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Jerry F. Marzullo
jmarzullo@pgm-law.com

Joseph Weishampel

David Grady

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A STATEMENT OF FACTS: THE REALITY OF PUBLIC SAFETY EMPLOYEE PENSION FUNDS IN THE STATE OF ILLINOIS

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A STATEMENT OF FACTS: THE REALITY OF PUBLIC SAFETY EMPLOYEE PENSION FUNDS IN THE STATE OF ILLINOIS

By Jerry F. Marzullo, Joseph Weishampel, and David Grady

Jerry Marzullo, J.D., M.B.A., is a founding partner of Puchalski Goodloe Marzullo, LLP. He represents public employee labor unions and public pension funds on both state and federal levels. Mr. Marzullo is a frequent statewide speaker on all relevant labor and pension topics in the State of Illinois. He is one of the legal counsel for the newly consolidated Statewide Police Officer Pension Investment Fund. He is also a Battalion Chief with the City of Berwyn Fire Department.

Joseph Weishampel is an associate at Puchalski Goodloe Marzullo, where he represents police and firefighter pension funds and unions. He previously worked as a staff attorney in the Circuit Court of Cook County. He is a 2015 graduate of Loyola University Chicago School of Law.

David Grady is a firefighter in Cicero, Illinois where he serves as the President of the pension board and as a union trustee. He is also a part-time law student at Loyola University Chicago and a fellow for the Beazley Institute for Health Law and Policy.

I. INTRODUCTION

Perhaps no other topic in the arena of Illinois labor and employment relations is so divisive and, therefore, so subject to passionate misinformation, as the current state of public safety employee pension funds. The debate appears endless with alleged “facts” and “common sense” solutions permeating everything from local media to the State Legislature to police squad rooms and firehouse kitchen tables throughout our great state. Such hyperbole not only muddies the water but obstructs real and meaningful discussion. This article separates facts from fiction hoping that interested parties may discuss and debate without distraction.

A common complaint in Illinois politics is that public pension systems are crippling the state financially and that only drastic action, such as cutting assertedly-generous benefits, can restore the state’s fiscal health. This article explains that public pensions in Illinois pay out relatively modest benefits, which generate economic activity roughly equal to what is paid. Further, the pension funds have made every payment and weathered every economic downturn during the past 100 years. Thus, there is not a “crisis” demanding a drastic emergency solution. This article reviews the Illinois pension system, refutes assertions made by critics, and explains the statistics critics use to shock audiences. This article sets forth the true state of pensions in Illinois: while there is not a crisis, there is a structural problem in that the funds do not have enough money. The leading cause of this fact, by far, is that plan sponsors have systematically underfunded the pension system.

In late 2019, Illinois Governor J.B. Pritzker signed into law Public Act 101-0610 ("Consolidation Law"), which concerns Article 3 and 4 pension systems, the focus of this article. The Consolidation Law transferred investing assets and authority previously held by each Article 3 and 4 fund to two statewide Pension Investment Funds, to obtain higher returns on investment. The Consolidation Law also will terminate each municipality's power to hire its own actuary to calculate its annual contribution. Finally, the Consolidation Law reversed some previous changes that decreased benefits for employees hired after January 1, 2011. This article examines those changes. This article also discusses ongoing challenges that Article 3 and 4 funds face, including each fund's relationship with its municipality and the mechanisms by which a fund may secure the money that municipality owes.

II. PENSIONS IN ILLINOIS

A. The Perception

Illinois' public employee pension funds are often represented as being on the brink of failure. Those funds are described with language such as "crisis"[1] and "pension-bomb."[2] A typical article from a critic implies that one or more public bodies in Illinois, or Illinois itself, owe(s) a very large and scary amount of money to a pension fund as if it is a traditional type of debt, and then makes clear that the taxpayer is "on the hook" for it.[3] For example, one article noted that "[f]or more than 50 years, state leaders have failed to deal with a slow-burning *disaster* that has taxpayers on the hook for $133.5 billion,"[4] resulting in pension debt that is "devouring all else in state government."[5] A *Bloomberg* article asserted that pension debts amounted to "$11,000 for every man, woman, and child" in Illinois.[6] Critics often attribute dramatic consequences to the state's pension debt: it "threatens to swallow the state budget and suffocate Illinois' economy."[7] An Illinois Policy Institute ("IPI") report asserted that the situation would lead to "crushing the state's economy with more tax hikes."[8]

These dire diagnoses are invariably followed by the argument that the only way to "save" the State of Illinois is to diminish pension benefits.[9] To further support this action, critics often decry the supposed generosity of pension benefits. For example, another IPI article claimed that "[m]ore than 129,000 Illinois public pensioners" will receive $1 million or more in benefits.[10] The article refers to these recipients as "pension millionaires," the state's 1%, a "small, powerful and protected class of wealth" whose profits are "immense."[11] The article further asserts that "the state's social safety net has been gutted to pay for their privileges,"[12] which assumes that a "social safety net" is what the money would be used for if pensions were unconstitutionally diminished.[13]

The Illinois Constitution protects the pensions of public employees.[14] Some critics have claimed that the "crisis" is so extreme that Illinois must amend its constitution to remove the pension protection clause, which could allow lawmakers to reduce pension benefits for long serving employees already in the system with the stroke of a pen.[15] Others propose legislation that would *de facto* reduce benefits in an attempt to circumvent the pension protection clause.[16] One proposal would save less than 1 percent of the current pension debt by freezing pay to individuals already on fixed incomes.[17]

One critic-inspired law has already been enacted. Public Act 96-0889, which took effect January 1, 2011, created a "Tier Two" of pension benefits for employees whose employment started on or after that date.[18] Those benefits were significantly lower than the benefits enjoyed by employees hired before that date.[19] Public Act 96-0889 did this by, *inter alia*, changing the final salary calculation, reducing survivor benefits, and decreasing cost of living allowances; some of these changes may have violated federal Social Security law.[20] For Article 3 and 4 pension funds[21]—the focus of much of this article—the proportion of employees subject to these lower Tier Two benefits has steadily grown over time. Yet this lower benefit level has not increased Article 3 and 4 funds' funding percentage,[22] even before the stock market downturn associated with COVID-19. Between 2012 and 2017, the aggregate funded ratio for Article 3 funds dropped from 56.26% to 55.78%, and for Article 4 funds dropped from 55.56% to 55.10%.[23] Lower future benefits should have increased the funded level, but they have not. The likely reason is that the lower benefits have been included in the actuarial valuations used to determine municipal contributions, so required (and actual) municipal contributions have decreased, i.e., the municipalities, who do not have IMRF-like forced contributions, have enjoyed the lower municipal contributions but have done very little to make up for their earlier missed contributions. Instead of improving funded ratios, Tier Two benefit reductions have taken benefits from future retirees and given that money to municipalities in the present.

B. The Reality

The hyperbolic rhetoric critics employ skews the debate and negatively affects the policymaking process.[24] It provokes a false sense of emergency, disregards the history of the problem, and does not address what solutions are actually feasible.[25] It has also led to illegal policy measures: one or more Tier Two alterations may have resulted in benefits so low they are in jeopardy of violating the social security safe harbor law.[26] And while politicians recite that employees are not responsible for the pension system's problems, they repeatedly ask those employees to bear the burden of resolving them through freezes, pay cuts, reductions to retirement and healthcare benefits, and other measures that place the lives of critical employees and the public at risk.[27]

The reality is that there is no crisis, but it is easy to create the appearance of one. The metrics used to measure pension fund solvency, such as accrued unfunded liability and pension debt, are unfamiliar to the casual reader. They are generally appropriate and useful when properly understood. However, they generate large numbers that obscure the fact that pension funds in Illinois, despite being poorly funded, are generally solvent now and for the foreseeable future.[28] Although there is a *problem*, there is not a *crisis*: any emergency mindset is not justified, and large numbers do not a crisis make. It would appear that critics are creating a "crisis" and then adhering to former Chicago Mayor Rahm Emanuel's doctrine of "never allow[ing] a [good] crisis go to waste."[29]

1. *Beneficiaries*

The often-criticized Illinois pension recipients have not meaningfully caused or contributed to the underfunding that plagues the system.[30] This is because "public pensions in Illinois are not significant outliers in terms of expense or generosity."[31] In Illinois, state and local government work is "strongly associated with" incomes that are 13.5 percent less than comparable private sector employees,[32] and employees with bachelors' degrees earn 32 percent to 40 percent less than their private sector counterparts.[33] Compared to state and local government employees in other states, pay and benefits for state and local government employees in Illinois are toward the middle of the pack,[34] but slightly less than the national average.[35] Total compensation, including benefits, is lower in Illinois than in other high-income states, and even less than in neighboring states like Iowa and Minnesota.[36] Moreover, public-sector employees comprise just 13.2 percent of the Illinois workforce, lower than the national average of 15.1 percent.[37] Illinois employees also contribute significantly to their pension fund: they pay more than 75 percent of the other states.[38] Most other states do not cap pension benefits, but Illinois caps pension benefits at 75 percent of an employee's final average salary.[39] Illinois pension benefits themselves are in the middle of the pack, over $10,000 annually lower than the conservative "red states" of Texas and West Virginia.[40] Overall, compared to other states, public employees in Illinois are in the top quarter of employees in terms of paying in to their pension systems, but in the bottom quarter in terms of the pension benefits they receive.[41] And more Illinois employees are exempt from receiving social security benefits than the national average.[42] There is little evidence that Illinois' benefit structure accounts for Illinois' pension debt when compared to other states with better-funded pension funds.[43]

Additionally, public-sector retirees spend their money primarily in the local economy, which generates significant economic activity.[44] A National Institute on Retirement Security ("NIRS") study found that every dollar paid out in pension benefits in 2016 supported a national average of $1.41 in total economic output.[45] In

Illinois, the figure was $1.57.[46] A University of Illinois Labor and Employment Program ("UILEP") study found that Illinois pension benefit payments nearly pay for themselves.[47] During the period studied, Illinois government entities paid $13.4 billion in pension payments; retirees received an after-tax total of $12.22 billion; this resulted in $12.78 billion being injected into the Illinois economy.[48] Cutting pension benefits would not only break promises to recipients, it would inflict collateral damage on the Illinois economy.

2. The Real Problem

If pension recipients in Illinois are not overpaid, is there a crisis? If so, why? And if not, where do the critics' numbers come from? There is some degree of monetary shortfall in the pension system generally, due primarily to a history of inadequate contributions from plan sponsors.[49] Government contributions have fallen short because government entities have simply chosen to contribute less than necessary. Government entities have also manipulated the actuarial assumptions used to calculate contributions, or have chosen actuaries who will do so, to push contributions into the future. An examination of this history, these methods, and these assumptions is necessary to understand the true fiscal health of Illinois pension funds and the potential impact of the new pension fund consolidation legislation.

Pension fund contribution practices in Illinois have been inadequate for maintaining the health of the pension funds virtually from the start.[50] One source analyzed Illinois pension laws dating back to *1916* and stated that "financial provisions [were] entirely inadequate for paying the stipulated pensions when due."[51] In 1959, a report stated, "Of principle concern to the Commission is the accumulation of large unfunded accrued liabilities *resulting for the most part from the inadequacy of government contributions in prior years* to meet increases in costs."[52] In 1973, a plan was enacted to have annual contributions mirror what the state pension funds would pay out that year.[53] The General Assembly's Pension Commission stated that this plan was "unacceptable since it result[ed] in a deferment of the burden of financing currently incurred benefit obligations to future generations of taxpayers."[54] Later, Governor James Thompson committed the state to a plan of contributing only 60% of estimated payouts to defer contributions.[55] This "kick the can down the road" policy became Illinois' *de facto* funding policy from 1982 to 1995.[56]

Recent history is especially illuminating. In 1994, Illinois mandated that each pension fund be 90 percent funded by 2040 or 2045.[57] This new plan prescribed even lower payments than the previous 1989 plan with which the state had already failed to comply.[58] The timetable set by the 1994 plan—46 or 51 years—is twice as long as the 25-year period recommended under government accounting standards.[59] Such a long timetable adds billions of dollars in extra interest to what is already

owed, especially where, as in Illinois, contributions are backloaded.[60] Worse still, the plan is designed to allow the state's overall pension debt to *grow* until 2029.[61]

In 2003, with interest rates at historic lows, Illinois issued $10 billion in pension obligation bonds.[62] While this was initially seen as a responsible move to reduce pension debt and payments, about $2 billion of the bond issuance was diverted away from pensions.[63] In 2006 and 2007, Illinois granted a pension holiday.[64] This allowed the legislature to not contribute the amount required by the 1994 funding plan; instead, it lowered its payment over that two-year-period to allow it to use the bonds as the sole form of payment.[65] Pension bonds were sold again in 2010 and 2011.[66] This borrowing will add a total of $30.8 billion to the state's pension debt.[67]

The inadequacy of government contributions has been widely criticized. In its 2017 Annual Financial Report, the Teachers' Retirement System ("TRS") wrote: "Since TRS was founded in 1939, the State of Illinois has never, in any year, funded the system at a level that standard actuarial practice would define as sufficient."[68] In its annual reports, the Illinois Commission on Government Forecasting and Accountability has consistently noted:

The single largest cause—comprising just under *50 percent* of the total growth in underfunding—was that the state's contributions fell below the actuarially required level. No other single factor—investment returns, changes in actuarial assumptions, benefit increases, etc. —comprised more than 20 percent of the deterioration of funding status. [69]

Other calculations were even less flattering. One source concluded that from fiscal year 1985 to fiscal year 2012, over 47 percent of the growth in the State's unfunded liabilities[70] came from the shortfall in State contributions to the pension systems.[71] Another found that about 75 percent of the 2013 shortfall, then at $96 billion, was a result of the legislature failing to make contributions.[72] A third source found that Illinois' unfunded pension liabilities grew by $115 billion from 1996 to 2018; considering salary assumptions and benefit changes, benefit payments contributed less than 0.5 percent to that shortfall.[73] This widespread underfunding has also played out with respect to public safety pension funds established under Article 3 and Article 4 of the Pension Code, notwithstanding the fact that those entities are funded by municipalities.[74] The simple refusal by political entities in Illinois to adequately contribute to pension funds is the single most decisive cause of the situation that faces Illinois today.

But government entities also underfund pension funds more subtly, by manipulating actuarial assumptions. To understand these assumptions, one must first understand the actuarial methods by which a pension fund's liabilities are calculated. This article thus addresses actuarial methods and discusses the calculation and relevance of the "big numbers" that critics often cite. This article then explains the importance of the actuarial assumptions used in calculating a funding obligation, and explores how

funding entities tend to choose assumptions that reduce obligation in the short-term, regardless of the effect on their obligations in the long-term.

C. Determining Funding

1. Introduction and Terms

A pension plan is a defined benefit plan, meaning that a retiree's benefit is calculated by a defined, statutory formula based on his or her final salary and total years of service, irrespective of the amount of his or her contributions.[75] The (projected) future benefits owed to current employees and retirees—including those who will not retire for 15, 20, or 25 years—are considered accrued or present liabilities on the pension fund's balance sheet to the extent those benefits are attributable to the employee's past or present service.[76]

As to funding mechanisms, Article 3 and 4 pension funds have three sources of income. First, each employee pays a percentage of his or her salary into the pension fund.[77] Second, the municipality[78] contributes an amount calculated on an annual basis by an actuary.[79] Some of these assets are invested consistent with Pension Code provisions; the returns on these investments are the third source of income for the pension fund.[80] The remainder of the assets are held as cash and used to pay monthly benefits to retirees and other expenses.[81]

The municipality's contribution is calculated annually by an actuary.[82] This actuary may be employed by the Illinois Department of Insurance or retained by the pension fund or the municipality.[83] This calculation takes multiple present-day variables into account, such as the number and salaries of current employees.[84] The actuary must also make actuarial assumptions about future events, such as the average number of years each employee will work, the average lifespan of each employee, department payroll growth, and investment returns.[85] Each of these assumptions affects the calculation of the fund's unfunded actuarial accrued liabilities; the present value of the future benefits to be paid to each employee after he or she retires; the portion of the present value attributable to past years, the current year, and future years; and other measures.[86] A pension fund is considered fully funded with respect to an employee if it has enough assets to pay the portion of an employee's anticipated retirement benefit attributable to the years he or she has already worked, at the time he or she works them.[87] A pension fund is considered fully funded overall if it meets this standard with respect to all employees and retirees.

The following definitions may be helpful:

- **Present Value of Future Benefits**: The present-day dollar value of benefits that will be paid in the future to current participants who are active, retired, or terminated vested.[88]
    - **Actuarial Accrued Liability:** Portion of Present Value of Future Benefits allocated to prior years.[89]
    - **Normal Cost:** Portion of Present Value of Future Benefits allocated to the current year.[90]
    - **Future Normal Cost:** Portion of Present Value of Future Benefits allocated to future years.[91]
- **Unfunded Actuarial Accrued Liabilities:** The difference between the Actuarial Accrued Liability and the actuarial value of the pension fund's accrued assets.[92] This article refers to this measurement as "unfunded liability" or "pension debt."[93] When the accrued assets are divided by the Actuarial Accrued Liability and expressed as a percentage, this is referred to as the "funding percentage" or "X percent funded."

"Actuarial accrued liability," "normal cost," and "future normal cost" can be visualized as past, present, and future boxes. Each year an individual works creates greater benefit (and greater liability for the pension fund) that accrues that year: this is the second box, the normal cost.[94] The benefit accrued from work in previous years is the first box, which represents actuarial accrued liability.[95] This is a liability on the fund's balance sheet *regardless of when the employee will retire*, whether the benefits come payable two or twenty-five years later. The third box represents the future normal cost—the benefits that will be earned by the employee's future work.[96] As the individual continues to work, the past box will get bigger and the future box will get smaller.[97]

2. Actuarial Cost Method

The method used to calculate the present value of future benefits, the unfunded actuarial accrued liabilities, and other measures is referred to as the actuarial cost method.[98] There are two actuarial cost methods common to Article 3 and 4 pension funds; they often yield dramatically different results.[99] One method is the "projected unit credit" ("PUC") method and the other is the "entry age normal" ("EAN") method.[100] For EAN, normal cost is reflected as level percent of salary over an employee's career.[101] This creates a level contribution obligation for the funding entity.[102] By contrast, for PUC, normal cost typically increases as a participant gets closer to retirement age.[103] This creates an upward funding curve in the later years of an employee's career and backloads the required contributions attributable to that employee.[104] Thus, compared to EAN, the PUC method prescribes lower contributions initially, but those contributions increase above EAN levels over the employee's career.[105]

3. Amortizing Pension Liabilities

When a pension fund has unfunded liabilities, as all funds in Illinois do, the legislature can require (and has required) the pension fund to reach a certain funding percentage at a certain time. This is the 90 percent funded by 2040 requirement imposed in 1994.[106] To achieve this, pension debt is amortized and a portion of it included in the pension fund's yearly request to the municipality until it is paid off.[107] The request to the municipality for an Article 3 or 4 fund is usually calculated by adding the normal cost for the coming year to the amortized portion of the amount necessary for the fund to reach 90 percent funded by 2040.[108]

Pension debt can be amortized as Level Percentage of Payroll or Level Dollar.[109] Where payroll growth is zero percent, the two amortization methods yield the same contribution amounts.[110] However, where payroll growth is greater than zero, the Level Percentage of Payroll method decreases the contribution requirement in the near future but increases the requirement in the long-term.[111] This creates a funding ramp, similar to the PUC method, in which liability increases year over year.[112] By contrast, under the Level Dollar method, the same dollar amount of pension debt is paid every year during the amortization period.[113]

4. Other Assumptions

An actuary must make two other assumptions: the rate of return the pension fund will achieve on its investments, and the life expectancy of active members and retirees.[114] These assumptions, especially expected rate of return, are often discussed by critics and informed the Consolidation Law passed in December 2019.[115] If a higher expected rate of return is set, it is assumed that more money will be made from investments in the future, which lowers the amount a municipality must contribute in the present. By contrast, lowering the assumed rate of investment return by a quarter of a percentage point (from 6.75 percent to 6.5 percent) was estimated to increase municipalities' contributions for public safety funds by between 16 percent and 22 percent.[116] Finally, life expectancy assumptions work intuitively. If a shorter life expectancy is assumed, the required municipal contribution is lower.[117]

D. Misstatements and Manipulation Explained

The actuarial calculations detailed above—though, again, wholly appropriate in the correct context—generate the huge numbers critics use to create a sense of panic. Recall that pension debt represents the benefits a fund owes for past service regardless of when those payments will be made. This measure does not distinguish between the payments a pension fund must make next month and those it must make next decade. While it would be salutary for a pension fund to hold assets equal

to *all* obligations that have been incurred, the failure of a pension fund to hold such assets is not cause for panic or an indictment of its fiscal health. The same holds true if a pension fund has a funded ratio of less than 100 percent. Such a fund could easily make payments for years. A lower funding ratio means that investment returns will be lower, pushing future contributions higher.[118] But ultimately, pension debt does not represent the danger of missing a payment. As Bill Atwood, executive director of the Illinois State Board of Investment, stated, "I would say that the likelihood of Illinois plan participants not getting their retirement benefits is highly remote."[119]

To take a real-world example, a report prepared by the actuarial firm Foster & Foster found that as of January 1, 2019, the Hoffman Estates Firefighters' Pension Fund held $84,436,992 in assets, but also had a total accrued liability of $139,313,876.[120] That pension fund, therefore, had $54.8 million in pension debt and was 60.6 percent funded.[121] These numbers are eye-catching and work to the critics' advantage.[122] Hoffman Estates is a suburb with just over 50,000 people and a poverty rate of less than 5 percent.[123] An unfamiliar reader could easily be led to believe that Hoffman Estates residents each owe $1,000 that should be paid now to bring the pension fund into compliance with what it owes, or that pensioners stand to receive only 60.6 percent of their promised benefits, or that some other economic catastrophe is looming. And, the unfamiliar reader would note, Hoffman Estates is in no way economically disadvantaged. But the truth is that the Hoffman Estates Firefighters Pension Fund is nowhere near missing (or reducing) any benefit payments. This is a healthy fund. It maintains $84.4 million in assets and pays out approximately $5.3 million in benefits annually.[124] While fewer assets mean fewer investment opportunities, this fund is nowhere near insolvency.

Additionally, an unfamiliar reader would likely conceive of pension debt as similar to a home or car loan, as a fixed amount with a fixed payment that he or she will, at some point, pay down to zero (and the sooner the better). One would not look at a mortgage statement and say, "Wow, I owe $300,000 on my house and my yearly salary is only $75,000; this is a crisis!" because one will pay that amount over a long period of time. Just as this individual can meet his or her bills as they come due, the pension funds in Illinois, despite decades of underfunding, can make their necessary benefit payments.[125]

Looking to the unfunded liability at a single point in time as the only indicator or measure of the health of a pension system is disingenuous, overly simplistic, and obscures the many layers of nuance that play into this figure and what it means.[126] Low or decreased funding levels say very little about a public pension fund's long-term stability.[127] For this and other reasons, an emphasis on eliminating pension debt quickly is not recommended by economists.[128] Yet a "crisis" narrative has arisen, possibly from a misunderstanding about what funding ratios reveal about a pension system's financial stability.[129] Again, the terminology used also plays a part. "Unfunded liabilities," for example, is "an ominous new catchphrase . . . that is

rooted in financial fallacy."[130] Another factor giving the appearance of a "crisis" is the accounting standards governing public pension plans.[131] In addition to generating large, frightening numbers,[132] the Government Accounting Standards Board ("GASB") accounting standards misrepresent the health of public pension funds by resting on a false assumption.[133] GASB calculates pension debt based on the question, if the pension fund closed tomorrow, how much would be needed to pay out all the promised benefits until the last member dies?[134] This question is pivotal in the private sector where plan sponsors go bankrupt, but it has no application in the public sector where plan sponsors can levy taxes to fulfill their funding obligations.[135] The GASB standards fail to measure progress toward providing benefits when they are due, exaggerate the problems facing pension funds, steer legislatures toward misguided solutions, and cost taxpayers and the economy far more than they purport to save.[136] Any clarity the GASB standards bring "comes at the expense of making the situation seem much more dire than necessary" by ignoring or undermining the value of the pension plan.[137] GASB standards also add billions of dollars to a government's deficit.[138] All of this unnecessarily increases tension over policymaking.[139]

Funding ratios and pension debt should be one tool used to create a funding plan; they should not be used to frame the debate in a way that generates a widespread sense of urgency, creates a fear of insolvency, or results in rushed policy decisions addressing a crisis.[140] After all, Illinois pensions have been criticized and deemed unsustainable for over 50 years and yet have resiliently weathered economic ebbs and flows.[141] At the time of the 1970 Illinois Constitutional Convention, police and fire pensions were funded at 19 percent and 34 percent, respectively.[142] Yet in the intervening years, not a single pension fund in Illinois has failed to make a payment due to an inability to pay. It is irresponsible to use pension debt as a scare tactic to imply a looming catastrophe that does not exist.[143]

Under metrics other than "pension debt" and "funding percentage," Illinois' pension funds are doing well. The National Conference on Public Employee Retirement Systems ("NCPERS") concluded that a pension fund's fiscal health should be based upon 1) whether cash inlays from contributions and investment income exceeds benefit payments in a given year, and 2) whether there is a cushion to weather an economic downturn.[144] Using 2016 data from all 50 states, NCPERS analyzed the top and bottom states represented by the average funding level of the state's pension funds.[145] It then compared the four best-funded state funds to the four worst-funded state funds and examined the number of years in which cash inflows were less than cash outflows—in other words, how often was there a negative cash flow?[146] Illinois was among the worst states in terms of average funding level.[147] However, NCPERS found *no* significant difference between the best- and worst-funded states in terms of frequency of negative inflow years.[148] Regardless of funding level, each of the eight states had between five and eight years in which pension fund income was less than annual benefits paid, i.e., negative cash flow years.[149] Despite having one of the four

lowest funding ratios, pension funds in Illinois were tied with three other states' for the fewest years of negative cash flow.[150] It had fewer instances of negative cash flow than the highest funded state, Wisconsin.[151] Year by year, Illinois pension funds take in sufficient assets to operate and pay benefits, notwithstanding a lower overall funded level. Finally, addressing public pensions nationally, the study concluded, "[F]unding status has little correlation with a pension fund's ability to pay the promised benefits."[152] The study further concluded, "If left intact, public pension plans are sustainable, as they have been for decades. . . . Their assets now are higher than ever before."[153] Thus, regardless of their funding levels, pension funds can continue to meet obligations in perpetuity so long as they remain cash flow positive.[154] The large, scary numbers thrown around by critics do not stand up to scrutiny, and the facts do not establish a problem of the magnitude they suggest.

Rather than a crisis, Illinois has a fundamental, long-term problem: it has not funded its pension obligations. Often the plan sponsor has simply refused to contribute amounts called for by actuarial principles.[155] However, plan sponsors have also frequently manipulated the actuarial assumptions and methods described above, or have found an actuary to do that, in order to defer contributions into the future. The obvious winner in such a situation is the public figure who reduces taxes or increases spending elsewhere. This imposes a real cost on future public officials, residents, and the pension funds themselves that is generally ignored.

However, when a fund is less than 100 percent funded, there is a real cost. That fund has less money to invest, which leads to a lower return on investment. Ironically, the result is that plan sponsors have to contribute more money in the future to make up for the shortfalls of the past. Illinois plan funders are constantly on the wrong side of an "a stitch, in time, saves nine" scenario. And though they are far from the only offenders, it is worth noting that pension critics who fret about the long-term solvency of the system rarely advocate for aggressive funding plans that would benefit future generations out of proportion to any fiscal burden imposed in the present.

As mentioned, unfortunately, certain municipalities have manipulated actuarial assumptions to decrease their required contributions to the Article 3 and 4 funds. The financing provisions of Article 3 and 4 of the Pension Code provide a municipality a great degree of discretion in calculating its contribution to the pension funds each year.[156] The Code states that the municipality shall levy a tax in an amount which, when combined with all other revenues, is equal to the normal cost of the pension fund for the year and the amortized amount which will bring the pension fund to 90 percent funded in 2040.[157] The Code states that the municipality's minimum contribution must be determined by an actuary employed by the Department of Insurance or retained by the pension fund *or the municipality itself*.[158] The Code also specifies that the minimum contribution shall be calculated using the PUC method and the Level Percentage of Payroll method,[159] the very

problematic methods that create funding ramps and defer contribution requirements into the future. Municipalities can and do make contributions greater than this minimum, including by deferring to the determination of the pension fund's retained actuary, but their right to retain their own actuary and to use the methods that minimize current contributions is explicitly written into the Pension Code.[160] The municipality raises the necessary money by imposing a property tax.[161] If the municipality fails to forward the necessary contributions, a pension fund may certify the amount due to the State Comptroller, who intercepts state money otherwise directed to the municipality and redirects it to the pension fund.[162] But this process is time-consuming and takes a toll on fund-municipality relations.[163]

In addition to using the PUC method and the Level Percentage of Payroll method, actuaries often manipulate assumptions related to the rate of return on investment and life expectancy. Article 3 and 4 pension funds fall into one of four sets of legislative restrictions as to what they can invest in, based on the overall value of their assets.[164] Pension funds with fewer assets are subject to greater restrictions, which limits their possible return on investment.[165] By setting a higher expected rate of return on investments, an actuary could reduce a municipality's required contribution. For this reason, a decision by a pension board and its actuary to set a lower expected rate of return is not made lightly, and is made knowing that a municipality may balk at the greater liability the decision creates. When a booming market seems to justify a higher expected rate of return, a municipality is reluctant to lower it to a more realistic number even if the higher rate is not sustainable. Similarly, while actuaries generally rely on objective life expectancy tables and other sources to estimate life expectancy for each employee, retiree, and surviving spouse, actuaries can also produce outdated results. In one case, an actuary intentionally and wrongly "adjusted" mortality tables to understate future pension liabilities.[166] While this case is not typical, it highlights the lack of uniformity surrounding these assumptions and the ability of a municipality or a pension board to "shop" for an actuary likely to produce a favorable outcome.

E. Governor Pritzker's 2019 Task Force

Critics are wrong in their assessment of the causes of pension debt in Illinois and their continued proposals of faulty solutions. But one fact is clear: Illinois' public pension funds are "among the worst-funded" in the nation.[167] No governor can ignore that Illinois' repeated decisions to defer pension fund contributions have created a situation which, while not a crisis, is untenable in the long-term. These decisions have decreased the investment returns the funds would have otherwise realized, necessitating increased municipal contributions. Thus, during his first year in office, Governor J. B. Pritzker formed a task force to analyze the possibility and impact of consolidating the investment assets of the 600 Article 3 and 4 pension funds.[168] The individual funds' abilities to gain returns on their investments is a

frequently-discussed matter. Obtaining the highest return possible is, in the abstract, an uncontroversial way to improve the fiscal health of the system.[169] Consolidating all assets, beyond those needed to pay benefits in the near future, might result in better investment returns and lower costs.[170]

In its October 2019 report, the task force made two key recommendations.[171] First, it recommended that the assets of Article 3 and Article 4 pension funds be consolidated into separate statewide authorities for investment purposes.[172] Those assets would be managed by independent boards and invested in a way similar to the assets of the Illinois Municipal Retirement Fund.[173] The task force recommended that, while the investments would be centrally invested, each fund would maintain an account of its own assets and liabilities with no fund assets used to pay for the benefits of another fund.[174] The individual Article 3 and 4 funds ("Downstate Funds") would continue to manage the administration of benefits, but the Task Force called for continued study of possible administration consolidation.[175]

Second, the task force studied the aforementioned Tier Two benefit system that grants lower benefits to employees hired on or after January 1, 2011.[176] The task force considered the possibility that the lower benefits might violate federal Social Security law.[177] Some employees covered by a public pension plan in Illinois are not required to pay into the Social Security system, including almost all those covered by Articles 3 and 4.[178] The "safe harbor" regulation governing federal Social Security law[179] requires that such employees receive a retirement benefit from their public pension plan that is at least equal to the benefit they would receive under Social Security.[180] If the benefit is not equal, the public employer is required to increase benefits to the level of Social Security, or enroll the employee in Social Security and pay retroactive contributions.[181] As the Task Force Report noted, public employers' liability would continue to grow if the Tier Two benefits were found to violate the safe harbor provision, and the accumulated liabilities would have to be repaid in a short time frame.[182] To remedy this issue, the task force recommended increasing Tier Two benefits by changing calculations for final pensionable salary, cost of living allowances, and surviving spouse benefits in manners more favorable to employees.[183]

III. PUBLIC ACT 101-0610

Shortly after the pension task force released its report, the Illinois General Assembly passed a bill largely mirroring its proposals, which Governor Pritzker signed into law on December 18, 2019 as Public Act 101-0610 ("Consolidation Law").[184] The Consolidation Law created the Police Officers' Pension Investment Fund and the Firefighters' Pension Investment Fund ("Consolidated Funds"), thus accomplishing the consolidation contemplated in the Task Force Report.[185] Each Consolidated Fund is charged with investing the assets of the Downstate Funds.[186] By June 30, 2022, the

Consolidated Funds will have taken custody of each Downstate Fund's investment assets and authority resulting in an approximately $9.5 billion police pension fund and a $6.5 billion firefighter pension fund.[187] The Consolidated Funds will invest those assets pursuant to less-restrictive provisions than those that governed the Downstate Funds.[188] The method by which assets are returned to each Downstate Fund to pay benefits is not made clear but it is anticipated that the fund will develop operational procedures and guidelines to do so.

Under the Consolidation Law, the Downstate Funds will still exist to perform all their other functions, including adjudicating disability cases, verifying continued eligibility for benefits, and formally accepting new members. Every Downstate Fund will have its own account with the Consolidated Fund.[189] Investment gains and losses will be attributed to each Downstate Fund *pro rata*.[190] Each Downstate Fund will *not* have access to the assets attributed to another Downstate Fund.[191] The initial costs of consolidation will be financed by a $7.5 million loan to each Consolidated Fund from the Illinois Finance Authority.[192] However, the assets held for investment purposes are held in accounts outside the State Treasury.[193]

The Consolidation Law creates a transition period beginning on January 1, 2020, and ending June 30, 2022, by which time all Downstate Funds will have transferred their investment assets and investment authority to the appropriate Consolidated Fund.[194] Before this transfer is made, each Consolidated Fund, through its Board of Trustees, will engage a certified public accountant to audit the investment assets of each Downstate Fund.[195] Once a Downstate Fund's assets are audited, the Consolidated Fund will provide it with a certified investment asset list and the Downstate Fund may not purchase or sell investment assets.[196] Each Consolidated Fund's executive director will later give notice to the Downstate Fund of the Consolidated Fund's intent to assume control of the investment assets and the date it will do so.[197]

As with the Article 3 and 4 funds, each Consolidated Fund will be governed by a Board of Trustees ("Board").[198] Each Board has nine trustees.[199] Five of these are "employee-side," being elected by employees or beneficiaries or appointed from lists provided by employee unions; the other four are "employer-side."[200] A simple majority of five votes is enough to pass most motions.[201] However, establishing a quorum and passing certain important types of motions require six votes.[202] The adoption of actuarial assumptions, asset allocation policies, and investment policies are among the crucial matters for which six votes are required.[203]

Each Board has significant operational authority. The Consolidation Law gives each Board the authority to hire an investment manager.[204] Additionally, each Board may hire an executive director in charge of its operation and administration.[205] Each Board may also appoint one or more custodians for its assets.[206] The Board or the executive director may also employ legal counsel, independent auditors, and other

experts and set the compensation of those employed.[207] Each Consolidated Fund is subject to an independent audit by a CPA selected by the Board six months after the end of the transition period,[208] and each will be audited at least annually thereafter.[209]

Several matters remain to be standardized in the operation of the funds; these include certain timelines such as when the auditing process will begin and details such as the order in which the Downstate Funds' assets will be audited. The Boards must all address the mechanism by which they will distribute money to Downstate Funds to pay benefits,[210] and whether municipal contributions shall be paid directly to the Consolidated Funds. The Consolidation Law gives each Board considerable rule-making authority, including regarding the transition process, transfer of funds to the Downstate Funds, and how municipal contributions "may, but are not required to, be directly transferred to the fund."[211]

Of course, the Consolidation Law exists primarily to change the law governing investment of Article 3 and 4 assets to obtain a higher rate of return. It addresses this by eliminating the investment restrictions that currently govern Article 3 and 4 funds.[212] Specifically, the Consolidation Law states that the Consolidated Funds shall not be subject to the limitations applicable to Article 3 and 4 funds that limited the Downstate Funds' ability to invest more than 65 percent of their assets (or less for Downstate Funds with fewer assets) in equities.[213] The Consolidation Law does impose some investment restrictions on the Consolidated Fund, but these are of a different nature.[214]

Another significant provision of the Consolidation Law—and one not contemplated in the Task Force Report—is the removal of actuarial assumptions from the municipalities' influence. The Consolidation Law accomplishes this by addressing the annual actuarial report used as the basis for the municipalities' contributions to the Downstate Fund.[215] It provides that after the transition period, the report used *shall* be the report prepared by an auditor engaged by each Consolidated Fund.[216] The Consolidation Law thus removes from each municipality the power to hire the actuary who makes the assumptions upon which the contribution demand is based.[217] If a municipality was ever so inclined, it may no longer seek out actuaries who inappropriately reduce present-day municipal contributions by using certain assumptions. Instead, the new Consolidated Funds will use their own actuary to determine the required annual contribution for each municipality, thereby bringing a degree of objectivity and uniformity to the required assumptions.[218]

Finally, the Consolidation Law corrects some of the harmful effects of the Tier Two benefit reduction. Most significantly, the Consolidation Law corrects the Tier Two benefits provision to avoid any potential federal Social Security law violation. Under Tier Two cost of living adjustments for pension recipients were limited to one-half of the consumer price index ("CPI") or 3 percent, whichever was lower.[219] The

Consolidation Law changes this to the CPI itself or 3 percent, whichever is lower.[220] The Consolidation Law also increases benefits for survivors of Tier II pension recipients[221] and changes the calculation of final pensionable salary in a way favorable to employees.[222]

The Tier Two benefit enhancements are not projected to create great liability. The task force opined that the enhancements would cost less than 10 percent of the increased investment resulting from consolidation:

> While the fixes to Tier 2 benefits for suburban and downstate police and fire plans will have some associated cost, that cost is minimal in proportion to the improved investment returns resulting from consolidation. On average and over a five-year period, the recommended fixes to Tier 2 benefits are estimated to offset between $70 and $95 million of the $820 million to $2.5 billion (3-9%) in investment return gains, and avoids a potential and costly safe harbor violation.[223]

Data regarding these costs have not been compiled, other than in the Task Force Report, but it appears unlikely that the cost of the increased Tier Two benefits will exceed 10 percent of the expected gains from increased investment returns through consolidation.[224]

The Consolidation Law could increase the overall funding levels of the Downstate Funds, both by obtaining a higher return on investment with the assets pooled,[225] and by saving significant costs on hiring individual investment managers.[226] However, giving control of the actuarial assumptions to each Board may have the most beneficial effect of all, as actuarial assumptions will no longer aid in the effective postponement of liabilities into the future.[227] The fact that the task force report did not recommend this measure, but political leaders included it, may also indicate that there is now political willpower to confront the funding problem honestly in the present, instead of deferring it to the future.

IV. CHALLENGES GOING FORWARD

Public-sector employee pension systems in Illinois will face challenges going forward. Decades of underfunding cannot be undone with a single Consolidation Law. But the Law itself is an encouraging development. Challenges remain, however. Those challenges include a new global pandemic and the various strains of continuing, decades-old opposition to appropriate pension funding.

A. COVID-19

As this article is being written, the COVID-19 pandemic ravages the country. The Dow Jones Industrial Average (and other stock market indices) reflects the damage done to equities markets, falling from 29,276.82 on February 10, 2020[228] to

18,591.93 on March 23[229] before rising to 25,383.11 on May 29.[230] Article 3 and 4 pension funds are permitted to invest up to 65 percent of their assets in equities,[231] and most do so to capture the greatest return on investment. Unfortunately, this means that most Article 3 and 4 pension funds have lost asset value and may continue to do so. Though not explicitly stated, it is likely, that the Consolidated Funds will invest more than 65 percent of investment assets in equities, rather than fixed income instruments such as government bonds.[232] In that case, a future downturn like the one associated with COVID-19 would cause even more lost value to the Illinois pension system.

In response to the COVID-19 pandemic, Congress enacted several relief measures, including, the CARES (Coronavirus Aid, Relief, and Economic Security) Act, effective March 27, 2020.[233] The CARES Act provided $139 billion in relief to be divided among state and local governments based on population.[234] This relief is restricted to necessary expenditures incurred due to COVID-19, which were not accounted for in the state budget most recently approved as of March 27, 2020, and which were incurred between and including March and December of 2020.[235] Illinois received $4.9 billion, with $3.5 billion going to the state itself and $1.4 billion directly going to five large counties and the City of Chicago.[236] Whether any of this aid will go to state or local pension systems is not clear. The CARES act does not address public employee pensions.[237] A review of the Treasury Department's guidance does not yield a clear answer.[238] However, a Treasury Department statement clarified that due to the emergency nature of the situation, a state or local government "may presume that payroll costs for public health and public safety employees are payments for services substantially dedicated to mitigating or responding to the COVID-19 public health emergency" and therefore are permissible under the CARES Act.[239] It appears, then, that CARES Act aid may be used to support Illinois' pension systems if Illinois' leaders choose to put the funds to that use.[240] Regardless, any aid given to municipalities would indirectly support the funding of pensions because it would open up general fund revenue to pay the required contributions. Reimbursement to municipalities means money available to the pensions.

COVID-19-related aid explicitly intended for troubled pension plans is an idea being considered for the next COVID-19 relief act.[241] On May 15, 2020 the House passed another relief measure, the Heroes Act would increase the solvency of multi-employer plans and repeal some previous benefit suspensions.[242] However, the White House has already pledged to veto the Heroes Act.[243]

B. Ideological Opposition

Another continuing challenge for pension funds will be the ideological struggle against the critics' attempt to erase pension benefits, including by misrepresenting the fiscal health of the pension systems and the benefits the retirees receive. This

attempt will receive a new rationalization every time an event of real or asserted economic importance occurs. Thus, in addition to its economic impact, COVID-19 has also provided a rhetorical backdrop for additional attacks on pensions. In April, Illinois Senate President Don Harmon (D-Oak Park) wrote to Illinois' congressional representatives and asked for, *inter alia*, $10 billion in COVID-19 relief for the state's pension funds.[244] Because the assets of most pension funds are heavily invested in a stock market that has recently plummeted, this money was badly needed and would offset an unanticipated economic decline. As Harmon clarified, "The massive negative effects [of COVID-19] to state and local economies across this country have not been addressed and need to be."[245]

For some reason, those who frequently decry the asserted ill health of the Illinois pension system also opposed the use of federal money to help that system. In an open letter to Harmon, U.S. Representative Darin LaHood (R-Peoria) claimed that "Illinois must reform its pension system to reduce long-term liabilities and make the system more equitable to the people of Illinois before federal money is used to support the pension system."[246] Rather than allocate the federal money to a pension system that has been (1) underfunded continuously for decades and (2) hit hard by a stock market downturn, LaHood suggested that the money be given directly to the cities.[247] LaHood did not explain how "reduc[ing] long-term liabilities" would "make the system more equitable," unless he believes that public-sector employees should join the many private sector workers whose pension benefits have already been devastated.

But LaHood's reaction was measured compared to others. The general reaction of Republicans was described as "furious."[248] The Chicago Tribune Editorial Board referred to Harmon's request as "shameless," "dishonest," and "galling"; referred to the pension system as an "obvious drain on resources" and a "financial hellhole"; failed to address the effect of the Coronavirus-related recession on investment assets; and ignored the rights of pension recipients.[249] A welcome counterweight came, surprisingly, from *Crain's*, which acknowledged the need for Coronavirus relief for pension systems like Illinois'.[250] But this perspective should not be controversial. Pension funds rely on investment returns as a source of income. When the stock market goes down, even temporarily, the current value of pension fund assets and expected returns both decrease. This increases unfunded liability, which is presumptively the enemy of many of the critics. So the pension funds can either seek increased municipal contributions during a recession, when a municipality is likely to receive less tax revenue, or they can receive third-party payments from the federal government. And as is always the case with pension funds, increased payments now will eliminate the need for greater payments in the future. Despite the fiscal soundness of this argument, it does not seem to be popular with those who preach fiscal soundness.

C. Employer-Fund Relationships

One aspect of Article 3 and 4 funding unaffected by the Consolidation Law is the mechanics by which each Downstate Fund receives its municipal contribution. The task of ensuring that a municipality actually makes its required contribution is unaffected by the Consolidation Law; it therefore remains with the local pension board.[251] If a municipality fails to make its required contribution, the pension fund may file a complaint. The pension fund would fight an uphill battle, however; the Illinois Supreme Court has held that the question of how a pension fund is funded is a political one, and courts will not take action to protect beneficiaries unless the fund is on the verge of default or imminent bankruptcy.[252] An Article 3 or 4 fund might reach a settlement with a delinquent municipality, but in that case would almost certainly settle for less than its statutory entitlement, years after that money was due, in a settlement agreement that the municipality might later breach.[253]

One provision in both Articles 3 and 4 provides that if a municipality fails to make its required contribution, the pension board may certify the amount delinquent to the State Comptroller, who is tasked with intercepting state funds intended for the municipality and redirecting them to the pension fund.[254] But this "intercept" provision also leads to lengthy legal proceedings. The pension fund-claimant must formally notify the Comptroller of the amount delinquent.[255] "[A]s soon as is practicable" thereafter, the Comptroller must give notice to the municipality.[256] The municipality then has 60 days to contest the amount owed.[257] If it does, the Comptroller may seek more information from the pension fund, who is given 90 days to respond.[258] Once he or she has all the information necessary, the Comptroller issues a decision entitling the pension fund to a warrant for some, all, or none of what it has claimed.[259] As an administrative decision, the Comptroller's decision is subject to administrative review under the Administrative Review Law.[260] Therefore, while this process appears streamlined, it is still subject to lengthy court proceedings if a municipality chooses to challenge any aspect of the Comptroller's decision. Therefore, every legal avenue an Article 3 or 4 fund has against an undercontributing municipality is relatively slow, inefficient, and contributes to friction between the pension fund and the municipality.[261] Finally, an award against a municipality might necessitate enforcement proceedings before a pension fund can actually recover what it is owed.[262]

By contrast, the process authorized for the Illinois Municipal Retirement Fund ("IMRF"), the pension system of municipal elected officials and non-sworn employees, is swift and certain. The IMRF essentially sends a receipt to each municipality, detailing the money it has already intercepted for the municipality's share of contributions to IMRF.[263] In light of the fact that municipal underfunding is the reason Article 3 and 4 funds are inadequately funded, the failure to provide a stronger intercept provision in the Consolidation Law similar to what the IMRF enjoys appears to be a missed opportunity.

Underfunded Article 3 and 4 funds in economically distressed municipalities will continue to face challenges not addressed by the Consolidation Law. Indeed, the Consolidation Law explicitly states that assets will not be shared among Downstate Funds: each Downstate Fund will have its own "account" with each Consolidated Fund and no Downstate Fund will be credited with assets at the expense of another.[264] Additionally, whether an Illinois municipality could file for federal bankruptcy is unclear, and it is also unclear what would happen to the pension benefits payable from the associated Article 3 and 4 funds.[265] The Consolidation Law addresses this challenge only to the extent that eventual, expected greater returns on investment, and actuarial assumptions not made by the municipality, will place such pension funds in a better economic position.

D. Tax Collection and Public Opinion

Illinois' tax system also represents a challenge, for multiple reasons. First, the state is only one of seven that has a flat personal income tax rate, rather than a graduated tax rate which applies a higher marginal rate to higher incomes.[266] This flat income tax rate is enshrined in Illinois' Constitution.[267] A proposal to amend the constitution to eliminate this provision will appear on the ballot in November 2020.[268] If the proposal passes, Illinois would have the authority to apply a higher marginal income tax rate. This might alleviate some of Illinois' budget concerns, but there is no indication that any revenue would go toward any pension system, let alone an Article 3 or 4 system.

Second, Article 3 and 4 prescribe that municipal contributions to pension funds should be funded by property taxes.[269] This has not changed under the new Consolidation Law. Property taxes are the most conspicuous form of taxes. Income taxes are deducted individuals' paychecks, "depriving" them of money that they never had and are unlikely to miss. Sales taxes are imposed when a person is already purchasing something and merely "deprive" the purchaser of a small fraction of the purchase price. Income and sales taxes are relatively subtle in this regard.

By contrast, a property tax imposes a cost that is neither a subtle reduction in income nor a minor fraction of an overall cost. Property taxes force tax payers to open their wallets specifically to pay that tax. Property taxes intrude upon their lives and demand they pay money that they likely intended to spend some other way. Funding a government program by property taxes likely makes that program less popular. Further, property values and rates of non-payment of property taxes vary considerably across the state and are dramatically affected by income inequality, leading to decreased funding in troubled communities. Finally, tying a program to a property tax makes it a candidate to be cut if and when the tax itself is cut.

Since the property-tax-funding provisions of Article 3 and 4 are generally not enforced, it might be helpful to further deviate from this funding method, as some municipalities already have, and impose other income or sales taxes to generate the revenue to pay required contributions. Actions such as these should have a beneficial

impact on the funded levels of those pension funds, without incurring further voter frustration.

V. CONCLUSION

Illinois' pension funds, including Article 3 and 4 pension funds, are not on the brink of failure. They are not a crisis. They are not an extreme burden. And the numbers trotted out as scare tactics are not accurate measures of the pension system's health in the present or even the near future. However, serious underfunding problems have plagued the systems historically. The Consolidation Law will ameliorate problems to some degree, by generating greater returns on investment and by prohibiting untenable actuarial assumptions. But decades of underfunding will not be solved by a single law with a gradual effect. A serious political commitment must be made to funding pensions, with the knowledge that money paid now will generate investment returns and thus result in lower payments in the future. Whether the political will exists to allow greater enforcement of funding contributions remains to be seen.

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[1] ADAM SCHUSTER, TAX HIKES VS REFORM: WHY ILLINOIS MUST AMEND ITS CONSTITUTION TO FIX THE PENSION CRISIS, 3 (Ill. Pol'y Inst. Special Report, Summer 2018) (hereinafter Schuster, Amend), https://www.illinoispolicy.org/reports/tax-hikes-vs-reform-why-illinois-must-amend-its-constitution-to-fix-the-pension-crisis/.

[2] Greg Hinz, *Defusing Illinois' Pension Bomb*, CRAIN'S CHI. BUS. (June 21, 2019), https://www.chicagobusiness.com/html-page/848696 (hereinafter Hinz, Defusing). This article was accompanied by a cartoonish bomb graphic.

[3] *See, e.g.,* Hinz, Defusing, *supra* note 2; Schuster, Amend, *supra* note 2.

[4] Hinz, Defusing, *supra* note 2 (emphasis added). The $133.5 billion figure is true but misleading. Pension debt in Illinois has exceeded $100 billion since 2011. Jason Grotto & Ray Long, *Digging A Pension Hole*, CHI. TRIB. (Dec. 15, 2011), https://www.chicagotribune.com/investigations/ct-xpm-2011-12-15-ct-met-pension-code-20111216-story.html (hereinafter Grotto & Long, Digging). For reasons stated *infra*, *see* Sections II.B.ii., II.D., pension debt is not a typical kind of debt.

Hinz cites "declining assumed rates of return on pension investments; a state workforce that's roughly 20 percent smaller than it was and therefore contributing fewer dollars; and demographic factors—primarily the fact that people now live longer and draw their pensions for years longer" as the reasons for the pension debt. This analysis fails because every single one of the factors listed is calculated, accounted for, and adjusted for annually in determining employer contributions. Not one of these factors is a surprise. Had contributions been sufficient, these factors would have been neutralized and pension debt would be eliminated. If proper actuarial standards were set, the annual contribution would and should reflect these changes year-over-year such that the impact is smoothed over time.

[5] Hinz, Defusing, *supra* note 2. Heinz correctly indicates that state underfunding is to blame for the pension debt but repeatedly touts benefit reductions—not sufficient funding policies—as the solution to the problem.

[6] Elizabeth Campbell, *Every Illinoisan Owes $11,000 for Pensions with No Fix in Sight*, BLOOMBERG BUS. (May 8, 2015), https://www.bloomberg.com/news/articles/2018-05-08/every-illinoisan-owes-11-000-for-pensions-with-no-fix-in-sight.

[7] Joe Cahill, *Pritzker's Pension Silence Speaks Volumes*, CRAIN'S CHI. BUS. (Nov. 16, 2018), https://www.chicagobusiness.com/joe-cahill-business/pritzkers-pension-silence-speaks-volumes.

[8] Schuster, Amend, *supra* note 1. The "situation" referred to is failing to amend the Illinois Constitution to remove the Pension Protection Clause. *See infra*, note 14 and accompanying text.

Schuster, Amend asserts that pensions are causing a crisis in Illinois. Schuster attributes this to "a combination of factors," including "overpromising". This is inaccurate. As demonstrated at length *infra*, notes 30-48 and accompanying text, pension benefits in Illinois are modest and are not outliers in terms of expense or generosity. The benefit level itself contributes very little to the fiscal problems associated with the pension system. The problem is not "overpromising", it is primarily the failure of plan sponsors to meet their financing obligations, a form of self-sabotage that merely necessitates higher contributions in the future. *See infra*, notes 49-74 and accompanying text.

[9] See e,g., *id.* at 17 (calling for increasing the retirement age, capping the maximum pensionable salary, replacing the annual 3% benefit increase with a COLA tied to inflation and suspending COLAs to allow inflation to catch up to prior year increases).

[10] Austin Berg, *The 1%: Illinois' Pension Millionaires*, ILLI. POL'Y (Jan. 23, 2020), https://www.illinoispolicy.org/the-1-illinois-pension-millionaires/ (hereinafter Berg, 1%). The article does not mention that this $1 million is received slowly, over the course of years, and that a pensioner who received $40,000 a year over the course of 25 years would fall under the "1%" designation the article creates. Presumably, a delivery driver who earns $40,000 a year but works for 25 years is also a "millionaire" according to the IPI.

[11] *Id.*

[12] *Id.*

[13] This framing of the issue also assumes, rather oddly, that public employee pensions are not part of the social safety net. In any case, the critics tend to align themselves with a political philosophy that advocates for lower taxes and lower government spending, so their stated concern with the social safety net rings hollow.

[14] ILL. CONST. 1970, art. XIII, § 5. Research by Eric Madiar, who served as chief legal counsel for the Office of the Illinois Senate President, indicated that the framers of the 1970 Illinois Constitution, and the delegates to the convention that led to the same, "had a deep understanding of both the fiscal condition and legal landscape governing public pensions." One letter read at the debates stated the legislature's failure to fund the pension systems, *not* the benefits that beneficiaries received, "has created … a staggering liability for future taxpayers." The framers' intent in adding the pension protection clause was to prohibit the legislature from diminishing an employee's pension benefits once that employee had entered the system, including by pointing to the liability imposed on future taxpayers. The voters who ratified the clause did so under a belief that mirrored the framer's intent. *See* Eric Madiar, *Is Welching on Public Pension Promises an Option for Illinois? An Analysis of Article XIII, Section 5 of the Illinois Constitution*, 48 J. MARSHALL L. REV. 167, 172 (2014) (hereinafter Madiar, Option).

[15] Schuster, Amend, *supra* note 1.

[16] *Id.* These laws generally accomplish this by raising the retirement age or reducing cost of living allowances.

It is important to note that if the critics' contemplated benefit reductions ever became law, the existing pension debt—scary numbers like $133.5 billion—would *not* be affected. Pension debt refers to accrued liability, which relates to work already performed. The benefits earned prior to a benefit-reducing law would not be affected by that law. Thus, the critics could reduce benefits and then claim that the sky is falling because pension debt would not be reduced. *See infra*, note 22-23 and accompanying text.

[17] Schuster, Amend, *supra* note 1 (saving $1.1 billion of $133 billion pension debt). A related aim, advocated by Schuster and the IPI, is to "right-size" the state's union contracts and otherwise infringe on public-sector union bargaining rights, which would transfer $4.2 billion from unionized employees to their employers over five years. *Id.*

[18] Public Act 96-0889.

[19] *Id.*

[20] *Id.* For an explanation of how the Tier Two changes may have violated federal social security law, *see infra*, note 177 *et seq.* and accompanying text.

[21] "Article 3" pension funds are those established by a government entity to pay the pension benefits of retired police officers. *See* 40 ILCS 5/3-101 *et seq.* "Article 4" pension funds are for firefighters. *See* 40 ILCS 5/4-101 *et seq.*

[22] "Funding percentage" refers to the ratio of assets a pension fund has to liabilities attributable to employee service already rendered. *See infra,* Section I.C.i. An employee's eventual entitlement to benefits is accounted for in a pension fund's liability as soon as he or she starts accumulating service time, and therefore the lower benefits eventually payable to Tier Two employees are already part of each pension fund's current liabilities. In other words, even though the individuals eligible for lower Tier Two benefits will not retire for another twelve years, the lower liability associated with those employees is reflected in the Article 3 and 4 funds' current liability.

[23] COMMISSION ON GOVERNMENT FORECASTING AND ACCOUNTABILITY, REPORT ON THE FINANCIAL CONDITION OF THE DOWNSTATE POLICE & DOWNSTATE FIRE PENSION FUNDS IN ILLINOIS (P.A. 95-0950) at 7-8 (2019), http://cgfa.ilga.gov/Upload/2019FinancialConditionDownstatePoliceFire.pdf.

[24] ROBERT BRUNO, AMANDA KASS & DAVID MERRIMAN, A 'PENSION CRISIS' MENTALITY WON'T HELP: THINKING DIFFERENTLY ABOUT ILLINOIS' RETIREMENT SYSTEMS iv (Feb. 19, 2019), https://igpa.uillinois.edu/sites/igpa.uillinois.edu/files/reports/PensionReport.pdf (hereinafter Bruno, Mentality).

[25] *Id.*

[26] ROBERT BRUNO & FRANK MANZO, WORKING IN ILLINOIS' PUBLIC INTEREST: A COMPARISON STUDY ON EARNINGS, BENEFITS, AND IMPACTS, 14 (Mar. 12, 2013), https://ler.illinois.edu/wp-content/uploads/2015/01/Working-in-Illinois-Public-Interest_Bruno-Manzo.pdf (hereinafter Bruno & Manzo, Working); ILLINOIS PENSION CONSOLIDATION FEASIBILITY TASK FORCE, REPORT TO GOVERNOR JB PRITZKER, 4 (Oct. 10, 2019) https://ippfa.org/wp-content/uploads/2019/10/20701-

Report by the Pension Consolidation Feasibility Task Force.pdf (hereinafter "Task Force Report"). For an explanation of how the Tier Two changes may have violated federal social security law, *see infra*, note 177-82. and accompanying text.

[27] Bruno & Manzo, Working, *supra* note 26, at 4.

[28] While no Article 3 or 4 fund is on the verge of insolvency, there are some which could be considered troubled. These are found in municipalities that have long-term, widespread economic difficulty, such as Harvey and East St. Louis. An analysis of the problems faced by these communities is beyond the scope of this article, but the extent of those problems suggests pension funds are not to blame.

[29] Rahm Emanuel, *Let's Make Sure This Crisis Doesn't Go to Waste*, WASH. POST (Mar. 25, 2020), https://www.washingtonpost.com/opinions/2020/03/25/lets-make-sure-this-crisis-doesnt-go-waste/.

[30] *See generally* Jeffrey R. Brown & Richard F. Dye, *Illinois Pensions in a Fiscal Context: A (Basket) Case Study* 1 (Nat'l Bur. Econ. Res. Working Paper 21293, June 2015), https://www.nber.org/papers/w21293.pdf (hereinafter "Brown & Dye, Context").

[31] *Id.*

[32] Bruno & Manzo, Working, *supra* note 26, at 2.

[33] *Id.* at 2, 8. It is worth noting that 51.8% of state and local government workers in Illinois hold Bachelor's degrees, compared to just 30.5% of private sector workers.

Bruno & Manzo note that public-sector employees in Illinois tend to earn slightly more than their private sector counterparts among employees with less education. When examining highly-educated employees, private sector employees earn significantly more than their public-sector counterparts. *Id.* at 9. Further, the distribution of income is more egalitarian in the public-sector. *Id.* at 10. Bruno & Manzo explore additional benefits of public employment in Illinois, including less reliance on the Earned Income Tax Credit and greater racial and gender parity than the private sector, *Id.* at 10-11, but these are beyond the scope of this article.

Finally, Bruno & Manzo note an illuminating trend in Illinois. From the end of the recession in mid-2009 to 2013, when Bruno & Manzo, Working was written, real Illinois GDP grew, but the number of public sector state employees declined. *Id.* at 6-7. This calls into question the need for a crisis mentality in dealing with the problem of pension funding.

[34] Bruno & Manzo, Working, *supra* note 26, at 3; Brown & Dye, Context, *supra* note 30, at 1. Brown & Dye considered theoretical retirees and found that their pension in Illinois would be 25th most out of 50 states, or in another case 27th most out of 46 states. *Id.* at 4-5. The cost of living allowances can drive Illinois pensions higher later in a pensioner's life, but those benefits are required by the fact that Illinois pensioners generally do not receive Social Security benefits. *Id* at 1-2. Additionally, even considering the cost of living allowances, Brown & Dye concluded, "[T]here is little evidence that Illinois is more generous than other states with higher funding ratios [indicating better-funded pension funds]." *Id.* at 4-5.

[35] Bruno & Manzo, Working, supra note 26, at 12. The average state and local government employee earns $44,042 in wages in Illinois and $44,615 nationwide excluding Illinois. When pension and healthcare benefits are included, Illinois state government employees earn only $60,292, far less than the national average for state employees of $69,108.

[36] *Id.*

[37] *Id.* at 6.

[38] *Id.* at 13. Illinois employees contribute 7 to 9.5% of their salaries to their respective pension funds.

[39] *Id.* at 14.

[40] Andrew G. Biggs, *Not So Modest: Pension Benefits for Full-Career State Government Employees*, AEI ECON. PERSPECTIVES 2 (Mar. 2014), https://www.aei.org/wp-content/uploads/2014/03/-aei-economic-perspective-march-2014_160053300510.pdf.

While Illinois pension benefits are average, their cost to employers is somewhat higher. *See* Bruno & Manzo, Working, *supra* note 26, at 2.

Biggs's article also addresses the "pension millionaires." Unlike Berg's article, *supra* note 10, Biggs at least clarifies that these individuals receive $1 million gradually, over the course of their retirements. Of course, by this standard, almost anyone is a millionaire, including someone who makes a modest $50,000 salary and works for twenty years.

[41] Bruno & Manzo, Working, *supra* note 26, at 14.

[42] *Id.* Nationally, 25% of state and local government employees are not covered by social security. In Illinois, 45.4% of all public employees do not receive social security benefits, including the police officers and firefighters covered by Article 3 and 4.

[43] Brown & Dye, Context, *supra* note 31.

[44] Bruno & Manzo, Working, *supra* note 26, at 19.

[45] ILANA BOIVIE, PENSIONOMICS 2018: MEASURING THE ECONOMIC IMPACT OF DB PENSION EXPENDITURES 14 (Nat'l Retirement Sec. Inst., Dec., 2018), https://www.nirsonline.org/wp-content/uploads/2019/01/Pensionomics2018_final.pdf.

[46] *Id.* at 19, fig. 4.

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[47] Bruno & Manzo, Working, *supra* note 26, at 18.

[48] *Id.*

[49] Brown & Dye, Context, *supra* note 31, at 2.

[50] *Id.* at 2, 6. Public employees have at all times made 100% of the contributions required from them via deductions from their paychecks. *See* Bruno & Manzo, *supra* note 26, at 13. Additionally, "Public employees have historically paid their fair share of the normal cost of benefits through payroll deductions." *See* Madiar, Option, *supra* note, at 1.

[51] Brown & Dye, Context, *supra* note 31, at 6.

[52] *Id.* (emphasis added).

[53] *Id.* at 13.

[54] *Id.*

[55] *Id.*

[56] Eric Madiar, *Illinois Public Pension Reform: What's Past is Prologue*, 31 ILL. PUB. EMP. REL. REP. Summer, 2014, at 12 (hereinafter Madiar, Prologue).

[57] Brown & Dye, Context, *supra* note 310, at 14; CRAIG MARTIN ET AL, ILLINOIS PENSION LAW HANDBOOK 8 (Jenner & Block Practice Series, 2012), https://jenner.com/system/assets/assets/6852/original/2012_20IL_20Pension_20Handbook_20-_20FINAL.pdf (hereinafter Martin, Handbook). Article 3 and 4 pension funds, which are the focus of this article, must reach 90% funded by 2040. 40 ILCS 5/3-125; 40 ILCS 5/4-118.

[58] Brown & Dye, Context, *supra* note 310, at 14.

[59] Grotto & Long, Digging, *supra* note 4, at 3; Bruno, Mentality, *supra* note 24, at 19

[60] Grotto & Long, Digging, *supra* note 4, at 3.

[61] Grotto & Long, Digging, *supra* note 4, at 3; Bruno, Mentality, *supra* note 24, at 18.

[62] Bruno, Mentality, *supra* note 24, at 186

[63] Hinz, Defusing, *supra* note 2.

[64] Brown & Dye, Context, *supra* note 31, at 14.

[65] *Id.*

[66] Bruno & Manzo, Working, *supra* note 26, at 13.

[67] Grotto & Long, Digging, *supra* note 4; Adam Schuster, *Shell Game: Chicago Considers Plan to Borrow $10B to Pay Off Pension Debt*, ILLI. POL'Y (August 9, 2018), https://www.illinoispolicy.org/shell-game-chicago-considers-plan-to-borrow-10b-to-pay-off-pension-debt. As Grotto & Long, Digging, explained, "In recent years, the Legislature twice passed laws that allowed the state to borrow an additional $7.2 billion, this time to help make regular pension contributions. That means [that between 2003 and 2011], the state has borrowed $17.2 billion to make pension contributions that weren't even enough to keep the debt from growing, according to the Commission on Government Forecasting and Accountability. Including $13.6 billion in interest on the bonds, the borrowing will add a total of $30.8 billion to the state's pension debt."

[68] Bruno, Mentality, *supra* note 24, at 8 (citing Teachers' Retirement System, *2017 Comprehensive Annual Financial Report* (2017)

[69] Brown & Dye, Context, *supra* note 31, at 7 (emphasis added).

[70] *See infra*, note 893 and accompanying text, for an explanation of this term.

[71] Madiar, Option, *supra* note14, at 2.

[72] Bruno & Manzo, Working, *supra* note 26, at 3.

[73] Bruno, Mentality, *supra* note 24, at 7-8. During this period, benefit changes contributed $5.42 billion to the shortfall. *Id.* at 8. However, salary increases less than assumed decreased the shortfall by $5.06 billion. *Id.* Therefore, only $360 million of the $115 billion shortfall is attributable to more generous benefits.

[74] Martin, Handbook, *supra* note 57, at 4.

[75] 40 ILCS 5/3-111; 40 ILCS 5/4-109; Martin, Handbook, *supra* note 57, at 11; Natalya Shnitser, *Funding Discipline for U.S. Public Pension Plans,* 100 IOWA L. REV. 663, 667 (2015) (hereinafter Shnitser, Discipline).

[76] Bruno, Mentality, *supra* note 24, at 4. As explained further *infra*, this means that the pension fund is expected to have some money now to pay pensions that will not even begin to be paid for 15, 20, or 25 years.

[77] 40 ILCS 5/3-125.1; 40 ILCS 5/4-118.1; Martin, Handbook, *supra* note 57, at 3-5. The deductions taken from the salaries of police officers and firefighters have increased over time. Police officers prior to 1943 only contributed 1% of their salary; by 1971 they were contributing 7%; now they contribute 9.91%. 40 ILCS 5/3-125.1. Similarly, firefighters contributed just 6.955% of their salary until 1975; now, they contribute 9.455%. 40 ILCS 5/4-118.1. These increased contributions are rarely mentioned by critics of pension benefits.

[78] Some Illinois municipalities are served by a Fire Protection District. In that case, it is the Fire Protection District that creates the pension fund and that has the funding obligation. Hereinafter, references to a municipality should be understood to include a Fire Protection District.

[79] 40 ILCS 5/3-125; 40 ILCS 5/4-118; Bruno, Mentality, *supra* note 24, at 4; Martin, Handbook., *supra* note 57, at 3.

[80] 40 ILCS 5/3-135; 40 ILCS 5/4-128.

[81] Shnitser, Discipline, *supra* note 75, at 669; Gabriel Roeder Smith & Co., *2017 Actuarial Assumptions Review For Fund Fiscal Years 2011 through 2016*, State of Ill. Dept. of Insurance I-4 (2017), https://insurance.illinois.gov/Applications/Pension/Default.aspx (hereinafter GRS, Assumptions).

[82] 40 ILCS 5/3-125; 40 ILCS 5/4-118; Martin, Handbook, *supra* note 57, at 6; GRS, *supra* note 81, at I-2 (describing the actuarial assumptions comprising annual contributions).

[83] 40 ILCS 5/3-125; 40 ILCS 5/4-118.

[84] Martin, Handbook, *supra* note 57, at 6; GRS, Assumptions, *supra* note 81, at I-2.

[85] Martin, Handbook, *supra* note 57, at 6; GRS, Assumptions, *supra* note 81, at I-2; Jason Franken, Basic Funding Concepts 12 , paper presented at the 2017 Illinois Public Pension Fund Ass'n Annual Pension Conference) (copy on file with author) (hereinafter Franken, Concepts).

[86] Franken, Concepts, *supra* note 85, at 12; Gabriel Roeder Smith & Co., Wisconsin Retirement System Entry Age Normal Cost Method 2 (December 2016) (hereinafter GRS, Cost Method).

[87] Franken, Concepts, *supra* note 85, at 12; GRS, Cost Method, *supra* note 86, at 2.

[88] Franken, Concepts, *supra* note 85, at 14; GRS, Cost Method, *supra* note 86, at 3. An individual is "terminated vested" if he or she has worked enough creditable service time to be eligible for a pension and has retired, but is not yet old enough to receive a pension. For example, an Article 4 firefighter cannot receive a retirement pension unless he or she has 20 years creditable service and is age 50 or older. 40 ILCS 5/4-109. A firefighter who retires at age 48 with 22 years service is terminated vested.

[89] GRS, Cost Method, *supra* note 86, at 3; Franken, Concepts, *supra* note 85, at 14. For example, if an employee has worked five years, is projected to retire after 30 years, and is projected to receive a pension and live for 25 years after retirement, one-sixth of all 25 years of his pension is considered actuarial accrued liability.

[90] *Id*. In the example *supra*, note 89, the employee's normal cost would be one-thirtieth of his total pension. *See also* PAUL ANGELO & TOM LOWMAN, ACTUARIAL FUNDING POLICIES AND PRACTICES FOR PUBLIC PENSION PLANS 11 (Conference of Consulting Actuaries, Public Plans Community White Paper, Oct., 2014), https://www.ccactuaries.org/Portals/0/pdf/CCA_PPC_White_Paper_on_Public_Pension_Funding_Policy.pdf (hereinafter Angelo & Lowman, Policies).

[91] Franken, Concepts, *supra* note 85, at 14; GRS, Cost Method, *supra* note 86, at;. In the note 89 example, four-fifths of all 25 years of the employee's pension would be future normal cost.

[92] *Id*.

[93] *Id*.

[94] Martin, Handbook, *supra* note 57, at 11; GRS, Cost Method, *supra* note 86, at 6 (making a similar analogy).

[95] GRS, Cost Method, *supra* note 86, at 4.

[96] *Id.* at 5. As part of this calculation, an actuary will have to make assumptions about how long the employee will work. And for all three boxes, an actuary will have to make other assumptions: how long will the employee live after retirement? Will his or her spouse, if any, outlive the employee? Will the employee become disabled from service? And so on.

[97] *Id.* at 6.

[98] *Id.* at 3; Franken, Concepts, *supra* note 85, at 14.

[99] Angelo & Lowman, Policies, *supra* note 90, at 13.

[100] *Id.* at 1.

[101] Franken, Concepts, *supra* note 85, at 12-13.

[102] Id.

[103] *Id.*

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[104] *Id.*

[105] *Id.* at 14.

[106] 40 ILCS 5/3-125; 40 ILCS 5/4-118; Martin, Handbook, *supra* note 57, at 8. "90% funded" means that a fund's accrued assets must be at least 90% of its actuarial accrued liability.

It is unclear whether this requirement will be changed as 2040 approaches. If not, Article 3 and 4 pension funds could *actually* enter a crisis imposed by the legislature. Hopefully, the public dialogue at that time will reflect the actual causes of the crisis: sponsor underfunding, both overtly and covertly, as described in this article.

[107] GRS, Assumptions, *supra* note 81, at I-4.

[108] 40 ILCS 5/3-125; 40 ILCS 5/4-118.

[109] Franken, Concepts, *supra* note 85, at 18.

[110] *Id.* at 16.

[111] *Id.*

[112] *Id.* at 18.

[113] *Id.*

[114] GRS, Assumptions, *supra* note 81, at I-4.

[115] Public Act 101-0610 (Consolidation Law); Bruno, Mentality, *supra* note 24, at 3.

[116] GRS, Assumptions, *supra* note 81, at I-5; Bruno, Mentality, *supra* note 24, at 17.

[117] GRS, Assumptions, *supra* note 81, at I-5.

[118] This is one of the many reasons why the fiscally responsible course of action is to contribute more money to pension funds in the present.

[119] Grotto & Long, Digging, *supra* note 4, at 3. Mr. Atwood was recently named the interim executive director of the Illinois Firefighters' Pension Investment Fund. Rob Kozlowski, *New Illinois Firefighters Pension Fund Appoints Interim Executive Director*, PENSIONS & INVESTMENTS (Mar. 30, 2020), https://www.pionline.com/pension-funds/new-illinois-firefighters-pension-fund-appoints-interim-executive-director.

[120] FOSTER & FOSTER, ACTUARIAL VALUATION REPORT – VILLAGE OF HOFFMAN ESTATES FIREFIGHTERS' PENSION FUND, ACTUARIAL VALUATION AS OF JANUARY 1, 2019, ,at 7-8 (Oct. 7, 2019), , https://www.hoffmanestates.org/home/showdocument?id=21790 [hereinafter Hoffman Estates Fire Report].

[121] *Id.* at 8.

[122] Again, the prospective benefit reductions the critics advocate would not decrease this $54.8 million pension debt by a single time. Pension debt reflects benefits already accrued under existing law. *See supra*, note 16.

[123] U.S. Census, Quick Facts, https://www.census.gov/quickfacts/fact/table/hoffmanestatesvillageillinois/POP010210. Officially, the population estimate as of July 1, 2018 was 51,197. The "Persons in poverty," no date given, is 4.5%.

[124] Hoffman Estates Fire Report, *supra*, note 120, at 26 (revealing that benefit payments to members in 2018 amounted to $5,241,285).

[125] This comparison is especially apt for pension funds, which cannot stop accruing new liabilities as long as new employees enter the system.

[126] *See* Aaron Wallace, *Is the Sky Really Falling?* 60 S. TEX. L. REV. 597, 603-05 (2019) (making similar point in criticizing relatively new guidelines from the Governmental Accounting Standards Board).

[127] *Id.* at 599-600.

[128] Bruno, Mentality, *supra* note 24, at 5 ("While what level of unfunded liabilities is acceptable is debatable, focusing on just the funded ratio target misdirects attention away from the larger issue of funding discipline."); Wallace, Sky, *supra* note 126, at 601 & n. 20 (citing a Haas I statute analyst that full funding of public pensions is a misguided goal and waste of taxpayer money).

[129] *See* Wallace, Sky, *supra* note 126, at 598-99; *see also* TOM SGOUROS, , FUNDING PUBLIC PENSIONS: IS FULL PENSION FUNDING A MISGUIDED GOAL? 6 (Hass Inst. For a Fair & Inclusive Soc'y Policy Brief. 2017), https://belonging.berkeley.edu/pensionaccounting (click on "download the report here) (hereinafter Sgouros, Misguided). **.**

[130] Jan Dennis, *"Unfunded Liabilities" a Financial Myth, Expert Says*, ILL. NEWS BUREAU (Apr. 1, 2009), https://news.illinois.edu/view/6367/205985 (challenging distinction between "funded" and "unfunded" liabilities).

[131] Wallace, Sky, *supra* note 126, at 601-06; Sgouros, Misguided, *supra* note 129, at 4.

[132] *See supra*, notes 92-125 and accompanying text.

[133] Wallace, Sky, *supra* note 126, at 605.

[134] *Id.*

[135] *Id.*

[136] *Id.* at 605-06.

[137] Wallace, Sky, *supra* note 126, at 606; Sgouros, Misguided, *supra* note 129, at 28.

[138] Wallace, Sky, *supra* note 126, at 606; Sgouros, Misguided, *supra* note 129, at 28.

[139] Wallace, Sky, *supra* note 126, at 605-06.

[140] *Id.* at 601, 603.

[141] Bruno, Mentality, *supra*, note 24 at 4.

[142] *Id*.

[143] *See generally* National Conference on Public Employee Retirement Systems (NCPERS), Don't Dismantle Public Pensions Because They Aren't 100 Percent Funded, NCPERS Research Series (Nov. 2017), https://www.ncpers.org/files/NCPERS%20Research%20Series_Dont%20Dismantle%20Public%20Pensions%20Because%20They%20Arent%20100%20Percent%20Funded_Web.pdf (hereinafter NCPERS, Don't).

[144] *Id.* at 2.

[145] *Id.* at 5, 8.

[146] *Id*. at 7-8.

[147] Id.

[148] *Id*. at 8

[149] *Id*.

[150] Id.

[151] *Id.* Wisconsin was 99% funded but had eight years of negative cash flow.

[152] *Id.* at 1. The study further suggested that public pensions themselves "impose little or no burden on taxpayers" and are revenue-neutral or revenue-positive. *Id.*

[153] *Id.* at 11.

[154] *Id*.

[155] *See supra*, notes 49-73 and accompanying text.

[156] 40 ILCS 5/3-125(a); 40 ILCS 5/4-118(a). The financing provisions of Articles 3 and 4 are identical in all respects relevant to this article.

The Consolidation Law discussed in Part III of this article, *infra*, made changes to these provisions. For further discussion, *see* Part III.

[157] *Id.*

[158] *Id.* (emphasis added).

[159] 40 ILCS 5/3-125; 40 ILCS 5/4-118. Using these methods could, in fact, create an *actual* crisis similar to the ones the critics claim is already happening. It is curious, then, that the critics do not seek to change the Pension Code to mandate the use of the Level Dollar and EAN methods, which would be more likely to defuse a crisis. One suspects that lower taxes, not fiscal responsibility, are what the critics seek.

[160] 40 ILCS 5/3-125(a); 40 ILCS 5/4-118(a). Sometimes, a pension fund itself retains an actuary known for artificially decreasing a municipality's minimum contribution. *See infra*, note 166 and accompanying text.

[161] 40 ILCS 5/3-125(a); 40 ILCS 5/4-118(b).

[162] 40 ILCS 5/3-125(c); 40 ILCS 5/4-118(b-5).

[163] *See infra*, notes 251-265 and accompanying text.

[164] *See* 40 ILCS 5/1-113.2 (governing funds with assets of up to $2,500,000); 40 ILCS 5/1-113.3 (governing funds with assets of up to $5,000,000); 40 ILCS 5/1-113.4 (governing funds with assets of up to $10,000,000); 40 ILCS 5/1-113.4a (governing funds with assets of $10,000,000 or more).

[165] *Id.* This was a significant consideration in the passage of Public Act 101-0610, which consolidated the investment assets of all the individual police and fire pension funds. The investment parameters of the Consolidated Funds are less restrictive than those each individual fund faced, which is expected to generate a greater return on investment. *See infra*, Section II.

[166] Mark Glennon, *Illinois Pension Actuary Defrocked. Finally*. WIREPOINTS (Aug. 26, 2018), https://wirepoints.org/actuary-academy-disciplines-timothy-sharpe-illinois-pension-actuary-finally/. The actuary's license was suspended for two years.

[167] Brown & Dye, Context, *supra* note 31, at Abstract. Data from fiscal year 2017 indicate that Illinois' pensions are the third-worst-funded in the country. Janelle Cammenga, *How Well-Funded Are Pension Plans in Your State?*, TAX FOUND. (Apr. 15, 2020) https://taxfoundation.org/state-public-pension-plan-funding-coronavirus/.

[168] Amanda Kass, *Is Consolidating the Assets of Illinois Public Pension Funds a Good Idea?* (Oct. 16, 2019), https://amandakass.blog/2019/10/16/is-consolidating-the-assets-of-illinois-public-pension-funds-a-good-idea/) (hereinafter Kass, Consolidation).

[169] *Id.* As mentioned, in contrast to obtaining high returns, which all parties want, setting an expected rate of return is a matter of significant controversy. A more optimistic projection of future returns leads to a lower municipal contribution.

[170] *Id.*

[171] Task Force Report, *supra* note 26.

[172] *Id.* at 3; Kass, Consolidation, *supra* note 168.

[173] Task Force Report, *supra* note 26, at 4.

[174] *Id.*

[175] *Id.*

[176] *Id.* at 17. The Task Force Report acknowledged that "Tier 2 members receive a substantially smaller benefit relative to Tier 1 members (those hired before 2011) and experience a pensionable salary cap that grows at a slower rate." *Id.*

[177] *Id.*

[178] *Id.*

[179] "A defined benefit retirement system maintained by a State, political subdivision or instrumentality thereof meets the requirements of this paragraph (e)(2) with respect to an employee on a given day if and only if, on that day, the employee has an accrued benefit under the system that entitles the employee to an annual benefit commencing on or before his or her Social Security retirement age that is at least equal to the annual [retirement benefit] the employee would have under Social Security." 26 C.F.R. § 31.3121(b)(7)-2.

[180] Task Force Report, *supra* note 26, at 17.

[181] *Id.*

[182] *Id.*

[183] *Id.* at 18.

[184] Sam Dunklau *Pritzker Signs First Responder Pension Consolidation Law*, NPR ILLINOIS (Dec. 18, 2019), https://www.nprillinois.org/post/pritzker-signs-first-responder-pension-consolidation-law#stream/0.

[185] 40 ILCS 5/22B-101; 40 ILCS 5/22C-101.

[186] 40 ILCS 5/22B-101; 40 ILCS 5/22C-101.

[187] 40 ILCS 5/22B-120; 40 ILCS 5/22C-120.

[188] 40 ILCS 5/22B-122; 40 ILCS 5/22C-122. The specific restrictions on each Consolidated Funds' investment authority are not clear. *See infra*, notes 212-95

[189] 40 ILCS 5/22B-118(c); 40 ILCS 5/22C-118(c).

[190] 40 ILCS 5/22B-118; 40 ILCS 5/22C-118.

[191] 40 ILCS 5/22B-118(c); 40 ILCS 5/22C-118(c).

[192] 40 ILCS 5/22B-120(h); 40 ILCS 5/22C-120(h).

[193] 40 ILCS 5/22B-121(c); 40 ILCS 5/22C-121(c).

[194] 40 ILCS 5/3-132.1; 40 ILCS 5/4-123.2; 40 ILCS 5/22B-120(a).

[195] 40 ILCS 5/22B-120(c); 40 ILCS 5/22C-120(c).

[196] *Id.*

[197] 40 ILCS 5/22B-120(d); 40 ILCS 5/22C-120(d).

[198] 40 ILCS 5/22B-115; 40 ILCS 5/22C-115.

[199] *Id.*

[200] *Id.*

[201] 40 ILCS 5/22B-117(c); 40 ILCS 5/22C-117(c).

[202] *Id.*

[203] *Id.*

[204] 40 ILCS 5/22B-121(d); 40 ILCS 5/22C-121(d).

[205] 40 ILCS 5/22B-118(a); 40 ILCS 5/22C-118(a).

[206] 40 ILCS 5/22B-118(b); 40 ILCS 5/22C-118(b).

[207] 40 ILCS 5/22B-118(d); 40 ILCS 5/22C-118(d).

[208] 40 ILCS 5/22B-120(g); 40 ILCS 5/22C-120(g).

[209] 40 ILCS 5/22B-125(a); 40 ILCS 5/22C-125(a).

[210] The Consolidation Law provides that each Board "shall from time to time transfer moneys and other assets to the participating [downstate] pension funds as required". 40 ILCS 5/22B-118(e); 40 ILCS 5/22C-118(e).

[211] 40 ILCS 5/22B-119; 40 ILCS 5/22C-119.

[212] 40 ILCS 5/22B-122; 40 ILCS 5/22C-122.

[213] The Consolidation Law states, "The [Consolidated] Fund[s] shall not be subject to any of the limitations applicable to investments of pension fund assets by the transferor pension funds under Sections 1-113.1 through 1-113.12 or Article [3 or 4] of this Code." 40 ILCS 5/22B-122; 40 ILCS 5/C-122.

[214] For example, Article 3 and 4 funds were exempt from the requirement of adopting a policy "that sets forth goals for utilization of 'emerging investment managers,'" meaning firms that are minority-owned businesses, women-owned businesses, and businesses owned by a person with a disability. 40 ILCS 5/1-109.1. The Consolidated Funds are subject to that requirement. 40 ILCS 5/22B-122; 40 ILCS 5/22C-122.

[215] 40 ILCS 5/1A-111; *see also* 40 ILCS 5/3-125; 40 ILCS 5/4-118 (provisions altered in part by Consolidation Law).

[216] *Id.* 40 ILCS 5/1A-111(a)(2) provides, "[E]ach [annually-submitted] actuarial statement shall be prepared by or under the supervision of a qualified actuary retained by the Consolidated Fund." 40 ILCS 5/1A-111(a-5) provides, "[I]f a change occurs in an actuarial or investment assumption that increases or decreases the actuarially required contribution for the pension fund, that change shall be implemented [over three years]." 40 ILCS 5/1A-111(a-5) further provides, "The actuarially required contribution as described in this subsection shall determine the annual required employer contribution." Read together, these provisions indicate that the actuary retained by the Consolidated Fund will make all the actuarial and investment assumptions necessary to calculate the employer minimum contribution, and municipalities may not deviate from the actuary's determination.

Some ambiguity appears to arise from the fact that the Consolidation Law does not change the financing provisions of Articles 3 and 4. *See* 40 ILCS 5/3-125; 40 ILCS 5/4-118 (unaltered in relevant part by Consolidation Law). However, 40 ILCS 5/1A-111 clearly supplants 40 ILCS 5/3-125 and 40 ILCS 5/4-118 over time. 40 ILCS 5/1A-111 contemplates that the annual actuarial statement setting forth the employer minimum contribution might be prepared by "a person other than the Department" *during the transition period*. 40 ILCS 5/1A-111(a)(1). However, "[a]fter the conclusion of the transition period," only the Consolidated Fund's actuary may prepare this statement. 40 ILCS 5/1A-111(a)(2). Further, 40 ILCS 5/1A-111(a-5) states that before the transition period ends, the annual actuarial statements may be prepared "utilizing the method for calculating the actuarially required contribution for the pension fund that was in effect prior to the effective date of [the Consolidation Law]." 40 ILCS 5/1A-111(a-5). In other words, before the transition period ends, an actuary may still use the PUC and Level Percentage of Payroll methods. *Id.* After the transition period ends, however, the Consolidated Fund's actuary prepares the statements. *Id.* Although the methods to be used are not specified, the Consolidation Law specifies that "the adoption of actuarial assumptions" is a power reserved to the Boards of the Consolidated Funds. 40 ILCS 5/22B-117(c); 40 ILCS 5/22C-117(c). It stands to reason that the actuarial assumptions adopted by each Board will be used by the actuary to prepare the annual actuarial reports.

Even though it does not amend 40 ILCS 5/3-125 or 40 ILCS 5/4-118 in a way relevant here, the Consolidation Law terminates municipal input into the employer minimum contribution once the transition period ends. Only the Consolidated Fund's Board, not any municipality, will choose the assumptions underpinning the calculation of the annual contribution.

[217] *See* 40 ILCS 5/3-125; 40 ILCS 5/4-118 (authorizing report by actuary retained by municipality).

[218] This is the method employed by the IMRF.

[219] 40 ILCS 5/3-111; 40 ILCS 5/4-109 (eff. Jan. 1, 2011 to Dec. 31, 2019).

[220] 40 ILCS 5/3-111; 40 ILCS 5/4-109 (eff. Jan. 1, 2020 as amended by Consolidation Law).

[221] Instead of merely receiving 66 2/3% of the pension received by the employee, a surviving spouse will now receive the higher of that amount or 54% of the monthly *salary* at the date of death. 40 ILCS 5/3-112; 40 ILCS 5/4-114.

[222] 40 ILCS 5/3-111; 40 ILCS 5/4-109. When created, Tier Two benefits based an employee's final average salary on the "salary of the [employee] during the 96 consecutive months of service within the last 120 months of service in which the total salary was highest" divided by the total number of months, 96. The Consolidation Law provides that the final average salary will be the higher of this number, or the salary of the employee during the 48 consecutive months of service in the last 60 months during which total salary is highest, divided by 48. Since most employees receive annual wage increases through the collective bargaining agreement or promotions, the new calculation method will provide an increase in final average salary, and therefore an increase in pension, in most cases.

[223] Task Force Report, *supra* note 26, at 18.

[224] Email conversation with Jason Franken, Nov. 13, 2019. Franken is an accountant licensed in the State of Illinois. He is a member of the Conference of Consulting Actuaries ("CCA") and a featured speaker at CCA meetings on the subject of employee benefits. https://profile.actuarialdirectory.org/SearchDirectory/MemberDetail.aspx?CustomerRecord=dVlNEsnEBjmjjYQ0GZ9Hqj6swn6A18E1Vujhimo75jucf2mF7sKplw==Franken is employed by the actuarial and consulting firm Foster & Foster. https://foster-foster.com/. .

[225] Jerry Nowicki, *From 649 Funds to 2: Pritzker Signs Pension Consolidation Bill*, DAILY HERALD (Dec. 18, 2019), https://www.dailyherald.com/news/20191218/from-649-funds-to-2-pritzker-signs-pension-consolidation-bill.

[226] *Id.*

[227] *See supra*, note 216 and accompanying text.

[228] Fred Imbert, *Dow Jumps 170 Points, Amazon Leads S&P 500 and Nasdaq to Record Highs*, CNBC (Feb. 10, 2020) https://www.cnbc.com/2020/02/10/us-futures-point-to-cautious-open-as-investors-monitor-coronavirus.html.

[229] Yahoo! Finance Dow Jones Industrial Average, day-by-day, https://finance.yahoo.com/quote/%5EDJI/history/.

[230] *Id.*

[231] 40 ILCS 5/1-113.4a.

[232] *See supra*, note 212 and accompanying text.

[233] Pub. L. 116-136, 134 Stat. 281 (Mar. 27, 2020); *see also* U.S. Dept. of the Treasury, *The CARES Act Works for All Americans*, https://home.treasury.gov/policy-issues/cares (hereinafter Treasury, CARES).

[234] The Institute for Illinois' Fiscal Sustainability, *How Will CARES Act Funding Be Divided Among Illinois and its Local Governments*, (Apr. 15, 2020), https://www.civicfed.org/iifs/blog/how-will-cares-act-funding-be-divided-among-illinois-and-its-local-governments (hereinafter Institute, CARES).

[235] Treasury, CARES, *supra* note 233.

[236] U.S. Dept. of the Treasury, Payments to State and Eligible Units of Local Government 3, https://home.treasury.gov/system/files/136/Payments-to-States-and-Units-of-Local-Government.pdf.

[237] CARES Act, *supra* note 233.

[238] *Id.* The Treasury Department's guidance appears to permit use of this money to support public employee pension funds. *See* U.S. Dept. of the Treasury, *Coronavirus Relief Fund Guidance for State, Territorial, Local, and Tribal Governments* (Apr. 22, 2020), https://home.treasury.gov/system/files/136/Coronavirus-Relief-Fund-Guidance-for-State-Territorial-Local-and-Tribal-Governments.pdf. The guidance permits using the aid to offset "expenditures incurred to respond to second-order effects of the emergency." The guidance also gives examples of eligible expenditures of funds, which include "Payroll expenses for public safety, public health … and similar employees whose services are substantially dedicated to mitigating or responding to the COVID-19 public health emergency," which may include firefighters and possibly police officers. Elsewhere, the guidance permits expenditures of funds "related to a State, territorial, local, or Tribal government payroll support program." However, the guidance lists ineligible expenditures to include payroll or benefits expenses for employees not substantially dedicated to mitigating or responding to COVID-19.

[239] U.S. Dept. of the Treasury, *Coronavirus Relief Fund Frequently Asked Questions* (updated as of May 4, 2020), https://home.treasury.gov/system/files/136/Coronavirus-Relief-Fund-Frequently-Asked-Questions.pdf.

[240] *Id.* The Frequently Asked Questions also allow the transfer of funds from one unit of local government to another, including a school district. A pension fund would therefore fall within the definition of a "unit of local government."

[241] Doug Sword, *Unions, Employers Want Pension Relief Included in Coronavirus Aid Talks*, ROLL CALL (Apr. 17, 2020), https://www.rollcall.com/2020/04/17/unions-employers-pitch-pension-relief-in-coronavirus-aid-talks/.

[242] Heroes Act, H..R..6800 (2020), https://www.congress.gov/bill/116th-congress/house-bill/6800/text?r=48&s=1#toc-H8288223BC68D4195AD7ECE5395AC97E3; Hazel Bradford, *House Relief Act Comes with Multiemployer Changes – and*

Controversy, PENSIONS & INVESTMENTS (May 15, 2020), https://www.pionline.com/legislation/house-relief-act-comes-multiemployer-changes-and-controversy (hereinafter Bradford, Changes).

[243] Bradford, Changes, *supra* note 242.

[244] *Illinois Democrats Seek $41B in Federal Coronavirus Relief, Including $10B Pension Bailout*, NORTHWEST HERALD (Apr. 19, 2020), https://www.nwherald.com/2020/04/19/illinois-democrats-seek-41b-in-federal-coronavirus-relief-including-10b-pension-bailout/addwl95/ (referring to relief for pension funds as a "bailout").

[245] *$10 Billion Illinois Pension Bailout Request Ignites Controversy*, CHIEF INVESTMENT OFFICER (Apr. 21, 2020), https://www.ai-cio.com/news/10-billion-illinois-pension-bailout-request-ignites-controversy/ (hereinafter Chief, $10 Billion).

[246] Jeremy Scott, *LaHood: To Receive More Aid, Illinois Must Make Changes* (Apr. 20, 2020), https://www.933thedrive.com/2020/04/21/lahood-to-receive-more-aid-illinois-must-make-changes/ (hereinafter Scott, Changes). LaHood did not elaborate as to how or why he considered Illinois' pension system inequitable.

LaHood has voted to expend federal money on a border wall. *See* http://clerk.house.gov/evs/2018/roll282.xml (voting results on House Resolution 4760, June 21, 2018). That bill—the Securing America's Future Act—would have elevated being in the country without status from a civil offense to a criminal one. *See Tom* Jawetz & Philip E. Wolgin*, The Four Worst Parts of the Securing America's Future Act (June 7, 2018)* https://www.americanprogress.org/issues/immigration/news/2018/06/07/451726/4-worst-parts-securing-americas-future-act/. It is unclear whether LaHood considered "mak[ing] the system more equitable" before voting to use federal money to build the border wall.

[247] Scott, Changes*, supra* note 246. LaHood said, "Let's give money directly to the City of Peoria. Let them decide how to spend the money the best way that they can, so we don't have to lay off 50 police and firemen in Peoria." Instead of repairing the pension system from the damage that non-funding has caused, LaHood would give the money to a municipality, with no oversight, with the threat that Article 3 and 4 pension fund members would lose their jobs if his plan was not followed.

LaHood also stated that the state must withdraw the proposed Graduated Income Tax increase plan that is set to go to the voters in November. Scott, Changes, *supra* note 246. That plan would finally permit Illinois to tax high-earners at a higher marginal rate than low-earners. It is not clear whether LaHood stated why he was making this demand, but it is consistent with a desire to steer money away from people who need it and to avoid placing the tax burden on those who can afford it.

[248] *See* Chief, $10 Billion, *supra* note 245.

[249] *Editorial: Illinois' Shameless, Dishonest Ask for a Federal Bailout*, CHI. TRIB. (Apr. 19, 2020), https://www.chicagotribune.com/opinion/editorials/ct-edit-illinois-seeks-federal-bailout-pensions-coronavirus-20200419-ymvxr3m2lzd3zcoyytbahkyqki-story.html.

This appears to be the second Chicago Tribune editorial about a potential "bailout" for the state's pension systems in light of COVID-19. *See Commentary: Pension Bailouts Are Not the Answer for Chicago and Illinois—Even During a Pandemic* CHI. TRIB. (Mar. 30, 2020), https://www.chicagotribune.com/opinion/editorials/ct-edit-illinois-seeks-federal-bailout-pensions-coronavirus-20200419-ymvxr3m2lzd3zcoyytbahkyqki-story.html.

[250] *States Like Illinois Need Coronavirus Relief for Pensions and Healthcare*, CRAIN'S CHI. BUS. (Mar. 26, 2020), https://www.chicagobusiness.com/opinion/states-illinois-need-coronavirus-relief-pensions-and-health-care.

[251] 40 ILCS 5/3-125(c); 40 ILCS 5/4-118(b-5).

[252] *People* ex rel. *Sklodowski v. State*, 182 Ill.2d 220, 227-33, 695 N.E.2d 374, 377-79 (1998); *McNamee v. State*, 173 Ill.2d 433, 439-46 , 672 N.E.2d 1159, 1162-66(1996)

[253] A representative case is *Bd. of Trustees of City of Harvey Firefighters' Pension Fund v. City of Harvey*, 2017 IL App (1st) 153074, 96 N.E.3d 1. In *Harvey*, the pension board filed a complaint in 2010 seeking to enforce a settlement agreement from 1996 that the city violated from 2005-2010. *Harvey* is rare in that the *Harvey* court found that the pension fund *was* on the verge of default, which triggered the Pension Protection Clause. Despite finding for the pension board on most issues, and affirming a $15 million judgment, the appellate court denied the pension board a writ of mandamus, allowing the city—which violated statutory and settlement requirements—to continue to calculate its tax levy going forward. Further, despite prevailing in large part, the pension board was injured by the fact that city violations that occurred in 2005 were not finally adjudicated until 2017, denying the pension board of money it was entitled to for twelve years.

[254] 40 ILCS 5/3-125(c); 40 ILCS 5/4-118(b-5).

[255] 74 Ill. Admin. Code § 295.300.

[256] 74 Ill. Admin. Code § 295.600(a).

[257] 74 Ill. Admin. Code § 295.600(a)(3); 74 Ill. Admin. Code § 295.600(b).

[258] 74 Ill. Admin. Code § 295.600(d).

[259] 74 Ill. Admin. Code § 295.600.

[260] 735 ILCS 5/3-101 *et seq.*

[261] *Accord* Comments of LaHood, *supra* note 247 (asserting that giving federal aid to pension funds might cause municipalities to lay off the participants in those funds).

[262] *See, e.g.*, *Harvey*, 2017 IL App (1st) 153074 96 N.E.3d 1.

[263] 40 ILCS 5/7-172.1.

[264] 40 ILCS 5/22B-118(c); 40 ILCS 5/22C-118(c) ("The board [of each Consolidated Fund] shall separately calculate account balances for each participating pension fund. The operations and financial condition of each participating pension fund account shall not affect the account balance of any other participating pension fund.").

[265] *See* Bob Lawless, *Can a State File Bankruptcy? (ReBroadcast)*, ILL. PUB. MEDIA, WILL AM 580(Nov. 21, 2016), https://will.illinois.edu/legalissuesinthenews/program/can-a-state-file-bankruptcy.

[266] Bruno & Manzo, Working, *supra* note 26, at 22. Strangely, the failure to tax higher incomes at a higher rate is generally absent from critics' discussions about Illinois' budget and is not a proposal that pension critics advance.

[267] "A tax on or measured by income shall be at a non-graduated rate." ILL. CONST. 1970, article IX, section 3(a).

[268] Governor Pritzker signed legislation to place this issue on the November 2020 ballot. Tina Sfondeles, *Graduated Income Tax Question Heads to Ballot as House Oks Constitutional Amendment*, CHI. SUN TIMES (May 27, 2019), https://chicago.suntimes.com/2019/5/27/18641670/graduated-income-tax-illinois-house-constitutional-amendment-2020-ballot. For its part, the IPI opposes a graduated income tax, despite the fact that it would likely raise revenue and alleviate the fiscal concerns the IPI itself often raises. *See* Austin Berg, *Why Illinoisans Can't Trust Pritzker's Tax Promises*, ILL. POL'Y INST. (Mar. 14, 2019), https://www.illinoispolicy.org/why-illinoisans-cant-trust-pritzkers-tax-promises/. And as mentioned, LaHood opposes the graduated income tax. *See supra*, note 247.

[269] 40 ILCS 5/3-125; 40 ILCS 5/4-118. Some municipalities deviate from this funding scheme; those deviations are not challenged in court.

RECENT DEVELOPMENTS

By Student Editorial Board:

Enrique Espinoza, MaryKate Hresil, Nicholas Lisle, Erin Monforti

Recent Developments is a regular feature of the Illinois Public Employee Relations Report. It highlights recent legal developments of interest to the public employee relations community.

I. IPLRA DEVELOPMENTS

A. Arbitration

In *City of Chicago v. Fraternal Order of Police*, 2020 IL 124831 (Ill. June 18, 2020), the Illinois Supreme Court held that an arbitration award that directed the City of Chicago and the Fraternal Order of Police (FOP) to establish a procedure for the City to comply with Section 8.4 of their collective bargaining agreement (CBA) was contrary to public policy and, therefore, unenforceable. Section 8.4, provided for the destruction of Chicago police disciplinary records and related documents five years following the incident or the discovery of the violation. Section 8.4 has been the subject of controversy since 1991, when a federal district judge ordered the City to cease destroying complaint register files; other judges hearing civil rights cases involving Chicago police followed suit. The City was unsuccessful in its subsequent attempts to eliminate Section 8.4 from the CBA.

In response to several requests for policy misconduct records under the Freedom of Information Act (FOIA), the City in 2014 informed the FOP of its intention to release records that, under the CBA, should have been destroyed. The FOP sought a preliminary injunction, which was granted by the circuit court, disallowing the release of any records more than four years old as of the date of the FOIA request. The City thereafter filed an interlocutory appeal. When the United States Department of Justice (DOJ) began investigating patterns of excessive force and discriminatory police practices in Chicago in December 2015, it requested that the City preserve all misconduct-related documents, including those that were the subject of the ongoing arbitration cases. The arbitrator shortly thereafter issued his original opinion calling for compliance with the CBA.

In July 2016, the City filed a petition in the circuit court to vacate the arbitration award because it violated Illinois public policy pursuant to the Local Records Act, 50 ILCS 205, *et seq*. The FOP filed a counter-petition, but in October 2017 the circuit court granted the City's petition to vacate on the ground that enforcing the award violated the public policy to maintain public records. The appellate court affirmed, holding that the destruction of records was based not on the requisite consideration of whether the records have " . . . administrative, legal, research or historical value . . . ", 50 ILCS

205/10, but rather on an arbitrary fixed period of time. The FOP appealed, and the Illinois Supreme Court affirmed the appellate court's decision.

The Illinois Supreme Court employed a two-step analysis developed in *AFSCME v. Department of Central Management Services*, 173 Ill. 2d 229, 671 N.E.2d 668 (1996), which asks whether a clearly defined and strong public policy can be identified in constitutional, statutory, or judicial authority and then determines whether the award in question violates the public policy. Looking to the plain language of the Local Records Act, the court found a clear public policy to preserve public records, with destruction becoming appropriate only after review by the Local Records Commission. The court found that the arbitration award violated the policy of the Local Records Act. The court rejected the FOP's efforts to reconcile the contractual clause with the Local Records Act because, although the City could begin to comply with the award by submitting the records to the Records Commission, it could not comply with the award and the law if the Commission refused to allow the records' destruction. The court held that the Local Records Act and the contract were irreconcilable, as any denial of destruction by the Commission would run counter to the contract—and any attempt by the City to comply with the contract's terms outside the Commission's purview would be contrary to public policy.

The court concluded that state law must prevail over contracts, as "[a] contract expressly prohibited by law is void, and there is no exception to this rule for the reason that a law cannot at the same time prohibit a contract and enforce it." The court rejected the FOP's argument that section 15 of the IPLRA requires giving effect to CBA provisions that conflict with state statutes. The court reasoned that such a holding would eliminate the public policy exception in all cases involving collective bargaining and resulting contractual terms.

B. Discrimination

In *Carmen Rentas and County of Cook, Health and Hospital System*, Case No. L-CA-19-078 (ILRB Local Panel June 19, 2020), the Local Panel affirmed the Executive Director's dismissal of an unfair labor practice that alleged that Cook County Health retaliated against Rentas on the basis of "her race and/or national origin."
The Local Panel affirmed the Executive Director's dismissal of the charge on the ground that the charging party failed to allege the Respondent took adverse action against her because she engaged in activities protected under the Act. The Executive Director noted that Charging Party alleged that the Respondent retaliated against her because "she made claims of gender, national origin, and age discrimination."

Finding the appeal without merit, the Local Panel noted that "[t]he Executive Director correctly determined that the Charging Party did not raise issues for hearing on the allegation that the Respondent retaliated against her for engaging in protected, concerted activity." The Local Panel noted, "Even on appeal, the Charging Party

describes her protected conduct as a complaint to 'EEO Nick in HR' and 'complaint[s] to EEOC/IL[D]HR.'" (Alterations in original.)

The Local Panel held:

> To raise issues for hearing on a retaliation claim arising under Section 10(a)(1) of the Act, the charging party must present some evidence on each element of her prima facie case, namely, that[:] (1) she engaged in union and/or protected, concerted activity, (2) the Respondent knew of that activity[;] (3) the Respondent took adverse action against her; and (4) her protected, concerted activity and/or union activity was a substantial or motivating factor in the adverse employment action.

Here, the Charging Party alleged she was engaged in protected activity, suggested that the Operating Room Flow Coordinator, Cean Magosky, disciplined her with a one-day suspension, and proffered suspicious timing as evidence of a causal connection between her grievance and the adverse action. Regardless, the Local Panel held suspicious timing alone was not enough to "raise issues for hearing [under the Act]." Turning to the Charging Party's remaining arguments for suspicious timing, the Local Panel further determined there was insufficient evidence, particularly here the Charging Party made a blanket assertion that the Respondent "knew of her protected activity," and where the Charging Party alleged she received two suspensions in retaliation but it was unclear whether those resulted from the grievances filed.

For the forgoing reasons, the Local Panel affirmed the Executive Director's dismissal.

II. ILLINOIS SCHOOL CODE DEVELOPMENTS

In *Dynak v. Board of Education of Wood Dale School District 7*, 2020 IL 125062 (Ill. Apr. 16, 2020), the Illinois Supreme Court ruled that a teacher who gives birth at the end of one school year is not entitled under Illinois School Code to use her accrued paid sick leave at the start of a new school year.

On March 15, 2016, Margaret Dynak, a full-time teacher employed by Wood Dale School District 7 (District), notified the District she was due to give birth on June 6, 2016. She requested to use 1.5 days of her accumulated paid sick leave on the last 1.5 days of the school year in June. She also requested to use 12 weeks of leave pursuant to the Family and Medical Leave Act, beginning the first day of the 2016-17 school year. Additionally, she requested to use paid sick leave for the first 28.5 days of her FMLA leave, allegedly pursuant to section 24-6 of the School Code.

In *Dynak*, the court had to determine whether section 24-6 of the Illinois School Code, 105 ILCS 5/24-6, allowed a teacher who gives birth at the end of the school year to use her accumulated paid sick leave at the start of the next school year. The school district denied Dynak's request to use paid sick leave at the beginning of the new school year following, approximately two months after the birth, giving rise to the issue. Plaintiff

filed a complaint for declaratory judgment in the Circuit Court of DuPage County, where the court held in favor of the school district; the Appellate Court affirmed.

Section 24-6 defines sick leave for full-time teachers and certain school district employees in municipalities with populations of less than 500,000 people. 105 ILCS 5/24-6. The statute provides that eligible employees shall be granted at least 10 paid sick days per school year, with the unused amount allowed to accumulate. Through a legislative amendment in 2007, "birth, adoption, or placement for adoption," was added to the definition of sick leave. Plaintiff interpreted the statute as allowing sick leave for birth to be open-ended and noncontinuous. The Illinois Supreme Court disagreed.

The court determined the statute expressly limits a teacher's right to use paid sick leave for birth. Reading its plain terms, it provides "sick leave" to certain teachers and school employees for various events requiring employees to be absent from work. The court reasoned the statute includes "birth" in its list of events triggering a teacher's right to use her accumulated paid sick leave. Moreover, the court noted the statute even states that a medical certificate is required "as a basis for pay during leave after an absence of 30 days for birth." Ultimately, the court reasoned the language of the School Code strongly suggests that the legislature intended that "sick leave for birth must have a temporal connection to the birth." Theretofore, the court deduced the 30-day requirement could only make sense if its intent was for paid sick leave to follow immediately after the birth.

The court reinforced its understanding by considering that "birth" is contained within a group of other qualifying events, which also have a temporal connection. Finding "the most reasonable and consistent reading of the statute is [one] that it allows an employee who experiences a qualifying event to use accumulated paid sick leave at the time of that event, not later at the employee's discretion," the court held for the District.

Ultimately, the court held that under section 24-6, "[T]eachers may use up to 30 days of accumulated paid sick leave during the six-week period *immediately* following the birth." (Emphasis in original.)

III. WORKERS COMPENSATION DEVELOPMENTS

On June 5, 2020, by Illinois Gov. J.B. Pritzker signed HB 2455 into law. The amendment to the workers compensation law creates a rebuttable presumption that an essential employee's contraction of Covid-19 occurred in the course of employment and therefore is eligible for workers' compensation benefits.

The amendment applies to any first responder or front-line worker diagnosed with Covid-19 on or after March 9, 2020, and on or before December 31, 2020. The amendment specifies that the "presumption shall apply to any fireman [or policeman] who was exposed to and contracted COVID-19 on or after March 9, 2020, and on or before December 31, 2020; except that the presumption shall not apply if the fireman [or policeman] was on a leave of absence from his or her employment or otherwise not

required to report for duty for a period of 14 or more consecutive days immediately prior to the date of contraction of COVID-19."

The presumption only applies to workers who: required to interact with the public, or work with fifteen or more employees at their place of business. Except for home care workers, an employee's residence is not considered their place of business. Claimants must establish they contracted COVID-19 through a confirmed diagnosis from a licensed medical practitioner or a positive laboratory test for COVID-1 or COVID-19 antibodies. The amendment extends the rebuttable presumption for ordinary death benefits related to death *in the line of duty* because of COVID-19.

The employer may rebut the presumption by evidence, including but not limited to, the following:

1. Compliance with the fullest extent practicable with applicable health and safety practices and guidance in the fourteenth days prior to the diagnosis
2. Establishing the claimant contracted the virus somewhere else.
3. Showing the claimant worked from home or was off work in the fourteen days prior to the diagnosis.

Finally, an employer is entitled to a credit against any liability for temporary total disability due to an employee as a result of the employee contracting COVID-19 for (A) any sick leave benefits or extended salary benefits paid to the employee by the employer under Emergency Family Medical Leave Expansion Act, Emergency Paid Sick Leave Act of the Families First Coronavirus Response Act, or any other federal law, or (B) any other credit to which an employer is entitled under the Workers' Compensation Act.