

PROTECTING EMPLOYEE PENSIONS IN PUBLIC SECTOR BANKRUPTCY- LESSONS FROM PUERTO RICO AND DETROIT

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PUBLIC SECTOR BANKRUPTCY

**“How did you go bankrupt?
Two ways. Gradually, then
suddenly.”**

-Ernest Hemingway, *The Sun Also Rises*



DETROIT & PUERTO RICO



Detroit Pensions-Before & After Bankruptcy

Detroit Before

23,000: Number of Detroit pensioners (non-uniform)

\$19,000: Average annual pension amount

\$1,600: Average monthly pension payment

\$160 million: Annual amount in wage and benefit concessions already negotiated by Detroit workers

4%: Percentage of Detroit budget going to pensions

Detroit After

- **Non police/fire pension reduction of 4.5% and loss of COLA (City proposed 26% cut plus loss of COLA) No pension reduction for police/fire, COLA reduction of 1-2.25%**
- **“Recoupment” of “excess interest” in annuities paid to retirees.**
- **New CBA for active employees with raises, outsourcing protection, and reduced but continued health care benefits.**
- **VEBA for retiree health care**



Puerto Rico Pensions-Before & After Proposed POA

Puerto Rico Before

\$50 billion of unfunded pension liabilities

**Public employee pensions as low as \$600 per month.
Average pension \$13,000 per year.**

\$316 million in employee paycheck deductions for retirement benefits but no access to accounts by employees and not invested

Puerto Rico Proposed

- **Independent pension reserve trust to manage “paygo” system, funded for 30 years.**
- **Maximum 8.5% pension payment reduction (10% overall cuts originally proposed)**
- **No cuts to pensions under \$1200 per month (74% of all pensioners)**
- **AFSCME members receive full repayment of principal contributions to retirement plans, over \$1.3 billion.**
- **More \$ to health plans**



Begs the question . . .



Lesson Learned-Politics Matters

Bankruptcy is not independent of politics, and bad politics leads to the conditions that allow for bankruptcy.



The Lead Up to Detroit: 2010 TEA PARTY “REVOLUTION”

- **In 2010, 138 candidates ran for Congress with Tea Party support. In mid October, 35% of likely voters were Tea-party supporters, and they favored the Republicans by 84% to 10%**
- **In 2010, Rick Snyder is elected Governor of Michigan after campaigning as "pro-life, pro-Second Amendment, [and] pro-family," with a focus on the economy.**



MICHIGAN-SNYDER'S POWER GRAB UNIONS AND THE PUBLIC SILENCED

- **Local Government and School District Fiscal Accountability Act (“Act”) better known as the Emergency Financial Manager Bill or “Dictator Law” became effective on March 16, 2011.**
- **This first Dictator Law, Public Act (PA) 4, allows the Governor to appoint an emergency financial manager who can tear up collective bargaining agreements and privatize city services.**



EMERGENCY MANAGERS: REPEAL AND RE-ENACTMENT

- **In November, 2012, the people of Michigan by referendum repealed PA 4**
- **About one month later, Snyder signed an almost identical law, PA 436, with provisions making it referendum proof**
- **PA 436 included provisions allowing for authorization for cities to file for **Chapter 9 bankruptcy****
- **Oh, and Snyder railroaded a Right to Work for Less law through a lame duck session too.**



TIMELINE LEADING UP TO BANKRUPTCY

- **March 28, 2013 – PA 436 takes effect. Kevyn Orr, a bankruptcy lawyer at Jones Day, is appointed by Snyder as Detroit’s Emergency Manager on that day.**
- **May and June 2013 – Orr’s representatives meet with unions in group meetings but refuse to negotiate over any issue or meet separately. Orr makes it known he intends to gut retirement health and pension benefits.**



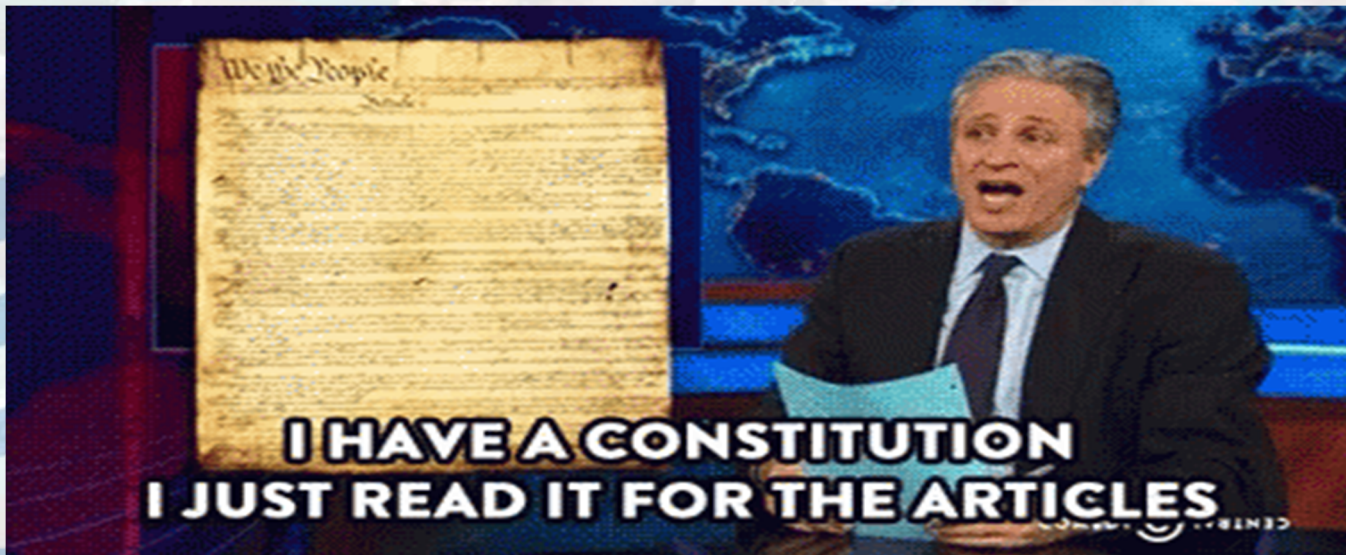
HOW DID WE GET HERE-PUERTO RICO

- **Tax incentives for bonds Puerto Rico was likely never going to be able to repay**
- **Tax incentives for business investments and employers expired over time decimating the economy**
- **High poverty levels and mass exodus to the continental U.S.**
- **Funds set aside for public employee pensions insolvent due to years of government mismanagement, underfunding, poor investments**
- **Cannibalization of existing funds to pay off current obligations/expenses**
- **PROMESA signed into law by President Obama in 2016. He appointed seven members of the Oversight Board. Puerto Rico had accumulated over \$50 billion in unfunded pension liabilities and over \$70 billion of debt, facing an imminent default**
- **Hurricane Maria devastated existing resources**



WHAT ABOUT THE LAW?

**What about state constitutions or state law,
doesn't the law stop bankruptcies in their
tracks?**



WHAT ABOUT THE MICHIGAN CONSTITUTION?

- **The Michigan Constitution in Article IX, Section 24, states that “the accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby.”**
- **In three lawsuits filed in early July, one brought by an AFSCME member and retired member, one brought by UAW retirees, and one brought by the Detroit General Retirement System, Michigan Judge Aquilina of the Ingham County Circuit Court ordered that the bankruptcy filing was illegal in violation of the state constitution.**



BANKRUPTCY FILED IN THE SHADOWS

- **On July 18, 2013, as the state court lawsuits are being argued to the Judge, and literally minutes before the Judge is ready to declare the bankruptcy provisions of PA 436 unconstitutional . . .**
- **Orr requests Snyder to authorize bankruptcy, and during a short break asked for by Snyder's attorneys, the authorization is given and Detroit files for Chapter 9 bankruptcy, triggering an automatic stay that turns things over to bankruptcy court.**



Other State Constitutions

Illinois-Article XIII, Section 5:

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

New York-Article V, Section 7:

Membership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired.



PROMESA

The Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA) is a US federal law enacted in 2016 that established a financial oversight board, a process for restructuring debt, and expedited procedures for approving critical infrastructure projects in order to combat the Puerto Rican government-debt crisis. Through PROMESA, the US Congress established an appointed Fiscal Control Board (Oversight Board/Junta) to oversee the debt restructuring.



PROMESA PROTECTS PENSIONS?

A Fiscal Plan developed under this section shall, with respect to the territorial government or covered territorial instrumentality, provide a method to achieve fiscal responsibility and access to the capital markets, and . . . **provide adequate funding for public pension systems**



CH 9 BANKRUPTCY BEST PRACTICES

**What should you do if you find yourself in
bankruptcy anyway?**



HELP ON THE WAY

- **Negotiating in the Chapter 9 context is very different than usual labor-management collective bargaining.**
- **Hire good bankruptcy counsel with experience in representing unions in bankruptcy cases.**



WHAT IS A RETIREES' COMMITTEE?

- **The bankruptcy judge appointed a separate retirees' committee to negotiate with the City over retiree benefits and to represent retirees in court ordered mediation. Unions also had representatives in the court ordered mediation.**
- **Representatives from AFSCME, the UAW, the public safety unions, and the community were chosen to serve on the retirees' committee.**



THE TONGUES OF BILLIONS SPEAK WITH JUST ONE VOICE

- **You can't negotiate a deal if you aren't in the room and at the table.**
- **The entire battle in the beginning is demonstrating your ability to speak for workers and retirees.**
- **AFSCME-- the representative of the interests of between at least forty and fifty percent (40-50%) of the about 11,943 retired City of Detroit non-uniformed employees, and about 2,523 active City employees, or about seventy percent (70%) of the active non-uniformed union-represented employees.**



HAVE A LEGAL STRATEGY THAT CREATES LEVERAGE

- **August 2013– Creditors filed robust objections to Detroit’s eligibility for bankruptcy based on among other reasons, the state Constitution pension protections, and failure to bargain in good faith.**
- **AFSCME filed an extensive objection, contending Chapter 9 violates the U.S. Constitution, the state constitution, that the City didn’t negotiate in good faith, and that the City did not need to file for bankruptcy.**



HAVE A ROBUST PUBLIC RELATIONS STRATEGY WHEN APPROPRIATE

- **Meager pensions, no protection under PBGC, some not eligible for social security.**
- **About 50 Detroit citizens appear before the court to state their opposition to the bankruptcy.**
- **“Banks are too big to fail, but are we so small there’s no one to help us?”**
- **“Michael Vick went to jail for cruelty to animals. Who’s going to jail for cruelty to retirees?”**



WORK IN COALITION WHEN POSSIBLE

In Puerto Rico, many public employees strongly believe that any negotiations with the federal Oversight Board over pensions equates with submission to the colonialist oppressor.

Elected officials and candidates for office have an interest in exploiting that sentiment.

Therefore, a united front all the more important.



TOGETHER, MORE OR LESS IN LINE

- **Bankruptcy mediation is coalition bargaining on steroids.**
- **Don't get divided and conquered.**
- **Every affected union, every affected retiree organization, the retirees' committee, every other creditor, the debtor, professionals hired to represent all of the above.**
- **Stay involved and informed and build alliances early and strategically.**



TOO MUCH OF EVERYTHING IS JUST ENOUGH

- **Chapter 9 bankruptcies are PUBLIC**
- **Therefore:**
 - **Public employees and the services they provide and long-serving retiree members of the community are the most compelling story.**
 - **Politicians' careers are at stake**
 - **Every part of your union can help, communications, organizing, political, legal . . .**



PUBLIC SECTOR BANKRUPTCY REFORM IDEAS

Good faith negotiations requirement without impracticability loophole.

Direct appellate court review on an expedited basis.

Protections for collective bargaining agreement terms (in law or defer to state law)

Higher secured priority status for pensions or defer to state law

Expressed protection for non-retiree related benefits, like health benefits



So what do you think?



WHERE IS DETROIT NOW?

City services have improved:

- **65,000 new street lights**
- **Police/Fire/Emergency response times much faster**
- **General fund in surplus**
- **Pension trust fund in the black**
- **Unemployment at 17 year low, but most jobs to suburbanites or other non-Detroit residents**
- **Increased private investment in the city, but only in a few already well-off areas**
- **At the mercy of the economy**



WHERE IS PUERTO RICO NOW?

- **At the mercy of all the same economic factors and political uncertainty from before, even if the cuts in the Plan of Adjustment are eventually adopted.**
- **At the mercy of mother nature. The fragile economy would be absolutely devastated by another hurricane like Maria, one that is almost certain to come at some point in the coming years.**



Final Thought

No matter what, in bankruptcy or out, public entities need revenue.



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