 terminate the entire plan **and** to confine sponsor liability to the level of funding at the time. Oregon has a provision  
35 that arguably restricts the authority to reduce benefits. These restrictions are fully wrapped into the 1999 PERS  
36 Reforms, and could only affect a pro rata distribution. This is buttressed by the express use of the word accrued in  
37 the 1999 PERS Reforms. The fund, at whatever funding level, became the outer limit of state liability. This was the  
38 contract, and the assignment of risk to PERS beneficiaries is unmistakably clear, inclusive of otherwise accrued  
39 benefits that could not otherwise be reduced. It is **not** the legislature that has caused any reduction to the PERS  
40 beneficiaries, it is the market drop since June 23, 1999. It is unmistakably clear that the government plan sponsors

1 noted above, reasserted and clarified the reserved right to terminate the pension plan in its  
2 entirety.

3 The 1999 PERS reforms added the component, not at issue in the McGrath case, of  
4 expressly confining liability to the assets in the fund. The liability-limiting phase “to the extent  
5 that [accrued] benefits are funded” must be interpreted to mean lawfully<sup>12</sup> funded. ORS  
6 238.600(2).

7 The general limitation on liability for lack of funding, in the face of otherwise specific  
8 legislative mandates, exists in other parts of the Oregon Revised Statutes. One example is the  
9 limitation placed on the otherwise mandatory obligation of the state and local governments to  
10 provide treatment for drug and alcohol abuse.

11 SECTION 1. ORS 430.630 is amended to read:

12  
13 430.630. (1) In addition to any other requirements that may be established by rule  
14 by the Department of Human Services **and subject to the availability of funds**,  
15 each community mental health and developmental disabilities program shall  
16 provide the following basic services to persons with mental retardation and  
17 developmental disabilities and alcohol abuse, alcoholism, drug abuse and drug  
18 dependence:

19 [. . .]

20 Or Laws 2003, Chapter 782, Section 1. (Emphasis in original signifying  
21 amendment.)

22 One could clearly visualize a different set of politicians that would refuse to fund actuarially  
23 calculated underfunding as it would be against the law and then choose to instead issue bonds to  
24 raise funds to cover the health needs of the citizens in the community. Local, as well as state,  
25 governments have a statutory duty to provide the care and to pay for its costs based on need

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26 did not have to cover any underfunding between June 23, 1999, and any time thereafter because they also had no  
27 obligation to fully fund accrued benefits even upon termination or as a precondition for termination.

28 <sup>12</sup> It is my contention that all transfers based on presumed liability for actuarially calculated underfunding were not  
29 lawful. Another argument in support of this contention, which is not inclusive of all the arguments, is that such  
claims would have been unenforceable as they were contingent upon future events beyond this courts’ control or the  
control of any of the parties or the even the legislature.

1 rather than only from available funds. ORS 426.241, in part, specifically imposes that duty of  
2 care upon the county,

3  
4 **426.241 Payment of care, custody and treatment costs; denial of**  
5 **payment; rules.** (1) The cost of emergency psychiatric care, custody and  
6 treatment related to or resulting from such psychiatric condition, provided by a  
7 hospital or other facility approved by the Department of Human Services and the  
8 community mental health and developmental disabilities program director of the  
9 county in which the facility is located, except a state mental hospital, for an  
10 allegedly mentally ill person admitted or detained under ORS 426.070, 426.140,  
11 426.228, 426.232 or 426.233, or for a mentally ill person admitted or detained  
12 under ORS 426.150, 426.223, 426.273, 426.275 or 426.292, shall be paid by the  
13 county of which the person is a resident from state funds provided it for this  
14 purpose. **The county is responsible for the cost when state funds available**  
15 **therefor are exhausted.** The hospital or other facility shall charge to and collect  
16 from the person, third party payers or other persons or agencies otherwise legally  
17 responsible therefor, the costs of the emergency care, custody and treatment, as it  
18 would for any other patient, and any funds received shall be applied as an offset to  
19 the cost of the services provided under this section. (Emphasis added.)

20 Can the court fashion a test that assures that the allocation of finite public resources to  
21 competing needs is fair and free from political favoritism and free from invidious discrimination?  
22 Perhaps it is impossible for the court to engage in that balancing act. The Oregon Constitution  
23 does however supply the missing test and that is the requirement that all appropriations be  
24 distinct and dedicated with particularity to specified programs and that the payment  
25 authorizations not be clouded by law other than the simple notation of the amount and program.

26 13

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27 <sup>13</sup> **ARTICLE IX**  
28 **FINANCE**

29 **Section 4. Appropriation necessary for withdrawal from treasury.** No money shall be drawn from the  
treasury, but in pursuance of appropriations made by law.—

**Section 5. Publication of accounts.** An accurate statement of the receipts, and expenditures of the public  
money shall be published with the laws of each regular session of the Legislative Assembly.—

**Section 6. Deficiency of funds; tax levy to pay.** Whenever the expenses, of any fiscal year, shall exceed the  
income, the Legislative Assembly shall provide for levying a tax, for the ensuing fiscal year, sufficient, with other  
sources of income, to pay the deficiency, as well as the estimated expense of the ensuing fiscal year.—

**Section 7. Appropriation laws not to contain provisions on other subjects.** Laws making appropriations,  
for the salaries of public officers, and other current expenses of the State, shall contain provisions upon no other  
subject.—

1           When a government negotiator, legislator or otherwise, agrees to pay someone for their  
2 labor services, together with arguably mandatory minimum future payments based either on rates  
3 of return on pension contributions or through a formula based on highest three years of salary and  
4 years of service, are they not making a future appropriations decision?

## 6           **CONTINGENT FUTURE EVENTS AND 1999 PERS MODIFICATIONS**

8           Suppose that the present value of the PERS assets, measured today, exceeded the measure  
9 of accrued non-forfeitable PERS beneficiary rights by several billion dollars. Suppose further that  
10 such excess asset value was derived exclusively from direct employee contributions and none  
11 from UAL sump sum payments. The Sprague v. Straub, 252 Or 507 (1969),. decision would  
12 prevent the state from claiming any of that excess value, as against the PERS beneficiaries,  
13 because that would violate the Oregon Constitutional limit on taking an interest in private  
14 property.<sup>14</sup> The market value and the dividends obtained from the assets are the beneficial  
15 interest to which the owners can claim an exclusive property right. The statutory changes of 1999  
16 (Or Laws 1999, Chapter 317, Section 8 above) are not inconsistent with this prohibition; but they  
17 do not directly resolve how to distribute the excess.

18           The prohibition of the state from claiming a beneficial interest to the assets of the PERS  
19 system as a whole has however been violated in the many reserve accounts or employer accounts  
20 that have developed over time within the whole PERS scheme. The reserve accounts cannot  
21 belong to the state, nor can the state claim any beneficial interests derived from those accounts.  
22 Whether the arrangements, system-wide or as applied to specific employers accounts, cannot  
23 have their validity be dependant upon contingent future events of this nature. Are they valid only  
24 if there is no gain or if there is a gain that the state does not claim any of that gain? Are they valid  
25 only so long as there is a loss?

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26 <sup>14</sup> Sprague, as to PERS and losses notes “it is possible that the legislature might think it advisable to reimburse the  
27 fund although not legally obliged to do so.” 252 Or at 524 (emphasis added).

28 This is the flip side to a gain. The State is Constitutionally prohibited from investing to obtain a gain. The legislature  
29 is not prohibited, by the Constitutional prohibition on investing in private enterprise, from subsequently covering  
PERS losses.

1 The court refuses to resolve abstract, hypothetical or contingent cases. See Brumnett v.  
2 PSRB, 315 Or 402 (1993) and Gortmaker v. Seaton, 252 Or 440, 442 (1969). So long as there is  
3 no surplus then there would be no ability to obtain a ruling on how the excess would be  
4 distributed. The court in Marr v. Fisher, 182 Or 383 (1947), addressed the legality of  
5 contingencies that are built into legislation. Was the mention of the right to terminate PERS, as  
6 passed in Or Laws 317, Chapter 317, Section 9, a delegation of authority to a future legislature?  
7 Such a grant of a right to terminate seems implausible as the Oregon Constitution does not  
8 confine that authority. It does seem plausible only in the context of overcoming the potential  
9 obstacle posed to termination by the Oregon State Police Officers Ass'n v. State of Oregon, 323  
10 Or 356 (1996) (OSPOA) decision. Section 9 represents, at a minimum, a clear legislative will  
11 that the PERS plan shall not be maintained indefinitely. The date of such potential termination is  
12 the only remaining contingency. The measure of accrued rights and the measure of the value of  
13 the assets in the fund are irrelevant to, and impose no condition precedent to, the right to  
14 terminate, because the liability is limited to the fund itself. The purpose behind the mention of  
15 accrued rights is plainly to limit all recovery to the fund itself, without any further payments from  
16 plan sponsors. If, as has happened subsequent to the stock market bubble, the assets dropped  
17 below the accrued rights then there could thus be no statutory right to compel UAL payments to  
18 raise the asset value up as a condition to terminate the plan. The liability limitation exists  
19 regardless of whether the law became operative upon passage or whether it became operative  
20 only upon subsequent legislative action.

21 The legislature has not altered ORS 238.600(2). The liability limitation to the fund thus  
22 still exists. The wording can clearly only mean that the risk of contingent asset depreciation shall  
23 not be borne by the state. Until the legislature changes the law as to who bears that risk then it  
24 has been allocated, by statute, to the PERS beneficiaries. The law is complete as to the allocation  
25 of the risk and the legislature did not, in the 1999 PERS modification, even attempt to grant  
26 another entity an arguable right to overcome or change the law so as to hold the PERS  
27 beneficiaries harmless to asset depreciation. See Foeller v. Housing Authority of Portland, 198 Or  
28 205 (1953) (citing Marr v. Fisher, 182 Or. 383 (1947)). All laws enacted by the legislature must  
29 be complete; the legislature cannot delegate the power to determine what the law shall be to

1 another branch of government. Foeller, 198 Or at 264. Such a grant to another branch or entity, to  
2 supplement the PERS losses, would have been absurd in any event because it would require  
3 appropriation decisions that are expressly reserved for the legislature.

4 The contingency, if there is one, is thus reserved to the legislature to make a new  
5 allocation of the risk of loss associated with asset depreciation. There is one specific subsequent  
6 alteration to the general risk of loss allocation made in 1999. The 2003 legislature passed HB  
7 2001 which established an 8 percent maximum rate of return except upon certain conditions.  
8 This appears to be a provision that exists outside of, or in parallel to, the self-sufficient plan  
9 design. HB 2001 (Or Laws 2003, Chapter 3) provides that a Tier-One PERS member cannot be  
10 credited with more than an assumed rate of 8 percent except upon the occurrence of particular  
11 events. It applies beginning with the 2003 investment year. This 8 percent rate of return is  
12 different from the 8 percent rate of return that preceded the 1999 PERS reforms which were  
13 subject to diminution by reason of fund asset depreciation. This new 8 percent rate of return on  
14 Tier-One accounts is silent as to whether it remains subject to the limitation of liability from the  
15 1999 PERS modifications. The state, presumably, retains the future right to terminate the 8  
16 percent rate of return if investment returns in the fund persistently lag behind 8 percent, thus  
17 inherently leaving accrued benefits potentially unfunded. This is actuarially unsound as a self  
18 sustaining plan. The younger participants bear the risk of loss disproportionately to the older  
19 members in such a declining market, but that is the law as intended by the legislature. This  
20 specific 2003 law does not authorize covering of losses for the period from June 23, 1999  
21 through the end of the 2002 investment year. It only hints at a potential obligation to cover,  
22 through its inherently unsound design, in the future if returns do not meet or exceed an assumed  
23 8 percent. The younger Tier-One participants, if they brought claims as a subset, would at best be  
24 able to claim that contingent future returns would be too low and that the legislature is being  
25 unfair to them. The older Tier-One participants continue to want the benefit of the already  
26 abandoned right to the an 8 percent assumed rate of return at the expense of the younger class

27 The Tier-One participants are simply not entitled under law as determined by the  
28 legislature to the transfer of any moneys from the general public to cover asset loss for the period  
29 from June 23, 1999, through the present; and particularly the period from June 23, 2002, through

1 the 202 investment year. The legislature has simply not authorized the payments. HB 3569  
2 allowed the State Treasurer to invoke Measure 29 bond authority to cover such pension liabilities  
3 as he, in his discretion, determined needed to made to the pension system. This authority of the  
4 State Treasurer, in the words from Foeller, represents a prohibited instance of the “the legislature  
5 [making] the effectiveness of one of its enactments depend upon the impulses of [someone  
6 else].” Foeller 198 at 215. The State Treasurer was left free to disregard the law on the allocation  
7 of risk of asset depreciation that the legislature generally dedicated to the Tier-One participants  
8 themselves. Some of the funds now within the pension system are the two billion dollars that the  
9 State Treasurer borrowed on behalf of the state and then unlawfully transferred (without  
10 following the constitutional requirements for appropriations) to the pension system where they  
11 are commingled with the employee contributions. The Attorney General, likewise, with or  
12 without a good faith conclusion about the presumption of liability to cover asset depreciation,  
13 simply does not have authority to directly or indirectly authorize another to appropriate public  
14 money for transfer to the private interests of a class of citizens. Here, there was neither a valid  
15 statutory right to demand the money nor authority to deliver the money.<sup>15</sup> The fact that the money  
16 was obtained from bond proceeds rather than obtained from income taxes or some other revenue  
17 source does not mean that the appropriations requirements of the Oregon Constitution do not  
18 apply. Measure 29 did not define pension liabilities, and thus can only be determined by  
19 reference to the statutes. Those unlawfully transferred funds should be excluded from the  
20 calculation of any damages for the plaintiffs in this case.

21 **THE OREGON CONSTITUTIONAL PROVISION RELATING TO**  
22 **APPROPRIATIONS CAN SUPPORT THE 1999 PERS REFORM**  
23 **LEGISLATION AND ARGUES FOR THE ADOPTION OF THE ZERO**  
24 **LIABILITY OBLIGATION OPTION.**

25  
26  
27  
28  
29 

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<sup>15</sup> The two billion dollars of borrowed dollars was ultimately transferred to PERS on March 17, 2004. This is documented in a letter from the former Chancellor of Higher Education to the bargaining representatives of employees in the higher education system that had demanded the money.

1 The Oregon Constitution also provides for a superior claim, apart even from the  
2 appropriations provision, for the adequate funding of education.<sup>16</sup> The pension provisions,  
3 notwithstanding legislative and ad hoc labor union agreements, are a distinctly isolated allocation  
4 and in direct conflict with meeting this prospective education obligation. While teacher pay  
5 includes both pay for labor and pension provisions it is the pay for labor to meet ongoing  
6 education needs that trump pension supplementation, not withstanding even the 1999 PERS  
7 reform that arguably put the assets of the PERS fund beyond the reach of legislators. This is yet  
8 another independent and adequate state laws grounds to avoid the contracts clause arguments, at  
9 least to the extent of education budgets from either taxes or bonds that were misappropriated to  
10 PERS rather than to education. Such education allocations should be available even if they are  
11 fully consumed to pay temporary replacement teachers while regular teachers perhaps strike in  
12 protest over pensions. If all allocations and borrowing authority are consumed to pay pension  
13 excesses then it interferes with the financial ability to endure a strike. The Constitutional  
14 requirement is directed at the educational services and not at the present set of persons currently  
15 performing that function. No legislature, nor any bargainer, can negotiate away the Constitutional  
16 obligation to educate the youth within the resources available. See Wilkinson v. PERB, 188 Or  
17 App 97 (2003) (the power to alter Oregon statutes is vested in the Oregon legislature). The  
18 legislature, likewise, cannot ignore the Constitutional limits.

## 19 **TAKINGS, TAKINGS OF WHAT?**

20  
21 The plaintiff's claims pertaining to takings are premised on the existence of some  
22 property interest to which it can be applied. At best they have an interest in the legislature not  
23 exercising the right to abandon the entire pension system to distribute the present fund assets on a

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24 <sup>16</sup> **ARTICLE VIII**  
25 **EDUCATION AND SCHOOL LANDS**

26 **Section 8. Adequate and Equitable Funding.** (1) The Legislative Assembly shall appropriate in each biennium a  
27 sum of money sufficient to ensure that the state's system of public education meets quality goals established by law,  
and publish a report that either demonstrates the appropriation is sufficient, or identifies the reasons for the  
insufficiency, its extent, and its impact on the ability of the state's system of public education to meet those goals.

28 (2) Consistent with such legal obligation as it may have to maintain substantial equity in state funding, the  
Legislative Assembly shall establish a system of Equalization Grants to eligible districts for each year in which the  
voters of such districts approve local option taxes as described in Article XI, section 11 (4)(a)(B) of this  
29 Constitution. The amount of such Grants and eligibility criteria shall be determined by the Legislative Assembly.  
[Created through initiative petition filed Oct. 22, 1999, and adopted by the people Nov. 7, 2000]

1 pro rata basis. The appropriate date to contemplate any rights to future participation in the  
2 pension plan, perhaps under OSP, is the date the voidable nature of the plan was clarified in the  
3 1999 PERS reform, June 23, 1999. The underfunding or overfunding of the plan assets relative to  
4 the accrued liabilities as of that date would be the proper focus, not the changes in the value of  
5 the assets subsequent to that time.

6 The case of Sprague also dealt with the voidable nature of PERS assets too. The  
7 challenge there was based on the state constitutional prohibition on taking an interest in private  
8 property. The court clearly excepted the PERS and SAIF systems based on the voluntariness of  
9 the state to cover loss, if such occurred. Sprague v. Straub, 252 Or 507 (1969). One would have  
10 to conclude that at no time has the state been **required** to make up for the lost profits of private  
11 investors, even if those private investors happen to also be current and former public employees.

12 One can assume that the PERS beneficiaries were not ignorant of this law. Likewise the  
13 government folks paying money to PERS based on underfunding, with the advice of learned  
14 professionals, can hardly claim ignorance either.

15 Perhaps the property interest claim is the right focus.

## 16 **SB 258 (2003) IS INHERENTLY UNSOUND**

17 SB 258 arguably gives inactive retirees a 50 per cent boost if they choose to leave PERS.  
18 This gift is not justified for the same reasons discussed above. One must distinguish between  
19 whether it is a gift from the public at large or whether it is a gift from the balance of fellow PERS  
20 beneficiaries (from their finite assets) for the benefit of non-inactive PERS beneficiaries. If it is a  
21 gift from the state then it is an unlawful post-employment supplementation. If it is a gift from  
22 fellow PERS beneficiaries then it must pass scrutiny from those other PERS beneficiaries would  
23 might be negatively affected.

24 It is relevant here in the instant action because the quantities likely to be paid out are so  
25 large, in lump sums, and later recovery of overpayments will be problematic at best. The  
26 calculation of the plaintiff's losses, if properly confined to the fund assets, could be adjusted to  
27 reflect the reduction in their pro rata share of the PERS assets caused by SB 258.  
28  
29

1 The inactive PERS members subject to SB 258, which is set to begin operation on July 1,  
2 2004, could have their pay-offs adjusted as a result of the this courts action here. This will be  
3 particularly significant if the court accepts that the Zero underfunding liability option should be  
4 chosen here or at least left on the table for another case.

5 It does seem that there is enough overlap that neither the 2003 PERS reforms nor the SB  
6 258 gift issue can be resolved other than simultaneously in the same action.

7 [The actuarial factors at issue in the City of Eugene case are linked in the same manner.]

## 8 **SOVEREIGN IMMUNITY IN FEDERAL COURT AND RESOLUTION OF** 9 **POTENTIAL FUTURE LITIGATION IF ISSUES RAISED HERE ARE NOT** 10 **FINAL AND COMPLETE**

11 A federal court would most like turn to this court to clarify whether there is or is not a  
12 contract via the mechanism of a Certified Question of Law.

13 Likewise a federal court would do the same to ascertain whether the conduct of public  
14 officials, and other non-governmental legal representatives and advisors, in Oregon are subject to  
15 RICO for their willful and wanton disregard for state law in undertaking bond activity or denying  
16 needy Oregonians their right to beneficial and essential services. Lawyers are granted an  
17 exception from RICO, via Reeves, only on the premise that they are considered outside  
18 professionals and do not operate or manage the enterprise. Reeves v. Ernst & Young, 507 U.S.  
19 170, 183 (1993). One could surmise that this exception also acknowledges that the professionals  
20 are subject to effective oversight by accountable governmental entities. Here, that would be this  
21 court. It is clear here that the legal advice of bond counsel is instrumental and indispensable to  
22 the state issuing bonds to then transfer such proceeds to the private interests of the enterprise  
23 beneficiaries. An actuary also plays an instrumental and indispensable role, as an expert, subject  
24 to discretionary review by the State Treasurer. Yet, at best, a successful RICO action all the  
25 relevant parties, in their personal capacity, could not offer an adequate financial remedy for all  
26 persons harmed. The only adequate remedy would be the return of illicitly obtained money from  
27 PERS to the state's general fund, which is within the power of the federal court. Such remedy of  
28 return would not end claims based on the temporary loss of funding.  
29

1 **BOND RATINGS (AS A POTENTIAL “ANY CONCEIVABLE”**  
2 **RATIONALIZATION)**

3 The state’s bond rating has suffered from the mischaracterization of the state’s pension  
4 liabilities. The ratings themselves are dependant upon what this court decides is the law. That is,  
5 if the Zero underfunding liability is the valid position then the bond rating for the state will go  
6 up, and borrowing will become cheaper. The cumulative effect of lawyers quibbling (or as the  
7 Governor so aptly remarked on other matters, “a bunch or lawyers talking”) about the horrible  
8 pension liability has driven up the rates that the state must pay on bonds that have been recently  
9 issued. This is a cost that results from the lack of resolution to the issues in the instant action.

10 **THE ACTUAL LEGAL SIGNIFICANCE OF AN ACTUARY**

11 The forecasts of an actuary are hopelessly, from a legal perspective, riddled with  
12 assumptions and contingencies. They do not lend themselves to finality in judicial decisions. The  
13 actuarial factors issues tend to show when the system design is unsound when there is either  
14 overfunding or underfunding. This design flaw cannot be remedied legislatively by enshrining  
15 uncertainty into the design. Rather it is remedied by allocating risk. Which was done in the 1999  
16 PERS reform. An actuary can offer only informational advice for noting when, and perhaps  
17 where, the law needs a redesign to keep assets and liabilities matched.

18 If this court chooses the Sixteen billion dollar option then can anyone assure that  
19 tomorrow we will not have to repeat the process with yet another Sixteen billion dollars. And so  
20 on. A mere tweak of the actuarial factors, such as a reduction on assumed rates of return, can  
21 make the Sixteen Billion dollar option seem like a bargain; if paid only once.

22 **MAINTAINING MULTIPLE TIERS**

23 First there was one tier and one plan. Then there was second tier, beginning January 1,  
24 1996. August 23, 2003 marks the beginning of a third tier. The future holds only the promise of  
25 yet another tier. The multiple tier scheme is arguable premised not on a days wage for a days  
26 labor but that upon the first day of work the government has promised the never change the  
27 system from that day forward. This concept of a full career term promise is incompatible with  
28 recognizing that a public employee is merely a person, like any other Oregonian, performing a  
29

1 service under a contract. I know of no rational basis to support the elevation of one's status,  
2 based on hiring date, above the value of the work they might perform. It is analogous to saying  
3 that the state of Oregon and its local governmental entities, when hiring outside counsel, shall  
4 use only attorneys who became members of the bar prior to January 1, 1996. Under the any  
5 rational basis standard one could argue that the availability of future service to the government  
6 was an important factor in seeking membership in the bar. One flaw in the reasoning is that it is  
7 not fair to persons that do not have the time-of-hire status.

8 This, of course, is an argument in favor of viewing pension laws with the same flexibility  
9 as any other law rather than as a contract. The only element of contract would be to prudently  
10 invest money deposited with the sate designated trustee for the pension investments. Creating  
11 tiers with decreasing rewards for each new group makes the whole scheme look clearly like a  
12 pyramid scheme. See Nielsen v. Myers, (A113071, May 12, 2004). If the scheme is not self  
13 sustaining from the original investments, without subsequent supplementation, then it is  
14 inherently going to fail.

## 15 **AUTHORITY TO REDUCE SIXTEEN BILLION DOLLAR LIABILITY TO** 16 **EIGHT BILLION IMPLIES LIKE AUTHORITY TO REDUCE IT TO ZERO,** 17 **AND THUS A DUTY TO SEEK THE ZERO LIABILITY OPTION**

18 I would share plaintiff's belief that the Eight Billion dollar option is not proper. If  
19 plaintiff's contract rights are found to be violated by the 2003 PERS reforms, in isolation, then  
20 the 16 billion dollar option becomes the only proper option. However, those contract rights  
21 cannot be viewed in isolation from the 1999 PERS Reform contract provisions that establish  
22 Zero liability for loss in investments. The legal choice then is between Zero and Sixteen, while  
23 the 2003 PERS Reforms and the Eight Billion dollar liability option should not even be on the  
24 table. The liability determinations must be based on the funding levels on June 23, 1999.

## 25 **CONCLUSIONS**

26 The angles of attack, both to defeat the PERS Coalition claims and to question the vigor  
27 of the Governmental defendants, are many and varied. The legislature's hopes are pinned to this  
28 court acting as if it were stoned and looking backwards through a telescope at a mere speck of  
29

1 law to the exclusion of anything else so as to transfer many billions of dollars from the public to  
2 the private interests of private individuals. The health and education, and thereby the general  
3 welfare, of Oregonians are at risk.

4 The real party seeking for an advisory opinion on the constitutionality of this statute is the  
5 government itself. The existence of the plaintiffs, who have genuine standing, are mere pawns to  
6 the process of creating the illusion of a justiciable controversy; but with class wide issue  
7 preclusion effect. See Gortmaker v. Seaton, 252 Or 440 (1969). The question that is not before  
8 the court is whether it was and remains official misconduct, or even theft, to transfer public  
9 money to PERS-beneficiaries based on the dubious claims of a mandatory obligation to cover  
10 actuarially calculated underfunding. Counsel for government officials can choose not to represent  
11 the elected officials if the conduct represents a willful and wanton violation of law.

12 If and when a criminal action is brought against the public officials who have been  
13 writing big checks then we might have a case worthy of testing the Zero liability option. See  
14 Gaffey v. Babb, 50 Or App 617 (1981) (declaratory judgment action seeking opinion on  
15 constitutionality of an ordinance). Alternatively, any local government could choose not to make  
16 a payment and then defend against a PERS demand, or a demand by the state or a PERS  
17 beneficiary, to deliver the money. Alternatively, someone such as myself could initiate a RICO  
18 action on behalf of aggrieved parties.

19 The legislation is a device to preempt such Zero liability option challenges and  
20 simultaneously vindicate the actions taken by public attorneys. This, in the end, is the result of  
21 the breakdown of certainty in the law and a breakdown in the judiciary's adherence to finality in  
22 judicial resolutions; which directly led to the multiple tier pension problem of today.<sup>17</sup> The  
23 problem is your creation.

24 A mutual bribery-blackmail pact by all sides in the PERS deals that transcend the  
25 legislative process to include negotiated vigor in your court is uniquely a problem that only you  
26 can solve. The Eight Billion dollar liability option is not even on the table as a renegotiated  
27 bargain, if there is indeed a contract for the period between June 23, 1999 and the effective date  
28

29 \_\_\_\_\_  
<sup>17</sup> See Oregon State Police Officers Ass'n v. State of Oregon, 323 Or 356 (1996).

1 of the 2003 PERS reforms. The relevant 1999 PERS reforms did not get amended in 2003. The  
2 choice is between the Zero and Sixteen Billion dollar liability options and the only non-absurd  
3 choice is the Zero liability option.

4 The best argument available to the defendants in justifying payments based on calculated  
5 underfunding is uncertainty on how this court will rule. The worst case argument for the  
6 defendants is that there are no colorable claims to raise in defense against the PERS  
7 beneficiaries. This worst case scenario is the one posited when the only defense is that of  
8 legislative justification to an apparent admission of a breach of contract. See, Chiles v.  
9 Robertson, 94 Or App 604 (1989) (duty to raise colorable claims). Here the duty of the public  
10 officials and officers, some subject to oversight by this court exclusively, in representing the  
11 public trust and in the public interest, is to the public and not to government employees.

12 The only claim that the state has for boosting pay to PERS by nearly 7 billion dollars is  
13 the threat of lawsuits. This court, by resolving the legality of those threats, can determine the  
14 validity of those claimed purposes. Then too this court can assess whether its public officers  
15 violated any duty by conceding to a 7 billion dollar giveaway. At a minimum this court should  
16 clarify the duty of lawyers so as to convert the legality of the Zero versus Sixteen billion dollar  
17 liability issue into one of law rather than one reserved to the discretion of legal advocacy.

## 18 **COMMENT ON STATE OF OREGON REPLY BRIEF (PAGE 76)**

19 The state refers to legislative history to claim that termination is too drastic and too  
20 complicated and would affect accrued benefits.

21 Yet, that ignores the law on the books at the time expressly limiting the payment of  
22 accrued benefits from the assets. The refusal to apply the 1999 PERS reforms, limiting liability  
23 for accrued claims to the fund assets, for the period between June 23, 1999 and the effective  
24 dates of the 2003 PERS reforms and beyond, are posited by the State of Oregon as something  
25 that a legislator could choose to ignore. The reasoning put forward is that it is “too complicated”  
26 (citing representative Hallock) and would affect the accrued claims of PERS beneficiaries. It  
27 should be abundantly clear that this legislative judgment, and specifically the contractual  
28 allocation of risk of asset depreciation below otherwise accrued claims, regardless of whether it  
29

1 is considered as a law or as an express contract provision subject to a Contract Clause analysis  
2 and the State of Oregon's urging of a "reasonable and necessary" defense. It makes no sense  
3 whatsoever to apply the reasonable and necessary defense, applicable only when there is a  
4 reduction of benefits, when the issue is instead the refusal to apply existing law from a prior  
5 legislature that expressly limited such liability.

6         The nature and existence of a contract is a prerequisite step in the Contract Clause  
7 analysis, before addressing the substantiality or necessity of such a change. (United States Trust)  
8 The contract, if there is one, must account for the statutory right to terminate the plan without  
9 liability beyond the assets. This examination of Hallocks's motive (assuming that such an  
10 examination legislative history is even relevant here under PGE v BOLI, 317 Or 606 (1993))  
11 should have no bearing on the retroactive rights and responsibilities prior to the 2003 PERS  
12 Reforms. Hallocks utterances pertaining to the 2003 PERS reforms cannot become the de facto  
13 new replacement legislative history applicable to contemporaneous legislative history for the  
14 1999 legislation. The State of Oregon is asking this court to ignore the legal basis for Hallock's  
15 points, and if it that is not enough, then to assume that it represents the will of the legislature both  
16 now **and** for the 1999 legislature. The truth is that the 1999 legislature expressly disclaimed  
17 general public liability for otherwise accrued benefits in the event of asset depreciation. This was  
18 reduced to clear and unambiguous law such that there is no need to even resort to an examination  
19 of legislative history. And if legislative history is used then the contemporaneous legislative  
20 history applicable to the liability limitation is the only relevant one to consider.

21         The harm that the State of Oregon points to in justifying upholding the 2003 PERS  
22 reforms apply equally to the already delivered and unlawful gift of nearly seven billion dollars to  
23 PERS.

24         Conceptually, the decision by the legislature, and the referenced portions of representative  
25 Hallock's utterances, represent a legal determination on the legal rights and responsibilities of  
26 parties preceding the enactment of current legislation. The comments, as to the period between  
27 June 23, 1999 and the effective date of the 2003 PERS reforms, could be treated in like manner to  
28 the review of a trial court judgment for errors of law. This court's duty is to interpret and apply  
29 the law to specific justiciable controversies. Representative Hallock's comments, as to prior

1 rights and responsibilities, cannot serve here to preclude an examination of their legal merit nor  
2 serve to exclude their examination in subsequent proceedings where those rights and  
3 responsibilities are the proper focus of a justiciable controversy properly before a court of law  
4 and where vigorous advocacy rather than political expediency govern the discussion and  
5 resolution of the issue.

6 If such restriction upon the legal value of Hallock's comments are not so confined then  
7 one could contemplate that the 2005 legislature could inturn make a new determination as to  
8 those prior rights and responsibilities and come to an alternative conclusion. Such other  
9 conclusion could be that the seven billion dollars of transferred UAL money was unlawful, and  
10 then order them transferred back to the public trust and from there properly allocate them through  
11 appropriations to cover health and education costs of the state.

12 HB 2001 purports to grant, or recognize, an 8 percent guaranteed prospective rate of  
13 return on some Tier-One beneficiary's deposits. One view is that this is an upper limit, restricting  
14 the allocation of surpluses. Another view is that it is a new specific right , new as a consequence  
15 of having been extinguished in 1999 to the extent fund asset values drop, applicable only to past  
16 deposits. This latter view makes this grant a gift too.

17 **COMMENT ON NON-STATE DEFENDANT REPLY BRIEF FOR STRUNK**  
18 **(PAGE 56)**

19 Ultra vires grant of benefits beyond their authority applies equally to payments on UAL  
20 prior to 2003 PERS modification.

21 At all times there was an absolute liability limit expressly pegged to the fund itself. The  
22 trigger event of termination or the ending of future contributions remained perpetually invocable  
23 throughout the entirety of the time from June 23, 1999 forward, and seemingly exists even after  
24 the 2003 PERS Reforms. That is, a future legislature still retains the authority to terminate the  
25 entire pension plan and limit liability to the fund itself. The payment or non-payment of UAL  
26 payments (independent of the 2003 PERS Reforms, or any conceivable prior reforms or future  
27 reforms) is wholly free from legal compulsion.  
28  
29

1           The non-state defendants posit that the the reforms were essential to avoid significant  
2 harm to the public. I would argue that the legislature was likewise aware of similar and  
3 substantial harm to the public that resulted from each and every gift of non-compulsory UAL  
4 payments. The 2003 PERS reforms were not needed to end the UAL gifting process, and the  
5 harm that they were causing, because the law was on the books already that limited liability. The  
6 liability limit, if not merely a bargained contract term, had a police power function to assure that  
7 the public purposes of government took precedence over gifting to private parties. If the reforms  
8 were justified as public policy then withholding all UAL payments from June 23, 1999, forward  
9 would have been equally justified.

### 10 **OSPOA**

11           The is no reason to overrule OSPOA because the supposed future rights to guaranteed  
12 returns is wrapped up into the general liability limit. It might only have relevance among  
13 different classes of PERS beneficiaries but not against the state. The actuarial soundness of the  
14 plan, as a theory of the plan, is that the plan be self sustaining and this is consistent with the  
15 limited liability.

### 17 **COMMENT ON PERB DEFENDANT REPLY BRIEF FOR STRUNK**

18           The PERB brief notes the IRS imposition of a definitely determinable accounts. This is  
19 not inconsistent with the 1999 PERS Reforms limitation on liability. As noted in the Lipscomb  
20 Opinion in the City of Eugene case that continued qualification or disqualification of the plan  
21 under as determined by the IRS is just an event not a law that can bootstrap into imposing a  
22 requirement upon the state.

### 24 **COMMENT ON AMICUS FROM ASSOCIATED OREGON INDUSTRIES**

25           The Amicus of Associated Oregon Industries notes the inherent flaws of the hybrid plan  
26 design of PERS. (page 9) This really is an impossibility defense, given the certainty of uncertain  
27 and variable future returns. Yet that is what the legislature created. The legislature, while  
28 certainly mindful of this flaw, wrapped those flaws into the ORS 238.600(2) blanket limit on  
29 total liability. Likewise it might seem impossible for either the PERB or this court to make pro

1 rata determinations among beneficiaries to enforce the self-sustaining nature of the plan and to  
2 assure continued actuarial soundness (without payment of UALs) but that is the task that must be  
3 accomplished.

## 4 **ADVERSARIAL ROLE REVERSAL**

5 A profound absurdity in this case is that the Contract Clause arguments, pro and con,  
6 have reversed adversarial role. The plaintiffs should be arguing that the 1999 PERS reforms are  
7 not contract terms, and not a part of any contract, and thus do not bind or restrict the legislature  
8 from giving them unearned gifts. The defendants should be asserting the there is a contract and  
9 that the terms of the 1999 PERS reforms expressly exclude all UAL cover. The legal validity of  
10 pre-2003 PERS reforms UAL transfers remain unresolved as either unlawful gifts or as payments  
11 compelled by the presumption of an assumed contract obligation to a contract. This role reversal,  
12 the existence or non-existence of a valid enforceable contract, would flip back over were either  
13 side to note the 1999 PERS reforms as to limited liability, enacted at a time when there was little  
14 or no UAL and thus no reduction in benefits.

15 The legislative purpose in structuring this special review proceeding could only be to  
16 deceive either this court or the public or both so as to conceal the vast gifts based upon the  
17 presumption of compellable UAL payments. Public employee demands for such payments could  
18 not ultimately survive an objection based on contingent future events beyond the courts power to  
19 resolve in a manner compatible with finality. Thus this process is a product of an effort to obtain  
20 the imprimatur of judicial validity and thus taint this court's stature as well. This purpose of  
21 deception could tend toward aiding a finding of invidious discrimination in the defunding of  
22 legally mandatory obligations, such as the provision of medical care to persons subject to  
23 heightened scrutiny under federal law, accomplished via means clearly beyond the limits of the  
24 Oregon Constitutional provisions pertaining to appropriations and generally recognized public  
25 purposes.

## 26 **COMPARISON OF CONTRACTUAL PENSIONS TO CERTIFICATES OF** 27 **PARTICIPATION**

1 In Kane v. Goldschmidt, 308 Or 573 (1989), this court dealt with the validity of  
2 Certificates of Participation in the context of a challenge based on a violation of the  
3 appropriations provision of the Oregon Constitution. The bonding undertaken by the State was  
4 considered valid authority, despite a direct conflict with the prohibition on extending the Full  
5 Faith and Credit without Constitutional Authority, because the legislative assembly retained the  
6 option to refuse to appropriate the money on such bonds. The bond rating consequences that  
7 might flow from such refusal were not considered pertinent to the legal resolution of that  
8 authority. Contracts Clause issues, traditionally, relate to the issuance of government bonds as  
9 part of a bargain. The power of the Legislative Assembly, or any delegated negotiating body,  
10 would likewise find their flexibility as to prospective negotiating authority similarly confined.

## 11 **TOMORROW'S POTENTIAL POLITICAL BARGAIN**

12  
13 Suppose that an alternative set of politicians choose, as public policy, to view that  
14 238.600(2) expressly prohibits the payment of calculated underfunding. Is it possible for the  
15 court today to ignore such a possibility in deference to the legislature of today? I think that such  
16 deference to the legislative re-bargaining, as accomplished in the 2003 PERS reforms, would  
17 convert law into something akin to recognizing arbitrary and capricious decision-making as a  
18 valid goal of legislation. This would compound the impossibility problem referred to by the  
19 Lewis & Clark Law School professors. Either the plan is designed as self-sustaining or it is not.  
20 If it is not then the allocation and reallocation of the benefits of the investments, a property right  
21 issue, between the state and the private interests of PERS beneficiaries is not within the  
22 constitutional authority of the state. If the plan is self-sustaining then the PERS beneficiaries get  
23 all the investment gains or all the losses from investments, period, including the actuarially  
24 calculated imbalance component that has thus far escaped legal resolution. The legislature did  
25 not impose upon itself an obligation to cover UALs through a change in the law and, a fortiori,  
26 lesser bodies within this state could not take it upon themselves to assume that legislative  
27 authority. Unless and until the legislature changes current law then payment upon UALs is not  
28 lawful.  
29

1 A final and justiciable resolution of this controversy as to the named parties or to a  
2 judicial reformation of the plan as a whole cannot be rendered without examination of other  
3 applicable statutes and Oregon Constitutional provisions to clarify both the law and the  
4 appropriate damages to apply.

5 Summary judgment is not proper for either party without additional fact finding and  
6 without additional briefing on the law by the parties from properly aligned and sufficiently  
7 vigorous postures on the issues that they present to this court. The statutory duty of the lawyers is  
8 to represent the public interest, particularly when they are representing governmental parties who  
9 have an express duty to represent the public trust. The authority of lawyers to raise and waive  
10 arguments in their legal judgment does not extend to breaching Oregon law and thus effectively  
11 to authorize their governmental clients to exceed their authority or directly breach Oregon law.  
12 Law making authority is reserved to the Legislature and this court has the authority and duty to  
13 determine what that law is and to simultaneously oversee that the lawyers in this battle serve the  
14 public interest.

15  
16  
17 Respectfully Submitted this 6<sup>th</sup> day of July, 2004,

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