



CYPEN & CYPEN NEWSLETTER for January 30, 2020

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Never Forget September 11, 2001
and
Always Remember May 2, 2011

1. THE TOP 25 NON-NORTH AMERICAN SETTLEMENTS:

In the wake of the 2010 U.S. Supreme Court decision in *Morrison v. National Australia Bank Ltd.*, securities litigation outside North America changed significantly. Morrison markedly reshaped the class action industry around the world including, critically, for foreign investors who previously relied upon the North American class action regime to recoup lost assets stemming from securities fraud. As a result of Morrison, foreign investors are now able to fulfill their stockholder duties by pursuing a collective redress in an overseas court. Despite the uncertainties in different jurisdictions that allow collective redress around the globe, foreign investors increasingly recognize the need to action and recover losses from securities fraud. Dating back to 1998, ISS Securities Class Action Services (ISS SCAS) has tracked and ranked the Top 25 Largest Securities-Related Settlements Outside of North America. Key Highlights: After years of litigation relating to

the collapse of Ageas SA/NV's (f/k/a Fortis S.A./N.V. & Fortis N.V.) ("Ageas") and its exposure to the financial crisis of the late 2000's, the Court of Appeal of Amsterdam in July 2018 approved a binding settlement agreement between the parties. Investors who held Ageas shares between 28 February 2007 and 14 October 2008, and who did not opt-out of the collective settlement, are slated to receive part of the record-breaking US\$1.5 billion¹ settlement fund, the largest settlement of all time outside of North America. The Netherlands recorded four of the top 25 collective redress proceedings that delivered significant settlement dollars to investors. It ranks second among ex-North American markets based on number of settlements achieved and ranks first by approved settlement amount. In the U.K., recent collective redress proceedings have brought two significant settlements, including the Tesco Compensation Scheme and The Royal Bank of Scotland Group. Ranking third in both settlement funds approved and number of settlements adjudicated, the market has provided a limited venue to pursue collective redress. Tesco and RBS delivered just over US\$1.1 billion in funds to investors who incurred losses in their previous investments. Australia, on the other hand, has the largest number of settlements outside of North America. Of the Top 25, 17 settlements received judgment in Australian courts totaling US\$1.5 billion in settlement funds. Five of the 17 settlements delivered funds of more than US\$100 million. Of the top 25 settlements, one settlement in Australia dealt with a company's initial public offering. This is notable, given trends evidenced in the U.S. suggest a growing focus on IPO-related class action litigation. While there are many nuances around collective redress in different jurisdictions, Australia has far deeper experience in the class- and group-action space compared with other markets. ISS SCAS tracked more than 70 proposed Australian securities class action filings in the past five years making it far and away the leader by volume for all markets outside North America. With the average court proceeding lasting three years before resolution, Australia is also the most deliberate and mature class action venue outside of North America. Lastly, European countries show growing activity in recent collective redress. Multiple proposed claims have in recent years been launched against blue-chip publicly traded companies such as Volkswagen, Danske Bank, Daimler and Steinhoff International, to name a few. While there are no guarantees in predicting future settlements, these and other pending litigations will likely lead to significant recoveries for investors, and, upon settlement, a prominent place within the ISS SCAS "Top 25." See full report [here](#). Institutional Shareholder Services Securities Class Action Services, 2020.

2. MILLENNIALS & RETIREMENT 2020:

Saving for retirement is likely not the most pressing financial priority for most millennials. The oldest are in their late 30s, focused on their next career move, or maybe with children in elementary or middle school, and the youngest are just starting their careers in a very challenging employment environment, many saddled with student debt. Retirement may

be the last thing most of them are thinking about on a day to day basis or planning for, but they do have a vision of what retirement will look like when they get there. This report will explore how “on track” millennials are to achieve a secure retirement, their expectations and attitudes toward retirement saving and retirement planning, and their views on retirement products and working with financial professionals. With these findings as a backdrop, the report will offer recommendations for steps millennials can take now to help ensure they are financially secure when they retire in 25 to 40+ years. Millennial retirement expectations are not well aligned with the planning steps they have taken to date, but they are open to annuities in general, and guaranteed lifetime income in particular, as solutions that can help them plan to have lifetime retirement income and alleviate their concerns about investing. The rest of this report can be found [here](#). Insured Retirement Institute, 2020.

3. THE HIGH COST OF REJECTING PUBLIC PENSION REFORM IN ILLINOIS:

Once more, from the top: here is why public pension reform matters. [In December, we cited a report by the *Chicago Tribune*](#) that, due to lack of funding, 20,000 adults in Illinois with cognitive disabilities were on a waitlist for group homes or day programs, waiting seven years or longer, due to lack of funding. Earlier this month, [the *Trib* reported that](#), due to the end of work-requirement waivers for SNAP/food stamps, social services agencies were scrambling to place recipients in job training or volunteer programs.

Here is a key excerpt:

“Basic processes to help with the administrative burden have yet to be put in place, state caseworkers say. For example, there is no efficient way to report volunteer or training hours completed outside of state-sanctioned programs, so people will have to do so monthly in person at benefits offices, where waits can stretch longer than two hours, said John Mitchell, an officer with AFSCME Local 2858, which represents caseworkers in northeast Cook County.

“Understaffed benefits offices also haven’t prioritized connecting people with employment services as they’ve dealt with a backlog for processing SNAP applications that was so bad that the federal government threatened to suspend funding, Mitchell said.”

Last week, the *Tribune* reported that the University of Illinois system was raising its tuition after having frozen it for the past six years. The increases are modest, all things considered, but here is the key paragraph:

“Residents long have complained that U. of I., the state’s flagship, is too expensive and does not offer enough financial aid. University data show all three University of Illinois

schools remain among the priciest in their peer groups, even though other schools raised their prices during Illinois' tuition freeze." And this week, Chicago Mayor Lori Lightfoot announced plans for an anti-poverty summit "to marshal resources from the city, business community and philanthropic groups to rescue Chicagoans 'trapped in the throes of generational poverty,'" as reported at the [Chicago Sun-Times](#). How's she funding this? "The \$250 million earmarked for Lightfoot's 'Invest South/West' program is 're-prioritized money already in the pipeline' from tax increment financing; the moribund \$100 million Catalyst Fund; the Small Business Improvement Fund; and the share-the-wealth Neighborhood Opportunity Fund generated by developers paying a fee for permission to build bigger and taller buildings downtown." But at the same time, the city of Chicago issued its new "refinancing" bonds, in which the city found \$210 in cash up front due to lower rates -- and, it turns out, those rates were not favorable solely because of a lower interest rate environment, in general, but because the city legally committed the right to future sales tax revenue it has coming from the state, so that investors will receive their money even if the city goes bankrupt and has to default on other loans and cut city services. And it was only possible to do so because of a last-minute back-room provision inserted into the 2017 budget in the literal last hours of the legislative session. (See this [Wirepoints report](#) for details.) The list goes on: insufficient spending on childcare subsidies for low/moderate-income parents ... insufficient state spending on education, placing the burden on local property tax payers ... These are all areas where there is widespread agreement that the State of Illinois falls short. At the same time, of course, however eager the Democrats currently in power in Illinois (that is, controlling the governorship and State House and State Senate, with supermajority control over the General Assembly, as Illinois labels it) are to raise taxes through a graduated income tax, skeptical voices caution that it simply isn't possible to raise taxes however much you'd like to boost spending however much you'd like -- even if you claim those increases will be limited to "the rich" (which is always defined as "everybody with more money than your audience at any given point in time). Not only will it raise the ire of those taxpayers, but increasingly many of them will find somewhere else to live. And, yes, one would like to imagine that there's an easy solution to these woes, whether it's the perennial pledge to cut wasteful spending or the dream to find new sources of free money (in Illinois' case, pot and gambling). But Illinois politicians have believed in the promise of free lunches for far too long. And this is why public pension reform matters: [25.5% of Illinois' spending is going to its state pension funds](#). Once the city has made it up to the top of its funding ramp, it will be spending 18% of its revenue on pension contributions, assuming its revenue projections are not overly optimistic. (See [here](#) for the contribution schedule -- \$2.2 billion in 2022 -- and here for [the revenue projection](#) which we've increased by two years' worth of inflation.) And these percentages could go higher if the state and city are forced to unwind the ["Tier 2" pension cuts](#) as a result of court cases or political pressure. It

should be obvious: pension reform is not about trying to fleece public employees and retirees. Instead, it's quite simple: had the state not promised more in pension benefit accruals each year than they funded through contributions at the time, that money would be available to spend on all these needs. And if Gov. Pritzker, the General Assembly, Major Lightfoot and public union leaders were to forge a consensus for an amendment which would permit pension reforms, some portion of that 25.5% and the 18% would be freed up to spend on these needs. Elizabeth Bauer, *Forbes*, January 22, 2020.

4. 403(B) AND THE SECURE ACT; THE NEW 500 HOUR, LONG SERVICE RULES DO NOT APPLY TO 403(B) PLANS:

There is an encouraging sign that Congressional staff and other legislative writers may finally be taking seriously the notion that that 403(b) plans really are fundamentally different than 401(k) plans. This "sign" takes the form of Section 112 of the SECURE Act, under which sponsors of "cash or deferred arrangements" must allow long-term employees working more than 500 but less than 1,000 hours per year to make elective deferrals to their plans. At first glance, one may be under the mistaken impression that this is a rule which applies to all elective deferral plans, whether they be 401(k) plans, 403(b) plans or 457(b) governmental plans. But this impression is likely wrong: the statute, by its terms, clearly only applies to elective deferrals under 401(k) plans, not 403(b) plans. The title of this section of the SECURE Act which imposes this new rule can be misleading ("QUALIFIED CASH OR DEFERRED ARRANGEMENTS MUST ALLOW LONG-TERM EMPLOYEES WORKING MORE THAN 500 BUT LESS THAN 1,000 HOURS PER YEAR TO PARTICIPATE"), because we have all been conditioned in recent years to treat 403(b) elective deferrals in the same manner as a "cash or deferred arrangement" under 401(k). But there is truly a legal difference between a deferral under a 401(k) "cash or deferred" arrangement" and one under 403(b). Technically, here's how it works. You'll see that the legislative language could have been a bit clearer:

The new rule amends Section 401(k)(2)(D) of the Code, not 403(b). So we need to look at 403(b) and its regulations to see if 401(k)(2)(D) somehow applies to 403(b) elective deferrals. 1.403(b)-2(b)(7) defines a 403(b) elective deferral under 1.402(g)-1. 1.402(g)-1(b)(3) defines a 403(b) elective deferral as one made under a salary reduction agreement which is excluded from income by virtue of Code Section 403(b). Note the difference between this and the definition of elective deferral for 401(k) plans under 1.402(g)-1(b)(1), which defines a 401(k) elective deferral separately as being made under a "cash or deferred" arrangement under 401(k). This seems pretty clear, then, that the new rule would not apply to 403(b) plans. But then it gets complicated. 1.403(b)(3)(a) excludes from income amounts "contributed by an eligible employer for the purchase of an annuity contract for an employee pursuant to a cash or deferred election (as defined at 1.401(k)-

1(a)(3))"-which suggests that 401(k)(2)(D) (and the new rule) might apply. But when you go to 1.401(k)-1(a)(3), it merely defines the 403(b) contribution as an elective deferral, without any reference to any service requirement. Indeed, the service requirements under 401(k)(2) do not apply to 403(b) plans, as 403(b) plans instead have the universal availability rule-a rule which was NOT changed by SECURE. Thus the 500 hour rule will not apply to 403(b) plans. This analysis may sound a bit convoluted, but that's the way any legal analysis gets when you try to compare 403(b) and 401(k) rules. It sometimes is just like trying to compare apples and oranges. Now, you may want to take the cynical view that this was merely a legislative drafting oversight, and that the regs which are eventually written will impose this rule on 403(b) plans. I don't believe this will happen, for two reasons. First, there are no statutory grounds for doing so. Secondly, the ERISA minimum participation rules under Section 202 (which imposes the 1000 hours/2 year rule)- which would have made this new 500 hour rule apply to ERISA 403(b) plan if it were amended-was NOT changed. Robert Toth, Toth Law & Toth Consulting, January 20, 2020.

5. LOCATION, LOCATION, LOCATION! EMPLOYEES MAY QUALIFY FOR DISABILITY RETIREMENT IF THEY CAN NO LONGER PERFORM THEIR USUAL JOB DUTIES AT THE LOCATION WHERE THEIR EMPLOYER WILL ALLOW THEM TO WORK:

Plaintiff Cari McCormick worked as an appraiser for Lake County. In 2010, she started to experience physical pain throughout her body and felt constantly fatigued. McCormick's symptoms worsened when she was in her office environment but felt much better if she was at home or outside. McCormick was eventually told by her supervisors that she "was a liability" and "should stay home." McCormick took leave under the Family Medical Leave Act and continued to ask for accommodations such as permission to telecommute. However, her supervisors declined to let her work anywhere other than in the courthouse. In May 2013, Lake County terminated McCormick's employment because she had exhausted her medical leave. McCormick applied for disability retirement to CalPERS. In the application, she stated that her disability was "[respiratory] and systemic health problems as a result of exposures in indoor environment" at the courthouse. She also explained that she could work in another building but that her employer would not allow her to work outside of the courthouse. CalPERS denied the application in December 2014. McCormick appealed the decision. At the administrative hearing on the appeal, McCormick's doctor indicated that he had initially opined that McCormick was "temporarily partially disabled." He explained at the hearing that he had assumed in forming his initial assessment that she would be able to find a different location in which to work. While his diagnosis remained unchanged, McCormick's doctor testified that McCormick was permanently disabled to the extent that she was unable to work *at that courthouse* due to

her symptoms. CalPERS presented testimony from another one of McCormick's doctors who opined that "if the environment can be amended or... accommodations [could be provided] to help her, then she would not be disabled." Accordingly, based on the medical testimony, the administrative law judge (ALJ) issued a proposed decision denying McCormick's appeal and finding that she was not permanently disabled or substantially incapacitated from performing her usual job duties at the time she submitted her disability retirement application. The ALJ rejected McCormick's argument that because the County would not accommodate her to work at a location outside the courthouse, she was substantially incapacitated from performing her usual job duties. The Board of Supervisors adopted the ALJ's proposed decision and McCormick filed a petition for writ of administrative mandate. The Court of Appeal did not dispute that McCormick was physically capable of performing her usual job duties *if* she worked in an environment that did not trigger her systems. However, the Court acknowledged that "Section 21156 is concerned with members' ability to perform their duties for their actual employers, not their ability to perform their duties in the abstract. Thus, the relevant question is whether McCormick was incapacitated from performing the duties of an Appraiser III for Lake County, not whether she was incapacitated from performing them elsewhere." Thus, whether McCormick was able to perform the duties of an appraiser somewhere other than the Lakeport courthouse did not foreclose a finding that under Section 21156 that she was unable to perform her usual job duties. Moreover, Lake County denied McCormick's request for accommodation, which included a request to work in a different location or environment. Therefore, the Court found that CalPERS may not deny disability retirement under Section 21156 when, due to a medical condition, applicants can no longer perform their duties at the only location where their employer will allow them to work. Based on the holding of this case, employers should explore, during an interactive process meeting, whether the employee can perform their essential job duties at a different work location as a reasonable accommodation. If the employer denies such an accommodation, then the employee may be found to be substantially incapacitated from performance of their usual job duties and entitled to a disability retirement. Jennifer Rosner, Leibert Cassidy Whitmore, January 16, 2020.

6. PROTECTING SMALL BUSINESS FROM IMPOSTERS:

Opening a business requires planning, elbow grease, and probably some paperwork to register your new company with your state or local government. And that's where some not-so-honest outfits may try to confuse you into thinking they're from the government and that you need to pay money to complete your registration. Their mailings look like an official bill for documents to complete your registration – and may even include what looks like a government seal. To convince you it's legit, the mailer may include your business identification number. To get you to pay, the mailer claims that you need to hurry up and

pay or you could be in legal hot water. But here's the thing: the people behind the mailers are not from the government and you probably don't need the paperwork they're talking about, at least not to complete your registration. At best, you'll get overcharged. At worst, they could be scammers who steal your money or account information. What can you do to steer clear of these schemes?

Spread the word. The best defense is to be sure everyone at your workplace knows about this scam and how it works. Scammers often target several people in an organization to create confusion. Are you part of a business networking group or service organization? Help your fellow businesspeople and fill them in on these schemes.

Check all invoices closely. Be sure that you have clear procedures to approve expenditures, and that major spending can't be triggered by an unexpected call, email, or invoice. If you get one of these mailers, you may need to check in with the people on your staff who are responsible for filing legal documents with the state.

Pay attention to how you pay. If someone tells you to pay with a wire transfer, reloadable card, gift card, or bitcoin, you can bet it's a scam. Laura Solis, Attorney, Federal Trade Commission Consumer Information, consumer.ftc.gov, January 9, 2020

[*Erratum.*] Our January 23, 2020 Newsletter, original Item 6, contains an obvious typographical error. The above item is the corrected version.

7. CERTAIN DISABILITY PAYMENTS AND WORKERS' COMPENSATION MAY AFFECT YOUR SOCIAL SECURITY BENEFITS:

Many people working nowadays have more than one job. This means they have several sources of income. It's important to keep in mind that having multiple sources of income can sometimes affect your Social Security benefits; but, it depends on the source. Disability payments from private sources, such as private pensions or insurance benefits, do not affect your Social Security disability benefits. Workers' compensation and other public disability benefits, however, may reduce what you receive from Social Security. Workers' compensation benefits are paid to a worker because of a job-related injury or illness. These benefits may be paid by federal or state workers' compensation agencies, employers or by insurance companies on behalf of employers. Public disability payments that may affect your Social Security benefits are those paid from a federal, state or local government for disabling medical conditions that are not job-related. Examples of these are civil service disability benefits, state temporary disability benefits, and state or local government retirement benefits that are based on disability. Some public benefits do not affect your Social Security disability benefits. If you receive Social Security disability

benefits, and one of the following types of public benefits, your Social Security benefits will not be reduced:

- Veterans Administration benefits;
- State and local government benefits, if Social Security taxes were deducted from your earnings; or
- Supplemental Security Income (SSI).

You can read *How Workers' Compensation and Other Disability Payments May Affect Your Benefits* to find out about the possible ways your benefits might be reduced. Please be sure to report changes. If there is a change in the amount of your other disability payment, or if those benefits stop, please notify us right away. Tell us if the amount of your workers' compensation or public disability payment increases or decreases. Any change in the amount or frequency of these benefits is likely to affect the amount of your Social Security benefits. An unexpected change in benefits can have unintended consequences. You can be better prepared if you're informed and have financially prepared yourself. Visit our [benefits planner](#) for information about your options for securing your future. Mike Korbey, Deputy Commissioner for Communications, Social Security Administration, January 17, 2020.

8. HERE ARE REASONS FOR PEOPLE TO FILE A 2019 TAX RETURN:

While many people are required to file a tax return, it's a good idea for everyone to determine if they should file. Some people with low income are not required to file, but will need to do so if they can get a tax refund. Here are five tips for taxpayers who are deciding whether to file a tax return:

Find out the general reasons to file

In most cases, income, filing status and age determine if a taxpayer must file a tax return. Other rules may apply if the taxpayer is self-employed or can be claimed as a dependent of someone else. There are other reasons when a taxpayer must file. The [Interactive Tax Assistant](#) can help someone determine if they the need to file a return.

Look at tax withheld or paid

Here are a few questions for taxpayers to ask themselves:

- Did the taxpayer's employer withhold federal income tax from their pay?
- Did the taxpayer make estimated tax payments?
- Did they overpay last year and have it applied to this year's tax?

If the answer is “yes” to any of these questions, they could be due a refund. They must file a tax return to get their money.

Look into whether they can claim the earned income tax credit

A working taxpayer who earned less than \$55,592 last year could receive the EITC as a tax refund. They must qualify and may do so with or without a qualifying child. They can check eligibility by using the 2019 [EITC Assistant](#) on [IRS.gov](#). Taxpayers need to file a tax return to claim the EITC.

Child tax credit or credit for other dependents

Taxpayers can claim the child tax credit if they have a qualifying child under the age of 17 and meet other qualifications. Other taxpayers may be eligible for the credit for other dependents. This includes people who have:

- Dependent children who are age 17 or older at the end of 2019
- Parents or other qualifying individuals they support

[The Child-Related Tax Benefits tool](#) can help people determine if they qualify for these two credits.

Education credits

There are two higher education credits that reduce the amount of tax someone owes on their tax return. One is the [American opportunity tax credit](#) and the other is the [lifetime learning credit](#). The taxpayer, their spouse or their dependent must have been a student enrolled at least half time for one academic period to qualify. The taxpayer may [qualify for one of these credits](#) even if they don't owe any taxes. [Form 8863, Education Credits](#) is used to claim the credit when filing the tax return.

IRS Tax Tips, Issue Number: Tax Tip 2020-01, January 13, 2020.

9. U.S. SUPREME COURT MULLS FIDUCIARY CASE FOR OVERFUNDED DB PLAN:

U.S. Supreme Court justices heard arguments on whether defined benefit plan participants can sue for fiduciary breaches even if a plan is overfunded and participants have not experienced a monetary loss. Joseph R. Palmore, a partner at Morrison & Foerster in Washington, who represented [U.S. Bancorp](#), the plan sponsor at the heart of the case, argued that to have legal standing, the plaintiffs must demonstrate injury, which they cannot do. Peter K. Stris, founding partner at Los Angeles-based Stris & Maher, who represented the plan participants, felt differently. He argued that DB plan participants have "equitable interest" in all assets of a plan and therefore are the only logical ones to file suit when an Employee Retirement Income Security Act violation is alleged. Justice Brett

Kavanaugh highlighted the intricacies of the case during a line of questioning to Soplan Joshi, assistant to the solicitor general, who argued in favor of the plaintiff's position. Justice Kavanaugh said that since it's "99.9% certain" the participants will get their promised benefits, it's difficult to grant standing. However, he said trust law history backs the participants' right to sue. "I think it's a close case," Justice Kavanaugh said. The case began in 2013, when some participants in the U.S. Bancorp Pension Plan filed suit, claiming that plan fiduciaries engaged in prohibited transactions, including failing to diversify investments and investing in an affiliate's mutual funds. When the participants questioned the investments involved, U.S. Bank replaced those amounts. According to the participants' Supreme Court petition, the plan had \$2.8 billion in assets as of 2007, but that changed when plan fiduciaries ignored their investment consultants and invested all plan assets in high-risk equities, including 40% in a proprietary mutual fund, in violation of prohibited-transaction rules. The market crash of 2008 caused the plan to lose \$1.1 billion, which the plaintiffs claim was \$748 million more than a diversified portfolio would have lost, and caused a once-overfunded plan to drop to 84% funded. The sponsor contributed \$339 million, restoring the plan to its overfunded status. Mr. Palmore said that no matter what the case decides, the participants who initially filed suit will continue to receive the same monthly benefits payments, so no harm has come to them. If their benefits were tied to the value of the trust, "They'd have standing, but these are fixed payments," he argued. Justice Elena Kagan asked Mr. Palmore if participants would have standing to sue if they had an equitable interest in the plan, to which he affirmed. "Yes, a loss of a dollar from the trust corpus is loss of a dollar to them, but they don't (have an equitable interest)," Mr. Palmore said. "That's the critical point." Justice Kagan said that argument "falls apart" when ERISA is examined. She said Congress expressly gave "all of the beneficiaries and participants an equitable interest in the integrity of the trust" when creating ERISA. During Mr. Stris' arguments, Justice Samuel Alito asked if the risk of these participants not receiving their promised benefits is "greater than the risk of being hit by a meteorite?" Mr. Stris said that just because a plan is overfunded or funded adequately one year doesn't mean it will be the next. At a later point in his argument, Mr. Stris pointed to the 2008 financial crisis. "You don't know whether you're going to need the surplus until it's gone," he said. The Supreme Court accepted the case, *Thole vs. U.S. Bank*, after it was dismissed by a lower court and the 8th U.S. Circuit Court of Appeals in St. Louis. Both courts said participants did not have statutory standing to assert fiduciary breach because the participants had not suffered any individual financial harm and there were enough plan assets to cover benefits. Brian Croce, Staff writer Hazel Bradford contributed to this report, *Pensions & Investments*, January 13, 2020.

10. TACKLING THE ISSUE OF CONFLICT ON PUBLIC FUND BOARDS:

With plans under increasing pressure, some boards are looking at codes of conduct.

Already under pressure to produce returns in the face of underfunded liabilities, some public pension boards also are having to address bad board behavior. It's not the first time that boards have faced uncooperative board members or individuals who have been suspected of leaking closed-session discussions. After the global financial crisis, which put the very existence of public pension plans into question, bad board behavior ranged from board members pushing anti-defined-benefit-plan agendas and harassing staff, to unauthorized communication with money managers and a general lack of civility and mutual respect, said Harvey L. Leiderman, San Francisco-based partner at law firm Reed Smith LLP. "I was amazed then to learn how widespread most of these activities were," said Mr. Leiderman, who is fiduciary counsel to multiple state and municipal pension funds. One of his clients, the \$15.7 billion New Mexico Public Employees Association, Santa Fe, last year was embroiled in a dispute over pay raises for senior pension fund staff. "It's not as widespread today, but where they do happen they seem to be more severe and brazen such as filing criminal complaints and lawsuits against fellow board members and executive staff," Mr. Leiderman said. In 2014, Mr. Leiderman gave a speech at the State Association of County Retirement Systems, Sacramento, in which he listed 29 examples of boards behaving badly that he had seen. "In the last several years, with the markets doing well, I saw less of it but I am seeing more of it now," Mr. Leiderman said in a recent interview. Poor behavior could again become more prevalent if there is an economic hiccup that affects pension plan investment returns, industry insiders predicted. "On a macro level, all public discourse has become highly polarized. Dysfunction results from living in a polarized atmosphere, nationally and internationally. It's in the water," Mr. Leiderman said. "On a micro level, for employees and pension funds, we are living in a highly stressed financial environment." Despite the fact that the economy remains in a long recovery, many public pension plans are underfunded and struggling to surpass a 70% funding level. The pressure is building on plan sponsors, and nearly every state has cut back on benefits, he said. "Retirement board members start seeing themselves as advocates and representatives of the constituencies that put them on the board rather than as a collective of fiduciaries working for the common goal of funding promised benefits," he said. "It's tending toward identity politics at the board level. Collegiality has broken down on some boards and board members don't hear each other."

Crafting a code

In response, some boards are developing or have adopted codes of conduct to remind members of their roles and foster a collegial working atmosphere. CalPERS is currently working on a code of conduct that, in part, is in response to board members allegedly leaking closed session discussions and materials to the press. In August, board member Margaret Brown in a news release called for the release of information surrounding an internal investigation into whether board members were sharing closed-session

information to the press. Ms. Brown said she was not the source of the leaks. The internal investigation is ongoing, said Megan White, CalPERS spokeswoman, in an email. Also this year, past sexual harassment charges resurfaced at CalPERS when a former board member unsuccessfully ran for a board seat. In September 2011, J.J. Jelincic, then a CalPERS board member, was publicly censured and stripped of his committee chairmanships over sexual harassment complaints from female system employees. The same month, the California State Personnel Board and administrative law judge Teri L. Block upheld a reprimand by CalPERS management against Mr. Jelincic for sexual harassment. The \$395.3 billion [California Public Employees' Retirement System](#), Sacramento, also voted to limit Mr. Jelincic's travel privileges and required him to attend sensitivity training. After Mr. Jelincic lost the Oct. 17, 2019, election to unseat board President Henry Jones, he lodged a protest. Among other things, he alleged that CalPERS' press office had solicited negative stories in the press about past alleged occurrences of sexual harassment, and that Mr. Jones, as CalPERS board president, had allowed negative comments about Mr. Jelincic during two board meetings before the election. Mr. Jelincic withdrew his election protest on Oct. 21. Several board members said that a code of conduct could help instill more civility on the board. CalPERS declined to comment. The code of conduct is expected to return to the board for approval in 2020 but no date has yet been set, Ms. White said. CalPERS' funded ratio was 70.2% as of June 30, according to its latest annual report.

'Stay at the policy level'

CalPERS is not alone in trying to encourage a culture of collegiality. It can take just one board member to divide the board, industry experts said. "A lot depends on the individuals who are on that board," said Bob Jacksha, chief investment officer of the \$13.3 billion [New Mexico Educational Retirement Board](#), Santa Fe. Not long ago, the board had one member who "gummed up the works," Mr. Jacksha said. That former board member disagreed with the way the plan was structured and thought most plan assets should be invested in fixed income, Mr. Jacksha said. "He considered himself as the taxpayers' representative (on the board) first and the pension plan second," Mr. Jacksha said. "In general, boards work well when they stay at the policy level, hire good people, monitor them to make sure they are doing their jobs and are staying within that policy." The board member decided in 2015 not to seek another term, Mr. Jacksha said. Pension plan boards should have a diversity of opinion "but in a respectful way," said Amy McDuffee, Westminster, Colo.-based founder and CEO of Mosaic Governance Advisors LLC, a public pension plan governance consulting firm. If a pension fund is under financial pressure and has board members who were elected on a platform of making reforms, that can result in more polarized boards, Ms. McDuffee said.

New Mexico board roiled

The New Mexico PERA is currently experiencing a polarized atmosphere on the board. On Oct. 31, 2019, Executive Director Wayne Propst's 2014 pay raise was ratified by the board majority. Six months earlier, board member and New Mexico Treasurer Tim Eichenberg had asked state Attorney General Hector Balderas to investigate whether Mr. Propst's 2014 raise and that of other pension plan executives were given without board approval, according to an opinion article by Mr. Eichenberg sent to several news outlets obtained by *Pensions & Investments* and written confirmation by Mr. Balderas' office at the time. Also in May, Mr. Propst was cleared of wrongdoing by New Mexico State Auditor Brian Colon, who in January 2019 had launched an investigation into raises given pension fund employees over the prior five years. In September 2019, Mr. Balderas reported to the board that his investigation found no information to support fraud, misconduct or any evidence that the raises violated the pension plan's rules or policies. Even so, according to a recording of the board's Oct. 31 board meeting, board member Loretta Naranjo Lopez said that the raises were unauthorized and amounted to crimes of "embezzlement, misappropriation and possibly bribery." Additionally, she said she had been assaulted by fellow board member Stephen J. Neel during a closed session on Oct. 8 and that she had filed a police report. According to the police report filed Oct. 8, she told the police officer that Mr. Neel had asked her whether she was recording the meeting and had reached for her cell phone. There was no contact between them and Mr. Neel did not get Ms. Naranjo Lopez's cell phone, the police report said. The officer in the report said he told Ms. Naranjo Lopez that Mr. Neel had not committed a crime. Six other board members filed affidavits attesting that they witnessed Mr. Neel's actions and that he did not assault Ms. Naranjo Lopez, nor did he attempt to take anything from her. "I was happy to see the report completely exonerated me of the false allegations," Mr. Neel said. "It is a pity that pointing out to a fellow trustee that their phone was on during an (confidential) executive session could be interpreted as assault or attempted robbery. This was a sad situation. I regret the board was embroiled in such petty matters. I am hopeful that we can focus on the fiduciary issues such as the \$6.6 billion unfunded liability, enhanced investment performance and plan design changes." At a Dec. 10 board meeting, Ms. Naranjo Lopez left the meeting, which meant that the board didn't have a quorum, according to a recording of the meeting. "I will not be allowing a quorum to allow a state law to be violated," she said. Ms. Naranjo Lopez left the meeting after reading a statement claiming, among other things, that the board's fiduciary counsel, Reed Smith LLP, had advised the board that giving staff unauthorized raises was a criminal misdemeanor. As a result, she said in her statement, senior staff and the board majority that ratified the raises on Oct. 31 had committed a crime. New Mexico Secretary of State Maggie Toulouse Oliver, who is also a board member, arrived later, allowing the board to finish its business. Mr. Leiderman said during the meeting: "Lest silence be deemed to be assent to the

statements that were made about myself and my law firm, I would like to simply go on the record and state that the statement that attributed statements and actions to myself and my law firm were materially false and misleading and if the board at any time needs a line by line refutation from myself or my firm I would be happy to do so. But, I didn't want to simply let silence be on the record today as indicating that in any way that I agreed with those statements." Responding to *Pensions & Investments'* request for comment, Ms. Naranjo Lopez wrote in an email: "Your questions seem to have come from a biased and defamatory NMPERA staff or board member(s)." Ms. Naranjo Lopez previously was censured twice by the board. In 2018, she was censured for, among other things, accusing PERA staff of criminal battery over board seating arrangements and filing a complaint with the state human rights commission for harassment. That complaint was summarily dismissed by the commission. Ms. Naranjo Lopez was re-elected by retirees in 2019 for a four-year term starting January 2020. She has been serving on the board consecutively since January 2012. She previously served on the PERA Board for four years from 2005 to 2009.

Replacement board weighed

A committee of the New Mexico Legislature, the Investments and Pensions Oversight Committee, is currently considering a recommendation that would disband New Mexico PERA's current board and replace it with a smaller, eight-member board made up mostly of appointees by state officials and various retiree organizations. Currently, most members of the 12-person board are elected by retirees and state employees. The proposal "would improve the status quo," Mr. Neel said. "The size of the board is too big and unwieldy. Plus the proposal would require (board members have) some expertise. The problematic history of the board shows that there has not been enough expertise on the board in different subject matters such as investments."

Arleen Jacobius, *Pensions & Investments*, January 13, 2020.

11. EXAMINING THE NEST EGG: THE SOURCES OF RETIREMENT INCOME FOR OLDER AMERICANS:

A new report finds that a large portion (40 percent) of older Americans rely only on Social Security income in retirement while only a small percentage of older Americans (seven percent) receive income from Social Security, a defined benefit pension, and a defined contribution account. Retirement income from these three sources is widely considered to be the ideal situation to ensure retirement security, particularly for the middle class. Retirees with these three sources of income are far less likely to face poverty and economic hardship. These findings are contained in a new report from the National Institute on Retirement Security (NIRS), *Examining the Nest Egg: The Sources of Retirement Income for Older Americans*. The report is co-authored by Tyler Bond,

NIRS manager of research, and Dr. Frank Porell, University of Massachusetts Boston professor emeritus. The analysis also finds that without income from Social Security in 2013, the number of poor older U.S. households would have increased by more than 200 percent to 11 million households. Absent income from defined benefit pensions, the number of poor older households would have increased by 19 percent to more than four million households in 2013. Defined contribution plans, however, are less powerful at keeping older households out of poverty than pensions and Social Security because fewer near-poor households have assets in 401(k)-style defined contribution accounts and income from those accounts provided a smaller portion of total income. Without income from defined contribution accounts, the estimated number of poor older households would have increased by five percent.

The report's key findings are as follows:

1. Only a small percentage of older Americans, 6.8 percent, receive income from Social Security, a defined benefit pension, and a defined contribution plan.
2. A plurality of older Americans, 40.2 percent, only receive income from Social Security in retirement.
3. Roughly equal numbers of older Americans receive income from defined benefit pensions as from defined contribution plans. This is likely to change in the future as fewer private sector workers have access to defined benefit pensions now than in the past.
4. Defined benefit pensions have a much greater poverty-reducing effect than defined contribution plans. This may be partly due to the fact that recipients of defined contribution income tend to have much higher net worth than the recipients of defined benefit income.
5. Unmarried older men and unmarried older women receive retirement income from similar combinations of sources, but the older men consistently have higher incomes than the older women. Both unmarried men and women have lower retirement incomes than married older men and women.
6. Race and educational attainment both have very strong roles to play in determining retirement outcomes. Whites have consistently higher retirement incomes than blacks or Hispanics, and those with a college degree have significantly higher retirement incomes than those with only a high school education. Race and educational attainment also intersect in meaningful ways.
7. Expanding Social Security benefits would be a potent poverty-reducing tool for policymakers to implement to fight elder poverty.

The study data were drawn from the first wave of the re-engineered 2014 Survey of

Income and Program Participation (SIPP) and the 2014 Social Security Administration (SSA) Supplement on Retirement, Pensions, and Related Content. It includes an analysis of all respondents to both the SIPP and SSA Supplement who were age 60 years or older, and who worked fewer than 30 hours per week or not at all. It also includes all households with a householder age 60 or older, where neither the householder nor the spouse/partner worked 30 or more hours per week or didn't work at all. Download the report [here](#). Frank Porell, Tyler Bond, National Institute on Retirement Security, January 2020.

12. DID YOU KNOW WILL ROGERS SAID THIS?:

“Ability is all right but if it is not backed up by honesty and public confidence you will never be a successful person. The best a man can do is to arrive at the top in his chosen profession. I have always maintained that one profession is deserving of as much honor as another provided it is honorable.”

13. INSPIRATIONAL QUOTES:

“When one door of happiness closes, another opens; but often we look so long at the closed door that we do not see the one which has been opened for us.” - Helen Keller

14. TODAY IN HISTORY:

On this day in 2003, Richard Reid sentenced to life in prison for attempting to bomb an American Airlines flight with 197 on board.

15. REMEMBER, YOU CAN NEVER OUTLIVE YOUR DEFINED RETIREMENT BENEFIT.

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