SEEKING ALBANY JUSTICE

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I write this essay as a lobbyist. I write about a legislative campaign to help New York pension funds to recover asset value losses suffered due to financial fraud. The campaign fell far short of its goals but did achieve at least one success, in the form of a compromise. I explain why. I also describe the legislative process that takes a lobbyist through the highs of winning incremental victories and knowing that the legislation's merits are right. I also describe ultimately losing and compromising more often than winning, which is a regularly felt low for anyone who truly believes in what he or she is advocating. It is important to examine failures in lobby campaigns as well as successes so that I can better benefit my present and future clients.

My job is to represent clients and advocate on their behalf, not mine. Ironically, in order to write here about these clients' views, I must interject my own opinions, emotions, disappointments, and hopes—the very things that I must avoid in my work on a day-to-day basis.

Since finishing law school in 1978, my career has involved lobbying Albany, mainly on behalf of private and public sector unions, as well as not-for-profits that support the work of these unions. I have been fortunate to make a career of advocating on behalf of working people. Their concerns are also my personal concerns. I have been able to make a living and advocate for those whose voices often go unheard, such as domestic and farm workers.

I found organized labor by chance. I had a vague sense that unions might be advocating for things I believed in. I interned at the State Assembly during the summer of 1976 and met the newly hired political director for the American Federation of State, County and Municipal Employees (AFSCME) at District Council 37. He was a political scientist who was looking for a law student to help him interpret the legal jargon in legislation. He hired me part-time in 1977, the year in which public employee unions won an agency shop law in Albany which provided that non-union members had to pay a fee in lieu of dues to their union because the union had the duty to bargain on behalf of non-members as well as members.

Some unions rewarded their lobbyists with the extra union income from agency fees with better cars and living conditions in Albany. My boss asked to hire me as legislative counsel. I was hired, and worked full-time for DC 37 until 1984, when I became the legislative and research director for the New York State American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), which represents both the private and public sectors. I held that position up until 1987, when I founded the now quarter-century-old lobbying practice at my current law firm, Meyer, Suozzi, English, & Klein.

Key to my longevity in this lobbying career has been my ability to build credibility and trust with policy makers and with the groups for which I work. A lobbyist can play fast and loose with the truth and may be successful in doing so, but only on a one-off basis. To build a long career, a lobbyist needs to build trust and a good reputation. I always maintained the longer view; I have wanted to be known as a lobbyist who brings facts, honesty, and political sensitivity to my work with policymakers and longtime loyal clients. I have also tried to be very practical about what types of victories are feasible within a given timetable, since Albany mostly engages in incremental, rather than sweeping, change.

Nonetheless, the occasional opportunity comes when I can bring an issue to my client's attention that could be a "home run."

The Martin Act was one such. The trust and reputation I had built with unions in New York State allowed me to present the issue and to engage unions in support of a campaign to enact legislation. My urgings probably would have fallen on deaf ears on this legally complicated issue but for my good reputation and the battle scars I had already received working three decades for incremental change to benefit working New Yorkers. It is one thing to advocate for half a million or a million dollars for a program to benefit workers, and quite another to advocate for billions in restitution to the pension funds that hold the deferred wages of thousands of workers. Unions were supportive. They saw that this was a practical campaign with a defined legislative goal that could produce massive restitution to their pension funds. If successful, the work of the legislation could lead to the rare Albany "home run" for the advocates.

What follows is one lobbyist's view—that is to say, it is not a comprehensive review of the legal, policy, and political impact of the 2007-09 financial crisis on New York's public pension funds.

I was privileged to be able to play a role in this campaign directly, as a lobbyist for two public employee unions: Local 237 of the Teamsters and Local 1180 of the Communications Workers of America. These unions supported my analysis of the pension issue and my proposed solutions. This is different than the way most lobbyists get an assignment from their client and then go to work on the client's predetermined solution. In the course of building a coalition in support of legislation, I worked closely with many other public and private sector unions in New York State whose members were defrauded, and who had to pay the price for it in reduced pension benefits, as well as at the collective bargaining table. I received invaluable help, advice, and support from the New York State AFL-CIO and representatives of affiliate members who shared my view that there might be a chance to achieve restitution to pension funds for losses due to the fraud that caused, and permeated, the 2008 financial crisis.

I don't name names to blame. The importance of this article lies in its view of governmental and financial institutions, not of individuals who act in good faith to represent these institutions. However, there were two fundamental views of the behavior of the financial services industry: First, that blame can be fixed and compensation sought; and second, that the world of finance is too big to fail (TBTF) and too complicated to blame. If there was a near repeat of the Great Depression, it was because "shit happens," leaving unacknowledged the American consumers who lost $11 trillion in the value of their savings and homes because of Wall Street fraud.

I describe a lobbying effort to amend the New York State Securities Consumer Protection Law, called the Martin Act, in order to overcome legal obstacles to New York's public and private sector pension funds and receive civil monetary compensation for the asset value losses attributable to fraud that permeated the behavior of major financial institutions. The Martin Act was enacted in 1921 as a deterrent against securities fraud. It allows New York's attorney general to pursue criminal or civil charges against companies. But the law does not require the government to show proof that the defendant intended to defraud anyone, or that fraud actually took place. So the State has a lower bar to bring cases.

Attorneys general can use the law to seek an enormous amount of information from businesses based in New York, and they can also disclose an unusually large amount of information about their investigations.

Even without the proposed changes to the Martin Act, New York's attorneys general, Andrew Cuomo and Eric Schneiderman have utilized the Martin Act to address this fraud, particularly with respect to mortgage-backed securities that might have been held by pension funds. For example, Attorney General Cuomo issued Martin Act subpoenas to Bear Stearns, Deutsche Bank, Morgan Stanley, Lehman, and Merrill Lynch. Attorney General Schneiderman launched an investigation into bundled mortgages by Bank of America Corp., Goldman Sachs Group Inc., and Morgan Stanley.

This article points to work that remains to be done—putting the same power and resources to work at compensating New York pension funds, particularly the public funds.

The consequences to these pension funds and their members were direct and immediate. In 2012, public employee pension benefits were cut for those newly hired. Public employers have suffered geometric increases in their pension contribution rates. Private sector union pension funds lost asset value, and the unions and employers had to deal with the consequences in collective bargaining. The amounts lost are staggering: a hundred billion for New York's public pension funds alone between 2007 and 2009. Because the losses were so large, and because the consequences were so immediate, this was a high-stakes campaign.

I usually have very limited time to get my argument and task across to lawmakers and staff. I have to compress complex and technical material into sound bites. Of course, when the material is public pensions and securities law, the compression required is no mean feat: "The misdeeds of too-big-to-fail banks caused massive asset value losses to the New York public pension funds from 07-09. Efforts to recover these losses under federal securities laws are thwarted by the almost insurmountable legal barriers to recovery. New York's Martin Act would allow recovery under a more reasonable and New York court-approved standard. The only entity that can bring a Martin Act suit is the New York State Attorney General. The New York State Attorney General has done great work in recovering for injured homeowners but *de minimis* for New York public pension funds. This bill will encourage efforts on behalf of New York public pension funds to win restitution for the massive asset value loss."

The financial crisis has lain low both the national and New York economies. The crisis and its aftermath have had many complex moving parts and causes. However, the bottom line is simple, like the Star Wars struggle between Good and Evil.

In 2007, securities fraud and greed brought the Second Great Depression to New York, just as they did the first Great Depression in the 1930s. Banks used our pension funds to gamble in a legalized casino for speculators and they lost big, bringing down the whole economy. They were aided and abetted by securities credit-rating agencies that rated worthless junk as Triple A investments.

Bernie Madoff became a household name associated with financial crime. But his crimes paled in dollar value and harm committed by the Too Big to Fail (TBTF) banks. We all know how the economy has suffered: double-digit unemployment, the near collapse of the auto industry, and foreclosures.

In the second great bank Depression, two major investment banks self-destructed. Worse, it led to the $13 trillion bailout of the financial industry, while leaving the same old banking and investment structures intact. Even the former Federal Reserve Bank Chairman, Alan Greenspan, has admitted that a substantial cause of the financial crisis was “just plain fraud.”

Trade unions’ ability to achieve wage increases, health benefits, and retirement security depends heavily on the state of the economy and the investment performance of employers and employee pension funds. The fraud committed by TBTF banks that began in 2006, and which threw the economy into a tailspin from which it has not yet recovered, has made it harder for the unions and employers to meet the needs of middle-class workers.

The public employee unions and their employers are not to blame—those who defrauded our pension funds are to blame. To date, government treasuries and mortgage consumers have benefited by $37 billion in settlements, while New York pension funds have not recovered anything resembling the scope of their asset value losses.

The fraudsters should be made to repay the pension funds from their bonuses and stock dividends. The stolen money has not evaporated; it is there in Wall Street pockets to be reclaimed. All the TBTF banks have enormous litigation reserves that have been used to compensate nearly all injured parties except the New York public pension funds. The securities industry has reported record profits, and is once again distributing large bonuses. Just for those who work in New York City, bonuses at Wall Street securities firms in 2009 were $20.3 billion, up 17 percent from the year before, while New York public pension funds lost over $100 billion in asset value from 2006-2009, and about $300 million of that loss was just from AIG, Citigroup, and Bank of America stock. A report by City Comptroller William Thompson on behalf of the five New York City public funds pointed out that, from 2001-2010, City pension contributions rose from $1.2 billion to $7.7 billion. Further, the report concluded that 48 percent of the increase in City contributions was due to poor investment performance, particularly the 2007-09 meltdown.

I was privileged to work on a legislative solution to benefit public and initially private pension funds in New York State. Two unions in particular (Local 237 of the Teamsters and Communications Workers Local 1180) supported me and gave me standing as a lobbyist to advocate on their behalf. Initially, I worked on legislation to make it possible to sue, under the Martin Act, large institutional investors, public or private.

The Brodsky (A.8646) / Schneiderman (S.5768) bill was introduced in Albany in 2009. The Assembly sponsor was Richard Brodsky of Westchester, a veteran lawyer and legislator, and Chair of the Assembly Codes Committee. The Senate sponsor was then-State Senator, now-Attorney General, Eric Schneiderman. Both were members of a Democratic majority in their respective Houses and the governor was David Paterson, also a Democrat. Since the New York State Legislature is majority-party controlled, since the Democrats had that control, and since our sponsors were senior Democrats, the bill had a strong foundation. Despite committed and technically savvy sponsors, widespread support from public and private sector labor, the bill failed. Incidentally, a similar bill had passed the Assembly 148-0 in 2007. Its Senate counterpart was sponsored by Republican State Senator Thomas Libous of Binghamton and was reported from the Senate Committee on Corporations and Public Authorities, but did not get a Senate floor vote, and died on the Senate-floor calendar.

This legislation is necessary simply because the federal securities laws and the New York State Martin Act do not provide justice for our pension funds. The federal securities laws that used to provide that justice were enacted after the first Great Depression. In the 1980s and ‘90s, politicians gutted these laws at the request of the TBTF banks. This is not to suggest that nothing has been accomplished by the New York State Common Retirement Fund under the federal securities laws. The Fund did recover $624 million in a settlement with Countrywide Financial, later absorbed by Bank of America. This shows how egregious the Countrywide behavior was.

The negative attitude of Governor Paterson was captured in an article about his speech at the Museum of American Finance at 48 Wall Street: “The health of our financial sector directly affects the economic security of people in all corners of New York State.” In 2007, Wall Street finances provided 22 percent of the revenues in New York; more than one out of every five dollars in wages comes from Wall Street. Wall Street capital allows for what is on Main Street—small businesses creating jobs. Paterson said Americans are understandably angry at Wall Street, but there needs to be “an understanding that Wall Street is the engine of New York’s economy.” He noted that other states have stood behind their iconic industries—the grape growers for California, the car makers in Michigan—and said New York should do the same. Paterson said, “You don’t hear anybody in Maryland complaining about crab cakes. If you say anything about corn in Iowa, they’ll run you out of town. If you say anything about oil in Texas, they’ll string you up on the nearest tree. We need to stand behind our engine of economy in New York, and that engine is Wall Street.”

Clearly, the bill faced strong headwinds from the governor, the head of the Democratic Party and usually a big influence on Democrats in the Legislature. The bill was also strongly opposed by the American Tort Reform Association and the Securities Industry and Financial Markets Association.

“Extending the Martin Act as proposed would make New York a magnet for class-action lawsuits against the companies that are the engine of our state economy,” Kathryn Wylde, president and chief executive officer of the Partnership for New York City, a network of business leaders concerned with economic development, said in a statement, “This bill would drive away current and future corporate operations and could cause the loss of thousands of jobs and millions of dollars in tax revenues. There is little the state could do that would have such a negative impact on New York’s ability to attract and retain business."

The Securities Industry and Financial Markets Association lobbying group said in 2008 that the "proposed legislation is unnecessary, duplicative, anti-competitive and harmful to both our national securities law policy and the stability of our markets and financial institutions."

So why did the effort take a step back from Assembly passage in 2007 to no passage in 2009? My view is that the intensity of the campaign waged by the opponents overwhelmed the intensity of the proponents. Packs of business lobbyists buttonholed legislators, decrying the bill. On our side, we had written memos of support from many unions and two comptrollers but no buttonholing. Finally, the bill failed because the attorney general was loath to give up exclusive standing under the Martin Act as it was fighting in New York State appellate courts to preserve even that standing.

The issue isn't just that those with political influence and financial power have some advantages dealing with our government. They are routinely allowed to break the law or operate in gaping holes in the law, with few legal repercussions. Wall Street owns Washington through its huge political contributions and armies of lobbyists. Wall Street has disproportionate influence in Albany and New York City because it is viewed as the "Home Team," whose wrongdoings can be forgiven because to hold it accountable would be to risk wreaking havoc on our New York economy.

For the 2012 legislative session, the Brodsky-Schneiderman bill needed new sponsors. Assemblyman Brodsky did not seek reelection and Senator Schneiderman had moved on to become Attorney General. The Office of the Attorney General did not come out in favor of the Lancman-Libous bill, perhaps because it was litigating the right of the Attorney General to enforce the Martin Act; litigation that ultimately won. The bill itself was substantially the same but was limited to standing for pension funds and not all institutional investors because the groups representing financial institution investors had come out in opposition. The new bill's sponsors were Democratic Assembly Member Rory Lancman of Queens and 26 bipartisan co-sponsors, and Republican Senator Thomas Libous of Binghamton, since the Republicans had won back the majority in the Senate. This bill had mostly the same set of supporters and detractors.

Unfortunately, the New York State Teachers' Retirement System did not join the other public pension funds in supporting the bill. While I never knew why, there was speculation that the bill not being restricted to standing for public pension funds may have been behind the decision to sit it out, despite strong support from the New York State United Teachers board.

Midway through the 2012 session, it became clear to me that this bill would not pass either House. In addition to the strong Wall Street opposition, the Office of the Attorney General did not support the bill because it alters the exclusive jurisdiction of the OAG to enforce the Martin Act. At the suggestion of staff in the Assembly and colleagues in public sector labor, I sought introduction of a new bill that would limit standing to represent the public pension funds under the Martin Act to the Attorney General. The bill provided that when trustees for a public fund asked the Attorney General to investigate a securities fraud case, the Attorney General would be required to do so, and if a settlement or an award were reached, the Attorney General would be required to restitute funds to the affected public pension fund. The bill was introduced on March 22, 2012, in the Assembly by Peter J. Abbate, a Democrat from Brooklyn and Chair of the Government Employees Committee. The bill was later introduced in the Senate by Senator Libous, who also sponsored the (now stuck in legislative mud) Lancman-Libous bill.

The introduction of the Abbate-Libous bill brought pros and cons. The biggest gains were written support from the New York State Association of Counties, representing a bipartisan group of public employers. A second gain was the lessening of opposition from the Office of the Attorney General, since it would now retain its exclusive standing under the Martin Act. On the other hand, the loss of active support from the Office of the New York State Comptroller, which was loath to cede control over litigation involving the Common Retirement Fund to the Office of the Attorney General, was a blow. Private sector unions still supported the Lancman-Libous bill, but public sector union support and focus moved to the Abbate-Libous bill.

But the plot thickens. While all of this legislative maneuvering was going on, the governor, Assembly, and Senate were forging an agreement behind the scenes to cut future public employee pension benefits, and they threw in, for good measure, a partial win for the Martin Act campaign. On March 16, 2012, the so-called Tier 6 Law was enacted to govern most newly hired public employee pensions. This tier included reductions in employee benefits and increases in employee contributions for those benefits. The total savings to public employers in New York State are estimated to be $80 billion over the next 30 years. Spiraling pension obligations have been one of the top financial problems faced by state and local governments across the United States. For New York's municipalities, pension costs have risen more than 650 percent since 2002, so that they were $12.2 billion in 2012. About 40 percent of this increase is attributable to poor investment performance, such as that by New York public funds from 2007–2009. Therefore, the upshot of this poor performance is reduction of employee benefits and increase in employer contributions, even though the damage to the investment performance was caused by neither. Employees and employers suffered in the 2012 solution, but the fraudsters on Wall Street did not suffer at all. There is a straight line between the pension fund asset value losses and the losses to public employees and employers.

There was one ray of light tucked into this Tier 6 pension law that would provide a path to seeking redress against the now well-documented fraudsters: Section 78-a of the bill amended Executive Law 63-c to require the Attorney General to deposit into the public pension fund all monies received in connection with the investigation, commencement, or settlement of an action involving that fund, arising out of its management, operation, investments, or otherwise. This would include all actions commenced under New York's Martin Act. Previously, the statute read that the Attorney General "may" deposit to the fund. This was changed to "shall."

To this day, I do not know how or why this provision was included in the Tier 6 bill. I certainly think that our efforts to expose the asset value losses of the public funds and the lack of adequate statutory redress had something to do with it. No representative of the Governor, Assembly, Senate, Office of the Attorney General, or Trustee of a public fund ever called to say, “Look, we responded to your cries for redress.” Usually, someone wants to take credit for a statutory change that might aid public funds in recovering billions of dollars. It has been dead quiet to this day.

Undeterred, and with great excitement, I passed the news of the very significant one-word change along to my public sector union clients and our broad coalition that had lobbied for Martin Act reform. While the enacted solution was half a loaf, if that, at least there was some consolation prize for the public funds for the benefit cuts of Tier 6.

In late 2013, Greg Floyd, President of Local 237 of the Teamsters and a Trustee of the New York City Employees Retirement System, and I approached the Office of the Attorney General (OAG) to find out what arrangements had been made to coordinate between the OAG and the public retirement funds. We were told that no public retirement fund had asked the OAG to start an investigation into any of their ‘07–’09 asset value injuries. Not only was there not a process in place, but there had been no interest expressed by the public funds. I was perplexed and saddened that our efforts had come to naught, despite the fact that we had actually won a change in the law.

But in Albany, hope springs eternal and things happen when the timing is right. The one-word change from “may” to “shall” could return hundreds of millions to the public pension funds in the future—if attention is paid by the public funds and the Office of the Attorney General. That hasn’t happened—yet.