Illinois State Pension Plans:  
Do Participants Have Standing to Demand a Minimum Funding Ratio  
By: Barry Kozak* and Jeremy Brunner**

Abstract

The Illinois Constitution of 1970, Article XIII, section 5, provides a contractual protection for state employees from their pension benefits being diminished or impaired. The courts have interpreted this pension protection clause as a protection for employees to receive the benefits that they have been promised. However, the courts have not held that the Illinois Constitution provides a protection for state employees that secures actuarially sound funding of those pension funds. The courts have also held that the Illinois Constitution does not provide for a cause of action requiring the pension funds be maintained at the required statutory level of 90%. The Illinois state pension funds have historically, and are currently, funded at an actuarially unsound level, 62.6%. The courts have held that only if the funds are on the verge of default or bankruptcy, do the participants and beneficiaries of these pensions have an actionable right to mandate funding from the courts.

This article provides the history and structure of the Illinois Pension System, bifurcating the legal environment into the period before the 1970 State Constitution and the period after its ratification. It provides the basic issues with funding a pension plan, starting with a general primer on how any employer would fund a plan, and then illustrating how well funded the Illinois State plans were as of 2007. The main emphasis of the article is an exploration of how the Illinois State Courts have interpreted issues arising from the benefits promised and funding levels maintained by the State in regards to Illinois State Supreme Court decisions that have looked at a plan participant’s standing to sue to force the pension plans to be funded at a certain level. The article concludes that 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. In the conclusion, a bright line test is offered for the Illinois State Supreme Court to adopt in its next review of these issues or for the Illinois General Assembly to craft into an amendment to the pension protection provision, either through an ad hoc amendment of the State Constitution or upon the voters calling for a complete Constitutional Convention.

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By: Barry Kozak* and Jeremy Brunner**

On November 4, 2008, the Illinois Secretary of State, Jesse White, submitted to the Illinois general election voters the question of whether a Constitutional Convention should be called.¹ The last time a Constitutional Convention was held in Illinois was in 1970 and a new constitution was adopted that resulted in many reforms to the previous constitution, including the requirement that a mandatory submission to voters for whether a Constitutional Convention should be called every twenty years.² One notable provision inserted into the 1970 Constitution, which is the subject of this article, is the establishment of a contractual right to benefits for state civil servant workers who are members of the state pension systems.³ The 2008 vote resulted in the rejection of a constitutional convention by an overwhelming majority,⁴ and thus the next guaranteed opportunity Illinois voters will have to call for a Constitutional Convention will be in 2028. Therefore, the Illinois State Constitution, as ratified in 1970, remains in tact and in force, and the ambiguities inherent in the pension protection clause, as discussed herein, will not be resolved until the State Supreme Court provides clarity, or until the State Constitution is ratified.

Measured in isolation against themselves, the five funds that comprise the Illinois State pension system are clearly underfunded (meaning that when comparing current assets to the current value of future expected pension payments, there is a shortfall). When measured against the funded status of its sister States’ respective pension systems, all evidence indicates that Illinois is woefully among the most underfunded states. The Illinois State General Assembly (its bicameral legislative body) did not need to respond to the underfunding, but they did, and they enacted a statutory funding plan so that over several decades, the plans would collectively be funded at a 90% level. As indicated herein, the total funded ratio in 2007 for all Illinois State plans was 62.6%.

The pension protection clause included in the 1970 State Constitution provides an enforceable contractual relationship to members of the State pension system, and prohibits the State, acting as an employer, from diminishing or impairing any of the benefits. If you are a State civil servant worker, trading in a lower cash salary in exchange for a promise of an income stream during retirement, then you care about how well funded the plan is so that your pension income is not hindered in any way. However, as the provision is not clear on its face, this article will explore who exactly is a “member” of the State pension system, what is the “contractual relationship” and how can a breach of contract be detected and remedied, what are the “benefits” that cannot be diminished or impaired, what are the thresholds to anticipatorily prevent a diminishment or impairment, and upon proving any of those

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¹  Ill. Const. art XIV, § 1.
initial questions, can the State courts issue a mandamus to the Illinois State Governor, Treasurer or
Comptroller to properly fund the plans?

The first section of this article provides the history and structure of the Illinois Pension System,
 bifurcating the legal environment into the period before the 1970 State Constitution and the period after
its ratification. The second section provides the basic issues with funding a pension plan, starting with
a general primer on how any employer would fund a plan, and then illustrating how well funded the
Illinois State plans were as of 2007. The third section explores how the Illinois State Courts have
interpreted issues arising from the benefits promised and funding levels maintained by the State: first a
listing of the three sources of contract protection afforded to plan participants; then a discussion of
several areas where the State retains the right to amend the pension system; then a comparison between
the Illinois pension protection provision and the New York provision it was based upon; and finally a
summary of the three State Supreme Court decisions that have looked at a plan participant’s standing to
sue to force the pension plans to be funded at a certain level. The article concludes that 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. In the
conclusion, a bright line test is offered for the Illinois State Supreme Court to adopt in its next review
of these issues or for the Illinois General Assembly to craft into an amendment to the pension
protection provision, either through an ad hoc amendment of the State Constitution or upon the voters
calling for a complete Constitutional Convention.

I. History and Structure of the Illinois Pension System

Prior to the adoption of the Illinois Constitution of 1970, state pensions were divided into two
categories based on the employees' participation: compulsory (sometimes referred to as mandatory) and
optional.\(^5\) Compulsory pensions are those that had mandatory participation and mandatory
contributions by the participants, but which gave no contractual rights to the participants. Those
pension plans were deemed to be “in the nature of a bounty springing from the appreciation and
graciousness of the sovereign, and may be given, withheld, distributed, or recalled at its pleasure.”\(^6\)
Because contributions were compulsory, participants' contributions were not held as payments made to
the participants and then transferred to the pension fund, but were treated as being directly transferred
from one public fund to another, never becoming the property of the participants, as if the participants
overtly acquiesced to such an arrangement as a condition of their employment agreements.\(^7\) The
participants never had any vested contractual or property right to the compulsory contributions that
were deducted from their salary.\(^8\)

On the other hand, the rest of the state employees participated in optional plans. When an elective right
to participate and contribute to a pension is offered to an employee, then electing to participate and
contribute to the pension fund creates a contractual right for the employee to receive future payments
from the pension.\(^9\) Because the employee has the choice to participate, contributions made pursuant to


\(^{6}\) *Blough v. Ekstrom*, 14 Ill. App. 2d 153, at 160. (1957)

\(^{7}\) *Id.*

\(^{8}\) *Id.* at 161

\(^{9}\) *Raines v. Board of Trustees*, 365 Ill. 610, at 615. (1937)
the election to participate provides consideration and creates a vested right for the employee. Unlike a compulsory pension where the money never becomes property of the employees, participants who elect to participate in an optional pension plan are deemed to have received their full salary and have chosen to deduct the contributions from his salary at the employee's direction after the money has become under his control. Participation in an optional pension plan creates a contract between the sovereign and the employee similar to that of an annuity contract offered by an insurance company where options to modify the contract between the two parties must comply with contract law to be valid, but no one party can unilaterally alter a contract against the other party's will.

When the Illinois Constitution of 1970 was drafted, the drafters included Article XIII, section 5:

“Membership in any pension or retirement system of the State, any unit of local government or school district, or any agency or instrumentality thereof, shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired.”

This section of the Illinois Constitution of 1970, commonly called the pension protection clause, was included to provide greater protection to public employees in their rights to receive pension benefits than they received before under the optional-mandatory pension standards; the purpose was to grant some degree of vested rights to public employees participating in mandatory pension plans. In interpreting the pension protection clause, the courts have noted an uncertainty in the scope of protection the clause provides and has relied on transcripts from the constitutional convention floor debate. The courts have also relied on the New York Constitution, from which the language of the pension protection clause is modeled, and New York case law interpreting the clause. The pension protection clause has been interpreted by courts to mean that an employee has a contractual right to receive not less than the benefits under the benefit formula that was in place at the time of the employees initial employment or at the time of the effective date of the pension protection clause, whichever date is later, not at the time the employee retires.

Currently, the state pension systems in Illinois are governed by the Illinois Pension Code. The state of Illinois currently supports five separate pension funds for state employees: the General Assembly Retirement System (GARS), the State Employees’ Retirement System of Illinois (SERS), the State Universities Retirement System (SURS), the Teachers’ Retirement System of the State of Illinois (TRS), and the Judges Retirement System of Illinois (JRS). There are other retirement systems in the state of Illinois that are specifically and separately for certain employees of Cook County and the City of Chicago, most notably the Public School Teachers' Pension and Retirement Fund of Chicago.

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10 *Bardens v. Board of Trustees*, 22 Ill. 2d 56, at 60. (1961)
11 *Raines*, at 615
12 *Id.*, at 616
13 Ill. Const. art XIII, § 5.
15 *Kraus v. Board of Trustees*, 72 Ill. App. 3d 833, at 843. (1979)
16 *Peters* at 151
17 *Id.* at 142; see N.Y Const., art. V, § 7.
18 *Id.* at 844
19 40 ILCS §5 et. seq.
20 40 ILCS §5/2-101
21 40 ILCS §5/14-101
22 40 ILCS §5/15-101
23 40 ILCS §5/16-101
24 40 ILCS §5/18-101
(also called the Chicago Teachers Pension Fund, or CTPF).\textsuperscript{25} The Cook County and City of Chicago retirement funds are not funded by the state at the same level as the five principal state pensions. For example, CTPF is mostly funded through employee contributions\textsuperscript{26} and employer contributions\textsuperscript{27}, but does receive some funding from the State.\textsuperscript{28} The Illinois Pension Code also provides for firefighter and police pensions that are to be maintained by the respective municipalities.\textsuperscript{29} This article will, however, focus on the five main pension plans funded wholly by the State of Illinois.

The administration of pension funds is divided amongst several state officials. The level of funding of the five state pension systems is determined by the legislature through appropriation bills\textsuperscript{30} and must be signed by the Governor\textsuperscript{31} or the level of funding may be reduced by the Governor by use of his power of line-item veto.\textsuperscript{32} Once the funding level is determined through that process, the Comptroller must order payments to the pension funds from the Treasurer.\textsuperscript{33} The Comptroller is also responsible for maintaining fiscal accounts for the State.\textsuperscript{34} Therefore, in Illinois, the State Comptroller is ostensibly the key person in charge of actually funding the state’s public sector plans.

II. Funding Pension Plans

A. A Primer on How Employers Fund Pension Plans\textsuperscript{35}

There are basically two retirement models available to an employer: a defined contribution plan, where contributions and allocations are made to individual accounts on an annual basis, and once made, assuming the assets are invested prudently, the employee’s benefits upon retirement are the accumulated value of his or her account (\textit{i.e.}, there are no guarantees provided by the employer other than definitely determinable contributions, and the entire investment risk is borne by the employees because a low rate of return or a loss of plan assets immediately before retirement will result in a lower than expected account balance); and a defined benefit pension plan, where benefits are accrued each year, and the employee’s benefits upon retirement are whatever has been accrued (\textit{i.e.}, there are guarantees provided by the employer to properly fund the definitely determinable benefits, and the entire investment risk is borne by the employers because a low rate of return or a loss of plan assets will result in a higher than expected required contribution). This article focuses on the latter type of plan since there are no funding issues with a defined contribution plan (other than physically depositing the proper amount that is promised through a plan document, stated in a collectively bargained agreement or employment contract, or defined in a controlling statute).

A pension plan literally needs to pay the very last dollar of liability when it comes due. At that point in time in the future, if there are enough assets to pay all liabilities, then the plan will be deemed to be

\textsuperscript{25} 40 ILCS §5/17-101
\textsuperscript{26} 40 ILCS §5/17-130
\textsuperscript{27} 40 ILCS §5/17-129
\textsuperscript{28} 40 ILCS §5/17-127(b)
\textsuperscript{29} 40 ILCS §§ 5/3, 5/4, 5/5, and 5/6
\textsuperscript{30} Ill. Const. art IV, § 8.
\textsuperscript{31} Ill. Const. art IV, § 9(a).
\textsuperscript{32} Ill. Const. art IV, § 9(d).
\textsuperscript{33} Ill. Const. art I, §17.
\textsuperscript{34} Ill. Const. art I, §17.
overfunded, but if there is any shortfall, then the plan will be deemed to be underfunded. At any point in time before the last day of the plan’s natural life, all that an interested party can do is understand the current funding status, and then make predictions on whether the current funding status provides any assurances of the actual funded status after all liabilities have become due. Even if the funding status at any point in time were instructive in predicting the ultimate funded status of the plan, properly valuing the current plan assets and the present value of future benefits for the comparison is yet another issue that complicates how each interested party (the employee, and the employer) perceives a pension plan.

The employer that promises retirement benefits through a defined contribution plan must make contributions in today’s dollars; thus a contribution of $1 adds $1 to that particular employee’s total cost for the year. On the other hand, the employer that promises retirement benefits through a defined benefit pension plan is only making contributions of less than $1 today for a benefit of $1 in the future. The employer has some choice and freedom in selecting a funding method that can potentially smooth out the high costs of funding older employees with the lower cost of funding younger employees. The amount of a worker’s pension liability, for accounting purposes, can be bifurcated between the wages associated with the individual performing services and the financing cost associated with the employee’s creditor function.  

From the employer’s point of view, the funded ratio represents cash flows that can be used for other purposes (a higher funded ratio will generally result in lower contributions). For private-sector employers, federal income tax rules limit the amount of extra contributions in any year that can be deducted on the employer’s return, and when the plan ends or terminates, any excess plan assets that revert back to the employer are generally assessed a 50% penalty tax. Therefore, although the private-sector employer can generally decide how much revenue can be used to fund retirement promises through a pension plan, the Tax Code provides some boundaries. Additionally, private-sector pension plans will pay higher premiums to the PBGC when the funding ratio is low. Because of the Employee Retirement Income Security Act of 1974, the federal United States government (through the Pension Benefit Guaranty Corporation) has “become a partner in sharing the [firm’s] pension liability.” While public-sector employers don’t have the income tax constraints or PBGC premiums, they similarly need to carefully allocate scarce resources between current compensation, retirement income, and other employee benefits, so the better funded the pension plan, then the less that needs to be contributed.

Finally, the employer has discretion in the investment of pension plan assets. The assets can be invested simply to be diversified and to minimize the risk of large losses. However, since governmental plans are not subject to the fiduciary rules of ERISA, the elected officials and appointed trustees are generally free to invest the pension plan assets in any manner. Appropriate statutes might impose criminal activity for theft and embezzlement, but the only penalty for mismanagement of their stewardship duties is usually not being re-elected or re-appointed. The controlling statutes also might provide restrictions on investment vehicles, including social-investing strategies that prohibit investments directly or indirectly in Sudan or Iran. According to a recent report, of the 125 public

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37 P.L. 93-406, codified at 29 USC §§ 1001 et. seq. ERISA controls the design and operation of private-sector employer retirement plans, and government plans are specifically excluded from coverage under §1003(b)(1).

38 Jeremy I. Bulow, *What are Corporate Pension Liabilities*, Quarterly Journal of Economics, Vol. 97, No. 3, 435 (August 1982). The PBGC is the government insurer of pension promises originally made by employer sponsors where the plans are underfunded upon bankruptcy or dissolution of that employer.

pension plans surveyed, 6.5% of the aggregate assets were invested in portfolios of non-traditional assets, such as derivatives or other types of hedging schemes currently under scrutiny. Additionally, a growing trend for governments (including the state of Illinois) is to issue pension obligation bonds.

For public sector pension plans, there are generally four different types of projected optimal funding patterns based on expected pension growth rates and expected tax base growth rates. The pension growth rates include the purely mathematical elements: the actuarial increase in the present value of liabilities simply because each employee is closer to retirement age; the increase in liabilities due to accruals and salary increases earned during the year; and increases in liabilities because new individuals were employed and added to the plan. However, public sector pension plans face an additional component of pension growth – the promises to increase or otherwise improve benefits made by public officials during an election campaign simply to attract votes, but which are not funded or even anticipated in the budgeting process. The tax base growth, which is the denominator of the funded ratio fraction, is the increase in taxes the state or local government can reasonably anticipate by increasing property, sales, income or other taxes based on the demographics, income and consumption habits of the population.

The four funding patterns are:

- when the expected tax growth rate is greater than the expected pension growth rate, and the funding ratio is below 100% in the early years, then the ratio should follow a concave curve, where it decreases over time down to 100% during the final years (a variation of this is a period during the middle years where the funding ratio is actually allowed to drop below 100%);
- when the expected tax growth rate is greater than the expected pension growth rate, and the funding ratio is below 100% in the early years, then the ratio should follow a convex curve, where it increases over time up to 100% during the final years (a variation of this is a period during the middle years where the funding ratio is actually a bit lower than the initial percentage);
- when the expected pension growth rate is greater than the expected tax growth rate, and the funding ratio is above 100% in the early years, then the ratio should follow a concave curve, where it decreases over time down to 100% during the final years (a variation of this is a period during the middle years where the funding ratio is actually a bit higher than the initial percentage); and
- when the expected pension growth rate is greater than the expected tax growth rate, and the funding ratio is below 100% in the early years, then the ratio should follow a concave curve, where it increases over time up to 100% during the final years (a variation of this is a period during the middle years where the funding ratio is actually a bit higher than 100%).

The “relationship between the pension growth rate and the tax base growth rate plays a crucial role in determining the optimal funding decision. Only if the growth in pension costs over time can be constrained below the growth in the tax base, are funding levels less than [100%] ever optimal. However, if pension costs grow faster than the tax base then the optimal funding strategy requires overfunding of public pension plans.”

As wage economics and the local government’s budget constraint will indicate an optimal mix between

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40 “Public Fund Survey as of 7/30/2008, Executive Summary,” available at http://www.publicfundssurvey.org/publicfundssurvey/scorecard.asp. Traditional assets generally include equities, fixed income debt obligations, real estate and cash.


42 Id.
current wages and future pensions, there is no single best level of pension funding that fits every state or local government. In economics lingo, a public sector pension plan can reasonably, and purposely, be underfunded in the first-period (assuming a two period model) if that local government’s preference function favors the amount of second-period revenue endowment over the expenditures on second-period employees. An underfunded public sector pension plan might be the “most efficient way to borrow in order to obtain a more preferred distribution of employees through time than would be possible with a given time profile of revenue flows.” If a public sector plan is underfunded, it is usually a result of either adopting unrealistic assumptions (such as a greater rate of return for discounting present values than is reasonably anticipated to be realized) or the failure of the public sector employer to actually make the required contribution. However, if the state or local government makes an affirmative decision to maintain a funding ratio below 100%, knowing that it must necessarily increase over time, then the government officials must ensure that the plan’s funding is monitored properly, and not simply forgotten about.

Since many public sector employees are employed pursuant to a collective bargaining agreement, the “unions might themselves be under pressure to produce ‘results’ in the areas about which workers are most informed and most likely to care: namely, pay levels. If union leaders believe that workers only (or primarily) about wages, but much less about the complexities of funding a rather distant pension obligation, then unions may exert efforts to secure a high wage while tacitly allowing public employers to partially ‘pay for’ that high wage through inadequate pension contributions.” In the early 1990’s, an econometrics analysis indicates that increases in unemployment within the governmental unit will cause an increase in the probability that the associated public sector plan will tend to be underfunded.

B. How Well Funded Are the Illinois State Pension Plans?

As described above, the funding ratio of a pension plan is the percentage of the plan's liabilities (accrued benefits by participants) that are covered by current plan assets. The funding ratio places the plan liabilities in context with the plan assets. The aggregated funding ratio for all of the Illinois state plans was 62.6% for the 2007 fiscal year - current accrued liabilities for all Illinois state plans was just under $113 billion; the pension plans held a combined net assets of about $70.7 billion; and the resulting unfunded liability for the pension plans combined was about $42.1 billion.

In 1994, this ostensibly bipartisan Illinois General Assembly passed a law stating “The General Assembly declares that a funding ratio (the ratio of a retirement system’s total assets to its total actuarial liabilities) of 90% is an appropriate goal for State-funded retirement systems in Illinois, and it finds that a funding ratio of 90% is now the generally-recognized norm throughout the nation for public

44 Id.
45 Id.
47 Id.
48 Id.
50 Id. at 14
51 The 88th session of the Illinois state General Assembly can be considered to be bipartisan, as Republican James “Pate” Phillip was the Senate President and Democrat Michael Madigan led the House (and Republican Jim Edgar served as Governor).
employee retirement systems that are considered to be financially secure and funded in an appropriate and responsible manner.” Specifically, it requires a gradual increase in funding ratio to get to the 90% target –

- for State fiscal years 1996 through 2010, the State contribution to the System, as a percentage of the applicable employee payroll, shall be increased in equal annual increments so that by State fiscal year 2011, the State is contributing at the rate required under this Section, and

- for State fiscal years 2011 through 2045, the minimum contribution to the System to be made by the State for each fiscal year shall be an amount determined by the System to be sufficient to bring the total assets of the System up to 90% of the total actuarial liabilities of the System by the end of State fiscal year 2045. In making these determinations, the required State contribution shall be calculated each year as a level percentage of payroll over the years remaining to and including fiscal year 2045 and shall be determined under the projected unit credit actuarial cost method.

This 1994 Act repealed an earlier 1989 Act that would have required a gradual increase in the funding ratio to 100% in 40 years, as opposed to the 1994 Public Act that now requires a gradual increase in the funding ratio to 90% in 50 years. Further, the law required “Every 5 years, beginning in 1999, the Illinois Economic and Fiscal Commission, in consultation with the affected retirement systems and the Bureau of the Budget, shall consider and determine whether the 90% funding ratio adopted in subsection (b) continues to represent an appropriate goal for State-funded retirement systems in Illinois, and it shall report its findings and recommendations on this subject to the Governor and the General Assembly.”

As discussed above, 90% is not necessarily the proper funding ratio target. Each state should set its targets and funding policy based on expected tax growth versus expected pension growth. As the expectations might vary over time, the 1994 General Assembly was correct and insightful in requiring that the target itself be reassessed from time to time.

Apparently, in all fiscal years from 1995 until 2003, all Governors, Treasurers and Comptrollers, without any resistance from the General Assembly, followed the funding mandate. However:

- in 2003 (Governor Blagojevich’s first year in office), Illinois issued $10 Billion in pension obligation bonds in order to avoid meeting pension funding requirements;

- in 2004, the Governor proposed underfunding pension system by more than $500 million. In overtime session Republicans demanded an additional $200 million be put in the pension

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52 Illinois Public Act 88-593, amending 40 ILCS §5/1-103.3(b).
53 Illinois Public Act 88-593, amending 40 ILCS §5/2-124.
54 40 ILCS §5/2-124(c) (emphasis added).
55 Illinois Public Act 86-273
56 Public Act 88-593, amending 40 ILCS §5/1-103.3(c) (emphasis added). On February 1, 2004, the Commission on Government Forecasting and Accountability replaced the Economic and Fiscal Commission and the Pension Laws Commission pursuant to the Government Forecasting and Accountability Act (25 ILCS § 155/1 et. seq.) (according to the State of Illinois Commission on Government Forecasting and Accountability Compliance Examination for the Two Years Ended June 30, 2005). Unfortunately, a comprehensive internet search did not yield any reports in 1999, or thereafter, revisiting the 90% funding ratio goal, as required by the statute.
57 D’Arcy et al, Optimal Funding
58 On June 12, 2003, Illinois issued $10 billion in pension funding general obligation bonds with maturities of up to 30 years. The bond proceeds provided funds to the state pension systems, as well as monies for budget relief during fiscal years 2003 and 2004. The pension systems’ share was $7.3 billion allotted to the five systems in proportion to their unfunded pension liabilities (See Illinois State Comptroller Daniel W. Hynes’ website, http://www.ioc.state.il.us/FiscalFocus/article.cfm?ID=286).
system. Payment due under the Early Retirement Incentive for state employees was deferred for one year;

- in 2005, pension contributions were $1.2 billion short of the required amount; and
- in 2006, an additional $1.1 billion was diverted away from proper pension funding to enable the Governor to avoid meeting the state’s financial obligations.\(^{59}\)

In an apparently partisan\(^{60}\) amendment to the funding ratio target, the law was changed in 2004: “Notwithstanding any other provision of this Article, the total required State contribution for State fiscal year 2006 is $4,157,000. Notwithstanding any other provision of this Article, the total required State contribution for State fiscal year 2007 is $5,220,300. For each of State fiscal years 2008 through 2010, the State contribution to the System, as a percentage of the applicable employee payroll, shall be increased in equal annual increments from the required State contribution for State fiscal year 2007, so that by State fiscal year 2011, the State is contributing at the rate otherwise required under this Section.”\(^{61}\)

“From 1990 to 1996, the state’s pension systems were funded at levels between 50 and 60 percent. In 2000, the systems were funded at 75%, according to state records, dropping significantly to 63% by 2001 and 54 percent in 2002 when the recession hit.”\(^{62}\) “As a result, the State of Illinois faces future financial obligations of staggering proportions. Even after issuance of $10 billion in Pension Obligation Bonds in 2003, the State still must make contributions totaling $275.1 billion to the five retirement systems to attain the statutory requirement of a 90% funded ratio by 2045. This sum – some six times greater than the entire proposed FY2006 State operating budget -- will increase even further if the State continues to ignore the financial reality of its flawed pension policies.”\(^{63}\) “For the state of Illinois, which has among the most poorly funded state pension systems, its unfunded liability of $40.7 billion is 7.3 percent of state GDP and 154 percent of annual state tax collections. For comparison purposes, the estimate of unfunded benefits for retirees for two federal programs (Medicare and Social Security) is a staggering $65.9 trillion. This is 5 times annual GDP and nearly $300,000 on a per capita basis. While this state-federal comparison of liability may not be directly comparable, this puts the state liability in perspective. Giertz concludes that even in states with substantial underfunding, pension financing is more a question of will than capacity.”\(^{64}\)

The Illinois state budget is about $46 Billion dollars, which can be compared to the $41 Billion funding shortfall. According to Governor Blagojevich, in his 2007 Budget address, an immediate cash infusion of $26 Billion would be made in 2007, $10 Billion from a lease of the Lottery and $16 Billion in Pension Obligation Bonds.\(^{65}\)

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\(^{59}\) According to Senator Frank Watson’s discussion of “The Governor’s Pension Diversion” on www.senategop.state.il.us/index.php?option=com_content&task=view&id=136&Itemid=1

\(^{60}\) Democratic Senate President Emil Jones, Jr., Democratic Speaker of the House Michael Madigan, and Democratic Governor Rod Blagojevich.

\(^{61}\) Illinois Public Act 94-004, amending 40 ILCS §5/2-124.


\(^{65}\) As of the writing of this article, Governor Blagojevich was impeached and replaced by Governor Quinn, and the budget was still pending approval in the General Assembly.
Though the amount of money appropriated for funding state pensions is determined through the law making process between the legislature and the governor, the Illinois State General Assembly (its bicameral legislative body) has set into law a funding goal for state pensions of 90%. 66 Prior to the 90% funding goal, the pension plans were not funded on an actuarial basis. 67 The employer contributions to the pension plans were used to pay current benefits and the employee contributions and investment income on the monies already in the funds were used to build up a reserve fund for future benefit payments. 68 This resulted in a particularly hazardous funding level for the state pensions. 69 Since 2004, State contributions to the pension funds have decreased. 70 In 2004, the State injected $7.3 billion into pension funds by the sale of a pension funding general obligation bond, though the prudence of using pension-funding bonds has been questioned. 71 Coupled with decreased value in equity investments, the value of system assets decreased over $5 billion from 2000 to 2003 due in part to equity value decreases, the pension funds seem to be dangerously underfunded and threaten to burden the State's finances. 72

Table 1.73
Pension Fund Statistics per Retirement System for Fiscal Year 2007

<table>
<thead>
<tr>
<th></th>
<th># of Current Participants</th>
<th># of Annuitants</th>
<th>Participant to Annuitant Ratio</th>
<th>Accrued Liability</th>
<th>Net Assets</th>
<th>Unfunded Liability</th>
<th>Funded Ratio</th>
</tr>
</thead>
<tbody>
<tr>
<td>TRS</td>
<td>160,317</td>
<td>89,236</td>
<td>1.80</td>
<td>$65,648.4</td>
<td>$41,909.3</td>
<td>$23,739.1</td>
<td>63.8%</td>
</tr>
<tr>
<td>SURS</td>
<td>72,092</td>
<td>35,200</td>
<td>2.05</td>
<td>$23,362.1</td>
<td>$15,985.7</td>
<td>$7,376.4</td>
<td>68.4%</td>
</tr>
<tr>
<td>SERS</td>
<td>67,699</td>
<td>42,979</td>
<td>1.58</td>
<td>$22,280.9</td>
<td>$12,078.9</td>
<td>$10,202.0</td>
<td>54.2%</td>
</tr>
<tr>
<td>JRS</td>
<td>957</td>
<td>620</td>
<td>1.54</td>
<td>$1,385.3</td>
<td>$670.1</td>
<td>$715.2</td>
<td>48.4%</td>
</tr>
<tr>
<td>GARS</td>
<td>182</td>
<td>272</td>
<td>0.67</td>
<td>$231.9</td>
<td>$87.2</td>
<td>$144.7</td>
<td>37.6%</td>
</tr>
<tr>
<td>Total</td>
<td>301,247</td>
<td>168,304</td>
<td>1.79</td>
<td>$112,908.6</td>
<td>$70,731.2</td>
<td>$42,177.4</td>
<td>62.6%</td>
</tr>
</tbody>
</table>

As illustrated by Table 1, it seems that the size of the pension fund is not necessarily the determinative factor in causing a deficient funded ratio. It appears that a better indicator of a deficient funded ratio for the pension funds is comparing the number of current participants to the number of annuitants. As the participant to annuitant ratio decreases, more people are taking money out of the fund proportionate to the number of participants contributing to the fund. Employee contributions are less able to cover the costs of benefits being paid currently to annuitants. If the relation to the funding ratio and the workers to retiree ratio remains consistent, Illinois may be facing a crisis soon as the baby boomers in the workforce reach retirement age which will result in a drastic decrease of working participants and an increase in retirees receiving pension benefits. 74

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66 40 ILCS §5/2-124
68 Id. at 5.
69 Id.
70 Id.
73 Id. and; the Teacher's Retirement System, trs.illinois.gov (for employee and retiree information for TRS)
III. State Court Interpretations of Standing and Proper Funding Levels

Three Sources of Contract Protection

There are three possible sources of contract protection for state pension participants in any state: the Contract Clause of the United States Constitution, any provision in the state constitution that mirrors the federal Contract Clause, and a state constitutional provision that provides contract rights for participants (such as the pension protection clause of the Illinois Constitution). State constitutions that provide protection in provisions that mirror the Contract Clause provide little extra protection from state impairment of contract than that which is guaranteed federally. State constitutional contract protection, such as the contract clause in the Illinois Constitution, is held to the same standard of analysis as the federal contract protection; however, state constitutional contract protection cannot supplement federal contract protection. State pension protection, like the pension protection clause of the Illinois Constitution, may be able to provide greater protection to participants than the protection provided by the Contract Clause.

The Contract Clause on its face holds unconstitutional any law that impairs the obligations of a contract, but the Supreme Court has held that there are some permissible impairments: a state may impair the obligations of a contract if it is necessary to safeguard the welfare of its citizens which is an essential attribute of sovereign power, an attribute that cannot be contracted away by a state. However, the requirement of a state to pay debts is not an exception as a necessity to safeguard the welfare of a state's citizens. The Supreme Court held that a state's “taxing power may have to be exercised if debts are to be repaid . . . . the State's are bound by their debt contracts.” A governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a State could reduce its financial obligation whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all. Further, the Supreme Court held that when a state impairs a contractual financial obligation of that state, it is only permissible when that impairment is both reasonable and necessary to serve the important purposes of the contract entered into by the state. When determining whether a state has entered a contract by a statute, the language of the statute is of first importance.

As a reminder, the pension clause in the Illinois State Constitution prohibits a diminishment or impairment of an employee’s pension. The Illinois Court of Claims has described the pension protection clause as “much more explicit and affirmative than the general language” of the Illinois

76 Id. at 1078
77 Ill. Const. art I, § 16.
78 Sklodowski v. the State of Illinois, 162 Ill.2d 117 (1994), at 148 (Freeman, J. dissenting and concurring in part). Note that this 1994 case is labeled as “Sklodowski I” herein to differentiate it from the 1998 case appealed on different issues labeled as “Sklodowski II” herein.
79 Felt v. Board of Trustees, 107 Ill. 2d 158, at 164-165. (1985); see Bardens
80 U.S. Const.art. I, § 10.
82 Id. at 24.
83 Id. at 25.
84 Id. at 29.
85 Dodge v. Board of Education, 302 U.S. 74, 78. (1937)
Contract Clause.\textsuperscript{86} Even with this more explicit language, the Illinois courts have not held a differentiation between a diminution of benefits and the impairment of benefits. There is a constitutional protection from the diminution of benefits that have already been accrued and the court has held that participants and beneficiaries have a protected right to a minimum funding level that will ensure the pension fund does not default on benefit payments or result in imminent bankruptcy of the fund. The Illinois courts have not fully explored what qualifies as an impairment of benefits. It has been suggested that underfunding or removing monies from the pension funds constitutes an impairment of benefits.\textsuperscript{87} The interpretation of the pension protection clause's use of the words “diminish” and “impair” as the same runs contrary to rules of constitutional interpretation for regarding different words as synonymous.\textsuperscript{88} It is proper that the courts interpret the pension protection clause as providing state pension participants three protections as the clause states: a contractual right, a protection against benefit diminution, and a protection against benefit impairment.

**Rights Retained by the State of Illinois in Regards to Pension Protections**

The state may not constitutionally decrease the amount of benefit that an employee has vested, but the state may increase the benefits or create additional benefits.\textsuperscript{89} A participant's benefits are protected from reduction by the contractual rights granted in the pension protection clause, but the state may increase those benefits, which become vested when the participant provides consideration to complete the contract; the increased benefits vest when the participant provides new or continued contributions to the pension.\textsuperscript{90} The argument that a beneficial change after the participant's initial vesting at the time of employment may be reduced to the original level of benefit has been rejected by most appellate courts in Illinois.\textsuperscript{91}

This protection, however, does not grant an employee a contractual right to accrue the maximum amount of benefits under the benefit formula at the time of employment.\textsuperscript{92} The state has the ability to change limits on how much may be accrued under the benefit formula by changing factors such as maximum retirement age. This is allowable even if it bars participants from accruing the maximum benefit under the benefit formula that was in place at the time they were hired. These changes are allowed if they are due to external factors that may require changes in whether a position should be maintained or abolished, changes in functions of the employee, or terms of employment being changed.\textsuperscript{93} The state still has the power to limit how much benefit may ultimately be accrued, but may not “impair or diminish” a participant's right to receive benefits that have already been accrued.\textsuperscript{94}

The Illinois State courts have held that the protection offered by the pension protection clause extends to protecting the calculation of the salary basis on which a pension annuity would be based.\textsuperscript{95} In

\begin{flushleft}
\textsuperscript{86} Illinois Educators Association v. State, 28 Ill. Ct. Cl. 379, 383. (1973)
\textsuperscript{87} Simko, Of Public Pensions at 1078.
\textsuperscript{88} Id. at 1079.
\textsuperscript{89} Schroeder v Morton Grove Police Pension Board, 219 Ill. App. 3d 697, at 701. (1991)
\textsuperscript{90} Kuhlmann v. Board of Trustees, 106 Ill. App. 3d 603, at 608. (1982)
\textsuperscript{91} See Kuhlmann; Gualano v.City of Des Plaines, 139 Ill. App. 3d 456 (1985); and Carr v. Board of Trustees, 158 Ill. App. 3d 7, (1987); but see Sellards v. Board of Trustees, 133 Ill. App. 3d 415 (1985) (Kuhlmann, Gualano , and Carr held that if benefits are increased by the State and the participant provides consideration, such as continued contributions, the benefit increase is contractually protected. Sellards held that after a participant is vested, subsequent statutory increases in benefit may be withdrawn by statute.)
\textsuperscript{92} Peters at 152.
\textsuperscript{93} Id.
\textsuperscript{94} Id.
\textsuperscript{95} Felt v. Board of Trustees, 107 Ill. 2d 158, at 164-165. (1985)
\end{flushleft}
determining that a change in the salary basis of a participant's pension annuity is an unconstitutional diminution of pension benefits per the pension protection clause, the court has noted this protection is viewed in similar light to the previous protection granted to mandatory pensions on a contractual basis.\footnote{96} It was noted by the court that the State may reduce benefits by use the State's police power if the diminution of benefits was insubstantial in relation to the use of police power, but such an allowance would be unlikely; the use of a State's police power to alleviate pension funding inadequacies is not reason enough to diminish the value of salary in determining the amount of benefits to be received by participants.\footnote{97}

**Illinois’ Pension Protection Provision and its Similarity to New York’s Provision**

The state constitutional framer who sponsored the pension protection clause (which was accepted) proposed language that is identical to the provision included in the New York State Constitution.\footnote{98} This seems to suggest that the framers of the Illinois State Constitution intended to provide identical coverage to Illinois participants, and the courts have accordingly relied on New York case law when interpreting how this protection should be applied in Illinois.

One major exception to the courts' reliance on New York case law, however, has been in the instance of funding and the use of pension funds.\footnote{99} As summarized below, the state courts in Illinois have provided Illinois participants almost no protection in how well the pension plan or trust is funded.\footnote{100} New York courts have held that its State legislature may not dictate how pension fund monies may be invested, specifically that funds may not be directed to be invested in government bonds aimed at providing financial support to New York City during a time of financial crisis.\footnote{101} Such direction was an overstep by the legislature which violated the safeguard of having a specific elected official, the State Comptroller, to invest pension funds in the best interest of the participants and beneficiaries.\footnote{102} The New York State legislature, it held, has some control over allocating contributions to the pension funds and how the funds are invested, but that control is not unlimited and “any radical change” made by the legislature that may effect the maintenance of security of pension funds must be closely scrutinized.\footnote{103} The New York court stated: “[T]he [New York State] Legislature is powerless in the face of the constitutional nonimpairment clause to mandate that [the State Comptroller] mindlessly invest in whatever securities they direct, good, indifferent, or bad. The ultimate difference is between authority to invest and a mandatory direction to invest in certain securities, and in certain minimum amounts, whether or not the State Comptroller deems it advisable.”\footnote{104} The New York court went further by stating that the pension protection clause had two purposes: the first is to protect participants right to receive benefits and the second is to protect future taxpayers by use of sound actuarially determined funding of state pensions.\footnote{105}

The Illinois courts have held a juxtaposed position on use of pension funds for non-pension purposes.\footnote{106}
Where New York bars legislative direction to invest pension funds in specific securities, the Illinois courts have allowed the state government to transfer monies that have already been contributed to the state pension funds into the state’s general revenue fund.\textsuperscript{107} Such maneuvering of monies out of the state pension funds is of a magnitude greater than underfunding the pension funds; instead of not contributing an actuarially appropriate amount to the pension funds, the government is actually reducing the amount of money that is already in the fund. In \textit{Sklodowski I}, an interlocutory appeal to the Illinois Supreme Court seeking to reverse the dismissal of a temporary restraining order against the Treasurer from transferring money out of the pension funds and seeking to disqualify the Attorney General from taking part in the trial, the court, while not expressly holding that the transfer of funds was constitutional, refused to decide the constitutionality of such a transfer on procedural grounds in the one case that raised that issue.\textsuperscript{108} Though the majority of the court refused to answer any constitutional questions of the transfer of monies, the dissent offered a strong rebuke of the majority opinion stating that “the transfer impaired constitutionally protected pension benefits or contract rights”\textsuperscript{109} and that the court showed “a sign of willingness to weigh political expediency in crafting the constitutional jurisprudence of this State”\textsuperscript{110} and concluded that “the transfer here substantially impaired pension benefits.”\textsuperscript{111}

\textbf{Standing Issues with Regard to Funded Status of Illinois State Pension Plans}

The Illinois State Supreme Court has looked at the specific issue of funding three times, and in all three cases, indicated that there is no group of plaintiffs that can sue the State (through its Governor, Treasurer or Comptroller) for underfunding the public sector plans. First, in \textit{People ex. Rel. Illinois Federation of Teachers v. Lindberg}, the Court determined, after reviewing the transcripts from the 1970 state constitutional convention, that the “convention debates do not establish the intent to constitutionally require a specific level of pension appropriations during a fiscal period”\textsuperscript{112} and that the pension protection clause in the State constitution does not create a contractual basis for participants to expect a particular level of funding, but only a contractual right that “they would receive the money due them at the time of their retirement.”\textsuperscript{113} Then, in \textit{McNamee v. State of Illinois}, the Court concluded that the constitutional pension protection clause “creates an enforceable contractual relationship that protects only the right to receive benefits.”\textsuperscript{114} Finally, in \textit{Sklodowski v. the State of Illinois (Sklodowski II)}, the Court held that allegations of underfunding, even if true, are, “insufficient as a matter of law to constitute an impairment of benefits” in violation of the pension protection statute.\textsuperscript{115} Therefore, it seems clear that the State Supreme Court interprets, over three cases, that the constitutional protection very narrowly protects a state employee’s right to receive benefits, but leaves the funding decisions in the hands of the appropriate state officials. However, in dicta, the \textit{Sklodowski II} opinion suggests that plaintiffs might have a valid suit against the state if there is a factual allegation that the funds at issue are “‘on the verge of default or imminent bankruptcy’ such that benefits are in immediate danger of being diminished.”\textsuperscript{116}

\textsuperscript{107} \textit{Id.}
\textsuperscript{108} \textit{Id.} at 133
\textsuperscript{109} \textit{Id.} at 146, (Freeman, J. dissenting in part and concurring in part)
\textsuperscript{110} \textit{Id.} at 135
\textsuperscript{111} \textit{Id.} at 151
\textsuperscript{112} 60 Ill 2d. 266, 272 (emphasis added).
\textsuperscript{113} \textit{Id.}, at 271.
\textsuperscript{114} 173 Ill.2d 433, 446 (1996) (emphasis added).
\textsuperscript{115} 182 Ill.2d 220, 233 (1998). See f.n. 79 for a distinction between Sklodowski I and Sklodowski II.
\textsuperscript{116} \textit{Id.} (quotations in the original, emphasis added).
The pension protection clause offers little protection to the participants regarding issues on how well the pension plan is funded. The process of determining the funding level of state pensions involves actions by both the legislature and the governor: the legislature enacts laws to determine at what percentage level the pensions should be funded by statute, the legislature then determines how much will be appropriated to the funds on an annual basis and that appropriations bill must then be passed by the governor, who may sign the bill, veto the bill, or alter the bill via his power of line-item-veto. Due to the involvement of the other branches of government, the courts have generally refused to mandate the means and level of funding for public pensions due to the required separation of powers.

When dealing with issues of funding, the courts have determined that the pension protection clause offers minimum protection to participants to enforce any particular level of funding, as long as the pension fund is at a level where participants who are currently receiving benefits can actually receive them. The pension protection clause provides no contractual right to any particular level of funding. The courts have avoided mandating the level of funding, holding that it is out of the courts reach of power unless the funding method used by the legislature and governor would place the fund on the verge of default or imminent bankruptcy, which would likely result in participants not receiving their benefits. The courts have not defined any specific level of funding that would allow a participant to successfully sue to increase funding, but they have held that a mere insufficiency in funding from a prudential standpoint is not enough to achieve a judicial mandate. As long as pension funding does not result in the pension being on the verge of default or bankruptcy, the participants' rights are the same as they were before the enactment of the pension protection clause; the participants in a compulsory pension have no contractual right to funding.

Therefore, attorneys for Illinois state workers and attorneys for the government will likely clash on the exact meaning, timing and metric used to determine whether a plan is on the verge of default or bankruptcy, thus allowing the current worker or retiree to have standing. Once standing is allowed, then the questions will become what amount is proper at that present time to fund the plan (i.e., will it be the amount just to bring it $1 away from being on the verge of default or bankruptcy or some larger amount creating some sort of cushion), whether the state Governor, Treasurer and Comptroller will have any recourse in contributing a different amount at that time, and whether the court can prospectively require contribution amounts to keep the plans properly funded or if with each budget, a court needs to determine if the plans are on the ambiguously defined verge for each respective review of standing. The authors of this article plan a future article focusing in on these questions.

Though the language of the Illinois statute requiring a minimum 90% level of funding for the state pension plans may not read as a contract on its face, when read in the light of the existing pension protection clause of the Illinois Constitution, it becomes clear that this level of funding is part of the contract between Illinois and state employees who participate in the pension funds. However, the funded ratio is only supposed to tier up to 90% by 2045. Prior to the enactment of this funding statute,

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117 *Illinois Federation of Teachers v. Lindberg*, 60 Ill. 2d 266, at 277. (1975)
118 40 ILCS §5/2-124
119 Ill. Const. art IV, § 8.
120 Ill. Const. art IV, §9.
121 *Lindberg*, at 272.
122 *McNamee v State*, 173 Ill. 2d 433, at 446. (1996)
123 *Sklodowski II* at 232. (1998)
124 *Id.*
125 *Id.* at 233
126 *Lindberg* at 273 (emphasis added)
the Illinois courts had held that there was no contractual right to any specific level of funding citing framers' floor discussion regarding the avoidance of any mandatory level of funding. However, subsequent to the enactment of the funding statute, the courts continued to deny a contractual right to the expressed funding level by the legislature stating that there was no legislative intent to establish a contractual right. The intent of the framers of the Illinois Constitution may not have been to have a contractual right to a specific level of funding given by the pension protection clause, but the subsequent enactment of the funding statute by the legislature evidences a legislative intent to expand that right statutorily. If the legislation is not enforceable, it is meaningless and the courts must not interpret legislation as meaningless. The courts may find it permissible for the legislature to repeal the funding statute as long as the pension funds are maintained at an adequate level and the funding is reduced for a reasonable and necessary purpose as required by the Contract Clause. As long as the statute is in force, the courts must enforce it as required by the Contract Clause.

In order to fully enforce the protections of the pension protection clause, the court must define some bright line test. The bright line test may not be a simple percentage of funding, though it may. Funding should at least be at a level where the funding ratio is not decreasing. The “verge of default or bankruptcy” rule is not satisfactory to ensuring that all benefits will be able to be paid. If the pension funds are on the verge of default or bankruptcy, then the pension funds will likely be not salvageable. If the courts refuse to hold the legislature to its word, that is “a funding ratio of 90% is now the generally-recognized norm throughout the nation for public employee retirement systems that are considered to be financially secure and funded in an appropriate manner”, the courts should at least mandate that the legislature maintain a funding level that gives the pension funds the best chance at being sustainable in the future.

IV. Conclusion

A. Summary of Ambiguities With Standing and Proper Funding Levels

The rights of Illinois public service employees to receive retirement benefits have been greatly increased over the past four decades, most notably with the insertion of the pension protection clause in the 1970 State constitution. The treatment of retirement benefits has evolved from being viewed as a bounty springing forth from the appreciation of the sovereign to that of a contractual right held by the employee to receive those benefits. It cannot be denied that progress has been made by the state to ensure the well-being of its employees in retirement.

The situation is not a safe one yet. The intentions of the government seem to be schizophrenic at times. On the one hand, the state legislature has strengthened benefit rights of the employees through the pension protection clause and has enacted laws requiring actuarially sound funding methods while on the other hand the executive branch seems to continue to use pension funds as a safety valve to increase spending on other projects while not increasing taxes. It seems that the government indeed holds the best interests of its employees to a high regard, but weighs that best interest against alternative political goals that run contrary to those interests.

If, and when, the first pension check to the first retired civil servant is either less than required or not issued, then with hindsight we can look back and exclaim that the Illinois State pension funds were

127 See Lindberg
129 40 ILCS §5/103.3
improperly funded by the State government. Until that point in time, however, all that interested parties (current retirees, current workers who will be future retirees, and citizens of the State of Illinois whose personal tax liabilities might be affected) can do is to encourage the trilogy of Governor, Treasurer and Comptroller to properly fund the plan, and to use the power of the voting booth to express our concerns. Under the current judicial standard, however, where the courts will only intervene on behalf of the employees and beneficiaries in cases of imminent default or bankruptcy, there is a strong possibility of a “too little, too late” protection. As more employees retire, the pension funding situation will likely continue to become more dire. If the courts continue to refuse to intervene and hold the other branches accountable, when the pension funds do become on the brink of default, the burden of cleaning up a history of underfunding will fall on future taxpayers who may not be able to fiscally carry that weight.

B. Authors’ Suggestions for a Bright Line Interpretation

The test for determining standing must not rely on the vague notion of when the fund is on the verge of bankruptcy or default. A bright line interpretation is necessary. If the court refuses to enforce the statutory 90% funding limit as a contractual right, another limit must be enforced. In order to ensure state pension participants’ benefits are not impaired, the court must require that the pension funds are at least adequate to sustain the pension benefits that are to be distributed for a reasonable amount of time. A reasonable amount of time can be calculated using the life expectancy of the annuitants. It would be reasonable to calculate the minimum level of funding by taking the number of years between the current average age and the expected life expectancy of the cohort of retirees. The pension funds should be funded at least to a 50% level of this amount. This funding threshold indicates that there would be a 50% chance that the fund would default for benefit distributions on newly retired annuitants. If the pensions are funded at a lower ratio than 50%, then the chance of default could be considered to be “more likely than not” of default.

The most appropriate remedy for a plaintiff attempting to enforce the minimum funding requirement would be to seek a writ of mandamus. The plaintiff would ask the court to compel the Comptroller and Treasurer to release the appropriate amount from the general funds to either be deposited into the pension funds or paid directly. The plaintiff would also need to seek declaratory relief from the courts stating that they have a constitutionally protected interest in this minimum funding level to ensure that the plan does not go bankrupt or default. It would seem that if a plaintiff ever has such standing, then he or she should represent the class of all current annuitants, who are similarly situated in that they are equally as fearful that the funds are on the verge of default or bankruptcy, thus there is a more likely than not chance of diminishment or impairment of their benefits, which would be a direct violation of the State constitution.