Shoot the Patient or Find the Cure: The Florida Constitutional Requirement that Increases in Public Employee Pensions be Funded on a Sound Actuarial Basis

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I. HISTORY OF THE CONSTITUTIONAL PROVISION

Section 14 of article X is entitled “State retirement systems benefit changes.” It provides:

A governmental unit responsible for any retirement or pension system supported in whole or in part by public funds shall not after January 1, 1977, provide any increase in the benefits to the members or beneficiaries of such system unless such unit has made or concurrently makes provision for the funding of the increase in benefits on a sound actuarial basis.

This peculiar constitutional provision first appeared on April 8, 1975, when it was introduced as House Joint Resolution 291 in the Florida House of Representatives by Jerry G. Melvin of Fort Walton Beach. On that day,

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1. FLA. CONST. art. X, § 14.
2. Id.
the resolution was read for the first time and referred to the Committees on Retirement, Personnel & Claims, and Appropriations, which later reported it favorably.4

The House passed the bill, by a vote of 110 to 1, and sent it to the Senate, which adopted the measure by a vote of 29 to 7.5 The bill was then submitted for approval by the voters at the general election scheduled for November 1976.6 The proposed amendment was described on the ballot as follows: “Proposing to add Section 14 to Article X of the State Constitution to provide that increases in the benefits payable under any governmental supported retirement system after January 1, 1977, be fully funded by the governmental unit.”

In response to a question submitted by Representative Barry Richard, the Assistant Attorney General, David K. Miller, rendered opinion 78-34.8 He concluded that the words “fully funded” appearing on the ballot proposal cannot mean that a system is required to maintain reserves sufficient to cover all potential claims to a mathematical certainty. Rather, it means that “a system is required to maintain reserves sufficient to cover its probable claims, as prudently determined with reference to risk based on statistical and demographic computations.”9 Therefore, the phrase “fully funded” on the ballot question “is not substantially different in meaning from the constitutional . . . [provision requiring funding on a] sound actuarial basis.”10

This constitutional provision applies to all Florida governmental units, which includes local governmental units, as well as the state itself.11 This section of the Florida Constitution does not require that benefits provided by law, prior to January 1, 1977, be funded on a sound actuarial basis, only that increases in benefits after that date be so funded.12 There is, however, a requirement elsewhere in the law that benefits existing prior to January 1, 1977 be funded on a sound actuarial basis,13 but this is required by statute, not by the Florida Constitution.

4. Id.
5. Id. at 597; FLA. S. JOUR. 457-58 (Reg. Sess. 1975).
8. 1978 FLA. ATT'Y GEN. ANN. REP. 78.
9. Id.
10. Id.
12. See id.
II. STATUTORY IMPLEMENTATION

In 1978, Florida enacted part VII of chapter 112 of the Florida Statutes, which is entitled “ACTUARIAL SOUNDNESS OF RETIREMENT SYSTEMS.” The statute has the short title “Florida Protection of Public Employee Retirement Benefits Act.” Section 112.61 of the Florida Statutes, contains a statement of legislative intent which implements section 14 of article X of the state constitution. The 1978 statute contained the following statement of legislative intent:

It is the intent of the Legislature in implementing the provisions of s. 14 of Art. X of the State Constitution, relating to governmental retirement systems, that such retirement systems or plans be managed, administered, operated, and funded in such a manner as to maximize the protection of public employee retirement benefits.

In 1983, this statement of legislative intent was changed by amendment to add the following:

Inherent in this intent is the recognition that the pension liabilities attributable to the benefits promised public employees be fairly, orderly, and equitably funded by the current, as well as future, taxpayers. Accordingly, except as herein provided, it is the intent of this act to prohibit the use of any procedure, methodology, or assumptions the effect of which is to transfer to future taxpayers any portion of the costs which may reasonably have been expected to be paid by the current taxpayers. This act hereby establishes minimum standards for the operation and funding of public employee retirement systems and plans.

The Employee Retirement Income Security Act of 1974 (“ERISA”), among other things, requires adequate pension funding by private employers. ERISA was not imposed upon state or local governments. Thus, it was left to the state and local governments to enact appropriate provisions.

16. Id. § 112.61.
17. FLA. STAT. § 112.61 (1979).
18. Ch. 83-37, § 1, 1983 Fla. Laws 105 (amending FLA. STAT. § 112.61 (1983)).
of their own. Part VII of Florida Statutes chapter 112 applies to the state and to local governments, which had been exempted from the requirements of the federal statute.

Part VII of Florida Statutes chapter 112 applies to any employee pension benefit plan supported in whole or in part by public funds. Indeed, the statute specifically applies to the state for the Florida Retirement System. This system includes those counties which are compulsory members, and municipalities and special districts which are voluntary members.

Section 112.64(2) of the Florida Statutes provides that after October 1, 1980, a plan then in existence shall be sufficient to meet the normal cost of the retirement system or plan and to amortize the unfunded liability, if any, within 40 years. For a retirement system or plan which [came] into existence after October 1, 1980, the unfunded liability, if any, shall be amortized within 40 years of the first plan year.

The Florida statute requires a plan to amortize any unfunded liability using acceptable actuarial cost methods, subject to the approval of the Division of Retirement. Local governments are required to submit plans for approval by the Division of Retirement in a statement of an enrolled actuary.

Part VII of chapter 112 of the Florida Statutes sets forth what are acceptable funding methods in an unusual fashion. The chapter incorporates by reference not only those methods provided for in ERISA, but also those permitted under regulations prescribed by the Secretary of the Treasury. Section 112.63(1) of the Florida Statutes, provides, "[t]he actuarial cost methods utilized for establishing the amount of the annual actuarial normal cost to support the promised benefits shall only be those methods approved..."
in the Employee Retirement Income Security Act of 1974 and as permitted under regulations prescribed by the Secretary of the Treasury.\(^\text{28}\)

The methods approved in the Employee Retirement Income Security Act of 1974 are stated as follows: "Acceptable actuarial cost methods shall include the accrued benefit cost method (unit credit method), the entry age normal cost method, the individual level premium cost method, the aggregate cost method, the attained age normal cost method, and the frozen initial liability cost method."\(^\text{29}\) It further provides that, "[t]he Secretary of the Treasury shall issue regulations to further define acceptable actuarial cost methods."\(^\text{30}\)

The Secretary of the Treasury has issued Treasury Regulation 1.412-(c)(3)-1 entitled "Reasonable funding methods in implementation of section 3(31) of ERISA."\(^\text{31}\) It describes acceptable and unacceptable actuarial cost methods.

In addition to requiring a plan of funding on a sound actuarial basis for any unfunded liability that existed on October 1, 1980 for amortization over 40 years,\(^\text{32}\) part VII of chapter 112 implements article X, section 14 of the Florida Constitution with regard to increases in benefits by requiring a plan of funding over 30 years.\(^\text{33}\)

### III. THE TURLINGTON CASE

The first case discussing the phrase "an increase in the benefits" is *Turlington v. Department of Administration, Division of Retirement*.\(^\text{34}\) In *Turlington*, a taxpayer\(^\text{35}\) challenged the validity of chapter 83-76, section 7, of the Laws of Florida. The law provided that an elected official covered by the Florida Retirement System ("FRS"), who was also employed in a non-elected position covered by FRS, could retire from the non-elected position while continuing employment in the elected office, but without

\(^{28}\) Id. § 112.63(1).
\(^{30}\) Id.
\(^{32}\) FLA. STAT. § 112.64 (1991).
\(^{33}\) The statute provides: "The net increase, if any, in unfunded liability under the plan arising from significant plan amendments adopted, changes in actuarial assumptions, changes in funding methods, or actuarial gains or losses shall be amortized within 30 plan years." Id. § 112.64(4).
\(^{34}\) 462 So. 2d 65 (Fla. 1st Dist. Ct. App. 1984).
\(^{35}\) The plaintiff was also the Commissioner of Education.
additional service credit. The taxpayer contended that this violated article X, section 14 of the Florida Constitution because there was admittedly no actuarial study done regarding the possible effect of chapter 83-76, section 7 on FRS.

The First District Court of Appeal held that section 7 of chapter 83-76 was not an increase in benefits. Hence, article X, section 14 was not involved. In dicta, the court said, "[t]he absence of an actuarial study does not, per se, render the statute invalid."

This analysis was correct. Even if no actuarial study accompanied the legislation in question, it does not necessarily violate article X, section 14. It could still be demonstrated that no funding plan was required, or that the funding plan employed was on a sound actuarial basis.

Turlington did not really deal with an increase in benefits, but rather, it dealt with a change in the circumstances in which retirement can be taken. The case illustrates that article X, section 14 presents a different kind of question about a constitutional requirement. It is not a question of facial invalidity, or whether the enactment contains constitutionally impermissible language or provisions. Nor is it a question of being unconstitutional as applied in the sense that the legislative language produces an unconstitutional result for a particular person or group of persons. Rather, the question is whether the governmental body properly performed an act in connection with legislation increasing pension benefits for public employees. It is a new kind of constitutional question: Did the government fund the increase on a sound actuarial basis or provide a plan of such funding? The question for the courts is not what did the legislative body enact, but rather, what provision for funding on a sound actuarial basis did the legislative body make for that enactment. Having said this, the next question must be: What is the remedy for the failure to fund on a sound actuarial basis?

The term "funding on a sound actuarial basis" is not one of ordinary understanding. Indeed, part VII of chapter 112 requires that the funding plan be accompanied by "[a] statement by the enrolled actuary that the report is complete and accurate and that in his opinion the techniques and assumptions used are reasonable and meet the requirements and intent of

37. Turlington, 462 So. 2d at 66-67.
38. Id. at 67.
This means that whether or not the legislative body performed the act (funding on a sound actuarial basis), which is constitutionally required in connection with legislation increasing pension benefits for public employees, is a question of opinion to be answered by expert witnesses. This is an unusual test of a constitutional requirement.

IV. THE FLORIDA ASS'N OF COUNTIES CASE

Florida Ass'n of Counties v. Department of Administration, Division of Retirement

clearly illustrates this constitutional requirement. In 1970, Florida consolidated its retirement benefits into FRS. FRS contains a "special risk" category of retirement, which is for police officers, firefighters, and correction officers. The statute provides that they have an earlier retirement date than other employees. When chapter 112 of the Florida Statutes was originally enacted in 1970, employees in the "special risk" category had a two percent per year service credit, which was generally a higher benefit than other employees received. The retirement benefit was calculated by a percent per year of creditable service times average monthly compensation. The service credit was increased to three percent per year for service after September 30, 1974. Effective October 1, 1978, the Legislature reduced the three percent service credit to two percent.

In Florida Sheriffs Ass'n v. Department of Administration, the Supreme Court of Florida held that the reduction was valid. The court stated that a retired employee has a vested right in the amount of his pension and a subsequent enactment could not change that. However, active employees had no such vested right. Therefore, the Legislature could change benefits for active employees, even reduce them, for given years of

41. 580 So. 2d at 641.
43. Id. § 121.0515.
44. Id. § 121.021(29).
45. Id. § 121.091(1)(a).
46. Id. § 121.091(1).
47. FLA. STAT. § 121.091(1)(a)2 (1991).
48. Ch. 78-308, §6, 1978 Fla. Laws 875, 883 (codified at FLA. STAT. § 121.091 (1)(a)3 (1979)).
49. 408 So. 2d 1033 (Fla. 1981).
50. Id. at 1037.
51. Id. at 1036.
service prior to retirement.\textsuperscript{52}

In 1988, there was a proposal to restore the service credit from two percent per year to three percent.\textsuperscript{53} It was considered by the Senate as the Committee Substitute for Senate Bill 150.\textsuperscript{54} The original bill would have increased the service credit from two percent per year to three percent immediately, and it would have required immediate funding for the increase by the state, counties, and cities involved.\textsuperscript{55}

On June 6, 1988, the Committee Substitute for Senate Bill 150 came to the floor of the Senate.\textsuperscript{56} Senator Hollingsworth offered an amendment which would increase the service credit from two percent per year to three percent over a five year period, together with a five year phase-in of contributions.\textsuperscript{57} Senator Girardeau raised a point of order that pursuant to Senate Rule 3.13, the amendment was out of order, since the actuarial report was for an increase from two percent per year to three percent in the same year, not phased-in over five years.\textsuperscript{58} The Chair requested Senator Baron and Senator Langley to make a recommendation to the Senate on the point of order.\textsuperscript{59} Senator Baron reported:

\begin{quote}
The question is whether Senator Hollingsworth's amendment complies with the requirement that changes to the state retirement system be studied by an actuary. An actuarial study was presented to the Senate in April of [1988] which studied the increase in special risk retirement from 2 percent per year of service to 3 percent per year of service. The increased employer contribution which was determined to be actuarially required for that change was 7.4 percent. Senator Hollingsworth's amendment divides both the increased benefit, and the increased employer contribution into five portions. The amendment is a modification of the original proposal, the basis of the study, and therefore protects the soundness of the Florida Retirement System, which is the underlying purpose of the rule. Therefore, the point is not well taken. The presiding officer ruled the point was not well taken.\textsuperscript{60}
\end{quote}

The amendment, which was adopted June 7, 1988, provided for the

\begin{footnotes}
52. \textit{id.}
54. \textit{id.} at 1136.
55. \textit{See id.} at 1135-36.
56. \textit{id.} at 1136.
57. \textit{id.} at 1034 (amendment 1).
59. \textit{id.} at 1035.
60. \textit{id.} at 1083 (ruling on the point of order by Senator Girardeau on Rule 3.13).
\end{footnotes}
"phasing-in" of the increased benefit, and the funding of it, over a five-year period. Senator Hair, the Chairman of the Senate Committee on Personnel, Retirement and Collective Bargaining, explained his vote in regard to this amendment:

The amendment offered by Senator Hollingsworth would "phase in" this increased benefit over a five-year period which would have the effect of reducing the immediate fiscal impact upon Special Risk employers. Nonetheless, the ultimate fiscal impact associated with increasing the retirement benefit of Special Risk members is still present, albeit spread over a longer period of time. I am further concerned about the precedent of "phasing in" new benefits; this is a concept never tried in the FRS before and one that is specifically not recommended by the FRSs' actuaries . . .

The bill passed in the Senate, and the House concurred. The measure became law as chapter 88-238 of the Laws of Florida.

Following enactment, the Florida Association of Counties and the Florida League of Cities, along with two taxpayers, brought suit in Leon County against the Department of Administration, Division of Retirement. They sought a declaration that chapter 88-238 was:

an improper exercise of the state's taxing and spending authority because it funded the costs of increased benefits to special risk members, composed of fire fighters and law enforcement officers, by assertedly shifting the burdens [of payment] from current to future taxpayers in violation of article X, section 14 of the state constitution.

The Florida Police Benevolent Association and the Florida Professional Firefighters intervened as defendants, and after the circuit court held that the statute did not violate the Florida Constitution, the plaintiffs appealed. The First District Court of Appeal affirmed the decision of the circuit court.

61. Id. at 1136.
62. Id.
64. Ch. 88-238, § 1, 1988 Fla. Laws 1327 (codified at FLA. STAT. § 121.071 (1989)).
66. Id.
67. Id.
court. On further review, the Supreme Court of Florida approved of and adopted the decision of the First District Court of Appeal.

The First District Court of Appeal described the phase-in of contributions and benefits as follows:

<table>
<thead>
<tr>
<th>Period</th>
<th>% Increase in Contributions</th>
<th>% Increase in Benefits</th>
</tr>
</thead>
<tbody>
<tr>
<td>1989</td>
<td>1.6</td>
<td>2.2</td>
</tr>
<tr>
<td>1990</td>
<td>3.2</td>
<td>2.4</td>
</tr>
<tr>
<td>1991</td>
<td>4.8</td>
<td>2.6</td>
</tr>
<tr>
<td>1992</td>
<td>6.4</td>
<td>2.8</td>
</tr>
<tr>
<td>1993+</td>
<td>8.0</td>
<td>3.0</td>
</tr>
</tbody>
</table>

The First District Court of Appeal stated that it found no case which had definitively considered the meaning of the phrase “sound actuarial basis.” It further noted that after hearing a diversity of expert opinions at the trial that indicated the phrase “sound actuarial basis” is not precisely defined in actuarial science, the trial court had accepted a consensus definition that “a retirement program must be funded in such a way that the retirement fund is able to meet its continuing obligations as and when they mature.” The trial court held that chapter 88-238 met that test, and the Supreme Court of Florida later approved of the definition adopted by the trial judge.

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68. Id. at 646.
69. Florida Ass’n of Counties, 595 So. 2d at 44.
70. Florida Ass’n of Counties, 580 So. 2d at 643 (footnotes omitted). The dates for the phase-in after 1989, as described in chapter 88-238 of the Laws of Florida, were impossible. This was corrected in a subsequent revisor’s (“glitch”) bill, chapter 89-220 of the Laws of Florida, which now appears in Florida Statute, sections 121.071 and 121.091. The First District Court of Appeal did not consider this error significant: “Appellants also assert that technical flaws in the original legislative bills . . . all render the plan unsound, and therefore constitutionally deficient. Assuming the validity of appellants’ criticisms, the record does not convincingly support the conclusion that asserted defects, if corrected, are constitutionally mandated.” Id. at 645.
71. Id. at 644.
72. Id.
73. Id.
74. Florida Ass’n of Counties, 595 So.2d at 43-44. Approving Judge Hall’s definition, the court opined:

First, we have never addressed the meaning of the phrase “sound actuarial basis,” as contained in article X, section 14. We agree with the trial court and district court of appeal that “sound actuarial basis” means that “a retirement program must be funded in such a way that the retirement fund is able to meet
The district court observed that the phase-in scheme selected by the Legislature clearly departed from plans used to fund benefit increases in the past. Customarily, increases in benefits have been paid for by amortizing the associated costs at a single rate over a thirty year period. The appellants conceded that article X, section 14 did not dictate such a plan.

The appellants argued that the Legislature determined the controlling meaning of article X, section 14 by its statement of legislative intent contained in chapter 83-37 of the Laws of Florida, the 1983 amendment to section 112.61 of the Florida Statutes. The First District Court of Appeal described that amendment in the following manner:

The legislature there declared that liabilities required to fund public retirement system benefits must be funded equitably by current and future taxpayers alike, and expressly prohibited the “transfer to future taxpayers [of] any portion of the costs which may reasonably have been expected to be paid by the current taxpayers.”

In addition, the appellants argued that the legislative interpretation of article X, section 14 contained in chapter 83-37 is entitled to a presumption of correctness. The district court of appeal concluded that, under the circumstances, chapter 83-37 is not entitled to such presumptive weight. Those “circumstances,” the court explained, are that article X, section 14 was adopted in 1976. The 1978 statement of legislative intent contained in chapter 78-170 “merely required that governmental retirement systems or plans be managed, administered, operated, and funded in such a manner as to maximize the protection of public employee retirement benefits.” The court pointed out that “[n]ot until 1983 did the legislature express its intent in implementing the provisions of Article X, section 14 to require that a plan be equitably funded by the current, as well as future, taxpayers.” The court reasoned that chapter 78-170 of the Laws of Florida is more contemporaneous with the constitutional provision than chapter 83-37. Therefore, chapter 83-37 is not entitled to any presumptive weight that it is

its continuing obligations as and when they mature.”

Id. (quoting Florida Ass'n of Counties, 580 So. 2d at 644).
75. Florida Ass'n of Counties, 580 So. 2d at 644 n.7.
76. Id. at 644.
77. Id.
78. Id.
79. Id. at n.9.
80. Florida Ass'n of Counties, 580 So. 2d at 644 n.9.
a contemporaneous legislative interpretation of article X, section 14.\(^{81}\)

The appellants also advanced a statutory argument that chapter 88-238 conflicted with the statement of intent contained in chapter 83-37. The First District Court of Appeal decided that a “sounder position is to harmonize the legislature’s intent for the amendment with its intent for the original law.”\(^ {82}\) Thus, rather than prohibiting the taxing of future taxpayers, chapter 83-37 requires that costs associated with chapter 88-238 are passed on to future taxpayers in a reasonable manner.\(^ {83}\) The court noted that a consulting actuary had testified that the amendment assessed the cost to the appropriate generation of taxpayers; “those who are being served by the generation of special risk members who are receiving the particular benefit.”\(^ {84}\)

This is an example of harmonizing one provision of the Florida Statutes with another. The court’s obligation to do that does not apply to any conflict between the Florida Statutes and an ordinance of municipal government.\(^ {85}\) Whether local government could, by ordinance, have accomplished the same phase-in of benefits and contributions poses a different question. It should be noted that article X, section 14 is now to be read in conjunction with article VII, section 18 of the Florida Constitution, adopted in 1990, which imposes limitations upon the Legislature to pass laws requiring counties or municipalities to spend funds or limit their ability to raise revenue. Article VII, section 18(d) specifically provides, “[l]aws adopted to require funding of pension benefits existing on the effective date of this section . . . are exempt from the requirements of this section.”\(^ {86}\)

*Florida Ass’n of Counties* was significant because it involved not only the state and all the counties in Florida, but the cities that were voluntary members of the State Retirement System as well. It also involved all law enforcement officers, firefighters, and correction officers employed by the state, the counties, and the city members of FRS. Quite plainly, it involved a large number of people, many governmental units, and large sums of money.

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\(^ {81}\) Id.
\(^ {82}\) Id. at 645.
\(^ {83}\) Id.
\(^ {84}\) Id.
\(^ {86}\) FLA. CONST. art. VII, § 18(d).
V. THE BRANCA CASE

In contrast, *Branca v. City of Miramar*\(^{87}\) involved one man and a small city. Frank Branca was the mayor of the City of Miramar for nearly sixteen consecutive years.\(^{88}\) Section 112.048 of the Florida Statutes, which predates article X, section 14 of the Florida Constitution, requires that cities provide a retirement benefit of half-pay to elective officers who retire voluntarily after holding office in that city twenty consecutive years.\(^{89}\) No retirement benefits are required for officials who serve less than twenty consecutive years.\(^{90}\)

In 1988, the City of Miramar passed Ordinance 88-16 which created a pension plan.\(^{91}\) Under the ordinance, "[a]n elected official retiring after twenty years would receive annually [fifty] percent of his or her average annual salary for the preceding five years."\(^{92}\) The ordinance also provided for reduced benefits in the event of earlier retirement,\(^{93}\) and for the elected official to contribute five percent of his or her salary. The employee's pension benefits were to be paid first from employee contributions, and once those were exhausted, the balance was to be paid from the city's general funds.\(^{94}\)

In 1989, Mayor Branca took an early retirement under this ordinance at the reduced benefit.\(^{95}\) His own contributions were exhausted two months after he retired,\(^{96}\) and thereafter, the pension benefits were paid to him by the city.\(^{97}\)

On May 15, 1989, a new City Commission repealed the ordinance, but payments were continued to Mayor Branca from a budget item entitled "disputed benefits payable."\(^{98}\) The City Clerk submitted the ordinance to the Florida Department of Administration, Division of Retirement for review. The Division's counsel gave an opinion that the ordinance violated article X, section 14 of the Florida Constitution and part VII of chapter 112
of the Florida Statutes. Upon receipt of the Division's legal opinion, the city filed suit seeking a declaratory judgment that Ordinance 88-16 was unconstitutional. Payments, however, were continued to Mayor Branca until the ordinance was declared invalid.

The circuit judge, ruling in the city's favor, held that the pension benefit was unlawful and should not be paid. The circuit court found that City of Miramar Ordinance 88-16 "was an increase in benefits as contemplated in article X, section 14, because no such pension benefits existed for elected officials prior to the enactment of Ordinance 88-16 apart from those mandated in section 112.048" of the Florida Statutes. The circuit judge found that the ordinance violated article X, section 14 of the Florida Constitution. The trial judge also found that the city was not estopped to deny the payment of pension benefits. Mayor Branca subsequently appealed.

The Fourth District Court of Appeal, in a 2 to 1 decision written by Judge Polen, concluded that the trial court was correct in denying the continuation of the pension benefit on an estoppel basis. The majority held that the ordinance in question was not a deferred compensation plan exempt from funding requirements. The majority then turned to the constitutional question posed by article X, section 14. The majority stated:

The trial court found, and certainly an argument can be made, that the creation and establishment of a retirement plan for Miramar elected officials under Ordinance 88-16 was an increase in benefits as contemplated in Article X, Section 14, because no such pension benefits existed for elected officials prior to the enactment of Ordinance 88-16 apart from those mandated in section 112.048, Florida Statutes. As such, Ordinance 88-16 would be subject to the requirements of Article X, Section 14. . . .

Notwithstanding, we need not resolve the issue of whether the Ordinance's enactment constituted an "increase" in benefits under Article X, Section 14, Florida Constitution. Rather, we certify the following question:

99. Id.
100. Id.
101. Id. at 1376.
102. Branca, 602 So. 2d at 1375.
103. Id. at 1375.
104. Id. at 1375.
WHETHER ARTICLE X, SECTION 14, AND THE REQUIREMENTS THEREOF APPLY ONLY TO EXISTING COUNTY OR MUNICIPAL PENSION PLANS, OR WHETHER THE REQUIREMENTS ALSO APPLY TO COUNTY OR MUNICIPAL PENSION PLANS THAT INCREASE OTHER EXISTING GOVERNMENTAL [i.e., STATE] PENSION PLAN BENEFITS.105

Judge Farmer dissented, pointing out that when the benefit is not funded on a sound actuarial basis, the remedy is not to obliterate the benefit, but rather to require the funding of it by the governmental unit. Judge Farmer wrote:

The essential rationale for the constitutional and statutory provisions cited by the city, from which I deduce public policy, is not that, if a particular plan is unsound, no one should get paid their retirement. Rather, the policy is to ensure that all retirees actually get paid by making the plans financially trustworthy and capable of meeting reasonably foreseeable obligations. To deny benefits to a retiree where the plan is unsound but the city is able to pay is to shoot the patient rather than to find the cure.106

The majority decision, holding that the case did not present either a factual or legal basis for estoppel, disagreed with Judge Farmer’s dissent that there was a contractual obligation on the part of the city to pay the promised benefit and that the city was estopped from denying the benefit. The real question, however, is suggested in Judge Farmer’s dissent. Essentially, the majority decision does not resolve the question of what is the proper remedy. Specifically, what remedy is appropriate when a beneficiary claims entitlement to a pension benefit that was otherwise lawfully enacted, but was not funded on a sound actuarial basis within the meaning of article X, section 14? Should the court order the governmental unit to fund the benefit on a sound actuarial basis, as required by article X, section 14, or should the court declare the benefit non-existent for the failure to comply with article X, section 14?

The trial court’s decision on this point could work mischief. There are a number of possibilities. The government could create a new benefit or increase an existing benefit. The government could provide no funding or some funding, but not on an actuarially sound basis. The government could also initially provide funding on a sound actuarial basis, but discontinue

105. Id. at 1376-77.
106. Id. at 1379 (Farmer, J., dissenting).
such funding at a later time. Finally, the government could even provide funding and experts could disagree as to whether such funding was on a sound actuarial basis.

A member or beneficiary of a pension system may bring a civil action to recover benefits due to him, to enforce his rights, or to clarify his rights to future benefits. Under the trial judge's decision in Branca, if a member or beneficiary brought suit to complain that an increase in benefits was not adequately funded, the benefit would be abolished. Similarly, if the governmental unit could bring suit that the increased benefit was not adequately funded, the benefit would be abolished. Under any scenario, an attempt to compel the government to fund an increase on a sound actuarial basis would result in the benefit being abolished. How then can the government be compelled to fund an increased benefit on a sound actuarial basis?

The Florida Supreme Court accepted jurisdiction of the case on the certified question, and on January 13, 1994, the court handed down its decision. The supreme court restated the certified question as follows:

WHETHER ARTICLE X, SECTION 14 OF THE FLORIDA CONSTITUTION APPLIES ONLY TO INCREASES IN EXISTING COUNTY OR MUNICIPAL PENSION PLAN BENEFITS.

On the procedural question, the court concluded that under the circumstances, the city could seek a declaratory judgment to challenge the constitutional validity of its own pension ordinance. As to the restated certified question, the court rejected Branca's claim that a new benefit is not governed by article X, section 14 of the Florida Constitution, holding:

We reject Branca's contention that there can be no increase in benefits unless there is an existing plan. When there is no plan, there are no benefits. However, if a plan is adopted the benefits are increased. It is unreasonable to believe that article X, section 14, requires that an increase in benefits from a preexisting plan be actuarially sound but that a new pension plan carries no similar requirement. We hold that article

108. Branca, 602 So. 2d at 1375.
111. Id. at S28.
112. Id.
X, section 14, applies to new plans as well as existing plans. Thus, although Florida Statutes part VII, chapter 112 already required that a new plan be funded on a sound actuarial basis, the Branca decision raises that requirement from a statutory one to a constitutional one under article X, section 14.

Branca did better on his estoppel argument, however. The court concluded that the pension ordinance was properly enacted. Although recognizing that estoppel against the government has limited applications, the supreme court held:

Branca relied upon the fact that ordinance 88-16 had been duly enacted by the city commission. He irrevocably changed his position in reliance upon the ordinance when he retired. The city should not be permitted to unilaterally terminate his pension benefits . . . .

However, the City of Miramar had the statutory authority under section 112.048(3), Florida Statutes (1987), to provide a pension plan for elected officials. The fact that the city created a program which was found to be improperly funded does not preclude relief under the doctrine of equitable estoppel.

The certified question as presented by the Fourth District Court of Appeal and as rephrased by the Florida Supreme Court, is not exactly correct. The question posed was whether article X, section 14 of the Florida Constitution applies only to increases in existing county or municipal pension plans. The holding, however, applies article X, section 14 both to increases in existing plans and new benefits in newly created plans. The certified question, however, refers to existing county or municipal plans and does not mention the existing state plan. Since the case involved the City

\[\text{113. Id.} \]
\[\text{114. Id. at S29.} \]
\[\text{115. Branca, 19 Fla. L. Weekly at S29. The court then quoted, with approval, Judge Farmer's dissenting opinion:} \]
\[\text{The city looks for its authority to cancel this plan in certain state constitutional and statutory provisions relating to the actuarial soundness of public employer retirement plans in Florida. But I do not understand how the fact that this plan may violate these provisions yields the conclusion that the city can just stop paying one of its retirees. I should have thought that the remedy for the constitutional/statutory violation would be to order the city to make the plan actuarially sound out of its own pockets (whether from tax increases or other revenues) but not to order it to stop paying retirement income.} \]
\[\text{Id. (quoting Branca, 602 So. 2d at 1378 (Farmer, J., dissenting)).} \]
of Miramar, the reference to municipal pension plans is appropriate. The reference to county pensions plans is dicta.\textsuperscript{116} Although, the more interesting question is whether the omission of any reference to "state pension plan benefits" was inadvertent or intentional.

In a case involving the State Retirement System, the court would have another constitutional provision to consider in ordering the Legislature to fund the promised benefit; specifically, the separation of powers requirement.\textsuperscript{117} In such a case, the court would have to balance a separation of powers consideration with the specific mandate of article X, section 14 that increases in pension benefits in an existing plan, or new benefits in a newly created plan per the \textit{Branca} decision, be funded on a sound actuarial basis.

Wages and pensions are not the same. There are differences among wages, leave benefits, and pensions, particularly as to funding over a short versus a long period of time.\textsuperscript{118}

\textit{State v. Florida Police Benevolent Ass'n}\textsuperscript{119} and \textit{Chiles v. United Faculty of Florida}\textsuperscript{120} involve the funding of wages and leave benefits that were provided for in collective bargaining agreements. These cases give an indication of how the supreme court might address the problem of requiring the Legislature to fund a promised pension benefit in accordance with article X, section 14.

In \textit{PBA}, the Governor had entered into collective bargaining agreements with several unions which were to be effective between 1987 and 1990.\textsuperscript{121} The agreements incorporated by reference certain provisions of the Florida Administrative Code governing annual leave (vacation) and sick leave for public employees. In 1988, the Legislature enacted its General Appropriations Act, which altered the annual leave and sick leave, and which in the aggregate may have had the effect of reducing the bargained-for benefits. The unions contended that the Legislature's actions abridged the right to bargain collectively, as guaranteed by article I, section 6 of the Florida Constitution. Therefore, the revisions to the collective bargaining agreements contained in the appropriations act were invalid. The trial court

\textsuperscript{116} It is also inappropriate dicta, since counties do not have pension plans. They are compulsory members of the FRS, the state plan. FLA. STAT. § 121.051(1) (1991); FLA. STAT. § 121.021(10) (1991).

\textsuperscript{117} FLA. CONST. art. II, § 2.

\textsuperscript{118} Pensions and wages of public employees are subject to collective bargaining. City of Tallahassee v. Public Employees Relations Comm., 410 So. 2d 487 (Fla. 1981).

\textsuperscript{119} 613 So. 2d 415 (Fla. 1992) [hereinafter \textit{PBA}].

\textsuperscript{120} 615 So. 2d 671 (Fla. 1993).

\textsuperscript{121} \textit{PBA}, 613 So. 2d at 416.
Sicking granted summary judgment in favor of the unions, and the district court of appeal affirmed. The Florida Supreme Court discussed the differences between collective bargaining in the private sector and the public sector. The court also discussed separation of powers with respect to the Executive branch’s ability to enter into collective bargaining agreements calling for additional appropriations versus the Legislature’s exclusive right to appropriate funds. The court did admit, however, that “[t]he facts of the present case are somewhat unique, in that the legislature did not simply under fund or refuse to fund certain benefits, but rather unilaterally changed them. Accordingly, we must determine whether the proviso language at issue here falls under the exclusive domain of the legislature’s appropriations power.”

The court adopted the following test:

We find this test to be a reasonable accommodation of both the right to collectively bargain and the legislature’s exclusive control over the public purse. Where the legislature provides enough money to implement the benefit as negotiated, but attempts to unilaterally change the benefit, the changes will not be upheld, and the negotiated benefit will be enforced. This result would not impede upon the legislature’s exclusive power over public funds, because the funds would already be there to enforce the benefit. Where the legislature does not appropriate enough money to fund a negotiated benefit, as it is free to do, then the conditions it imposes on the use of the funds will stand even if contradictory to the negotiated agreement. Any other result would necessarily entail impeding on the right to appropriate, since enforcing the negotiated agreement would necessitate additional funding under this scenario.

The Florida Supreme Court reversed the declaration that the appropriations act was unconstitutional and remanded the cause for further proceedings. The trial court was directed to determine whether the legislative appropriation was sufficient to fund the bargained-for benefit: “If it was, these provisions to the collective bargaining agreement must be enforced. If these provisions were underfunded, the legislative determination shall control.”

_Chiles v. United Faculty of Florida_ involved wages, specifically pay raises, which the Legislature had authorized. Later, however, the
Legislature convened in special session and among other measures, postponed the pay raises involved. During the 1992 regular session, it eliminated them altogether. The unions involved filed suit, and the trial court ruled in their favor, on the grounds that the Legislature’s actions violated article I, section 6 and section 10. The State appealed, and the district court of appeal, without deciding the matter, certified the case to the Florida Supreme Court for immediate review as a “throw up.” The court stated that the case was different from PBA in which no final agreement had been reached by the parties. In United Faculty, an agreement had been reached, funded, unilaterally modified by the Legislature, and finally, unilaterally abrogated by the Legislature.

The supreme court described the problem in a nutshell. “Separation of powers does not allow the unilateral and unjustified legislative abrogation of a valid contract.” The trial court decision was affirmed. However, on clarification, the decision was limited to the year in which the contracts were funded.

Both of these cases deal with the Legislature’s appropriation powers, viewed by its co-equal partner, the Judicial branch, within the framework of the constitutional protection of contracts of a general kind and collective bargaining agreements specifically. These cases do involve the question of the ability of the Florida Supreme Court to order the Legislature to appropriate money to pay for the performance of a contract.

VI. CONCLUSION

As already suggested by the comment on Florida Ass’n of Counties v. Department of Administration, Division of Retirement, the courts may treat the Legislature’s funding of increases in public employee pensions differently from that of funding by municipalities. The courts’ ability to order the Legislature to fund a contract may be more limited than the courts’ ability to order a city to fund a promised benefit. When the case involves a city, separation of powers considerations simply do not exist. If

126. Id.
128. 613 So. 2d at 415.
129. United Faculty of Fla., 615 So. 2d at 673.
130. Id. at 677-78.
132. See supra text accompanying notes 85-86.
the court was willing in *United Faculty* to require the Legislature to fund a promised benefit because it had already been funded and then unfunded, and was willing in *PBA* to remand the cause to determine whether there was sufficient funding so as to require enforcement of the contract, then it should not be the least reluctant to formulate a remedy by which the judicial branch is capable of directing the Legislative branch to fund a promised benefit. Thus, Judge Farmer’s question recurs: Should we shoot the patient or find the cure? What is the remedy for the failure of the legislative body (whether state or local government) to fund on a sound actuarial basis, a promised pension benefit to an employee who has already retired?133

Under *Florida Sheriffs Ass’n v. Department of Administration, Division of Retirement*,134 such a retiree has a vested property right. This property right cannot be taken away from him because of the failure of the government to provide for funding. The promised benefit must be funded by the government in compliance with article X, section 14 of the Florida Constitution.135 In *Branca*, however, the supreme court was not confronted with any consideration of separation of powers that might exist when the government involved is the State of Florida itself. Thus, a case against the state rather than a city would involve the balancing of several constitutional considerations: the employee’s contract and property rights; the specific requirement that the government appropriate money as expressed in article X, section 13; and the ability of the judicial branch to appropriate money.

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133. *Branca*, 602 So. 2d at 1377-79.
134. 408 So. 2d 1033, 1037 (Fla. 1981).