

Ottosen Britz Kelly Cooper & Gilbert, Ltd.  
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**Seventh Circuit denies insurance coverage for defending underfunding lawsuit**

by David Zafiratos

On April 23, 2008, the United States Seventh Circuit Court of Appeals decided the case of *St. Paul Fire and Marine Insurance Company v. Village of Franklin Park*, 523 F.3d 754 (7<sup>th</sup> Cir. 2008). St. Paul Fire and Marine Insurance Company ("St. Paul") asked the court to declare it had no duty to defend the Village of Franklin Park ("Village") after firefighters sued the Village for underfunding their pension fund. The court reviewed the insurance policy in question and determined that St. Paul did not have to defend the Village against the lawsuit.

The key factor for the court's decision was the nature of the underlying lawsuit between the firefighters and the Village. Beginning in 1999, two Franklin Park firefighters complained that the Village had underfunded the firefighters' pension fund for years, in violation of the Illinois Pension Code. The next year, the pension board submitted a written request to the Village for increased funding. In 2001, the Village purchased general liability insurance from St. Paul. Then, in 2002, the firefighters sued the Village over the underfunding of the pension fund.

The Village's insurance policy with St. Paul included a duty to defend the Village against certain claims, but St. Paul refused coverage for the defense of the underfunding lawsuit. St. Paul later filed a suit for declaratory judgment in federal court seeking a ruling that it had no duty to defend the Village. The trial court ruled in favor of St. Paul, concluding that St. Paul did not have to defend the Village because the firefighters' underlying lawsuit alleged intentional underfunding and not negligence. Meanwhile, the firefighters won their state court claim against the Village, and the Village was required to provide an additional \$42,000 in funding.

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**Appellate court revisits, yet again, the definition of an "act of duty" in police pension case**

by John H. Kelly

Adding to the long list of court cases attempting to define the term "act of duty" in police disability cases, the First District Appellate Court in *Sarkis v. City of Des Plaines*, 378 Ill.App.3d 833 (1<sup>st</sup> Dist. 2008) has refined the concepts of special risk. Over the last several years, courts have wrestled with defining the required act of duty necessary to support awarding a line-of-duty disability pension for police officers. The *Sarkis* case focused on a particular act performed by an officer and its relationship to ordinary acts performed by average citizens.

In *Sarkis*, Officer George Sarkis, a member of the Des Plaines Police Department, injured his shoulder while lifting a malfunctioning railroad gate and subsequently applied for line-of-duty disability benefits. At his disability hearing, the Des Plaines police chief testified that officers carried wooden blocks in their squad cars to prop up the numerous crossing gates in Des Plaines that frequently malfunctioned. The chief also testified that emergency management personnel -- other than police officers -- and a group of trained citizens named "Citizens on Patrol" received instruction on propping up the crossing gates. Finally, the chief testified that sometimes citizens without training would also lift the gates when they were down.

The Des Plaines Police Pension Board denied Officer Sarkis' application for line-of-duty disability benefits. The Board held that Sarkis' injury did not occur in the line-of-duty because "non-sworn volunteers and ordinary citizens do frequently hold up railroad gates" and that his action did not amount to the performance of an act of duty. Sarkis appealed the Board's decision to the Cook County Circuit Court. The circuit court reversed the Board's decision and ordered that a line-of-duty pension be awarded, finding that Officer Sarkis' raising of the railroad gates constituted the performance of an act of duty.

Both the City of Des Plaines, which had been allowed to intervene before the Board, and the Board appealed the circuit court's decision to the appellate court. The appellate court determined that the question presented by the appeal involved the legal interpretation of the term "act of duty" as defined in the Illinois Pension Code provisions applicable to Chicago police officers.

Because Article 3 of the Illinois Pension Code applicable to downstate police pension funds does not contain a definition of the

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## Underfunding lawsuit

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On appeal to the Seventh Circuit Court in the St. Paul case, the Village argued the firefighters' lawsuit was within the scope of the insurance policy. The Village also argued St. Paul waited too long to seek a declaratory judgment and should not have been allowed to deny coverage. The court disagreed with the Village's first argument; therefore, it was not necessary to consider the second argument. Citing the Illinois Supreme Court case of *Guillen v. Potomac Insurance Company of Illinois*, 203 Ill.2d 141 (2003), the court explained that St. Paul would be required to defend the Village only if the facts alleged by the firefighters fell within the scope of the Village's insurance policy.

This particular policy stated St. Paul would defend the Village "against a claim or suit for loss" covered by the policy. St. Paul argued the claim did not involve a loss as contemplated by the policy. Although the state court only ordered the Village to provide an additional \$42,000 in funding, the firefighters' victory fueled the Village's argument that it had suffered a loss.

The court, however, agreed with St. Paul and held that the firefighters' lawsuit did not subject the Village to a loss. Since the Village was required to properly fund the firefighters' pension fund, it was not entitled to the money in the first place and, therefore, experienced no loss of money. Since no loss was involved, the Village's insurance policy did not apply to the firefighters' lawsuit.

The St. Paul ruling indicates that, for insurance purposes, a loss does not include a settlement or court order to properly fund public pensions. Pension funds and municipalities should be aware that the duty to properly finance pension funds is mandated by the Illinois Pension Code, and failure to meet the Pension Code's funding requirements could subject them to lawsuits. As this case illustrates, the expense of defending such lawsuits is not covered by an insurance policy that specifies coverage for a "claim or suit for loss." ■

## Definition of an "act of duty"

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term "act of duty," courts have looked to the definition contained in Article 5 of the Illinois Pension Code which is applicable to Chicago's police pension fund. Section 5-113 of that Act defines "act of duty" as:

Any act of police duty inherently involving special risk, not ordinarily assumed by a citizen in the ordinary walks of life, imposed on a policeman by the statutes of this State, or by the ordinances or police regulations of the city in which this Article is in effect or by a special assignment; or any act of heroism performed in the city having for its direct purpose the saving of the life or property of a person other than the policeman. (40 ILCS 5/5-113)

The court focused on the words "a special risk not ordinarily assumed by a citizen" in deciding this case. In considering Sarkis' claim for line-of-duty disability benefits, the court reviewed other well-known cases that addressed the concept of "act of duty." First, the court found that simply because a police officer was on duty at the time of the injury does not automatically mean the injury is duty-related. (See *Morgan v. Retirement Board of the Policemen's Annuity and Benefit Fund*, 172 Ill.App.3d 273 (1<sup>st</sup> Dist.1988)).

The court also found that the term "special risk" was not only to be associated with inherently dangerous activities. (See *Johnson v. Retirement Board of Policemen's Annuity and Benefit Fund*, 114 Ill.2d 518 (1986)). The court determined that the act of duty requirement did not necessitate that an officer be responding to an emergency call or be acting under general or special orders of the police department. The court found that the key consideration was "the risks that are faced by an officer who is engaged in the duties of his job."

In answer to the City's argument that Des Plaines' citizens also raised the crossing gates, the court found that the actions taken by Sarkis were not actions which citizens commonly perform. Sarkis' action of lifting the crossing gate met the standard of assumption of a special risk because, as a police officer, he had a duty to assist in the mitigation of traffic problems created by the downed railroad crossing gate. While ordinary citizens might have lifted the gates on occasion, it was not their duty, nor were the risks of injury associated with lifting the crossing gate generally assumed by the public. Based on this reasoning, the court affirmed the circuit court's decision to award Officer Sarkis a line-of-duty disability pension.

Unlike some other courts, the *Sarkis* court applied a common-sense approach to the task of defining the term "act of duty." Police pension boards facing a similar situation should review this case to determine if their analysis matches the court's analysis. As the court pointed out, the key consideration when determining an "act of duty" is the risk faced by a police officer who is engaged in the performance of the duties of his job. ■

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## Mandatory retirement age adversely affects Chicago police officer's retirement pension

by **Ericka J. Thomas**

The First District Appellate Court recently considered an unusual case concerning the imposition of a mandatory retirement age on a City of Chicago police officer. In *Thompson v. Retirement Board of Policemen's Annuity and Benefit Fund of City of Chicago*, 379 Ill.App.3d 498 (1<sup>st</sup> Dist. 2008), a Chicago police officer was forced to retire at the age of sixty-three (63) with nine and one half (9 ½) years of service credit. The officer unsuccessfully attempted to creatively interpret Article 5 of the Illinois Pension Code to enhance his pension benefits, despite the fact that he had not reached ten (10) years of service credit.

To fully appreciate the issues in *Thompson*, it is important to consider the history of the imposition of a mandatory retirement age for Chicago police officers. Prior to 1983, the mandatory retirement age for Chicago police officers was 63. In 1983, the Age Discrimination in Employment Act of 1967 (ADEA) was applied to state law enforcement officials. As a result, the mandatory retirement age for Chicago police officers rose to 70 years of age, the maximum age to which ADEA protection applied at that time. In 1986, the United States Congress amended the ADEA to allow state and local governments to reinstitute a mandatory retirement age. In response, the City in 1988, reinstated a mandatory retirement age of 63 years of age for police officers.

Pursuant to a sunset provision in the 1986 federal legislation, the exemption permitting the reinstatement of a mandatory retirement at the age of 63 expired in 1993. As a result, the City of Chicago was compelled to drop the mandatory retirement age of 63 that it had imposed on police officers. In 1996, Congress reinstated the exemption provision regarding a mandatory retirement age -- this time with no sunset clause -- and made it retroactive to the expiration of the 1986 federal legislation. On May 17, 2000, the Chicago City Council adopted a mandatory retirement ordinance reinstating the mandatory retirement age of 63 years for its uniformed police officers, effective December 31, 2000. The police officer in *Thompson* was hired by the City of Chicago in 1995 at the age of 53 ½.

Generally, an annuity for Chicago police officers is determined through an application of the Illinois Pension Code to the number of years an individual has been a Chicago police officer. Section 5-128 of the Illinois Pension Code (40 ILCS 5/5-128) provides, "When a future entrant withdraws from service, his age and service annuity shall be fixed as of the date of withdrawal. The annuity shall be that provided from the entire sum to his credit for age and service annuity on the date he withdraws from service." For those officers that became subject to mandatory retirement under the Chicago ordinance passed on May 17, 2000, Section 5-129.1(a) of the Illinois Pension Code may determine the calculation of their annuity:

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## Attorney Notes

- **Donald Potts**, one of the firm's associates in its Naperville office, has been called to active duty with the U.S. Army in Iraq, beginning in May 2008. Don is a Captain in the Army Reserve and a member of the Judge Advocate General's Corps. He will serve as a legal advisor/planner in the office of strategy, plans and assessments at Multi-National Force-Iraq headquarters in Baghdad. Don is expected to return to OBKC&G in June 2009. The firm wishes Don the best during his leave and looks forward to his safe return next year.
- Congratulations to **David Zafiratos** and his wife, **Amy**, on the birth of their daughter, **Nicole Louise**, who was born at Delnor Community Hospital on May 6, 2008, at 1:45 a.m.
- **Brian J. O'Connor** was one of three attorneys presenting at the Lorman Educational Services' all day seminar on "Public records and the Open Meetings Act" held on Friday, April 4, 2008 at the William Tell Holiday Inn in Countryside.
- Congratulations to **Karl Ottosen**, who was listed as a leading lawyer in the areas of Governmental, Municipal, Lobbying & Administrative Law in the Leading Lawyers Network section of *Chicago Lawyer* Magazine. For the past three years, Karl has been recognized by his peers in a statewide survey to be among the top government-related attorneys in Illinois.
- **Karl Ottosen**, **Bob Britz**, and **Brian O'Connor** spoke at the Illinois Association of Fire Protection District's Administrative Training Session held at Byron Fire Protection District on Saturday, March 15, 2008. Topics covered in their presentation included: a review of recent legislation; fire district budget and levy highlights; a review of TIF/Enterprise Zone issues; and firefighter benefits. In addition, updates on court rulings, the Equal Employment Opportunity Commission, and code enforcement were discussed.

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## Attorney notes

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- Several attorneys spoke at the Illinois Association of Fire Protection Districts Annual Conference held June 19-22, 2008, at the Prairie Capital Convention Center in Springfield, Illinois. **Karl Ottosen, Thomas Gilbert, Stephen DiNolfo, and Shawn Flaherty** participated in a "Legal Open Forum – Panel of Attorneys." In addition, **Shawn Flaherty** spoke on "Discipline: Career vs. Volunteer / Part-Time / POC." **Carolyn Welch Clifford** conducted an "Update on Pension Issues." **Thomas Gilbert** and **David Zafiratos** spoke on the topic, "Did you know you're a fiduciary?" **Robert Britz** and **Brian O'Connor** gave a "Legal Update." **Stephen H. DiNolfo** addressed "Liability in the Fire Service and Using Insurance to Cover the Risks." **OBKC&G, Ltd. attorneys** presented a "Mock Disciplinary Proceedings" skit entitled "Crime and Punishment: The Darren Ridgewood Story." ■

Ottosen Britz Kelly Cooper & Gilbert, Ltd.'s newsletter, **Legal Insights for Pension Boards**, is issued periodically to keep its clients and other interested parties informed of legal developments that may affect or otherwise be of interest to its readers. Due to the general nature of its contents, the comments herein do not constitute legal advice and should not be regarded as a substitute for detailed advice regarding a specific set of facts. Questions regarding any items should be directed to:

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## Mandatory retirement age

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In lieu of any annuity provided in the other provisions of this Article, a policeman who is required to withdraw from service on or after January 1, 2000 due to attainment of mandatory retirement age and has at least 10 but less than 20 years of service credit may elect to receive an annuity equal to 30% of average salary for the first 10 years of service plus 2% of average salary for each completed year of service or fraction thereof in excess of 10, but not to exceed a maximum of 48% of average salary. (40 ILCS 5/5-129.1(a))

As his sixty-third birthday approached, Thompson asked the Retirement Board to consider calculating his annuity pursuant to Section 5-129.1(a) because when he was hired, neither the mandatory retirement age nor Section 5-129.1(a) existed. The Retirement Board did not apply Section 5-129.1(a) to the calculation of Thompson's annuity because he would not have at least ten (10) years of service credit when he was forced to retire. Thereafter, Thompson filed an administrative review action claiming the Board's failure to apply Section 5-129.1(a) was improper and, alternatively, claiming the Board had miscalculated his pension. The trial court found that Section 5-129.1(a) did not apply to Thompson because he did not have ten (10) years of service credit at the time of his retirement. The trial court then ordered the Board to provide Thompson with a detailed accounting of its calculation of his pension.

The First District Appellate Court agreed with the trial court that Section 5-129.1(a) did not apply because Thompson did not have ten (10) years of service credit at the time of his retirement. The First District also considered whether the enactment of Section 5-129.1 either impaired or diminished Thompson's benefits because pension rights vest when a person enters the pension system or when the Illinois Constitution of 1970 became effective in 1971, whichever is later. (*Hannigan v. Hoffmeister*, 240 Ill.App.3d 1065 (1<sup>st</sup> Dist. 1992))

The First District noted that Thompson entered and became vested in the pension system in 1995 when Section 5-128 of the Illinois Pension Code provided the sole basis for the calculation of his annuity benefits. The court reasoned that the addition of Section 5-129.1(a) to the Illinois Pension Code in 2002, and its amendment in 2004, would only serve to enhance Thompson's annuity should he reach at least ten (10) years of service credit. Thompson's nine (9) years and five (5) months of service did not entitle him to the enhanced benefits available to officers who retire with at least ten (10) years of service credit. Therefore, the court concluded that Section 5-129.1(a) of the Pension Code as amended did not diminish or impair Thompson's benefits. ■

## Welcome to the Firm

**OBKC&G, Ltd.** welcomes two law clerks. **Brent Eames** has completed his second year of law school at Northern Illinois University. **James Prescott** is completing his second year of law school at the University of Illinois. Brent and James joined the firm's Naperville office in May 2008. ■

