



California Court of Appeal Rejects Constitutional Challenges to New Felony Forfeiture Statute

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The evolution of vested rights jurisprudence in California is far from over, with the Second District Court of Appeal ("DCA") stepping into the fray with its June 19, 2018 decision, *Hipsher v. Los Angeles County Employees Retirement Association* (2018) ___ Cal.App.5th ___ (2018 WL 3031762) ("*Hipsher*"). In *Hipsher*, the Second DCA upheld the facial constitutionality of the felony forfeiture statute enacted as part of the Public Employees' Pension Reform Act of 2013 ("PEPRA") that is applicable to public employees who were already working at the time of its enactment (Gov. Code sec. 7522.72).

In sum, the case involved (i) a determination by the County of Los Angeles (County) that the illegal gambling operation Hipsher was convicted of running arose "in the performance of his . . . official duties," (i.e., was job related) under section 7522.72; (ii) the retirement system's resulting reduction of Hipsher's retirement allowance to remove service credit he earned while he committed that crime (and return of his corresponding member contributions); and (iii) Hipsher's constitutional challenge to the reduction of the retirement benefits he already had earned and had begun receiving as a retiree.

In response to Hipsher's challenge, the Second DCA held that the new felony forfeiture statute did not violate either the contract clause, or the "ex post facto" prohibition, of the federal or California Constitutions. The court did, however, conclude that Hipsher had a constitutional due process right to have the *Board of Retirement*, rather than the County, determine whether Hipsher committed the felony of which he was convicted on-the-job such that it would be subject to the forfeiture statute.

While the court's conclusions on the statute's constitutionality may strike many as correct as a matter of public policy, the legal analysis needed to reach that conclusion under California case law precedent is complicated. For, as the court plainly stated, "it is clear Hipsher had a vested contractual right to certain

retirement benefits." Then how could those rights that he already had earned be materially diminished, as they were, without providing any "comparable new advantage" under traditional California vested rights precedent? The court followed a "two-step process," with the first step resolved in Hipsher's favor as his retirement rights were in fact "vested." The court next observed, "if the rights at issue are vested, the court inquires into 'the scope of the Legislature's power to modify' the contractual right." The court observed that "Legislative deference is broad, as even 'a substantial [contractual] impairment may be constitutional if it is reasonable and necessary to serve an important public purpose.'" [Citations omitted.]

Thus, the court recognized it was addressing a vested pension right, and that the Legislative act in this case potentially resulted in a "substantial" impairment to that right. To determine constitutionality, the court concluded it must assess whether the "important public purpose" was sufficient to justify the substantial impairment.

In the Second DCA's view, it was: "Here, section 7522.72 served the important public purpose of *ensuring the integrity of public pension systems*." Interestingly, in reaching its pension system "integrity" assessment, the court cited one of the First DCA decisions that is currently pending review before the California Supreme Court, *Alameda County Deputy Sheriff's Assn. et al v. Alameda County Employees' Retirement Assn., et al.* (2018) 19 Cal.App.5th 61 (S. Ct. review granted, _____, 2018) ("*Alameda*") (discussed here). However, in *Alameda*, the First DCA essentially *rejected* the State's arguments about the important public purpose served by the "anti-spiking" legislation at issue there, and instead the court created a financial balancing test — as between the retirement system's financial integrity and the member's financial needs — to determine constitutionality. *Alameda* thus created a seemingly insurmountable barrier to *modest* prospective changes in public pension plans, endorsing instead the questionable proposition that the more extreme the modification in pension rights, the more likely it would be deemed constitutional.

In contrast here, to determine constitutionality, *Hipsher* used a *qualitative* assessment of what ensures the "integrity" of public pension systems, rather than relying on the *quantitative* test that the court in *Alameda* created. Notably, the court did not engage in *any* assessment of the financial impact on either the retirement system or Hipsher of the reduction in benefits.

The *Hipsher* court buttressed its conclusion regarding the statute's constitutionality as preserving the "integrity" of public pension systems, with a further observation that "A public employee's vested retirement benefits can be defeated upon the occurrence of a 'condition subsequent.'" The court cited seminal California Supreme Court precedent for that conclusion, including *Kern v. City of Long Beach* (1947) 29 Cal.2d 848 ("*Kern*"), *Betts v. Board of Administration of Public Employees' Retirement System* (1978) 21 Cal.3d 859, and *Dickey v. Retirement Board* (1976) 16 Cal.3d 745, but noted that while "*Kern* provided an example of a 'condition subsequent'—lawful termination of employment before completion of the period of service— [the court] did not define the term." As to the application of that principle here, the court in *Hipsher* concluded, "a felony criminal conviction stemming from the pensioner's public service constitutes a condition subsequent, thus permitted a limited forfeiture of vested retirement benefits under section 7522.72." In further support of its conclusion, the court cited precedent on the constitutionality of felony forfeiture laws in Oklahoma, Illinois, New Jersey, Florida, and West Virginia.

The Second DCA also followed the lead of the three First DCA decisions that are now pending before the California Supreme Court, *Cal Fire Local 2881 v. California Public Employees' Retirement System* (2016) 7 Cal.App.5th 115 (S239958) (discussed here), *Marin Assn. of Public Employees v. Marin County Employees' Retirement Assn.* (2016) 2 Cal.App.4th 674 (S237460) (on hold) (discussed here), and *Alameda*, that rejected

the assertion that any detrimental changes to public pension rights in California "must" be offset by comparable new advantages. *Hipsher* takes that conclusion even further, however, with its application of the principle to the diminution of unmistakably "earned" and "vested" benefits that were substantially, not modestly, impaired.

The *Hipsher* decision also analyzes the 7-factor test used to determine whether the statute violates the "ex post facto" constitutional restriction prohibiting laws that "retroactively alter the definition of crimes or increases the punishment for criminal acts." The court concluded after a detailed analysis of the limited reach of the forfeiture statute that it is not "so punitive that it must be considered punishment." Rather, the court explained, PEPPRA was enacted "in an attempt to curb what were seen as pervasive abuses in public pension systems throughout California . . . and [to] ensure adequate funding of the system as a whole." The court concluded, "Preserving the pension system by curbing abuses is a rational, nonpunitive purpose."

On *Hipsher*'s due process argument, the court first observed that "some form of due process is required before the state may reduce a pensioner's vested retirement benefits." However, if the job-related nature of the felony "is evident when the conviction, on its face, necessarily stems from a public employee's performance of official duties," such as embezzlement of public funds, then the criminal proceeding leading to conviction of a crime "necessarily satisfies any due process concerns." The court then noted, the issue "is more complex when the crime does not necessarily arise from the scope of the pensioner's public duties. . . . That is the case before us." When assessing the fact of this case, the court concluded that *Hipsher* was prejudicially denied his constitutionally protected due process rights. At a minimum, *Hipsher* "was entitled to notice of the proposed forfeiture under section 7522.72, along with an opportunity to contest his eligibility for forfeiture before an impartial decision maker." The court next determined whether the County or the retirement system was obligated to afford the required due process, and disagreed with the trial court's conclusion that the County was obligated to do so. After substantial analysis of both the felony forfeiture statute as well as California case law regarding the roles and responsibilities of public retirement boards, the court concluded "the retirement board is the adjudicatory entity with the authority to determine whether forfeiture of *Hipsher*'s retirement benefit was warranted."

What next? As those following this saga know, the California Supreme Court has accepted review of *Alameda* and the parties are currently in the midst of briefing that case. The Supreme Court continues to "hold" *Marin*, which has now been surpassed by *Alameda* in the briefing schedule, and *CalFire* is fully briefed with the parties waiting for oral argument to be set.

In this context, petitioner *Hipsher* will decide whether to petition for Supreme Court review of yet another DCA opinion interpreting the vested rights doctrine under California law. Meanwhile, all eyes will remain on the California Supreme Court as it tackles this challenging topic, with yet another angle on California's vested rights doctrine now provided in *Hipsher*.

UPDATE: On September 13, 2018, the California Supreme Court granted appellants' petition for review of *Hipsher*, but ordered further action, including additional briefing, to be deferred pending consideration and disposition of a related issue in [*ACDSA, et al. v. Alameda County Employees' Retirement Association, et al.*, Supreme Court Case No S247095], or pending further order of the court.