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MEMORANDUM

THE STATE OF ILLINOIS, AND THE CITY OF CHICAGO AND SMALLER MUNICIPALITIES, ARE NOT GUARANTORS OF THE PAYMENT OF PENSION BENEFITS

In prior legal analyses provided to the Civic Committee of the Commercial Club, we addressed whether the Illinois General Assembly may modify the formula used to calculate pension benefits earned by current State and local employees. We concluded that the Pension Clause of the Illinois Constitution (Ill. Const., art. XIII, § 5) prohibits State and local governments from reducing pension benefits that employees earned in prior years, but that there are compelling arguments that State and local governments may enact legislation that will *prospectively* reduce the pension benefits that current employees will earn as a result of *future* work performed after the prospective legislation takes effect. The sole exception is for the benefits to be earned by judges and other State officials whose compensation cannot be reduced during their terms of office under other guarantees of the Illinois Constitution.

This memorandum analyzes whether the State of Illinois is the guarantor for the payment of pension benefits if a State pension plan has insufficient assets for payment. This memorandum also analyzes whether the City of Chicago ("City") and smaller municipalities are guarantors, or whether the State is a guarantor, for the payment of pension benefits under City and smaller municipality pension plans that are part of the State pension system.

The answer is that neither the State, nor the City or a smaller municipality, has such a guarantor obligation. The debt obligation for pension benefits rests solely with the State pension funds and with City or municipal employee pension funds.[1]

There are at least three separate arguments that representatives of State pension beneficiaries have made to support claims that the State has guaranteed payment of pension benefits. First, these representatives argue that the Pension Clause of the Illinois Constitution, without more, establishes such an obligation for the State. Second, they argue that the State has taken on a guarantor role in the "Obligations of State" provisions in the statutory Articles of the Pension Code setting up the State pensions. Third, they argue that the Pension Clause, combined with the "Obligations of State" provisions, establishes a guarantor obligation for the State.[2] We disagree with these arguments.

Neither the Pension Clause of the Illinois Constitution, nor any provision of the Illinois Pension Code, establishes that the State has an obligation to guarantee the payment of pension benefits if the pension fund cannot. The Pension Clause provides: "Membership in any pension or retirement system of the State . . . shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired." Ill. Const., art. XIII, § 5. On its face, the Pension Clause protects the contractual relationship between any "pension or retirement system" and the members of that system. Each State "pension or retirement system" is created by the Pension

[1] The analysis of the guarantor issue is the same for the City or a smaller municipality as for the State, except in a few relevant respects specifically identified below. Also, each of the City or smaller municipality pension funds addressed here is part of the State pension system. Accordingly, when the analysis refers to the State in discussing the guarantor issue, the analysis is equally applicable to the City or smaller municipality, unless otherwise noted.

[2] In reality, this third argument is subsumed by the first and second arguments, because if neither the Pension Clause nor the Pension Code standing alone establishes a guarantor obligation for the State, the combination of the two cannot create such an obligation.

Code as a trust entity separate and distinct from any other State entity. Thus, the Pension Clause imposes the contractual obligation to pay State pensions upon these separate pension or retirement systems – not the State Treasury. The Pension Clause says nothing about the State being a guarantor of pension benefits if the "pension or retirement system" runs out of money. Further, the Constitutional debates do not support that such a role was intended by the Pension Clause.

The Illinois Pension Code requires specific legislative action before the State can become a guarantor of pension obligations. Under Section 22-403 of this Code, neither the State nor any local government within the State is obligated to pay pensions as a debt of the State or local government "unless otherwise specifically provided in the law creating such a fund." 40 ILCS 5/22-403. None of the Articles establishing the State pension funds "specifically provides" for a State guarantor obligation as required by Section 22-403. Although each of the Articles creating the State employee pension funds contains an "Obligations of State" provision that includes payment by the State of "all benefits granted under this system," that obligation expressly exists (with the exception of one Article) only "to the extent specified in this Article." Each of the State pension fund Articles specifies that the State is to establish and make contributions to a pension fund, and that that pension fund is to pay pension benefits. No Article specifies that the State will pay pension benefits if the pension fund cannot. In addition, even if the "to the extent specified in this Article" phrase were absent – as it is in Article 16 (creating the Teachers' Retirement System ("TRS")) – principles of statutory construction require that the generic "Obligations of State" provision be read to comport with the specific provisions in each of the Articles that provide that the State establishes and makes contributions to the pension funds and that the pension funds pay the benefits. Thus, because there is no provision that "specifically provide[s]" that the State is guarantor of payments under the State pension plan, the State has not guaranteed these payments when the funds are unable to make them.

In this regard, if the General Assembly had intended for the State to be a guarantor of pension benefit payments, it would have been a simple matter to have enacted legislation that imposed this obligation in express and clear terms. Although there are no "magic" words that must be used to establish a guarantor obligation, it must clear that the guarantor had this intent. Here, there is no clear legislative statement that evidences such an intention. There is only a general "Obligations of State" provision that provides that the State has an obligation to pay benefits "to the extent specified in this Article", and specific provisions specifying that the State is to set up and contribute to State pension funds and that those pension funds pay benefits. This does not evidence an intent for the State to pay pension benefits if the pension fund cannot.

Other considerations reinforce that no State guarantor obligation has been established. The "Obligations of State" provisions in the current Pension Code of 1963 were first enacted in 1939 and were subsequently amended in minor respects thereafter. But it was settled in Illinois in 1939 that State public pension plan participants had no contractual right to State pension benefits that had been accrued under an existing “mandatory” State pension plan. Thus, when the "Obligations of State" provisions were enacted, they could not have been intended to establish a State guarantor obligation for pension benefits, for there was no underlying “contract” for the State to guarantee in the case of mandatory State pension plans. Also, the first "Obligations of State" provision was enacted in the predecessor to Article 16 in 1939, which is six years before Section 22-403 was enacted. The Obligations of State provision thus could not have been intended to satisfy the requirements that must be met under Section 22-403 before the obligation to pay pension benefits applies to the State and not only to the pension fund itself.

Further, the Illinois Supreme Court has held that matters that were not enforceable contract rights before the adoption in 1970 of the Pension Clause of the Illinois Constitution are not enforceable contract rights after its adoption unless they were intended to be, and were, addressed by the Clause. Thus, pension obligations incurred before 1970 are not enforceable contractual rights unless they were addressed by the Pension Clause. The "Obligations of State" provisions were not addressed in the Clause and therefore could not establish a State guarantor obligation for pension benefits.

No Illinois case holds that the State has a guarantor obligation to pay pensions if a pension fund runs out of assets. There have been numerous, unsuccessful attempts by pension plan participants to require the State adequately to fund pension plans at the levels specified in the Pension Code. In each case, the courts have held that participants in State employee pension funds have no contractual right to a specific level of pension funding during any fiscal period. Moreover, the entire premise of these cases has been that participants will have no recourse against the State if pension funding levels are inadequate and the pension plans consequently are unable to pay the accrued pension benefits. Similarly, there are numerous decisions that have addressed whether the doctrine of sovereign immunity bars actions against State pension funds. The issue in these cases turned on whether the state pension plans are really the State for certain purposes, and in addressing these claims, no case has held that the State is subject to suit to enforce a guarantor obligation to pay pension benefits.

There are strong policy grounds for the law to presume that the State has not agreed to guarantee pension benefits. This obligation inherently imposes risks of large and unpredictable draws on the State Treasury that could impair the State’s ability to exercise its police powers to protect the health, education, and safety of its citizens. In addition, this obligation could encourage State pension boards to undertake more risky investments, knowing the State would provide a backstop.

The fact that the State pension plans are qualified pension plans under the tax deferral provisions of the Employee Retirement Income Security Act of 1974 ("ERISA") does not change these conclusions. ERISA does not give beneficiaries of State pension plans a right to sue in either state or federal court, or to assert a right guaranteeing benefits, that does not already exist under State law.

Finally, any claims under an alleged State guarantor obligation would be subject to the State's sovereign immunity and thus ultimately would have to be brought in the Court of Claims. Such claims would be unenforceable unless the General Assembly were to appropriate sufficient funds to make good on the guarantee. It has been estimated that the unfunded pension liabilities of State pension plans may exceed $200 billion. If the State pension funds were on the verge of bankruptcy, the State would be unlikely to have the money required to pay such claims, and it doubtful in the extreme that State courts could or would order the Governor and the General Assembly to raise income taxes or cut spending on other programs in order to pay the benefits. These practical considerations underscore why there should be strong presumptions against treating the State as guarantor of benefits under state pension plans.

The foregoing considerations apply with greater force to the pension funds of the City and smaller Illinois municipalities. There is nothing in the Articles that indicates that the City or smaller municipalities have guaranteed payment of benefits under these plans, and there is absolutely no evidence that the State has guaranteed those benefits. The City and smaller municipality pension funds do not even have an equivalent of the "Obligations of State" provisions. Further, courts have held that the City's pension obligation is limited to the statutorily required employer contributions. Indeed, not only does the City not have the obligation to pay money into the City funds beyond the required employer contributions, but it is prohibited from doing so under the Articles creating the City funds. Similarly, smaller municipalities generally have provisions in their pension fund articles that are inconsistent with a guarantor role by the municipalities for their pensions.

ANALYSIS

I. The Pension Clause Does Not Establish A State Guarantor Obligation For The Payment Of Pension Benefits

Representatives of pension beneficiaries have argued that the Pension Clause establishes that the State has an obligation to pay pension benefits if the pension funds cannot. We believe this argument is incorrect.

The Pension Clause does not establish a State guarantor obligation to pay pension benefits from the State Treasury if the State pension funds run out of money. The Pension Clause states: "Membership in any pension or retirement system of the State . . . shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired." Ill. Const. art. XIII, § 5. The text plainly provides that it is membership in "any pension or retirement system of the State" (e.g., the separate pension retirement systems for teachers, firemen, and judges) that is the "enforceable contractual relationship". The pension and retirement systems of the State are created by the Pension Code as trust entities that are separate and distinct from any other State entity. *See, e.g.,* 40 ILCS 5/2-101, 14-134, 18-101. It must be presumed that the drafters of the Pension Clause were aware of the legal nature of the pension or retirement systems as expressly defined in the Pension Code, and thus the decision to define "[m]embership in any pension or retirement" system as the "enforceable contractual relationship" evinces an intent to limit the protected contractual obligation to the pension or retirement systems themselves. Accordingly, the contract that the Pension Clause protects runs between the pension beneficiary and the pension or retirement system in which the beneficiary participates, not between the pension beneficiary and the State, and the Pension Clause imposes upon these separate pension or retirement systems – not the State – the contractual obligation to pay State pensions.

The reason for adoption of the Pension Clause was to ensure that "all pension benefits will be determined under a contractual theory rather than being treated as 'bounties' or 'gratuities', as some pensions were previously." *Buddell v. Board of Trustees, State University Retirement System of Illinois,* 118 Ill.2d 99, 102 (1987). The Pension Clause does this by creating a protected contractual relationship between pension beneficiaries and their State pension or retirement system that the State cannot abrogate on the legal theory that under Illinois State law, mandatory state pensions are gratuities.

The debates surrounding the enactment of the Pension Clause do not support that the delegates intended for the State to be a guarantor for the payment of State pensions as opposed to the State pension funds themselves. As explained in Section II, *infra,* when the Pension Clause was adopted, the delegates must be presumed to have been aware of Section 22-403 of the Pension Code, first enacted in 1945, which expressly provides that the payment of pension benefits is not a debt obligation of the State, as opposed to the pension fund itself, unless "otherwise specifically provided" in the law establishing the pension fund. The Pension Clause's creation of a protected contractual relationship between "any pension or retirement system" and its member beneficiaries, rather than between the pension beneficiaries and the State, is thus fully consistent with Section 22-403.

What the debates were about, as explained at length in our April 27, 2010 Memorandum on Illinois' authority to reduce the pension benefits that current employees will earn from future service, was preventing local home rule bodies from dishonoring pension benefits that had been earned. 4 Record of Proceedings, Sixth Illinois Constitutional Convention 2929 (Vice President Lyons); *id.* (Delegate Kinney). Thus, the Pension Clause ensures that neither the State nor local home rule bodies can dishonor pension benefits earned under the pension system of which the fund is a part.

The delegates otherwise debated only two issues relating to the scope of the Pension Clause in the Proceedings of the Constitutional Convention. First, the major issue was whether the Clause would impose a funding obligation on the Illinois General Assembly and other legislative bodies. The sponsors of the Pension Clause represented and agreed that the Clause would not impose actuarially adequate funding on legislative bodies in Illinois, but instead merely would provide contractual protection for "pension rights." 4 Proceedings 2925 (Delegate Green); 2928 (Vice President Lyons); 2929 (Delegate Whalen and Vice President Lyons); 2992 (President Witwer). Second, the delegates also addressed the issue whether it would be an "impairment" or "diminution" of pension benefits if they did not provide automatic cost of living adjustments. 4 Proceedings 2927 (Delegate Parkhurst); 2931-32 (Delegates Green, Kinney). In short, there was no agreement in these proceedings that a purpose of the Pension Clause was to ensure that if pension funds ran out of funds, the State would guarantee that pensions were paid.

To be sure, a few delegates speculated about the possible impact of the proposed Pension Clause if a pension fund were on the verge of default or imminent bankruptcy.[3] For example,

[3] *See, e.g.*, 4 Proceedings 2926 ("Mr. Kemp: . . . I would remind some of the members of this Convention that there have been municipalities in the state that have gone bankrupt. . . I would presume that the purpose of this proposal is to make certain that irrespective of the financial condition of a municipality or even the state government, that

one delegate who opposed adoption of the Pension Clause expressed concern that the Pension Clause might put the State Treasury on the hook for unfunded pensions if the funds defaulted.[4] Also, delegate Kinney, who supported adoption of the Pension Clause, initially stated her view that the word "impaired"[5] in the Pension Clause "is meant to imply and to intend that if a pension fund would be on the verge of default or imminent bankruptcy, a group action could be taken to show that these rights should be preserved." 4 Proceedings 2926.[6]

Importantly, however, the debates quickly reached a consensus that these scenarios were *not* what the proposed Pension Clause was designed to achieve. Vice President Lyons, a co-sponsor, reacted to this speculation by asserting that "I *thought* that the purpose of this amendment was to give protection to those people who felt they needed protection for their pension rights in the event that sweeping home rule powers were given to local governments." 4 Proceedings 2928. Mrs. Kinney agreed that Mr. Lyons had correctly described what the proposed Pension Clause was designed to do. 4 Proceedings 2929. Indeed, Mrs. Kinney stated that what was intended by the proposed Pension Clause "is simply to give them a basic

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those persons who have worked for often substandard wages over a long period of time could at least expect to live in some kind of dignity during their golden years. . . ."); 2927 ("Mr. Parkhurst:. . . There is no history in the state of Illinois of impairing or diminishing or welching on any pension plans when they come due. If we are going to get to the point in the state of Illinois where we can't pay the pensions, we're down the drain anyway; and anything you put in this constitution is not going to change that one bit").

[4] *See* 4 Proceedings 2928 ("Mr. Borek:. . .Finally, I would like to state that 'diminished' or 'impaired' indicates to me somehow that the treasury of the State of Illinois would guarantee 374 pension funds; should they go broke, they will reimburse those to the extent they can operate. I think this is a very bad amendment, and I am certainly talking against it.").

[5] Later during the debates, delegate Kinney stated her view that "if the word 'impairment' bothers people, I suggest, if it is the wish of the Convention, that word could be deleted, and the rest of the amendment could stand." 4 Proceedings 2929.

[6]The term "group action", although undefined and ambiguous, likely refers to an action by current and potential beneficiaries to compel the State to meet its "share" of statutory pension funding obligations, as set forth in the Pension Code. But as explained in Section II B 1, *infra*, that share, unlike a guarantor obligation, would not necessarily ensure that all pension benefits would be paid in full if the funds had insufficient money.

protection against abolishing their rights completely or changing the terms of their rights after they have embarked upon the employment – to lessen them." 4 Proceedings 2929. Vice President Lyons then stated that "then I should like to speak in favor of the amendment, because I am not shocked at the notion of vesting contractual rights in beneficiaries of pension funds." *Id.* Finally, Mr. Whalen agreed with Delegate Kinney that the proposed Pension Clause "doesn't require the funding of any pensions, and therefore the whole question of funding is irrelevant to the issue of whether we should adopt the provision." *Id.*[7] Thus, the debates reveal that the Pension Clause was not intended to make the State a guarantor for the payment of pension benefits.

Further, as earlier stated, it must be presumed that the delegates were aware of the existence of Section 22-403 of the Pension Code at the time of the Constitutional Convention. It bears repeating that Section 22-403 establishes, as the base rule, that the State is not obligated to pay pensions as a debt of the State, as opposed to the pension fund paying pensions as a debt of the fund, "unless otherwise specifically provided in the law creating such [a] fund." 40 ILCS 5/22-403. The very existence of Section 22-403 illustrates that without more, the Pension Clause does not establish that the State has an obligation to treat all pension amounts owed as a debt of the State; otherwise Section 22-403 would violate the Pension Clause.[8]

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[7] Mr. Whalen subsequently lamented that the Pension Clause would not secure full payment of pension benefits if a pension fund became insolvent, further evidence that the Clause was not interpreted as creating a State guarantee of pension benefits. *See* 4 Proceedings 2929 ("Under section 16, what we would have done is lock in the contractual line of cases into the constitution and I am not so sure that that in the end would benefit the people that we seek to benefit by this provision, because particularly in bankruptcy it seems to me, which was the concern of Delegate Kemp, the benefit – the person receiving the pension benefits would stand a better chance of receiving full payment if the benefit were characterized as proprietary rather than contractual. . .").

[8] The United States Supreme Court has held that the absence of any discussion regarding a sweeping legal change during lengthy deliberations "can be likened to the dog that did not bark" and is probative evidence that the sweeping change was not intended. *See Chisom v. Roemer,* 501` U.S. 380, 396 n. 23 (1992). The fact that no

The General Assembly has not interpreted the Pension Clause as establishing that the State, City, or smaller Illinois municipalities are guarantors for the payment of pension benefits. For example, Section 3-142 of Article 3, which creates the police pension fund for municipalities of 500,000 and under, provides that "[i]f at any time there is not sufficient money in the fund to pay the benefits under this Article", the city counsel or board of trustees of the municipality "shall make every legal effort to replenish the fund so that all beneficiaries may receive the amounts to which they are entitled." Section 3-142 then provides, however, that if after making such efforts "there still remain insufficient funds, the beneficiaries shall be paid pro rata from the available funds, but no allowance or order of the board shall be held to create any liability against the municipality, but only against the pension fund." 40 ILCS 5/3-142. The continued effectiveness of this provision shows that the General Assembly does not read the Pension Clause as mandating a guarantor obligation by the local municipality or the State for the payment of pension benefits.[9] As another example, the City pension funds created by the Pension Code contain provisions that require that where there is a shortfall in any one of the reserves of a City pension fund, that shortfall is to be made up from the other reserves of the same fund. *See, e.g.,* 40 ILCS 5/5-167.2, 6-164.1(e), 6-206, 8-137.1, 11-134.3, 16-185, 16-186.3, 16-136.2. There would be no need for a City pension fund to establish priority among a fund's reserves in the event one or more of those reserves were deficient if the City or the State had the obligation to

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delegate of the constitutional debates or any court thereafter has suggested that the Pension Clause nullifies Section 22-403 confirms that no such impact was intended.

[9] The General Assembly included this language in Section 3-142 when it enacted the Pension Code in 1963. *See* 1963 Ill. Laws, 161, § 3-142, eff. July 1, 1963. The General Assembly subsequently amended Section 3-142 in 1985, well after adoption of the Pension Clause in 1970, but did not alter the language quoted above. *See* Ill. Public Act 83-1440, § 1, eff. Jan. 1, 1985.

backstop payment of pensions by the fund. No mention is made in the Pension Code of having the City or State make up the shortfall.

Finally, the Pension Clause should be interpreted in light of the problem the delegates were trying to address. The theory that the Pension Clause imposes a guarantor obligation on the State or City rests on the Pension Clause's prohibition on "impairing" the benefits of membership in any State pension or retirement system. But the alleged guarantor obligation does not follow from that prohibition. As shown, although a few delegates to the 1970 Constitutional Convention suggested that the Pension Clause might provide rights against the State Treasury if pension funds were on the verge of bankruptcy, the delegates reached a consensus that this was not the issue being addressed by the Pension Clause. Instead, as the debates reflect, the problem sought to be solved by the Pension Clause was the general problem under Illinois law that mandatory State pensions were regarded as mere gratuities that could be changed or abrogated, i.e., "impaired", at will, and the particular problem that local governments might use the home rule powers granted under the 1970 Constitution to abrogate the obligations of municipal pensions funds. The delegates to the convention were not confronted with a history of pensions not being paid because of bankruptcy.[10] Against this backdrop, the word "impair" in the Pension Clause should be interpreted as addressing the problems that the delegates to the convention were seeking to solve, not addressing a hypothetical problem (i.e., bankruptcy of a fund) that had not been experienced.

[10] *See, e.g.* ,4 Proceedings 2927 ("Mr. Parkhurst: . . . There is no history in the state of Illinois of impairing or diminishing or welching on any pension plans when they come due."); 2926 ("Mr. Kemp: . . . I can remember in the City of Chicago when my father was an employee of the City of Chicago that our family subsisted on script; but that I would also call to your attention that even during those times that those civil service employees who retired never had their pensions altered or amended, even during those trying times during the days of the Depression.").

II. The "Obligations of State" Provisions In The Articles Establishing The State Employee Pension Funds Do Not Establish That The State Is A Guarantor For The Payment of State Pensions

Representatives of pension beneficiaries have also argued that the "Obligations of State" provision that appears in each of the Articles establishing the State employee pension funds makes the State a guarantor for payment of pension benefits. We believe this argument is also incorrect.

Section 22-403 of the Pension Code governs whether the State can be deemed to have taken on the obligation to be the guarantor for pensions payable under the State employee pension plans. Section 22-403 provides that "[a]ny pension payable under any law hereinbefore referred to shall not be construed to be a legal obligation or debt of the State, or of any [local government within the State], other than the pension fund concerned, but shall be held to be solely an obligation of such pension fund, unless otherwise specifically provided in the law creating such fund." 40 ILCS 5/22-403. Thus, pursuant to Section 22-403, a State guarantor obligation for payment of pension benefits exists, if at all, only where the State has "specifically provided" for such an obligation in the Article of the Pension Code creating the pension fund.

As set forth below, neither the "Obligations of State" provisions nor any other provisions in the Articles creating the State pension funds "specifically provide" for a guarantor obligation as required by Section 22-403, and no case holds that the State has such a guarantor obligation. Moreover, there are strong policy reasons why the State should not be presumed to be a guarantor of pension benefits. Accordingly, State pension benefits should not be regarded as a debt of the State, as opposed to the State pension funds themselves.

A. **The Articles Establishing The State Pension Funds Do Not Specifically Provide For A State Guarantor Obligation**.

Section 22-403 establishes, as the base rule, that neither the State nor a local government within the State is legally obligated to pay pensions as a debt of the State or local government "unless otherwise specifically provided in the law creating such fund." 40 ILCS 5/22-403. None of the Articles establishing the State employee pension funds "specifically provides" for the payment of pension benefits to be a debt of the State, as required by Section 22-403.

Each of the Articles creating the State employee pension funds contains an "Obligations of State" provision that states generically that the State is to pay "all benefits granted under this system."[11] Except for Article 16 creating the TRS, that obligation is expressly qualified by the phrase "to the extent specified in this Article." The words "to the extent specified" are words of limitation. They signal that the "Obligations of State" provision does not contain the operative words of the contract; that role is served by the detailed provisions of the Articles. Nothing specified in the detailed provisions of the Articles discusses and establishes that if the fund does not have sufficient assets, the State is the guarantor that pensions will be paid.[12] Instead, each of the State pension fund Articles "specifies" that the State is to establish a pension fund, make

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[11] An example is Article 15, creating the State University Retirement System ("SURS"), which includes the following provision: "Obligations of State: The payment of (1) the required State contributions, (2) all benefits granted under this system and (3) all expenses in connection with the administration and operation thereof *are obligations of the State of Illinois to the extent specified in this Article*." 40 ILCS 5/15-156 (emphasis supplied). Articles 2, 14, and 18, which create three of the other Illinois State employee pension funds, all contain similar "Obligations of State" provisions, including the "to the extent specified in this Article" language. *See id.* §§ 2-125, 14-132, 18-132.

[12] In fact, the sentence in Section 15-156 which follows immediately after the "Obligations of State" language confirms the expectation that the State has only a "share" of pension funding obligations, not an obligation to backstop all shortfalls in the ability of the pension fund to pay pensions when due: "*The accumulated employee normal, additional and survivors insurance contributions credited to the accounts of active and inactive participants shall not be used to pay the State's share of the obligations.*" (emphasis supplied). The express statement that the State has a "share of the obligations" is inconsistent with an interpretation of the "Obligations of State" language as placing entirely on the State as guarantor the ultimate obligation to pay pension benefits.

contributions to that fund, and have pension benefits paid from that fund. *See, e.g.,* 40 ILCS 5/2-101, 14-101, 14-134, 15-101, 15-159, 16-101, 16-163, 18-101 (providing for creation of State pension funds as distinct trust entities established for the purpose of paying benefits); *id.* §§ 2-124, 14-131, 15-155, 16-158, 18-131 (specifying the amount of employer contributions the State is to make to each of the pension funds); *id.* §§ 2, 132, 14-135.04,15-163, 16-172, 18-137 (providing the board of trustees of the several State pension funds with the responsibility of paying annuities, refunds, and other pension benefits). Thus, these are the specified means by which the State is to comply with the generic statement in the Obligations of State" provision that the State is to pay "all benefits granted under this system."

Even if the "to the extent specified in this Article" phrase were absent, as it is in Article 16, statutory construction rules would dictate that the highly specific provisions on pension benefits in the Articles (i.e., setting up a pension fund, contributing to that fund, and having benefits paid from that fund) provide the meaning of the generic pension benefit payment language in the "Obligations of State" provision. A longstanding principle of statutory construction is that "general language found in one place [within a statute], may be restricted in its effect to the particular expressions employed in another, if such, upon a careful examination of the subject, appears to have been the intent of the enactment." *Atkis v. The Disintegrating Co.,* 85 U.S. 272, 302 (1873). *See also Bell Fed. Sav. & Loan Ass'n v. Wagner,* 286 Ill. App. 3d 521, 524 (1st Dist. 1996) (reasoning that statutory terms "cannot be plainly understood outside the context in which they are used" and that "a specific provision, when followed by general provisions, is read to control the general when both relate to the same subject matter"); *Heron v. E.W. Corrigan Constr. Co.,* 149 Ill.2d 190, 196 (1992) (stating that "where there are two statutory provisions, one of which is general and designed to apply to cases generally, and the other is particular and relates to only one subject, the particular provision must prevail" (citations and quotation omitted)). The "to the extent specified in this Article" language in all but one of the prefatory "Obligations of State" provisions simply makes this rule of construction even more clear.

Although there are no "magic words" that must be used to be a guarantor, the intent to be a guarantor must be "clear and unambiguous" (*Gen. Elec. Bus. Fin. Sers., Inc. v. Silverman,* 693 F. Supp. 2d 796, 800 (N.D. Ill. 2010)), and "there must be mutual assent to the terms of the guaranty." *Williams Nationalease, Ltd. v. Motter,* 648 N.E.2d 614, 616 (Ill. App. 1995). No such clear intent or meeting of the minds is evident in the Articles. What exists in the Pension Code Articles is at most a general statement that the State has an obligation to pay benefits "to the extent specified in this Article", and details in the Articles which specify that the State is to set up and contribute to State pension funds and that those funds are to pay pension benefits. These actions are how the State is to meet its stated "obligations" to make required contributions and pay pension benefits. Nothing in the Articles evidences an intent for the State to take on the additional obligation to guarantee to pay pension benefits if the pension fund cannot. If the General Assembly had intended for the State to be such a guarantor, it would have been a simple matter to so state. *See People ex rel. Illinois Fed'n of Teachers v. Lindberg,* 60 Ill. 2d 266, 275 (1975). There is no such statement in the Articles establishing the pension funds.

The Articles also do not take the form of guaranty contract. In Illinois, a "guaranty contract is an agreement between a guarantor and a creditor wherein the guarantor agrees to be secondarily liable to the creditors for a debt or obligation owed to the creditor by a third party (the debtor)." *Int'l Supply Co. v. Campbell,* 391 Ill. App. 3d 439, 448-49 (3d Dist. 2009). Nowhere in the Articles are words such as "guarantor", "guarantee", or "secondarily liable" ever used. Further, although it is not absolutely necessary that a particular form or expression be used to establish a guaranty, there must be language "which, under the circumstances attending the transaction, may be construed as binding the guarantor *to answer for another's debt or default"*. *Mahler Textiles Inc. v. Woodka*, 251 Ill. App. 177, Gen. No. 32,821, 1929 WL 3105, *2 (Ill. App. Jun. 21, 1929) (emphasis supplied). Nowhere in the Articles does it state that the State will be liable to pension beneficiaries for pension benefits from the State treasury if the State "pension or retirement system" defaults.

The conclusion that the "Obligations of State" language does not create a guarantor relationship is further supported by the history of the "Obligations of State" provisions. First, it is clear that the Obligations of State language was *not* included in the Articles in the Pension Code setting up the various State pension plans in order to shift the pension debt obligation from these funds to the State pursuant to Section 22-403. That is because, for example, the first "Obligations of State" provision was included in the predecessor to Article 16 when it was enacted in 1939, which is six years before Section 22-403 was enacted. Thus, it cannot reasonably be argued that this Obligations of State language in the TRS Article was intended to meet the requirements of Section 22-403 for imposing a debt obligation on the State to pay pension benefits rather than on the pension fund itself. Similarly, the "Obligations of State" provisions for all but one of the other State pension systems – the University Retirement System, the Judge's Retirement System, and the State Employees' Retirement and Benefit system – were passed before enactment of Section 22-403. Only the General Assembly Retirement System was passed after Section 22-403 was enacted in 1945. [13]

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[13] The predecessor to Article 16 included an "Obligations of State" provision when it was enacted in 1939. *See* 1939 Ill. Laws 1095, § 11. The predecessors to the other State employee pension funds were enacted between 1941 and 1947 and contained Obligations of State provisions that are not materially different form the current language. *See*,

Second, the timing of the enactment of the Obligations of State provisions compared to the Pension Clause also shows that those provisions could not have been intended, and would not have been effective, to impose a guarantor obligation on the State for the payment of pensions. Both the Articles containing the "Obligations of State" language and Section 22-403 were part of the present Pension Code when it took effect in 1963, which is at least seven years before the Pension Clause became effective. *See* 1963 Ill. Laws, 161, §§ 2-125, 14-170, 15-156, 16-158, 18-132, eff. July 1, 1963. Indeed, the "Obligations of State" language and Section 22-403 or its equivalent were included in Pension Code provisions as early as 1939 and 1945, respectively.[14]

As shown, the Pension Clause itself establishes an "enforceable contractual relationship" between pension participants and their "pension or retirement system," not between the pension participants and the State. Prior to the Pension Clause, it was well established that public pension plan participants had no contractual right to pension benefits if those benefits had been accrued under an existing mandatory pension. *See, e.g., Bergin v. Board of Trustees of Teachers' Retirement System,* 31 Ill. 2d 566, 574 (1964); *Raines v. Board of Trustees of Illinois State Teachers' Pension and Retirement Fund,* 365 Ill. 610, 614 (1937); *Ryan v. Foreman,* 181 Ill. App. 262 (1st Dist. 1913); *Eddy v. Morgan,* 216 Ill. 437, 449 (1905). As the Illinois Supreme Court stated in *Buddell v. Board of Trustees, State University Retirement System of Illinois,* 118 Ill.2d 99, 102 (1987), the reason for adoption of the Pension Clause was to ensure that "all pension benefits will be determined under a contractual theory rather than being treated as

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e.g., 1941 Ill. Laws Vol. 1, 1307, § 7.3 (University Retirement System); 1941 Ill. Laws Vol. 1, 527, § 7.2 (Judges' Retirement System); 1943 Ill. Laws Vol. 2, 350, § 28 (State Employees' Retirement and Benefit System); 1947 Ill. Laws 1061, § 50 (General Assembly Retirement System). The language currently codified in Section 22-403 was enacted in 1945. *See* 1945 Ill. Laws 161, § 3.

[14] *Id.*

'bounties' or 'gratuities', as some pensions were previously." Because there was no contractual right to a State pension in 1963, let alone when the "Obligations of State" language was first adopted in the late 1930s and early 1940s, this language could not have been intended, and in any event would not have been effective, to establish a State guarantor obligation for pensions as a matter of law.

This conclusion is reinforced by decisions of the Illinois courts holding that even after adoption of the Pension Clause, matters that were not enforceable contract rights before adoption of the Pension Clause are not enforceable contract rights after its adoption unless such was intended or addressed by the Clause. As the Illinois Supreme Court held in *Lindberg*, with respect to pension funding:

> "We must reject the statutory basis upon which plaintiffs seek to establish a contractual relationship. Prior to the enactment of the Pension Code in 1963 and during a period of time when the decisions of this court clearly established no vested right in compulsory statutory pension plans for public employees, the predecessor provisions of the respective pension statutes were similarly drafted. Prior statutes reflected that State contributions were an obligation of the State. (Ill.Rev.Stat. 1061. Ch. 122, par. 25-77; ch. 144, par. 104.) Before the adoption of the present Pension Code, the 'Downstate System' also contained the provision relating to State contributions being set in an amount of 1.2 in excess of those contributed by the employees. (Ill.Rev.Stat. 1961, ch. 122, par. 25-77.)" . . .
>
> "In summary, had the legislature intended to establish a present contractual relationship when the Pension Code was enacted in 1963, thereby affording plaintiffs the possible statutory basis to challenge necessary appropriations, it would have been a simple matter to so state . . . . Rather, we are of the opinion that the provisions upon which plaintiffs rely to establish the contractual relationship were merely engrafted from prior pension laws which had been construed as not conferring a vested right."

Lindberg, 60 Ill.2d at 275 (citation omitted). The same reasoning, applied to the "Obligations of State" language, leads to the conclusion that no State debt guaranty for pension benefits is established by that language. The Pension Clause does not address the funding of pensions or which entity, State or pension fund, has the ultimate legal responsibility to pay pension benefits, nor do the debates suggest that the Pension Clause was intended to address either of these matters. Before the Pension Clause, the State had no debt obligation for pension benefits, and we believe the pension beneficiaries still have no such right, because the Pension Clause does not impose that obligation on the State, rather than on the employee pension funds.

B. No Illinois Case Holds That The State Has A Guarantor Obligation For State Pensions

There has been considerable litigation concerning both the State's obligation to fund pensions and the extent to which the funds are "State entities" under sovereign immunity law. Significantly, none of the decisions holds that the State has a guarantor obligation to pay pension benefits if a State pension fund runs out of assets.

1. Funding Cases

As previously discussed, although the "Obligations of State" provisions in each of the Articles establishing the State pension funds provides that the State is required to pay not only "all benefits granted under this system", but also "the required State contributions" set forth in the Pension Code, numerous cases hold that participants in State employee pension funds have neither a vested contractual right nor a constitutional right to a specific level of pension funding during a fiscal period. *See Lindberg*, 60 Ill.2d at 271. *See also People ex rel. Sklodowski v. Illinois*, 182 Ill.2d 220, 231, 233 (1998); *McNamee*, 173 Ill.2d 433 at 446. These cases arose when the General Assembly, having passed specific annual funding requirements in 1989 that were designed to achieve a statutory goal of 90% funding for each State pension fund by 2045, subsequently reduced those annual funding amounts in each of four years (1994, 1998, 2003, and 2006) to free up money for other State programs. Pension beneficiaries sought to have the previous level of state mandated contributions declared a vested contractual or constitutional right, relying largely on the Pension Clause. The Illinois Supreme Court rejected their arguments:

> "We therefore find neither a vested contractual nor constitutional right for beneficiaries to enforce the level of state contributions previously mandated by Public Act 86-273. The framers of the Illinois Constitution were careful to craft in the pension protection clause an amendment that would create a contractual right to benefits, while not freezing the politically sensitive area of pension financing. In addition, the funding provisions contained in the Pension Code do not evince a legislative intent to create vested contractual rights in favor of beneficiaries."

Sklodowski, 182 Ill.2d at 233. *See also* Op. Atty. Gen. 05-005 (June 30, 2005) at 8 ("The Court's decisions make clear that the pension protection clause only protects pension benefits; it does not control funding.").

Nonetheless, in these same funding cases, the Supreme Court suggested, in *dicta*, that if facts established that the funds at issue were "on the verge of default or imminent bankruptcy," perhaps the "benefits" protected by the Illinois Constitution would be at risk sufficiently to constitute an unconstitutional impairment of benefits under the Pension Clause. *See Sklodowski*, 182 Ill.2d at 232-33; *McNamee*, 173 Ill.2d at 446-47 (1996). *See also Lindberg*, 60 Ill. 2d at 271; Atty. Gen. Opin., Op. No. 05-005 (June 30, 2005) at 9-10.[15] No case has yet determined

[15] The Supreme Court's *dicta* creates a situation that is inconsistent with "normal" pension obligations. The Internal Revenue Code and ERISA have rules and regulations for private pension plans establishing the minimum amounts the employer must contribute annually to the pension trust. Such requirements exist to ensure that pension benefits can be paid. An obligation to pay pension benefits divorced from a prudent plan for funding those benefits is a recipe for disaster. Although the federal law applicable to state pension plans specifically exempts the states from

precisely what this *dicta* means. It seems unlikely, however, that this *dicta* was meant to suggest that the State or municipality would be liable as a *guarantor* for the payment of pension benefits if the pension funds could not pay them. For example, none of the funding cases even mentions Section 22-403, which governs how, if at all, such a debt obligation would have to be established for the State or municipality, as opposed to the pension funds themselves. Moreover, in the normal course (for example, under ERISA), an employer has a contractual obligation only to make the contributions specified in the plan, not to "guarantee" that the pension benefits will be paid no matter what. This suggests that at most, the *dicta* must be referring to a possible State third party beneficiary contractual obligation related to the State's or municipality's share of whatever annual funding or ultimate funding goal is specified in the Pension Code.

The viability of any such third party beneficiary theory of contractual obligation to pay the pension benefits is also uncertain. As shown, the "enforceable contractual relationship" protected by the Pension Clause runs between the "pension or retirement system" and pension beneficiaries. Each State Article establishing a "pension or retirement system" requires the State, based on actuarial estimates, to make a specified level of contributions to the pension funds such that, together with employee contributions and pension fund investments, the statutory goal of

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the minimum funding requirements applicable to private sector plans, the concern over whether there will be adequate pension funds to pay benefits, and hence the need for a sound funding plan, remains the same. The Supreme Court's *dicta* suggests, however, that the delegates to the 1970 Constitutional Convention sought to preserve flexibility for the State on a year to year basis to use State revenue for purposes other than funding pension plans, but were indifferent as to whether, as a predictable result, the State would have no choice years later but to pay its share of pension benefit shortfalls out of the general revenues of the State, even if this were to require substantially raising taxes or severely compromising the State's ability to protect the health, safety and welfare of the citizens of the State. It seems unlikely that this is what the delegates intended. The triggering event for "impairment" identified by the Supreme Court is also puzzling, because there is considerable doubt that a pension fund can declare bankruptcy. Finally, if the pension funds had insufficient assets to pay benefits, and the State did not have sufficient money to pay its share of those benefits without raising taxes, cutting funds for schools, health and law enforcement, or both, because of the doctrine of separation of powers, it is questionable that a State court could force the executive and legislative branches to take such action.

adequately funding pensions is met (for State employee pension funds that goal is 90% funding by 2045). If the State pension funds were on the verge of bankruptcy, Illinois courts would have to determine whether this level of State funding is a benefit of membership in the pension or retirement system that pension participants can enforce against the State or municipality on a third-party beneficiary theory of contractual liability. No such court decision exists. Indeed, in a recent unpublished legal article presented at a symposium at John Marshall Law School, entitled "Illinois State Pension Plans: Do Participants Have Standing To Demand a Minimum Funding Ratio", the authors conclude that on the issue of a pension plan participant's standing to sue to force the pension plans to be funded at this required statutory level of 90% by 2045, "the three Illinois State Supreme Court holdings, collectively, leave an ambiguity as to when exactly a plan participant (i.e., a current state worker or retiree expecting a pension) has standing to sue and even with proper standing, there is uncertainty as to what remedies are available to the plaintiffs." Barry Kozak & Jeremy Brunner, "Illinois State Pension Plans: Do Participants Have Standing To Demand A Minimum Funding Ratio" (2009) (unpublished manuscript available at htt://works.bepress.com/cgi/viewconent.cgi? article=1000+content=barrykozak).

In any event, even if it were assumed that such a third party beneficiary contractual theory might otherwise be viable, the changes by the General Assembly to the annual funding requirements of many of the Articles setting up the State pension systems appear inconsistent with, or pose difficulties for, its application. For pension systems funded by the State (Articles 2, 14, 15, 16 and 18), the Pension Code requires the State to make a level of contributions to the fund investments such that, together with employee contributions and projected results of pension fund investments, the pension system is funded at a 90% level by 2045, but the General Assembly has regularly amended the Pension Code to provide for lesser contributions for specific years. Thus, if the pension fund should subsequently have insufficient money to pay pensions when due, but the State had paid in each year the reduced amounts approved by the General Assembly, it is unclear whether there would be any State liability on a third party beneficiary theory.

It should also be clear that even if a ruling were made that the State had such a third-party beneficiary contractual obligation, the State should not be liable as a guarantor for all shortfalls in the pension funds. If anything, the State should be responsible on a third party beneficiary theory only for its statutorily required "share" of the funding for the pension fund for the benefit of pension participants. Because the State's statutorily required "share" of the funding obligation was initially set, and subsequently adjusted, in disregard of sound actuarial requirements, that "share" would not make up the expected shortfall in the pension funds caused by use of the flawed actuarial requirements. The State's "share" also would not make up any shortfalls caused by less than projected investment results for the pension funds. *See, e.g. Board of Directors of 345 Fullerton Parkway Condominium Association v. Teachers' Retirement System of the State of Illinois, and T.R. Fullerton Corp.,* 50 Ill. Ct. Cl. 396, 403 (Ill. Ct. Cl. 1996) (hereinafter "*Board of Directors*") (the State is not "a guarantor of all State-administered pension fund investment liabilities and money losses"). Thus, there could be a considerable gap between what the State might owe under a third party beneficiary contractual theory based on its "share" of the obligation for pension funding, and what would be required if the State were a "guarantor" of pension benefits.

Finally, it is significant that in none of the pension funding cases do the parties argue, or does the court discuss, an obligation by the State to pay pension benefits when due if the pension funds are unable to do so. It is hard to imagine why funding cases would continue to be brought if it was clear to potential pension beneficiaries that regardless of the amount of assets in the pension funds when they retire, the State has a debt obligation to pay their pension benefits. And it is equally hard to imagine that if the State had a debt obligation to pay pension benefits regardless of the ability of the pension funds to do so, the courts would not have pointed this out in one or more of the decisions in these cases. Indeed, it appears that the reason the parties bringing such funding cases have been so intent on forcing the State to fund at a particular level annually is that they assume either (1) that any shortfall in the ability of the funds to pay benefits when due will *not* be a debt of the State, but an obligation to be paid solely out of the pension fund, or (2) that in the event of such a shortfall their only recourse will be in the Court of Claims, where they are unlikely to receive their full benefits (*see* Section IV, *infra*).

The funding provisions for the City and smaller municipality pension systems also pose difficulties for liability under a third party beneficiary contractual theory. As explained above, pension systems funded in whole or in part by municipalities fall loosely into three categories. These are: (1) pension funds for municipalities of 500,000 and under (Articles 3, 4, and 7) require the municipality to make contributions in an amount sufficient to amortize the unfunded liability over a period of 30 to 40 years; (2) pension systems funded by the City of Chicago (Articles 5, 6, 7, 8, and 11) provide for a maximum contribution level by the City based on a multiple of employee salaries; and (3) the Teacher' Retirement System (Article 16), which is funded primarily by the State, requires participating school districts and other municipal employers to contribute a fixed percentage of participating teachers' salaries.

The pension systems for municipalities of 500,000 and under establish funding levels similar to those required in the State-funded systems, and the proper remedy for insufficient funding would likely be the municipality's statutorily required share of the funding. One potential issue here is that the municipality's statutorily required share of the funding obligation is initially set based on actuarial projections. If there is a shortfall in the pension funds caused by use of inaccurate actuarial projections, it is not clear whether the municipality would be responsible to make up that shortfall. Also, the gap between the actual contribution levels and proper actuarial projections at the time of the contribution may also be difficult to determine. No court has addressed the extent of liability under such circumstances.

An additional problem is that as with the State-funded systems, the General Assembly has periodically amended the contribution obligations of municipalities. When first codified into the modern Pension Code, Articles 3 and 4 required the municipality to make contributions in an amount sufficient to meet the annual requirements of the pension fund and defined such requirements to include the amount necessary to amortize the fund over a period of 40 years from July 17, 1959. *See* Laws 1963, p. 161, §§ 3-127, 4-118, eff. July 1, 1963. But the General Assembly has twice amended these sections to delay the amortization period. In 1980, the General Assembly changed the beginning date of the 40-year amortization period from July 17, 1959 to January 1, 1980, *see* Public Act 81-585, § 1, eff. Jan. 1, 1980, and in 1993, the General Assembly pushed back the amortization period still further to run 40 years from July 1, 1993. Public Act 87-1265, eff. January 25, 1993. Article 7 did not include an amortization period for the general contributions of municipalities in 1963, but in 2006, the General Assembly amended Article 7 to provide for a 30 to 40 year amortization period for municipalities with a shortfall in their contributions. P.A. 94-712, § 5, eff. June 1, 2006.

The pension systems funded by the City of Chicago and the TRS provide for a more straightforward contribution level. As explained previously, the City of Chicago pension systems set a maximum amount that the City may contribute in a given year. Thus, if the City does not make the maximum contribution amount and a pension system is on the "verge of bankruptcy", to use the term in *dicta* in the Illinois Supreme Court funding cases, presumably the City should at most be liable for the difference between the maximum contribution level and the amount actually contributed. The TRS only requires municipal employers to contribute a relatively modest percentage of participating teachers' salaries, so any liability for failure to contribute should similarly be limited to the difference between the fixed contribution requirement and the amount contributed.

2. **Sovereign Immunity Cases.**

A separate line of cases has addressed whether, for purposes of suit, a pension fund is a creature of the State or whether, even if the fund *per se* is not a creature of the State, the fund is a State entity as to certain types of pension related costs the State has agreed to pay. *See Jones v. Jones-Blyth Const. Co.*, 150 Ill. App. 3d 53 (4th Dist. 1986); *Guse v. Board of Trustees of the Public School Teachers' Pension and Retirement Fund of Chicago*, 203 Ill. App. 3d 111 (1st Dist. 1990); *Board of Directors, supra; Barry v. Retirement Board of the Firemens' Annuity and Benefit Fund of Chicago,* 357 Ill. App. 3d 749 (1st Dist. 2005); *Shields v. State Employees Retirement System of Illinois*, 363 Ill. App. 3d 999 (1st Dist. 2006).[16] The issue in each instance was whether sovereign immunity had been waived and thus suit could be brought against a State

[16] The Illinois constitution of 1970 provides for the abolition of sovereign immunity: "Except as the General Assembly may provide by law, sovereign immunity in this State is abolished." Ill. Const., art. XIII, § 4. The General Assembly has, however, restored immunity to the State. 745 ILCS 5/1. Although the State therefore has immunity, the legislature may, by statute, consent to liability of the State. *In re Special Education of Steven Walker*, 131 Ill.2d 300, 303 (1989). The State's consent to be subject to suit must be "clear and unequivocal." *Id.*

employee pension fund, *not* the State Treasury, in the Court of Claims. None of these cases deals with whether the State has agreed, pursuant to Section 22-403 of the Pension Code, to pay pension benefits as guarantor if the State employee pension funds run out of money.

The sovereign immunity case with the most relevance to the guarantor issue is *Board of Directors*. There, the issue was whether the TRS or the State should be held liable to pay to the purchasers of condominium units damages allegedly caused by the developer and alleged to fall on the TRS as successor equitable owner. The court held that the claim failed to state a cause of action against the State because: (1) "liabilities of the TRS pension fund are not State liabilities, except insofar as such liabilities have been statutorily assumed by the State"; (2) "the only TRS liabilities statutorily assumed by the State are those obligations assumed in § 16-158(c) of the Illinois Pension Code";[17] and (3) "[t]his claim is an investment liability and is not an 'expense of the administration and operation' of the TRS [under Section 16-158(c)] and is therefore not an assumed State obligation." *Id.* at 397-98 (citation and quotation omitted).

The court then explained why the State had not consented to liability for investment losses by the TRS fund notwithstanding that in § 16-158(c), the "Obligations of State" provision, the State had agreed to pay "administration and operation" expenses. The court reasoned that "administration and operation" expenses could not reasonably be said to include pension fund investment losses. Specifically, the court's opinion was that "State general funds are not available to pay investment losses of pension trust funds like the TRS pension fund"; otherwise, "the State would effectively become a guarantor of all State-administered pension fund investment liabilities and money losses." *Bd. of Dirs.*, 50 Ill. Ct. Cl. at 403. The court stressed

[17] Section 16-158(c) of the Illinois Pension Code contains the "Obligations of State" language in the provisions setting up the TRS.

that in its view, "that is not the law; has never been the law or the practice in Illinois; and would be a potentially huge and unpredictable drain on the State treasury." *Id.*

The Court of Claim's determination in *Board of Directors* that the State has not agreed to "become a guarantor of all State-administered pension fund investment liabilities and money losses" is flatly inconsistent with the notion that the State has agreed more broadly to guarantee the payment of all pension benefits if the pension funds run out of money. Indeed, a principal reason why the funds might run out of money is inadequate investment returns on the pension funds.

Two other sovereign immunity cases, *Barry* and *Guse*, also hold that the pension fund itself is not a State entity. In *Barry*, the court held that neither the Firemen's Annuity and Benefit fund of Chicago nor its board performed a governmental function, were governmental entities, or were the type of "public body" which Section 2-1303 of the Interest Act (prejudgment and post-judgment interest) was intended to protect. 357 Ill. App. 3d at 774. In *Guse*, the court's determination that the Public School Teachers' Pension and Retirement Fund of Chicago is not a state agency within the meaning of the Administrative Procedure Act rested on many factors, including a provision in the Illinois statutes that provided that "any deficiency in the Pension Fund must be removed by the Chicago Board of Education from the annual Pension Fund tax and/or its educational fund, and not by the State" (203 Ill. App. 3d at 117 (quoting Ill. Rev. Stat. 1989, ch. 108 1/2, par. 17-129)), that under the Pension Code the State executive department has no control over the board, and that under the Pension Code the State of Illinois is treated as a separate entity.[18]

[18] Although the court contrasted the Public School Teachers' Pension and Retirement Fund of Chicago with the State Employees' Retirement System ("SERS") because, according to the court, all SERS allowances, annuities, benefits

In several other sovereign immunity cases, although the court did not hold that the pension fund was a State entity generally, the court found that the State had expressly assumed financial responsibility for administration and operation expenses of the pension fund, and thus as to those functions the pension fund was a State entity. For example, in *Jones*, the court held that a claim for a slip and fall on the pension fund's premises was properly brought in the Court of Claims against the TRS as a State entity because, in what was then Section 16-162 of the Pension Code (now Section 16-158(c)), the "Obligations of State" provision, the State had assumed financial responsibility for "administration and operation" expenses of the TRS, and a claim arising from a slip and fall on the pension fund premises was properly considered an expense of administration and operation. 150 Ill. App. 3d at 55. *Jones* did not hold that the State Treasury must pay the slip and fall claim, only that the slip and fall claim could be brought against the TRS as a State entity in the Court of Claims.

Similarly, in *Shields*, post judgment interest was sought on an award refunding the plaintiff's prior contributions to the Judges Retirement System ("JRS"). The trial court had awarded interest, but defendants argued on appeal that the JRS "is, in fact, a creature of the State, and that the State of Illinois is immune from a suit for post judgment interest filed under section 2-1303 under the doctrine of sovereign immunity." *Id.* at 1002. Noting that the "Obligations of State" provision (Section 18-132) pertaining to the JRS is "strikingly similar" to that (Section 16-158) which the court relied on in *Jones* as establishing that suit could be brought in the Court of Claims against the pension fund, the *Shields* court concluded that "[b]y analogy, state general funds could be reached to satisfy a judgment against the Judges Retirement System." *Id.* at 1004.

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and administration expenses are obligations of the State (*Id.* at 117), this statement is clearly *dicta*, and contrary to the holdings in *Board of Directors* and *Barry*.

The court then held that sovereign immunity applied to the JRS as a State entity insofar as the issue was the satisfaction of a judgment against the JRS for a refund of contributions. Importantly, in *Shields* it was the Board of the JRS, not the State, that "issued Shields a check in the amount of $60,813, representing the amount ordered to be refunded." 363 Ill. App. 3d at 1001. Thus, *Shields* suggests that whatever payment "obligation" the State had could be, and was in fact, met by providing the JRS with annual funding rather than paying the refund from the State Treasury.

We believe there is no inconsistency between the rulings in *Jones* and *Shields* and the conclusion in this analysis of the guarantor issue. Neither case involved a suit for moneys to be paid from the State Treasury; instead, each involved a ruling that the particular suit in question could be brought against the pension fund as a State entity in the Court of Claims. Neither case involved the issue of whether the State was a guarantor for the payment of state pensions. Indeed, in *Shields* the refunds were paid by the pension fund, not by the State Treasury. The fact that in each case, the court interpreted the policy enunciated in the Obligations of State provisions for State payment of the pension fund's administration and operation costs as making the pension fund a State entity for a lawsuit involving such costs also has no bearing on whether State is a guarantor for payment of pension benefits. Although the "obligation" to pay "administration and operation" expenses and the "obligation" to pay "all benefits granted under this system" are each qualified by the phrase "to the extent specified in this Article", the extent to which these two "obligations" are specified in the Articles is dramatically different. Each pension Article provides great detail on the payment of pension benefits, specifying how the State is to set up the pension funds, make contributions to the funds, and have pension benefits paid by the funds. This detailed "specification" therefore establishes how the State will meet its policy obligation to pay pension benefits. By contrast, the pension fund Articles provide no detail on administration and operation costs. Thus, the courts have been required to determine what does and does not qualify as administrative and operation costs, and reasonably have concluded that with no alternative specified in the Articles for payment other than the "Obligations of State" policy statement regarding such costs, State general funds could be tapped for such costs, if necessary. This means that to that extent, the fund was a State entity.

III. Policy Reasons Why The State Should Not Be Presumed To Be A Guarantor Of Pension Benefits

There are strong policy reasons not to presume that the State has taken on a guarantor role.

It is well-settled that the State may not disable itself from being able to exercise its police power to protect its citizens. *See Stone v. Mississippi*, 1010 U.S. 814 (1879); *United States Trust Co. v. New Jersey,* 431 U.S. 1 (1977); *Allied Structural Steel Co. v. Spannous,* 438 U.S. 234 (1998). As stated in *Stone v. Mississippi*:

> "All agree that the legislature cannot bargain away the police power of a State. Irrevocable grants of property and franchises may be made if they do not impair the supreme authority to make laws for the right government of the State; but no legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police."

101 U.S. at 817-18 (citation and quotation omitted). Further, Illinois courts have held that the police power "is not limited to health, morals and safety," but also "extends to economic needs as well." *Commonwealth Edison Co. v. Illinois Commerce Comm'n,* 398 Ill. App. 3d 510, 560 (2d Dist. 2009).

These principles are directly applicable here. Present estimates are that the unfunded liability for Illinois State pensions is roughly $80 billion. Professor Joshua Rauh of

Northwestern University's J.L. Kellogg Graduate School Of Management has written that a more accurate estimate of the unfunded liability exceeds $200 billion. A need to make up such amounts, while continuing to fund pension benefits going forward, could "bankrupt" the State. In that circumstance, the State would be unable to exercise its police power to protect the health, safety, and welfare of its citizens.[19]

Having the State bear responsibility for shortfalls in pension funds caused by unsuccessful investment decisions by the pension board, as would be the case if the State were guarantor for pension benefits, is contrary to Illinois law and practice, as well as bad policy. In *Board of Directors*, the Illinois Court of Claims was adamant that "State general funds are not available to pay investment losses of pension trust funds," that a contrary view would effectively render the State "a guarantor of all State-administered pension fund investment liabilities and money losses," and that "that is not the law; has never been the law or practice in Illinois; and would be a potentially huge and unpredictable drain on the State treasury." *Board of Directors*, 50 Ill. Ct. Cl. at 403. Indeed, if pension fund managers knew that the State was a guarantor, they would be more likely to take chances on risky investments, potentially saddling the general public with enormous costs if those investments failed.

Finally, the State and its citizens benefit from having such pension funds bear the debt obligation for the payment of pensions. Because there are contributions to the pension funds not only by the State, but also by employees, and because the contributed funds are invested and earn a return, the exposure to the State and its citizens for payment of pension benefits is reduced.

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[19] The argument here is not that under the Contract Clause of the United States Constitution, the State may avoid a legitimate debt to safeguard the welfare of its citizens. *See United States Trust Company of New York v. New Jersey*, 431 U.S. 1 (1979). Instead, the argument here is that an additional reason not to strain to find that the State has entered into a contractual guarantor obligation for payment of pension benefits is the likely resulting negative impact on the State's ability to exercise its police power on behalf of its citizens.

This limit on exposure would be substantially negated if the State were the guarantor for pension benefits. Also, as shown, the State's ability to meet its police power responsibilities is enhanced if there is no guarantor role.

For reasons such as these, establishing a guarantor obligation on the State pursuant to Section 22-403 that would potentially undermine these benefits should require a clear and unequivocal statement that the State has agreed to be liable to pay pension benefits if the pension funds cannot. No such clear and unequivocal statement establishing a guarantor obligation exists.

IV. Payment of Judgments Against the State

Even if the Pension Code were somehow understood to create a guarantor relationship between the State and the beneficiaries of the pension funds, we believe any such obligation would be largely unenforceable. In Illinois, all contractual claims against the State must be brought in the Court of Claims, which only has the power to issue money judgments to the extent the General Assembly appropriates sufficient funds for that purpose. Thus, unless the General Assembly were to appropriate additional funds to cover any shortfall in the State pension funds, the State’s liability would be limited to whatever amount the General Assembly had already appropriated to those funds. To date, the State has not appropriated moneys for this purpose, and given the size of the unfunded liability for pensions (roughly $80 billion; perhaps in excess of $200 billion), there is little likelihood the State could do so if and when suit were brought to collect on the State's alleged guarantee of pension benefits.

The Court of Claims Act grants the Court of Claims "exclusive jurisdiction to hear and determine . . . [a]ll claims against the State founded upon any contract entered into with the State of Illinois." 705 ILCS 505/8. As shown earlier, the Pension Clause speaks to a protected contractual relation between pension members and the "pension or retirement system" of the State, i.e., the State pension funds, not between pension beneficiaries and the State. But if the State were a guarantor of State pension benefits, that guarantor obligation would be a contractual relationship between pension beneficiaries and the State, and claims against the State for the unfunded liability of the pension funds could only be brought, if at all, in the Court of Claims.

"It is a fundamental principle of the Court of Claims that where agencies incur obligation [sic] in excess of amounts appropriated to them, that such claims must be denied," and that in such circumstances, "[o]nly an act of the legislature can provide for [a] [c]laimant's damages." *Loewenberg/Fitch P'ship v. Illinois*, 38 Ill. Ct. Cl. 227, 254 (1986). Under the Illinois Court of Claims Act, the Court of Claims may only direct payment from funds appropriated by the General Assembly. 705 ILCS 505/24. The Court of Claims has repeatedly held that "where there [is] an absence of or inadequate amount of funds remaining for which claims are made," the court is "constrained by law not to make an award." *Bd. of Educ. of Ill. Valley Cent. Unit Dist. No. 321 v. Illinois*, 35 Ill. Ct. Cl. 716, 726 (1982).

Where a claimant seeks payment under a State contract for which the applicable appropriation has lapsed, the Court of Claims must limit any award to the amount of funds which lapsed. *See, e.g., Allies for a Better Cmty. v. Illinois,* 38 Ill. Ct. Cl. 224 (1986). In *Allies for a Better Community*, the State contracted with the claimant for family counseling and group therapy and then failed to pay the claimant for six months of services. The Court of Claims determined that the State was liable under the contract, but the General Assembly had not appropriated sufficient funds to cover the amount of the State's liability. Even though the State plainly owed the claimant payment for two quarters at a rate of $9,698 per quarter, the Court of Claims was "constrained by the Illinois Constitution and the State Finance Act to limit any award

. . . to the amount remaining in the applicable appropriation." *Id.* at 226. In the end, the court awarded the claimant only $5,324.28 in "full and complete satisfaction" of the claim. *Id.* at 227. The Court of Claims has applied the same principle to claims against the State for unpaid employee pension contributions by the State, holding that the SERS could not recover from the State where the General Assembly appropriated insufficient funds to cover the contributions. *See State Employees' Ret. Sys. v. Illinois*, 37 Ill. Ct. Cl. 288 (1984).

We believe that what this means is that if the State pension funds were on the verge of bankruptcy and suit was brought to obtain the threatened pension benefits from the State as guarantor, no judgment amounts could be awarded unless there were a special appropriation by the General Assembly for the purpose of paying such allegedly guaranteed pension benefits. It is highly unlikely that such an appropriation could or would be made. Present estimates are that the unfunded liability for Illinois State pensions is roughly $80 billion and may even exceed $200 billion. By the time the State pension funds might be on the verge of bankruptcy, this number would be even larger. It is unlikely the General Assembly could appropriate the amounts required without "bankrupting" the State. Thus, under the circumstances likely to exist if State pension funds were on the verge of bankruptcy and had insufficient assets to pay pension benefits owed, any so-called State guarantor obligation, even if it existed, likely would prove chimerical.

V. Federal Law Would Not Protect State Employee Pension Claims If The State Pension Funds Ran Out of Money.

Representatives of the TRS have argued that because State pension plans, such as that for the TRS (Article 16), are qualified pension plans under the tax deferral provisions of ERISA, the

State government's sovereign immunity against lawsuits has been waived, and federal law would protect all of the beneficiaries' pension claims. In our opinion, such arguments are incorrect.

With respect to sovereign immunity, ERISA section 4(b)(1) provides that governmental plans are *not* subject to Title I, which among other things gives a plan participant the right to bring a lawsuit under ERISA either in (i) state court for a claim for benefits, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan, or (ii) federal court for any of the types of relief that can be brought in state court, as well as for breaches of fiduciary duty under ERISA. *See* 29 U.S.C. §§ 1003(b)(1), 1132(a), 1132(e). Similarly, ERISA section 4021(b)(2) provides that government plans are not covered by Title IV, which concerns the Pension Benefit Guaranty Corporation ("PBGC") guarantee. *See id.*, § 1321(b)(2). In short, nothing in ERISA would give the beneficiaries of State pension plans a right to sue in either state or federal court, or to assert a right guaranteeing benefits, that does not already exist under state law.

With respect to substantive qualification requirements, almost all such requirements added to the Internal Revenue Code by ERISA specifically exempt governmental plans from coverage. For example, governmental plans are specifically exempted from the Code provisions added by ERISA which relate directly to substantive qualification requirements such as participation (26 U.S.C. § 410(c)(1)(A)), vesting (§ 411(e)(1)(A)), funding (§ 412(h)(3)), prohibited transactions (§ 4975(g)(2)), payment of benefits (§ 401(a)(14)), and withdrawal of employee contributions (§ 401(a)(19)). Significantly, governmental plans are *not* subject to Code Section 411(d)(6), which provides that benefits already earned cannot be taken away. 26 U.S.C. § 411(d)(6). The only federal vesting and funding rules that apply to governmental plans are those that were in effect before ERISA's effective date. Under those rules, for example, for a governmental plan that is terminated or as to which there is a discontinuation of contributions, benefits must become fully vested, but only to the extent those benefits are then funded. *See* pre-ERISA Code § 401(c)(7). Thus, it is clear that alleged benefit rights under governmental pension plans are *not* protected by ERISA.

VI. The Articles Establishing The Employee Pension Funds For the City, And For Municipalities Of 500,000 And Under, Do Not Establish That The City Or The Smaller Municipality, Or Even The State, Is A Guarantor For The Payment Of City Or Municipal Pensions

A. Pension Funds For Cities Over 500,000 – The City of Chicago Funds.

Employees of the City of Chicago are members of one of four pension funds, each created under the State Pension Code. The four funds are:

Firemen's Annuity and Benefit Fund (40 ILCS 5/6)
Policemen's Annuity and Benefit Fund (40 ILCS 5/5)
Laborers' and Retirement Board Employees' Annuity and Benefit Fund (40 ILCS 5/11)
Municipal Employees', Officers', and Officials' Annuity and Benefit Fund (40 ILCS 5/8).

Funding for the pension plans comes from employee and City contributions each year. The State determines the amount that the City must put into the funds each year.

The claims of retirees to receive pensions from the four City pension plans are also governed by State law. As with State employees, the contractual rights of City retirees to receive pensions are governed by the Pension Clause, which makes it clear that membership in the pension system "shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired." Section 5, art. XIII. Thus, the relationship of the member to the City pension system is to be regarded as a contract, the rights under which are protected. It is the pension system with which the contract relationship exists – not the City. We believe it is thus the pension system that is responsible for any claims.

It is even more clear than with the State pension funds that neither the City nor the State has agreed to guarantee the payment of City pension benefits. As earlier related, Section 22-403 of the Pension Code provides, in relevant part, that "[a]ny pension payable under any law hereinbefore referred to shall not be construed to be a legal obligation or debt of the State, or of any [local government within the State], other than the pension fund concerned, but shall be held to be solely an obligation of such pension fund, unless otherwise specifically provided in the law creating such fund." 40 ILCS 5/22-403. Section 22-403 thus establishes, as the base rule, that the City is not obligated to pay pensions as a debt of the City "unless otherwise specifically provided in the law creating such a fund." *Id.*

None of the Articles creating the four Chicago pension funds even contains the equivalent of the generic "Obligations of State" provision found in the Articles establishing the State pension plans, much less in any other way "specifically provide[s]" that the payment of pensions thereunder is a City or State obligation rather than solely an obligation of the statutorily created City pension funds. Further, the City funds contain provisions that require that where there is a shortfall in any one of the reserves of a City pension fund, that shortfall is to be made up from the other reserves of the same fund. *See, e.g.,* 40 ILCS 5-167.2, 6-164.1(e), 6-206, 8-137.1, 11-134.3, 16-185, 16-186.3, 16-136.2. No mention is made of having the City or State make up the shortfall.

Even the City's obligation to pay money into the pension funds under the funding schedules set forth in the Articles of the Pension Code establishing the funds is strictly limited. In *Houlihan v. City of Chicago*, 306 Ill. App. 3d 589 (1st Dist. 1999), the court addressed the extent of the City of Chicago's funding obligations under the Pension Code. Participants in four Chicago employee pension funds brought a class action asking the court to compel the City of

Chicago to pay interest on employer contributions that were being paid into the funds on a delayed basis. The court held that the City had no obligation to pay interest, reasoning that "the maximum allowable tax levy authorized by the Pension Code is the maximum amount that the City may contribute to the funds." *Id.* at 595. The court further held that once "the City has contributed the maximum amount allowable to the funds [,] . . . the City cannot contribute additional money to the pension funds." *Id.* at 599.

In short, we believe the City has no obligation to guarantee payment of pension benefits if the funds run out of money.

B. **Pension Funds for Municipalities of 500,000 and Under**

1. **The Police Pension Fund**

The Article that most clearly provides that the municipality is not liable for payment of pension benefits is Article 3, which governs the Police Pension Fund - Municipalities 500,000 And Under ("Police Pension Fund"). The Police Pension Fund is financed through an annual property tax levy in an amount which, when added to the employee contributions and investment returns, "will equal a sum sufficient to meet the annual requirements of the police pension fund". 40 ILCS 5/3-125. To determine the "annual requirements" of the fund, a Board of Trustees for the Police Pension Fund files an annual report to the city council designating an amount needed to cover the money expended in the current year and amortize the unfunded liability over a period of forty years from 1993. 40 ILCS 5/3-127. The city council has discretion to determine the dollar amount to be levied, however, and is not required to accept the actuarial recommendations of the Board of Trustees. *See Bd. of Trustees of the Police Pension Fund of the City of Evanston v. City of Evanston*, 218 Ill. App. 3d 1047 (4th Dist. 1996).

Although Article 3 requires municipalities to levy an annual tax for the purpose of financing the Police Pension Fund, Article 3 is absolutely clear that the pension benefits of participating police officers are not a liability of the municipality. Section 3-142 provides that "[i]f at any time there is not sufficient money in the fund to pay the benefits under this Article", the city council or board of trustees of the municipality "shall make every legal effort to replenish the fund so that all beneficiaries may receive the amounts to which they are entitled". Section 3-142 then provides, however, that if after making such efforts "there still remain insufficient funds, the beneficiaries shall be paid pro rata from the available funds, *but no allowance or order of the board shall be held to create any liability against the municipality*, but only against the pension fund". 40 ILCS 5/3-142 (emphasis added). Article 3 thus expressly disclaims municipal liability for any unfunded pension obligations of the Police Pension Fund. Section 3-142 provides as a matter of policy that a municipality should seek to cover any deficiency in the fund, but the statute plainly affirms that only the pension fund itself is liable for any shortfall.

Even without Section 3-142, a municipality should not be held liable for any deficiency in the Police Pension Fund because Article 3 does not "specifically provide" that the municipality itself, rather than the pension fund, has the debt obligation to pay pensions, as would be required to establish such a debt obligation pursuant to Section 22-403. Indeed, Section 3-142 goes beyond Section 22-403 to expressly affirm that the municipality's obligation under Article 3 to "make every legal effort to replenish the fund" does *not* remove the ultimate debt obligation from the Police Pension Fund and thus the municipality contributing to the fund should not be liable for unpaid pensions.[20] None of the other Pension Code Articles contains a similar provision.

Accordingly, the extent of municipal liability to the Police Pension Fund is limited to contributing the annual tax levy in an amount that, in the city council's discretion, is sufficient to meet the actuarial requirements of the fund. Under the terms of Article 3, the municipality should not be liable for any deficiency if the tax levy, employee contributions, and investment returns are ultimately insufficient.

2. **Firefighters' Pension Fund**

The Firefighters' Pension Fund - Municipalities 500,000 And Under ("Firefighters' Pension Fund") is governed by Article 4 of the Pension Code. Like the Police Pension Fund, the Firefighters' Pension Fund is financed with a tax levy which, when added to the employee contributions, "will equal a sum sufficient to meet the annual actuarial requirements of the pension fund", defined as the amount needed to amortize the unfunded liability over a period of forty years from 1993. 40 ILCS 5/4-118. The municipality has "some discretion in determining the dollar amount to be levied in order to ensure a sufficient reserve". *Karfs v. City of Belleville*, 329 Ill. App. 3d 1198, 1204, 770 N.E.2d 256, 261 (5th Dist. 2002); *see also Board of Trustees of*

[20]In 2009, a bill was introduced in the Illinois General Assembly that would have amended Section 3-142 to delete the sentence reaffirming the nonliability of the municipality for any deficiency in the fund. *See* 2009 IL H.B. 5417 (NS). The bill passed the House on March 19, 2010, but stalled in the Senate. Even if enacted, the bill should not cause the municipality to be liable for any deficiency in the fund because even after the proposed deletion, nothing in Article 3 would specifically provide for municipal liability, as would be required to establish such liability under Section 22-403. In other words, under Section 22-403, silence by Article 3 on whether the fund or the municipality has the ultimate debt liability for pension benefits is tantamount to a declaration that such liability remains with the fund.

Police Pension Fund of City of Rockford v. City of Rockford, 96 Ill.App.3d 102, 107-08, 420 N.E.2d 1126, 1130-31 (2d Dist. 1981).[21]

Beyond requiring participating municipalities to make annual contributions to the Firefighters' Pension Fund according to the annual actuarial estimates, Article 4 does not specify any municipal liability for the fund's pension obligations. Nowhere does Article 4 specifically provide that the municipality is responsible for paying pension benefits to pension participants should the actuarial estimates prove insufficient. Because Article 4 does not specify otherwise, Section 22-403 controls, and the unfunded pension liability of the Firefighters' Pension Fund should not be a debt obligation of the participating municipalities. The extent of the municipality's obligation is to make contributions that, according to actuarial projections, are sufficient to meet the requirements of the fund.

3. **The Illinois Municipal Retirement Fund**

Employees, other than police officers, fire fighters and teachers, who work for municipalities of 500,000 and under participate in the Illinois Municipal Retirement Fund ("IMRF"), which is governed by Article 7 of the Pension Code. The IMRF is funded by employee contributions based on a percentage of salary and employer contributions collected by the municipality through a tax levy. The municipality contribution rate is based on the percentage of earnings of all participating employees "which, if paid over the entire period of their service, will be sufficient when combined with all employee contributions available for the payment of benefits, to provide all annuities" and other benefits to participating employees. 40

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[21] Unlike Article 3, which provides that the Board of Trustees recommends the amount of the tax levy, Article 4 specifically provides that the actuarial requirements of the pension fund may be "determined by an enrolled actuary employed by the Illinois Department of Insurance or by an enrolled actuary retained by the pension fund or municipality. " 40 ILCS 5/3-142.

ILCS 5/7-172(b). Although in theory this contribution rate should result in full funding of the IMRF, Article 7 has recently been amended to provide for a 30 to 40 year amortization period for municipalities with a shortfall in their contributions. *See* 40 ILCS 5/7-172(j); Ill. Public Act 96-1084, eff. July 16, 2010.

Article 7 has a unique provision providing that if a participating municipality fails to pay the municipal contributions to the IMRF within 90 days after the contributions become due, then the State is required to deduct the amount of the delinquent payments from any grants of State funds to the municipality and pay the amount to the IMRF. 40 ILCS 5/7-172.1. If the State has no grant of funds to the municipality from which to deduct the amount of delinquent payments, then Article 7 gives the IMRF the right to sue the municipality to recover the amount of the deficiency. *Id.* None of the other Articles in the Pension Code gives a pension fund this right to proceed against a municipality for failure to make timely pension contributions.

Illinois courts have not addressed the impact of the amortization contribution amendment, and it is not clear whether the IMRF may also proceed against a municipality if the municipality fails to make the amortization contributions. The very adoption of the amortization contribution amendment suggests, however, that a municipality is not responsible for the unfunded IMRF liability if the municipality makes contributions at the proper rate but the IMRF's assets are depleted due to a general downturn in the economy. The requirement that participating municipalities amortize unfunded IMRF liabilities over a thirty- to forty-year period suggests that municipalities would not have been responsible for making up the shortfall absent the amendment.

Because Article 7 nowhere "specifically provides" that pension benefits payable under the IMRF are debt obligations of the participating municipalities, according to Section 22-403, the debt obligation for the payment of those benefits should remain with the fund. Thus, the extent of a municipality's liability under Article 7 should be limited to the amount of the required municipal contributions. However, because Article 7 does not appear to grant the municipality the same amount of discretion as under Articles 3 and 4 to determine the contribution rate, and even provides the State with the right to sue a municipality that is delinquent in making contributions, a municipality's obligation to make contributions under Article 7 is likely to be more strictly enforced than under other funds.