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9/8/2017 12:43 PM
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In the Supreme Court of Illinois

Michael W. Underwood, Joseph M. Vuich, Raymond Scacchitti, Robert McNulty, John E. Dorn, William J. Selke, Janiece R. Archer, Dennis Mushol, Richard Aguinaga, James Sandow, Catherine A. Sandow, Marie Johnston, and 337 other Named Plaintiffs listed in Exhibit 23, Plaintiffs, vs. **CITY OF CHICAGO**, a Municipal Corporation, Defendant, and Trustees of the **Policemen's Annuity and Benefit Fund** of Chicago; Trustees of the **Firemen's Annuity and Benefit Fund** of Chicago; Trustees of the **Municipal Employees' Annuity and Benefit Fund** of Chicago; and Trustees of the Laborers' & Retirement Board Employees' Annuity & Benefit Fund of Chicago Defendants.	From the Illinois Appellate Court, No. 16-2356 (Consolidated with 16-2357) From the Circuit Court of Cook County, Chancery Division Case No. 2013 CH 17450 Calendar No. 5 Judge: Hon. Neil H. Cohen Previous Nos. in Cook County Circuit Court 01 CH 4962 87 CH 10134

Motion For Leave to File Oversized Petition For Leave to Appeal

1. Plaintiffs-Appellants-Petitioners, moving pursuant to Rule 361 and 315, request leave to file their attached oversized Petition For Leave to Appeal.

2. Petitioners' need for more than the usual size is because the Petition addresses thirty years of complex litigation over the City's and Funds' promised lifetime retiree healthcare obligations, one trial, two settlements, more than six appellate decisions, federal removal, and remand. The issues raised are both substantial and numerous. The Appellate decision sought for review presents substantial constitutional (*Pension protection, Equal Protection and Special Legislation*) and substantive issues (contract, estoppel, due process), that remain needing adjudication by this court. We have sincerely tried to pare the petition down to the minimum, but the factual statement itself consumes nearly fifteen pages.

3. Our Petition is due September 7, 2017 (submitted on the 7th, and resubmitted on the 8th). If leave to file oversized is denied, we respectfully request an additional 7 days to submit our Petition.

4. Plaintiffs-Appellants attach an Affidavit in support of this Motion

Wherefore, Plaintiff-appellants-Petitioners request leave to file our Petition as attached which is 29 pages.

Dated: September 8, 2017

Respectfully Submitted,

s/Clinton A. Krislov
Attorney for Plaintiffs-Appellants

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AFFIDAVIT

I, Clinton A. Krislov, an attorney, under oath, aver as follows:

1. I am an attorney for the Plaintiffs-Appellants-Petitioners in this case.

2. I have reviewed the attached Motion for Leave to file oversized petition.

3. The contents of that Motion are accurate, and the Motion is made in good faith.

Further affiant sayeth not.

Dated: September 8, 2017, at Chicago, Illinois.

s/Clinton A. Krislov

In the Supreme Court of Illinois

Michael W. Underwood, Joseph M. Vuich, Raymond Scacchitti, Robert McNulty, John E. Dorn, William J. Selke, Janiece R. Archer, Dennis Mushol, Richard Aguinaga, James Sandow, Catherine A. Sandow, Marie Johnston, and 337 other Named Plaintiffs listed in Exhibit 23, Plaintiffs,	)	From the Illinois Appellate Court, No. 16-2356 (Consolidated with 16-2357)
vs.	)	
CITY OF CHICAGO, a Municipal Corporation, Defendant, and Trustees of the **Policemen's Annuity and Benefit Fund** of Chicago; Trustees of the **Firemen's Annuity and Benefit Fund** of Chicago; Trustees of the **Municipal Employees' Annuity and Benefit Fund** of Chicago; and Trustees of the Laborers' & Retirement Board Employees' Annuity & Benefit Fund of Chicago Defendants.	)	From the Circuit Court of Cook County, Chancery Division Case No. 2013 CH 17450 Calendar No. 5 Judge: Hon. Neil H. Cohen Previous Nos. in Cook County Circuit Court 01 CH 4962 87 CH 10134

ORDER

Upon consideration of Plaintiff-Appellants' Motion Leave to File Oversized Petition for Leave to Appeal:

the motion is Allowed – Denied,

1) the Plaintiffs are granted leave to file their Petition with 9 additional pages.

Alternatively, if denied, Plaintiffs are granted until September 14, 2017 to file a revised Petition.

_____

_____

_____

Dated:_____

Certificate of Service

I, Kenneth T. Goldstein, an attorney, on oath, under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, and states that on **September 8, 2017,** I resubmitted for filing the foregoing **1) Motion for Leave to file our Oversized Petition for Leave to Appeal with 2) a Copy of the Oversized Petition** and served on Defendant and upon the Illinois Supreme Court by E-Filing, and E-mail service on the E-mails listed on the Service List.

s/Kenneth T. Goldstein

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In the Supreme Court of Illinois

Michael W. Underwood, Joseph M. Vuich, Raymond Scacchitti, Robert McNulty, John E. Dorn, William J. Selke, Janiece R. Archer, Dennis Mushol, Richard Aguinaga, James Sandow, Catherine A. Sandow, Marie Johnston, and 337 other Named Plaintiffs listed in Exhibit 23, Plaintiffs,	)	From the Illinois Appellate Court, No. 16-2356 (Consolidated with 16-2357)
vs.	)	
CITY OF CHICAGO, a Municipal Corporation, Defendant,	)	From the Circuit Court of Cook County, Chancery Division
and	)	
Trustees of the **Policemen's Annuity and Benefit Fund** of Chicago;	)	Case No. 2013 CH 17450
Trustees of the **Firemen's Annuity and Benefit Fund** of Chicago;	)	Calendar No. 5
Trustees of the **Municipal Employees' Annuity and Benefit Fund** of Chicago; and	)	Judge: Hon. Neil H. Cohen
Trustees of the Laborers' & Retirement Board Employees' Annuity & Benefit Fund of Chicago	)	Previous Nos. in Cook County Circuit Court
Defendants.	)	01 CH 4962
	)	87 CH 10134

Plaintiffs-Appellants' Petition for Leave to Appeal

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1. Prayer for Leave to Appeal.

Plaintiffs-Appellants below, petition this honorable court for leave to appeal from the judgment and opinion entered by the Illinois Appellate Court, 2017 IL App (1st) 162356.

2. Jurisdictional Statement.

The Judgment of the appellate court was entered June 29, 2017. Petitioners' timely filed petition for rehearing was denied August 3, 2017.

3. Statement of the Points Relied Upon in Asking the Supreme Court to Review the Judgment of the Appellate Court.

This thirty-year litigation, initiated by the City, presents important Constitutional questions by the last group of City of Chicago retirees whose City work, by their start date, did not qualify them for coverage under the federal Medicare program, thus leaving them uniquely vulnerable and deserving enforcement under Constitution, Contract and Estoppel.

This case presents (1) an Appellate Court ruling that ignored *Kanerva*'s direction to interpret pension issues liberally in favor of retirees and enforce promised "benefits" of participation in a retirement system, applying instead the restrictive dicta of the Seventh federal Circuit, limiting protection to just the explicit statute; (2) Following this court's *Matthews v CTA* and *Patrick Engineering* decisions limiting estoppel against a municipality, here the issues are whether the City's intentional agreement to be the health insurer, and its conduct of pre-retirement seminars informing employees of their permanent coverage, plus written handbooks all constitute sufficient municipal actions to enforce the promised benefits, (3) whether the City's distinguishing between participants with the same entitlement rights, agreeing to honor its promises to only the participants

who retired by that date, violates Equal Protection, and (4) Whether Pension Code legislation that awards benefits "by reason of employment by [a named City] Chicago, violates the Constitution's prohibition on Special Legislation. Additionally, this case presents the real due process failings where the courts intentionally refuse to certify the case to proceed on a class basis, while nonetheless adjudicating the terms of each class and subclass's benefits, along with the Appellate Court's repeated determination to issue opinions without affording the oral argument requested by all parties.

These retirees' repeated efforts to have these issues decided by this court have been blocked, diverted, and thwarted by accommodating to the City's opposition. It is time for this court to resolve these issues.

I. The Appellate Court's Opinion Applies a Restrictive View of the Protected Benefits in conflict with this Court's direction to construe pension provisions liberally in favor of the pensioners.

The appellate court's decision, adopts a restrictive view, that the only benefits protected by Article 13 §5 are the explicit statutory subsidy provisions, applying Seventh Circuit dicta, expressing its traditional hostility to retirement benefits[1], rather than this Court's direction in *Kanerva v Weems*, 2014 IL 115811, *that pension provisions are to be construed liberally in favor of the pensioners.*

[1] In the federal circuit split over whether the federal ERISA statute presumes for or against healthcare vesting, the Seventh Circuit has long adhered to the presumption against vesting of retiree healthcare benefits. See *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603 (7th Cir. *en banc* 1993)(4-2-4 opinion adopting "weak no-vest presumption", but with dissent by Judge Easterbrook, espousing strong anti-vest presumption, which he suggests in his *Underwood* dicta.). With all due respect to Judge Easterbrook's position, it is simply neither controlling nor in compliance with our Supreme Court's direction for interpreting our Illinois Constitution.

II. The Contract Claim - The City Acting As A Provider and conducting regular pre-retirement information sessions promising lifetime coverage constitutes sufficient Municipal Action to surmount the statute of frauds and support enforcement by estoppel.

At ¶¶ 30 and 48-50, the decision rejects the substantial "writings" in the form of Handbooks issued by the City and the Funds, ignores the Funds own assertions of a contract with the City, and ignored as well, that the 1983 and 1985 statutes require more than just a subsidy; the statutes squarely required the Four Annuity and Benefit Funds to provide health insurance for all annuitants.

III. Estoppel and The Subclass 3a-People Who Began Before 4/1/1986.

The lower courts' dispatching of the estoppel claim ignores the unique vulnerability and justification here: that participants who began their city work prior to April 1, 1986, did not earn any qualifying quarters for the Medicare program, no matter how long they worked for the City, nor how old they become. Consequently, they uniquely relied on the City's repeated assurances to them that they were earning lifetime coverage with the City, so need not worry about their not having Medicare coverage.

IV. The Opinion's extension of the protected class to the 2003 Agreement's execution date needs correcting.

The Appellate Court's expansion of the time-tolled class of retirees under the 2003 Settlement Agreement to just the *execution* date was clear error. While the terms of the Agreement should rather have extended the protected class dating through the 2003 agreement's *expiration*-6/30/2013; regardless, at the very least, it should be from the Agreement's *approval* date (June 16, 2003).

V. Deferring ruling on Class Certification for years while adjudicating the terms of each class' rights denies due process to the absent class members.

While courts routinely address initial motions to dismiss, initially deferring certification under ICCP 2-802's requirement to address class certification as soon as practicable, deferring the certification for years while deciding the terms of each class' entitlement, both in the Circuit Court and on appeal, violates due process for those absent class members, whose rights are being adjudicated despite their having neither notice nor knowledge of these proceedings.

VI. Oral Argument.

The Appellate court's disrespect for these retirees is shown by its repeated determination to just issue its decisions without the oral argument requested by all of the briefing parties. This is not a "no substantial issue" case situation, and these retirees should be treated with the respect of an oral argument.

VII. Equal Protection.

The Appellate Court, after recognizing that all people who were participants on a date certain have the same protected rights under Article XIII §5, the courts below nonetheless ignored the denial of equal protection, in the City's recognizing its obligation to pay at least 55% of healthcare costs for the 8/23/1989 *retirees*, disavowing those benefits for the other persons who were also 8/23/1989 *participants*.

VIII. Special Legislation.

Finally, the court totally ignores the violation of the Constitution's prohibition of Special Legislation, in statutorily defining retiree health benefits "by reason of employment by [a named City] Chicago".

Statement of Facts

This case has been on a track for eventual decision by this court for nearly thirty years.

I. History of the City's Providing Retiree Healthcare Benefits

A. The History of This Case Dates to the 1960s and 1980s

The City has been providing fixed-rate subsidized healthcare coverage to its annuitants under the City of Chicago Annuitant Medical Benefit Plan since the 1960s, not merely subsidizing, but acting as the actual insurer, hiring Blue Cross solely to administer the Plan, and conducting regular City-sponsored "Pre-Retirement Seminars" conducted by City Benefits spokespersons, advising employees that one of their benefits of employment included lifetime healthcare benefits in retirement. Third Amended Complaint, the "Comp." at ¶ 2.[2] (S.A. 197, R. C 3)

Thus, over decades, City employees came to understand and reasonably rely on the communicated assurance by City officials, that they would have lifetime healthcare coverage in their retirement. Appeal 15-3613 Supplemental Record C 329-839 ("3613 S.R. C_") S.A. 302-416.[3] This had a unique importance to these participants because local government employees who began their service prior to April 1, 1986 did not earn

[2] Exhibits 18 and 19 to the Complaint, respectively, are the declaration and testimony of Sgt. James McDonough re: how the agreement was reached (S.R. C 528, C 575-579) (Attached Appendix hereto, A547-601), and by Officer Herbert Kordeck, who was the actual speaker at 55 to 60 of these seminars (S.R. C 678, C 719) (A698). *See* testimony at 46:5-47:20, S.R. C 725-726 (A744-745).

[3] See examples, Craig, Tab 49-SA345, Gibbons, Tab 78 Tab-SA356, Grubisic, Tab 86-SA361, Kooyumjian, Tab 117-SA372, Dawn Lerner Manshereck, Tab 131-SA377, McCullom, Tab 137-SA386, Olle, Tab 158-SA394.

qualifying quarters for coverage under the federal Medicare program,[4] regardless of how long they worked for the City, nor how old they are.

B. 1983 and 1985 Agreements with Police, Fire, Municipal and Laborers Funds

In 1983, ostensibly to restructure the financing of the retiree healthcare costs, the City entered into an agreement with the Police and Firemen's' Funds, under which those Funds would provide the retiree healthcare to their annuitants, adopting the City as the health insurer, which provided coverage at a fixed rate premium of $55 or $21 per month (depending on the person's Medicare status), which the Funds (authorized by the 1983 Pension Code amendments) would "subsidize" by paying that same amount (itself funded by a separate City tax), as the annuitant's healthcare premium, with the annuitant paying only for spouse or dependent coverage. In 1985, the Municipal and Laborers Funds' and their annuitants were brought in to the same construct, but with the Funds subsidizing at a flat $25 per month per annuitant.[5] [6]

Over the years, the City issued Plan Books to participants, and Funds (evidenced by the Police Fund's handbook) explicitly advised participants that "the hospitalization premium for the retired employee is paid by the Retirement Board."[7] Over the years following, the City conducted dozens, at least, of City-sponsored "Pre-Retirement Seminars", informing employees of these as lifetime benefits, and the defendants do not

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[4] Federal Combined Omnibus Budget Reconciliation Act of 1985 ("COBRA," PL 99-272 § 13205(a), at SA 302

[5] Although some Police and Fire retirees have had outside engagements producing qualifying Medicare employment quarters, very few of the Municipal and Laborers Fund annuitants have earned Medicare qualifying quarters.

[6] As will be repeated, local government workers who began their employment prior to 4/1/1986 do not, by their City work, accrue qualifying "quarters" for coverage under the federal Medicare program.

[7] Police Fund Plan Handbook, Comp. Ex. 7, p.10 S.R. C 333, 342 (A355, 364)

dispute that City employees came to rely on the assurance of these lifetime benefits (the Funds themselves asserting that it was a contract term of employment by the City). These promises and participation by the City at the seminars was not just alleged. Plaintiffs produced and put in evidence in the Circuit Court, statements by speakers, and retirees who attended these seminars. S.A. 302-817; 3613 S.R. C 329-839.

C. October 19, 1987, The City Launches a Political "Game Plan", Threatening Retiree Healthcare to Offset its Liability For Its Converting Pension Tax Levies, Which Leads to the *City v. Korshak* Litigation and First Settlement.

After the discovery of the Byrne administration's conversion of pension tax levies resulted in a $25-plus million liability to the Funds,[8] the Washington administration concocted a "game plan"[9] to offset the liability, by asserting that the City was not obligated to continue providing annuitant healthcare, and threaten to seek recovery from the Funds as negotiating ploy, seeking a waiver of its liability in exchange for dropping the healthcare challenge.

When the Fund trustees refused the City's backdoor offer/request to waive the City's *Ryan* liability[10], the City initiated this litigation on October 19, 1987 (*City v. Korshak*), seeking a declaration that it was not obligated to provide retiree healthcare, and to recover back the $58 million it had spent on retiree healthcare during the preceding few years. The four Funds' trustees all counterclaimed,[11] asserting (what Retirees claim now) that the lifetime annuitant healthcare benefit was an enforceable contract term of

[8] *Ryan v City of Chicago*, 148 Ill.App.3d 638 (1986).
[9] Testimony June 22, 1988 by then-City Comptroller Picur (Comp. Ex.9), S.R. C 394, C 397-398.) A416, 419-420
[10] Police Fund Minutes May 11, 1987 (Comp. Ex.1), S.R. C 53. (A77)
[11] Funds' Counterclaims to City (Comp. Ex. 3), S.R. C 64-180. (A88-A229)

employees' employment. Participants intervened, seeking enforcement of their lifetime fixed-rate, subsidized-by-their- respective- Fund, benefit.[12]

The Circuit Court (Hon. Albert Green) dismissed the City's claim, but upheld the counterclaims against the City, asserting participants' rights to permanent coverage under principles of Contract, Estoppel (participants added Article XIII, §5).[13] The upheld participants' counterclaims were tried[14] to the bench in June 1988, but (prior to entry of a decision) "settled" for the period through 12/31/1997, by an interim agreement, between just the City (committing to pay at least 55% of healthcare costs) and the Trustees (committing the Funds to an increased monthly subsidy). Choosing not to address Participants' motion for summary judgment on the permanence of their coverage, the court instead approved and imposed the Agreement on them, in part because it expressly empowered the participants to restore the litigation to the original October 19, 1987 status (*see* 12/12/1989 Order at pg. 21, S.R. C 404, 425) (which is this very case and the same claims brought here now), in the event no permanent resolution was reached by the December 31, 1997 end of the ten year settlement period.[15] The accompanying Pension

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[12] Participants' original Korshak Counterclaims (Comp. Ex. 4) S.R. C 206. (A230)

[13] *City v Korshak*, May 16, 1988 transcript ruling by Circuit Judge Green (Comp. Ex. 5, pg. 66), S.R. C 218, C 286. A242 A308

[14] As listed in the Complaint (S.R. C 1A-52) at ¶115 and ¶¶79-89, numerous participants described their attendance at the pre-retirement seminars, their understanding, reliance, and need for their coverage as it had been described to them. *Id.*, testimony of annuitants and survivors of most categories and Funds, Jandersits, Gayne, Wilhelm, Ogonowski, Scacchitti, Sweeney, Venturella, Shakleton, Hince, Hester, and Bauer, the last of whom had been a court stenographer who testified from her notes taken at the seminar she attended.

[15] Korshak Settlement, Comp. Ex. 10 at ¶ J, S.R. C 399: A421, 424-425

J. The parties agree to negotiate in good faith toward achieving a permanent resolution of this dispute on or before December 31, 1997. Failing agreement, the parties shall be restored to the same legal status which existed as of October 19, 1987, with the exception that the City agrees not to pursue any claim for past amounts allegedly due it

Code codifying amendments were not enacted until August 23, 1989[16], P.A. 86-273, hence, the significance of that date.

D. The 1997 Extension, and 2003-2013 Settlement Continues Participants' Rights to Revive Claims.

No permanent resolution having been reached by the end of 1997, participants sought to revive their claims, but were denied by the Circuit Court. The Appellate Court reversed and ordered the litigation revived[17], eventually leading to another ten-year interim settlement (with participants' agreement this time) through June 30, 2013; again with the City committed to provide the insurance and pay "at least" 55% of the costs, the Funds committed to an increased subsidy, and participants explicitly entitled to again restore the litigation and pursue their claims to permanent coverage (which again are the same upheld claims brought before and tried).[18, 19] No resolution was reached before June 30, 2013.

E. May 15, 2013-City Declaration to Phase Out and End Retiree Healthcare Entirely

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for the costs of annuitants' health benefits incurred prior to March of 1990. The Funds, intervenors or any annuitant may contend that the City is obligated to provide and pay for the health care benefits of its retired employees and their dependents to the extent that such cost exceeds the premiums which went into effect in April of 1982. Similarly, the city may contend, as it did in the trial of this case, that it has no obligation to provide or pay for health care benefits for its retired employees or their dependents. *City v. Korshak*, 206 Ill. App. 3d 968, 973 (Ill. App. Ct. 1st Dist. 1990)

[16] P.A. 86-273, S.R. C 358

[17] App. Ct. June 15, 2000 Order (Comp. Ex. 12), S.R. C 429. A451

[18] 2003 Settlement ¶J (Comp. Ex. 13), S.R. C 429. A461

[19] During the course of the 2003 Settlement, it was discovered that the City's calculation of premiums had greatly overestimated healthcare costs, leading to a separate audit and reconciliation agreement, which actually produced over $51 million in refunds to participants. *See City v. Korshak*, 2016 IL App 1st 152183-U, reversing Judge Cohen's dismissal of participants' motions to audit the charges in the period unilaterally extended by the City.

Nearing the 2003 Settlement's June, 30 2013 end, the City rejected participants' requests to negotiate another (permanent) resolution. The current City administration, instead declared that it would unilaterally extend the settlement's benefits through the end of 2013, then "phase out" retiree healthcare coverage, and end it entirely at the end of 2016.[20]

F. 2013 Revival of Participant Claims: *Underwood v. City and Funds*

When participants sought to revive the case in the *City v. Korshak* docket, the Circuit Court refused[21], requiring them to file a new complaint, which the City then removed to the federal district court, where, its pre-*Kanerva* dismissal was, *post-Kanerva*, vacated and reversed by the Seventh Circuit[22], and (bowing to the City's opposition to our request for referral of the issue to the Illinois Supreme Court) remanded to the Circuit Court of Cook County, where the Circuit Court has entertained virtually every time-delaying and dividing tactic by the City, including denial of another injunction to prevent the City's termination of coverage pending resolution of the litigation.

G. The Third Amended Complaint

In the Third Amended Complaint (the "Complaint") participants assert their entitlement to permanent healthcare coverage by the City, and each annuitant's respective Fund, under (1) the Illinois Constitution's Article XIII §5 Pension Protection Clause, (2)

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[20] May 15, 2013 letter (Comp. Ex. 21), S.A. 1, S.R. C 847. A865. Indeed, the City artfully reworded its commitment to extend the settlement benefits and pay from "at least 55 %" to "up to 55%" of healthcare costs; and it refused to audit the charges which had actually been overstated, requiring refunds to retirees averaging $5 million each year.

[21] A. 31, Judge Cohen's dismissal of *City v. Korshak* Motion to Revive and File an Amended Complaint.

[22] *Underwood v. City of Chicago*, 779 F.3d 461 (7th Cir. Ill. 2015)

Contract (a) by the *City of Chicago Annuitant Medical Benefits Plan*, and (b) if the obligation is the Funds' to provide a plan, that they have done so by contracting with the City as the insurer; and (3) Estoppel, by the City's having acted by issuing Plan handbooks and explicitly informing employees at dozens of City sponsored "Pre-Retirement Seminars" that they would have permanent City coverage under the City's *Annuitant Health Benefit Plan*. Participants additionally assert Count V, that the City's action impairs their federal and state contract rights; Count VI, that because rights under the Pension Clause are determined by *participation* (i.e. from hiring date), the City's recognizing lifetime coverage only to those who *retired* before 8/23/1989 (i.e. while the rights are based on a pre 8/23/89 hire date, denying them to those who have not retired by then) violates Equal Protection guaranteed by Illinois Constitution Art. I, §2[23]; and Count VII, that the 1989 and subsequent amendments to the Pension Code, defining rights by employment by a named City, constitute invalid special or local legislation prohibited by Illinois Constitution Article IV §13.[24]

H. The Appealed-From Rulings in the Case Below

The facts being essentially undisputed by the City and Funds, Plaintiffs submitted motions to certify the case to proceed on a class basis, for preliminary injunction against the City's "phase out" and termination of benefits, and for summary judgment. The Circuit Court, Judge Cohen, refused to address any of plaintiffs' motions until the court ruled on all of the City and Funds' challenges to the Complaint. On the City and Funds' first motions to dismiss, the court upheld the participants' Constitutional claim, but

[23] Supra., Section 2. Due Process and Equal Protection, Constitution and Statutes Involved, p. 8.
[24] Supra., Section 13. Special Legislation, Constitution and Statutes Involved, p. 8.

without defining the benefit to be protected, and dismissed the Counts seeking to enforce the terms of the *City of Chicago Annuitant Medical Benefits Plan* by Contract and Estoppel.

Subsequently, the Circuit Court issued five rulings which essentially free the City, from any obligation to continue healthcare benefits for their annuitants or stay the case pending resolution before the City's scheduled end of benefits.

1. **December 3, 2015 Memorandum and Order** (A. 31, R. C 831) **on the City's and Funds' motions to dismiss the complaint:**

Upholding Count I (Constitutional Claim) for declaratory relief as to the City's and Funds' obligations under the 1983 and 1985 amendments, but dismissed as to the City's and Funds' obligations under the 1989, 1997 and 2003 amendments to the Illinois Pension Code:

- Refused to defer to Judge Green's 1988 ruling and holding participants claims as either law of the case or persuasive,
- Rejected the Fire and Municipal Funds' contention that they do not have capacity to be sued,
- Rejected the Laborers' Municipal and Firemen's Funds' assertions of Statute of Limitations as defeated by the 1989 and 2003 settlement agreements.
- Holds that Article XIII section 5 protects the healthcare benefits as to the City's and Funds' obligations under the 1983 and 1985 Pension Code amendments, albeit leaving for future determination "the exact nature of those obligations";
- Holding unenforceable the language of the 1985, 1989, 1997 and 2003 Pension Code amendments purporting to cast the healthcare benefits as not protected by the Pension Clause;
- Holding that the 1983 and 1985 statutes impose on the Funds, the non-time-limited obligation to provide healthcare coverage for their annuitants;
- Rejecting the participants' assertion that the time period limitations in the 1989, 1997 and 2003 Amendments as violating Art.13 Sec.5;
- Dismissing, but with leave to replead, the contract claim and the estoppel claims.

2. **December 23, 2015 Denial of Injunction Against 2016 Rate Increases (**A47, 3613 R. C 912, Transcript, S.A. 2)

- On December 23, 2015, the court denied participants' motion for a preliminary injunction to block the 2016 rate increases resulting from the "phase out" appropriation reduction, in the court's view that the Constitution protected only what was required by statute; that the City's 2016 rate subsidies were greater than the subsidies required of the Funds in 1983 or 1985; that the handbooks did not explicitly promise "lifetime" benefits; that no written contract existed promising lifetime benefits; and, that no estoppel claim could be enforced without showing that the City's promises of lifetime coverage had been made by a person with explicit authority to bind the City. The Appellate Court, without hearing argument, affirmed, 2016 IL App (1st) 153613 (Sept. 21, 2016); Participants' Petition for Leave to Appeal to this court No. 121498, was denied.

To address the pleading issues identified in the December 3, 2015 Order, Participants on January 13, 2016, filed their Third Amended Complaint, adding Counts 5) Impairment of Contract, 6) Denial of Equal Protection (treating 8/23/1989 participants differently, based on retirement date), and 7) Invalid Special or Local Legislation; and attaching the evidentiary exhibits that had been previously submitted in response to the motions to dismiss the Second Amended Complaint.

In the meantime, the City and Funds moved for "clarification" or reconsideration on the upheld Count 1 protected benefit.

3. March 3, 2016 "Clarifying" Memorandum and Order (A. 48, R. C 101)

On the City's motion for Clarification or Reconsideration of the Court's December 3, 2016 rulings, and the Fire and Municipal Funds' Motion for reconsideration, the Court issued its March 3, 2016 Order:

- "clarifying" that the City "does not have any obligation under the 1983 or 1985 amendments to subsidize or provide healthcare for the Funds' annuitants"; but otherwise denying reconsideration.
- Although still refusing to certify the case under §2-801, adopting Plaintiffs' category designation of four subclasses of participants:
    1. "Korshak" retirees, retired by December 31, 1987
    2. "Window" retirees, retired during the "window" period of post Korshak to August 23, 1989 (the date of enactment of the Korshak Settlement codifications in PA 86-273

3. Pre-August 23, 1989, participants hired by August 23, 1989
4. Hired post August 23, 1989

The City and Funds moved to dismiss the Third Amended Complaint, (the court still refusing to address *any* of plaintiffs' motions until it had dealt with *all* of the defendants' challenges).

4. July 21, 2016 Memorandum and Order. (A. 54, R. C 857, Transcript S.A. 96, R. 182)

As to Plaintiffs' Third Amended Complaint, the court, after briefing and argument, issued its July 21, 2016 Memorandum and Order:

- Dismissing Count I "with prejudice as to any claim based on the 1989, 1997 or 2003 amendments;
- Upholding Count I as to the claims under the 1983 and 1985 amendments, except as to Sub-class 4 (persons who became Fund participants [i.e., hire date] after 8/23/1989; and Dismissing Counts II, III, V, VI and VII with prejudice:
- Upholding Count I, as to the 1983 and 1985 Pension Code amendments, but interpreted only as the Funds' obligation to provide coverage, and the City's only obligation only to finance the Funds' small dollar subsidy amount;
- Dismisses the Count II contract claim, rejecting the assertion that either the *City of Chicago Annuitant Medical Benefits Plan* handbook or the Police Fund handbook constitute enforceable contracts because they "do not contain any provision promising lifetime subsidized healthcare benefits";
- Dismisses the Estoppel claim with prejudice, rejecting the assertion that the handbooks' writings, or City-conducted "Pre-Retirement seminars" constitute sufficient action by the City to support estoppel;
- Dismisses the Impairment Count V, as lacking an enforceable contract to impair;
- Dismisses Count VI (Equal Protection) in the court's view that (despite our claim being based on different treatment of pre-8/23/1989 hires from retirees) there was a rational basis to differently treat pre- versus post-August 23, 1989 participants;
- Dismisses Count VII (Special Legislation), viewing the statutes as rationally based, without addressing whether these provisions (the only Chicago-designated-by-name provisions in the Pension Code, perhaps in the entire ILCS) invalidly limit their application to a named municipality;
- Reopens (despite the Settlement Agreements' explicit restoration to October 19, 1987) the Statute of Limitations question as a factual issue as follows:
  a. Declaring class rights (despite repeatedly refusing to certify the case as a class action "until I have to"), holding that the claims for the (Korshak and

Window) Pre-8/23/1989 retirees are moot because of the City's extension of subsidized coverage for them;
b. Open for factual determination of the notice chargeable to "Sub-Class 3" (hired, but not retired, by 8/23/1989);
c. Moot for "Sub-Class 4" post-8/23/1989 participants as having "no claim".

5. **August 9, 2016 Decision and Order.** (A71, R. C 902, Transcript, S.A. 118, R. 204)

On Plaintiffs' motion to reconsider, Judge Cohen heard argument and issued his August 9, 2016 Decision and Order:

- Denying reconsideration;
- Granting 304(a) findings as to subclass 4;
- Denying them as to subclass **x3x**; and
- Holding them in abeyance as to subclasses 1 (Korshak) and 2 (Window retirees), directing counsel to confer and report back on 8/31/2016 to the court about what the City was actually providing/committing to, with respect to pre-8/23/1989 retirees;
- Denying plaintiffs' renewed motion for preliminary injunction;
- Ordering defendants to answer the Complaint Count I, and the motion for class certification.

6. **August 31, 2016 Decision and Order.** (A. 72, R. C 917, Transcript, S.A. 139, R. 225)

On August 31, 2016, when the parties returned and informed the court, the Court entered its 8/31/2016 Order:

- Granting Rule 304(a) findings on all counts;
- Staying the case pending appeal;
- Denying, without prejudice, participants' renewed motions for preliminary injunction and class certification.

The Circuit Court listed its conclusions of law as:

1. that retirees' healthcare benefits are protected by the Constitution's Pension Protection Clause; that the statutory language purporting to define them as not protected benefits are ineffective;
2. that the protected benefit is only what is stated in the Pension Code provisions as they were prior to the 8/23/1989 P.A.86-273, and subsequent amendments, codifying the terms of the settlements, which explicitly restored annuitants' rights to restore the litigation to its pre-settlement stage.

3. that the handbooks and preretirement seminars issued by the City and funds are not sufficient writings to surmount the statute of frauds for a contract claim.
4. that estoppel is not assertable against the city and Funds,
5. that the statute's explicitly conditioning the benefit on employment by a named city, does not violate Article IV, Section 13's prohibition on Special Legislation,
6. that the only people protected are those who retired before 8/23/1989, concluding that persons who participated (i.e., hire date) by 8/23/1989 are subject to a limitations defense as untimely.
7. that the City does not violate equal protection in recognizing the lifetime claims of those who retired before 8/23/1989, over the retirees' claims that all persons who were participants on that date, plus all those who became participants during the settlement periods through 6/30/2013, had identical protected rights under the Illinois Constitution.

And rendered its Rule 304a findings that there was no just cause to delay appeal or enforcement.

Plaintiffs on September 1, 2016 timely appealed from those decisions.

The Appellate Court's decision, 2017 IL App.(1st) 162356, June 29, 2017, affirmed most of the trial court's rulings, holding:

1. The benefits as provided during the settlement periods were time-limited so not protected thereafter by Article XIII §5; Opinion ¶24-29
2. The protected group includes all persons who became participants prior to the execution of the 2003 settlement. *Id*. at ¶37
3. The "benefit" that is actually protected is only the fixed rate subsidy stated in the 1983 and 1985 statutes. *Id*. at ¶39-40.
4. Rejecting the Contract claims, due to allusions in the handbooks, and the lack of any explicit "lifetime" language. *Id*. at ¶49-50;
5. Rejecting the Estoppel claims as barred by *Patrick Engineering v. City of Naperville*, 2012 IL 113148, as a matter of law,
6. Rejecting the equal protection argument (over the City's discriminatory treatment based on retirement date), since the court holds that all persons who became participants by the 2003 Settlement are entitled to the same statutory benefit based on when they entered the retirement system; *Id*. at ¶57;
7. Never actually addressing the Special Legislation "named City" issue;
8. Ruling that the injunctive relief request to preserve the 2016 status quo is moot because the end of 2016 "has already arrived".

Petitioners sought rehearing, asserting that:

1. Interpreting the protected benefits as just the statutory subsidy misapplies *Kanerva*, to strictly construe pension benefits, rather than liberally in favor of annuitants,
2. The extension of the protected class to the 2003 Agreement's Execution date needs correcting to extend to persons who became "future annuitants" (i.e. began participation) by the Agreement's expiration (6/30/2013), or at least the Agreement's Approval Date (June 16, 2003), when it actually became effective.
3. The 2003 Agreement did not permit the City to amend existing plans. The authorization to amend or terminate was just for "Additional" plans that the City might enact.
4. The court's refusal to certify the case to proceed as a class action means that the court is making determinations of the rights of City Funds participants, the vast majority of whom have neither notice nor knowledge of the proceedings, violating due process;
5. The appellate court's determination to repeatedly rule in these matters without affording the Oral arguments requested by all parties, disserves our justice system and erodes respect for the courts' process.
6. The court's rejection of Equal Protection ignores that the City's discrimination in providing lifetime 55% benefits to 8/23/1989 retirees, but not for others who were participants on that date, violates Equal Protection, and
7. The court never addresses the legality of the Pension Code provisions defining retiree health benefits "by reason of employment by [a named City] Chicago".

The Appellate Court denied rehearing August 3, 2017.

Argument

Petitioners are the last group of City employees whose City employment did not qualify them for coverage under the federal Medicare program, and despite having repeatedly sought this court's ruling on their unique claims, it is now time for this court to determine the law on these issues.

This case presents the most important issues not resolved by this court's decisions in *Kanerva* and *Matthews* and this court's review is necessary because the lower courts have ignored their obligations to construe benefits liberally in favor of retirees, and instead construed them strictly in favor of the City.

I. The Opinion's Restrictive View of the Protected Benefits conflicts with this Court's direction to construe pension provisions liberally in favor of the pensioners.

The appellate court's decision, its fourth one rendered without even the courtesy of the hearing requested by all parties, shockingly adopts a restrictive view, that the only benefits protected by Article 13 §5 are the explicit statutory subsidy provisions, applying Seventh Circuit dicta, expressing its traditional hostility to retirement benefits[25], rather than this Court's direction in *Kanerva v Weems*, 2014 IL 115811, *that pension provisions are to be construed liberally in favor of the pensioners:*

> ¶36 In addition, it is proper to consider constitutional language "in light of the history and condition of the times, and the particular problem which the convention sought to address ***." *Client Follow-Up Co. v. Hynes, 75 Ill. 2d 208, 216, 390 N.E.2d 847, 28 Ill. Dec. 488 (1979))*. "Moreover, *** to the extent there is any question as to legislative intent and the clarity of the language of a pension statute, it must be liberally construed in favor of the rights of the pensioner." *Prazen v. Schoop, 2013 IL 115035, ¶ 39, 998 N.E.2d 1, 375 Ill. Dec. 709*; accord *Shields v. Judges' Retirement System, 204 Ill. 2d 488, 494, 791 N.E.2d 516, 274 Ill. Dec. 424 (2003)*; *Matsuda v. Cook County Employees' & Officers' Annuity & Benefit Fund, 178 Ill. 2d 360, 365-66, 687 N.E.2d 866, 227 Ill. Dec. 384 (1997)*
>
> ……
>
> **¶55.** Finally, we point out again a fundamental principle noted at the outset of our discussion. Under settled Illinois law, where there is any question as to legislative intent and the clarity of the language of a pension statute, it must be liberally construed in favor of the rights of the pensioner. This rule of construction applies with equal force to our interpretation of the pension protection provisions set forth in *article XIII, section 5*. Accordingly, to the extent that there may be any remaining doubt regarding the meaning or effect of those provisions, we are obliged to resolve that doubt in favor of the members of the State's public retirement systems.

[25] In the federal circuit split over whether the federal ERISA statute presumes for or against healthcare vesting, the Seventh Circuit has long adhered to the presumption against vesting of retiree healthcare benefits. See *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603 (7th Cir. *en banc* 1993)(4-2-4 opinion adopting "weak no-vest presumption", but with dissent by Judge Easterbrook, espousing strong anti-vest presumption, which he suggests in his Underwood dicta.). With all due respect to Judge Easterbrook's position, it is simply neither controlling nor in compliance with our Supreme Court's direction for interpreting our Illinois Constitution.

Interpreting the benefits to be protected as just the statutory subsidy, misunderstands *Kanerva's* direction that Article XIII Section 5 protects "benefits" not just a statutory subsidy):

> ¶ 38 Article XIII, section 5, provides that "[m]embership in any pension or retirement system of the State *** shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired." Ill. Const. 1970, art. XIII, § 5. Under the language of this provision, …, it is clear that if something qualifies as a benefit of the enforceable contractual relationship resulting from membership in one of the State's pension or retirement systems, it cannot be diminished or impaired.

While the issue presented in *Kanerva* was indeed whether a statutory healthcare subsidy to former State employees is or is not a protected benefit, which could be legislatively reduced, *Kanerva*'s definition of what is protected is not limited to the subsidy, or even to the Pension Code[26], but embraces and protects whatever benefits participants receive by their being participants in an Illinois retirement system:

> ¶ 39 As noted above, Illinois law affords most state employees a package of benefits in addition to the wages they are paid. These include subsidized health care, disability and life insurance coverage, eligibility to receive a retirement annuity and survivor benefits. These benefits were provided when article XIII, section 5, was proposed to Illinois voters for approval, as they are now.
> ¶ 40 Although some of the benefits are governed by a group health insurance statute and others are covered by the Pension Code, eligibility for all of the benefits is limited to, conditioned on, and flows directly from membership in one of the State's various public pension systems. Giving the language of article XIII, section 5, its plain and ordinary meaning, all of these benefits, including subsidized health care, must be considered to be benefits of membership in a pension or retirement system of the State and, therefore, within that provision's protections. See Duncan v. Retired Public Employees of Alaska, Inc., 71 P.3d 882, 887 (Alaska 2003) (giving comparable provision of Alaska constitution "its natural and ordinary meaning," there "is little

[26] The statutory provision at issue there, P.A.97-695, eliminated the statutory standards for the State's contributions to health insurance for members of three of the State's retirement systems, Despite its not being a Pension Code provision, it was still protected as a benefit of participation by Article XIII, Section 5.*Kanerva* at ¶1.

> question" that it encompasses "health insurance benefits offered to public employee retirees").

But, even if enforcement of the 1983 and 1985 Statutes were the extent of the Protected Benefit, then the Protected Benefit is far more than just the City's meagre subsidy amount. While the subsidy is what the Appellate court focuses on, the Statute, especially for Police and Fire, actually requires *far more,* imposing a duty on the Fund's Board (i.e., the trustees) to provide group health insurance for all of their annuitants:

> (b) The Board shall contract with one or more carriers to provide group health insurance for all annuitants. Such group health insurance shall provide for protection against the financial costs of healthcare expenses incurred in and out of hospital including basic hospital-surgical-medical coverages and major medical coverage. The program may include such supplemental coverages as …. The group health insurance programs may also include:…
>
> (c) the group contract shall be on terms deemed by the board to be in the best interest of the fund and its annuitants, based on, but not limited to, such criteria as administrative costs factors, the service capabilities of the carrier, and the premiums charged. Complaint Exhibit 8, 1983 Pension Code Group health benefit provisions 5-167.5 (Police), and 6-164.2 (Firemen).

And while the 1985 Pension Code Group Health Car Plan provisions for Municipal (8-164.1) and Laborers (11-160.1) were permissive; nonetheless, all four Funds' original filings asserted that they had, in fact, contracted for the City to affirmatively act as the actual Health insurance provider (See the four Funds' counter claims, Ex. 3 to Participants' Third Amended Complaint ("Comp.") A88-203. And that is precisely why Judge Green (Comp., May 16, 1988 transcript, Ex. 5, at 63-66, A242) declared that it was "well within the ambit of the city's authority to provide healthcare benefits to retired employees", found it illogical to believe that the City's paying health claims made on behalf of approximately 26,000 persons for millions of dollars over a period of seven years could have occurred without the affirmative action of appropriation, and finding the funds involved as far too substantial to have slipped through the cracks.

> "What is relevant is that over this period of years the city must have repeatedly contemplated and made provisions for the availability of these monies with which it paid the annuitants' claims and provided insurance to them."
> Finally this court finds that the defendants have adequately stated a claim for equitable estoppel and that the city's argument that claims of equitable estoppel could not lie against it is a government entity will not defeat defendants [the Funds and participants] claims"

Accordingly, the circuit and appellate courts' rejection of the contract claim (supported by the Funds' original Korshak filings (Comp. Ex. 3) ignores that there was a contract, in which the Funds themselves asserted that they had had a contract with the City, for which the Retirees were intended beneficiaries, under which the City had affirmatively agreed to and did act as an insurer of the retirees, charging a premium set to the amount of the Fund Subsidy, which the Fund paid; thus the benefit was that (a) for police and firemen, the annuitant paid only for spouse and dependent coverage, and (b) for municipal and laborers, that they paid only the amount in excess of the Fund subsidy.

And there was good reason for that contract to be enforceable, and for the City and Funds be estopped from denying it, because the core class here, almost all began their work for the City before April 1, 1986, so *none* of their City work entitles them to any qualifying quarters for the federal Medicare program. The courts below totally ignored that as well.

II. The Contract Claim - The City Acting As A Provider constitutes Municipal Action.

At ¶¶30 and 48-50, the decision below rejects the existence of any written agreement. But what the court ignored, from our Complaint at ¶¶68-71*ff*, A24 and Ex¶¶. 8, A370, is that the 1983 and 1985 statutes did not merely provide a subsidy; the statutes squarely required the Four Annuity and Benefit Funds to provide health insurance for all annuitants, (Comp. at ¶68, A24 and had done so, by contracting with the City agreeing to

act as the insurer, charging premiums at the amount of the Police and Fire subsidies (*Id*. at ¶69), which is precisely what the Funds alleged in their original Korshak countercomplaints (*Id*. at ¶¶68-79, and Ex. 3, A88-203) each of them asserting a Contract-based claim, that the City had affirmatively acted taking the role of insurer, issuing plan Handbooks (Comp. Ex. 6, A314) and affirmatively informing employees that coverage under the City Annuitant Health Benefits Plan was a term of their employment. (*See* Comp. Ex. 3, A88, Fund Trustees' Countercomplaints, Police Fund at ¶¶16-31/A209, Fire at ¶6-11, 16-23/A113-114, Municipal at ¶¶8 and 16/A93, 96-97, and Laborers at ¶¶8, 18-23/A124, 128-129).[27]

And further asserting claims based on estoppel, that the City had "engaged in a continuous pattern of affirmative acts over the past ten years, and that each Fund and its annuitants have reasonably relied on the city's plan covering all costs in excess of the subsidy. (Police Countercomplaint at Count IV, themselves originally asserted that they had an enforceable contract with the City, under which the City agreed to be the insurance provider for their retirees, with premiums priced at the Police and Fire Subsidy amounts, thus paid for the annuitant for life by their Fund (and this is supported by the Police Fund's handbook (Comp. Ex. 7 at 10, A355).

Handbooks need not say "lifetime" (*Kanerva* at ¶2*ff*, the statute there did not use the word either); they need only list something as a benefit for which eligibility is determined by one's being an annuitant. Consequently, the **City Annuitant Health Benefits Handbook** states:

[27] The circuit court's permitting the pension funds to abandon their City v Korshak contract claims for annuitants and change to supporting the City's motions to dismiss, would seem to violate both the mend the hold doctrine, *Trossman v. Philipsborn*, 373 Ill. App. 3d 1020, 869 (Ill. App. Ct. 1st Dist. June 8, 2007), as well as equitable estoppel.

> ELIGIBILITY
> You will be eligible for coverage if you are: ..
> -An Annuitant, of the City of Chicago. "Annuitant" means a former employee who is receiving an age and service annuity from one of four retirement funds. (Comp. Ex. 6, at 2, A314).

And, the Police Annuity and Benefit Fund Handbook "Your Service Retirement Benefits", (Comp. Ex. 7, at 10, A355) just stated it as a benefit :

> The hospitalization premium for the Retired employee
> is paid by the Retirement Board.

Viewed another way, if the qualification for a benefit is that one is an "annuitant" (i.e., a person receiving an annuity from the Fund or the City), that benefit is protected by Article XIII, §5, and cannot be reduced as long as the person remains an annuitant; without requiring "for life" language. The appellate court's focus on the lack of the words "for life" ignores that *Kanerva* had no such language of permanence other than "former employee", and the Handbooks, both for the City of Chicago Annuitant Health Benefit Plan and the Police Fund Annuitant Handbook, required only that the person be an annuitant.

City Annuitant Health Benefits Handbook: No explicit reservation of right to amend or terminate: Notwithstanding the Appellate court's attraction to the Seventh Circuit's presumptions *against* vesting of healthcare benefits, and regardless of which federal circuit, any reservation of right to terminate must be explicit and clear. Here there is no explicit reservation, and the mere allusion is insufficient.

Namely, the Termination of Coverage provision in the City's Handbook (Comp. Ex. 6 at p.3, A314), while saying that coverage for you will terminate the date that the Plan is terminated, does not explain the conditions under which it could be terminated.

III. Estoppel And The Subclass 3a-People Who Began Before 4/1/1986.

The lower courts' dispatching of the estoppel claim is troubling, ignoring the fact that *participants who began their city work prior to April 1, 1986, did not earn any qualifying quarters for the Medicare program--no matter how long they worked for the City, nor how old they become.* (Comp. ¶157, A24). Consequently, they were uniquely entitled to rely on the City's repeated assurances to them that they were earning lifetime coverage with the City, and needn't worry about their not having Medicare coverage. Indeed, between the courts' rulings in *Dell v. Village of Streator* (applying estoppel) and *Matthews v. CTA* (declaring that employees *generally* cannot rely on estoppel to bind a municipality, in the absence of official action) equity would be that *Matthews*' declaration should be only prospectively applied; especially with people (first hired by April 1, 1986) who have nowhere else to go, because none of their City employment qualifies them for coverage under the federal Medicare program.

Moreover, the lower courts' rulings ignore the Funds' assertions in their original Korshak countercomplaints that the City had engaged in continuous affirmative actions; recognized by even Judge Green in the City's affirmatively agreeing to be the insurer, not merely a subsidizer, as sufficient affirmative municipal action to support the estoppel claim, certainly at the pleading stage.

IV. This court's decisions in *Patrick Engineering* and *Matthews v. CTA* do not preclude estoppel as a matter of law where there are substantial actions by the City that support estoppel.

Also, the Appellate Court's Opinion (¶52) treats *Patrick Engineering, 2012 IL 113148 and Matthews v. CTA, 2016 IL 117638* as preclusive of estoppel at the pleading stage, ignoring that the City's actions were well documented, and the Funds' own filed

assertions of the City's providing lifetime healthcare as a term of employment, plus its intentional agreement to be the actual insurance provider, with lifetime coverage at the subsidy amount, plus written handbooks and years of presenters presenting the City's Annuitant Health Benefits Plan as a permanent plan, covering all premiums for the annuitant is documented, and over a period of time that is undisputed; such that, as Judge Green ruled back in 1988, it could not have been done without actual authority.

V. The Opinion's extension of the protected class to the 2003 Agreement's execution date needs correcting. Correctly interpreted, the 2003 Settlement Agreement extended the protected class dating through the 2003 agreement's expiration-6/30/2013. Or at least from its *approval* date (June 16, 2003) not its earlier *execution* date.

While we agree with the Appellate Court's holding that the 2003 Agreement (Comp. Ex. 13, A46) tolls claims for participants beyond those who retired by 8/23/1989, there are two aspects which would direct a different ending date for the entitled class.

First, the effective date of the Agreement, should be the date of its final *approval* (June 16, 2003), rather than its "*execution*" date. As a class agreement, it could not become effective until finally approved by the court.

But, the Agreement itself (*Id*. at ¶¶ II.H) continues the covered class members to be anyone who is or will become a future annuitant on or before June 30, 2013 a present or potential future annuitant by the Agreement's explicit expiration of June 30, 2013.

> H. The "Settlement Class" or "Class Members" consists of: all current annuitants of the Funds, who are receiving an annuity based on City Service and who are enrolled in City healthcare plans, and their eligible dependents; and all current and former City employees who will become one of the Funds' Future Annuitants on or before June 30, 2013, and their eligible dependents.

Further, the City's unilateral May 2013 extension of the Agreement's benefits to the end of 2016, suggests that the right answer is that all persons who were participants on or before December 31, 2016 should be included in the class.

VI. The 2003 agreement did not permit the city to amend *existing* plans; the authority to amend or terminate was just for "*additional*" plans the city might enact.

The Appellate Court's declaration at ¶¶ 35-36, that the 2003 Agreement acknowledged a City right to amend or terminate existing retiree healthcare plans – is wrong.

Rather, the 2003 Agreement (Comp. Ex. 13 at ¶IV.H, A461), because it explicitly permitted the City to create additional plans, gave the City the right to amend those *additional* plans, not *existing* plans:

> H. The City may offer additional healthcare plans at its own discretion and may modify, amend, or terminate any of such additional healthcare plans at its sole discretion. Any additional healthcare plans that the City may implement will not be subject to review by the RHBC and the City reserves full discretion to modify, amend or terminate any additional healthcare plans.

Indeed, the only authority the City had to modify even settlement-period Plans was with the advance approval of the dubious Retiree Health Benefits Commission (*Id*. at IV. G. 3(b):

> After July I, 2008, the City may make changes to the design of the Settlement Healthcare Plans only with the approval of a majority of the members of a commission, the Retiree Health Benefits Commission ("RHBC"), impaneled by the City to consider proposed plan design changes. The RHBC will consist of experts who will be objective and fair-minded as to the interests of both retirees and taxpayers. The RHBC will also consist of a representative of the City of Chicago and a representative of the Funds.

which was never convened after its January 11, 2013[28] Report. Accordingly, the City's actions in unilaterally reducing and terminating the healthcare benefits after the 2003 Agreement's expiration, without obtaining RHBC endorsement actually violates the Agreement itself.

VII. Deferring Class Certification for years, while deciding the terms of absent class members' rights, deprives class members of due process.

Although courts routinely delay deciding certification until after initial motions to dismiss, the Circuit Court's refusal to decide certification "until I have to", but proceeding ahead to adjudicate the terms of absent class members without notice to them violates their due process rights of notice and opportunity to protect their interests.

VIII. Oral Argument.

The Appellate court's disrespect for these retirees was shown by its repeated determination to just issue its decisions without the oral argument requested by all of the briefing parties. While Supreme Court Rule 352(a) authorizes the court, even where the parties have all requested oral argument, to dispose of the case without oral argument, but only "sparingly" where no substantial question is presented. This is no such case. These retirees have given their lives and careers to the City of Chicago, were promised and assured that one of their benefits of employment was lifetime healthcare coverage, paid by their Fund.

This case has never been a "no substantial question presented" case, and these retirees should be treated with the respect of an oral argument, even if the court chooses not to enforce the City's and Funds' promises to them.

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[28] https://www.cityofchicago.org/content/dam/city/depts/fin/supp_info/Benefits/RHBC/ReportToMayor/RHBC_Report_to_the_Mayor.pdf

It is an important aspect of retirees' belief that they have received due process, by the court's actually conducting a hearing; especially where the court adopts such a restricted view of the enforceable benefit[29]

IX. Equal Protection and Special Legislation.

After declaring that all the class members who are *participants* on a particular date have the same protected benefit (Opinion at ¶35), the Appellate court nonetheless ignored the denial of equal protection in the City's recognizing its obligation to pay at least 55% of healthcare costs for the 8/23/1989 retirees, but disavowing any obligation for the other 8/23/1989 participants, who had not retired by that date.

Also the Court totally ignored the unique vulnerability of those retirees who began working for the City before April 1, 1986, so none of their City employment qualified them for federal Medicare coverage.

As well, the court totally ignores the violation of the Constitution's prohibition of Special Legislation, in statutorily defining retiree health benefits "by reason of employment by [a named City] Chicago".

Conclusion

This court should grant leave to appeal. Petitioning Retirees' repeated efforts to have these substantial issues decided by this court should finally be realized. At least, these retirees, most of whom are uniquely vulnerable, because for most of them, their

[29] The Appellate Court's gratuitously expressed thought that both sides will be unhappy (presumably hoping to encourage the parties to explore settlement negotiations), ignores the Decision's actual impact-- although increasing the number of covered retirees, it so diminishes the benefit, reducing the City's aggregate obligation from $137 million, to a mere $10 million per year.

City work could not qualify them for federal Medicare coverage, deserve the respect of this court's long sought adjudication.

Dated: September 8, 2017

By: /s/Clinton A. Krislov
Attorney for Plaintiffs,
Participants-Appellants

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INDEX OF THE APPENDIX

Certification of Compliance

I certify that this brief conforms to the requirements of Rule 315 and 341, subject to our Motion for Leave to File Oversized Brief is Granted. The length of this brief, excluding the cover, Index of Appendix, Appendix, Proof of Service and Certificate of Compliance, is 29 pages.

s/Kenneth T. Goldstein

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2017 IL App (1st) 162356
No. 1-16-2356 and 1-16-2357 (cons.)

FIRST DIVISION
June 29, 2017
.

MICHAEL W. UNDERWOOD, JOSEPH M. VUICH, RAYMOND SCACCHITTI, ROBERT McNULTY, JOHN E. DORN, WILLIAM J. SELKE, JANIECE R. ARCHER, DENNIS MUSHOL, RICHARD AGUINAGA, JAMES SANDOW, CATHERINE A. SANDOW, MARIE JOHNSTON, and 338 other Named Plaintiffs listed, Plaintiffs-Appellants, v. CITY OF CHICAGO, a Municipal Corporation, Defendant, and TRUSTEES OF THE POLICEMEN'S ANNUITY AND BENEFIT FUND OF CHICAGO; TRUSTEES OF THE FIREMEN'S ANNUITY AND BENEFIT FUND OF CHICAGO; TRUSTEES OF THE MUNICIPAL EMPLOYEES' ANNUITY AND BENEFIT FUND OF CHICAGO; and TRUSTEES OF THE LABORERS & RETIREMENT BOARD EMPLOYEES' ANNUITY & BENEFIT FUND OF CHICAGO, et al., Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County. No. 13 CH 17450 Honorable Neil H. Cohen Judge Presiding

JUSTICE SIMON delivered the judgment of the court, with opinion.
Presiding Justice Connors and Justice Harris concurred in the judgment and opinion.

OPINION

¶ 1 This case is back before the court following another round of rulings by the circuit court concerning plaintiffs' rights to healthcare coverage. Plaintiffs are multiple categories of City of

Chicago retirees who have participated in the City's medical benefits plan and received some level of healthcare coverage from the City over the years. The City has undertaken to eliminate the healthcare benefits that many of the plaintiffs previously enjoyed; while the plaintiffs have fought to retain the benefits under a number of legal and equitable principles. The circuit court largely ruled in favor of the City and dismissed most of the plaintiffs' claims. We affirm in part, reverse in part, and remand the case for further proceedings.

¶ 2 BACKGROUND

¶ 3 The genesis of this case dates all the way back to the 1960s, but most of the relevant events occurred between 1983 and the present. The City has long been providing fixed-rate subsidized healthcare to its retirees through the City of Chicago Annuitant Medical Benefits Plan. In 1983, the City agreed to provide a subsidy for the Police and Firefighter funds for a healthcare benefit. Under that plan, the respective annuity and benefit funds (the Funds) would provide a subsidy to the City to cover a set amount of the participants' healthcare ($55 per month for non-Medicare-eligible retirees and $21 per month for Medicare-eligible retirees). Ill Rev. Stat. 1983, Ch. 108–1/2, par. 8–167.5 (eff. Jan.12, 1983). The contributions themselves were funded by a City tax. The municipal employees and the laborers and retirement board employees were brought under the same construct as the police and firefighters in 1985, just at a smaller average subsidy ($25 per month). Ill Rev. Stat. 1985, Ch. 108–1/2, par. 11–160.1 (eff. Aug.16, 1985).

¶ 4 In 1987, the City began its quest to stop subsidizing retiree healthcare. The City notified the Funds that it would stop providing healthcare benefits on the first day of 1988, and it filed suit in the circuit court of Cook County (*City of Chicago v. Korshak*, No. 87 CH 10134 (Cir. Ct. Cook Cty.)) seeking a declaration that it had no obligation to continue providing coverage. The

Funds counterclaimed seeking a declaration that the City was required to continue covering healthcare costs. A group of retirees intervened and were certified as the "Korshak subclass." The Korshak subclass is comprised of individuals that retired on or before December 31, 1987. The "Window subclass" was certified later and is comprised of employees that retired after December 31, 1987, but before August 23, 1989. The retirees counterclaimed seeking a declaration that they were entitled to lifetime healthcare coverage.

¶ 5 Before that case was adjudicated on the merits, the City and the Funds settled. The individual retirees were not parties to the settlement. The settlement, which was adopted legislatively as part of the Pension Code (40 ILCS 5/5-167.5 (as amended by P.A. 86–273, § 1, eff. Aug. 23, 1989)), amended the 1983 and 1985 fixed-rate subsidy statutes to set forth the City's new obligations. The amendment stated that for the period from 1988 through the end of 1997, the Funds would continue to pay a subsidy and the City was also responsible for 50% of the retirees' healthcare coverage costs. The parties agreed to "negotiate in good faith toward achieving a permanent resolution of this dispute" until the end of the settlement period and that "[f]ailing agreement, the parties shall be restored to the same legal status which existed as of October 19, 1987 ***." The amendment to the Pension Code explicitly stipulated that the obligations set forth therein "shall terminate on December 31, 1997." 40 ILCS 5/5–167.5 (d) (as amended by P.A. 86–273, § 1, eff. Aug. 23, 1989). The trial court in that *Korshak* case did not address the individual participants' claim for permanent coverage and imposed the settlement agreement on them.

¶ 6 When no permanent solution was reached by 1997, the City again sought to end its coverage obligations altogether. The case ended up before this court where we held that "under the express terms of the settlement agreement, the [retirees] are entitled to reargue the claims

originally asserted" in the 1987 case. *Ryan v. City of Chicago*, No. 98-3465, at p. 7 (Rule 23 Order June 15, 2000). Again before the claims were adjudicated on the merits, the parties settled. After settlement extensions and corresponding amendments to the Pension Code in 1997, 2002, and 2003 (P.A. 90-32, § 5, eff. June 27, 1997; P.A. 92-599, § 10, eff. June 28, 2002; P.A. 93-42, § 5, eff. July 1, 2003), all of which were substantially similar to the first settlement and all with the same limiting language and expirations, the City conveyed its intent to end healthcare benefits for retirees once and for all.

¶ 7 In the 2003 agreement, the parties agreed that, at the expiration of that agreement, "the City may offer additional healthcare plans at its own discretion and may modify, amend, or terminate any of such additional healthcare plans at its sole discretion." The agreement created the Retiree Health Care Benefits Commission ("RHBC") that would make recommendations concerning the state of retiree health care benefits, the costs of those benefits, and issues affecting the retirees' benefits to be offered after July 1, 2013. The 2003 agreement was set to expire in 2013. Before the agreement expired, the City notified retirees that, on the recommendation of the RHBC, once the agreement expired in 2013, the City was going to begin to reduce healthcare benefits until January 2017, at which time the City would end the plan in its entirety. Certain classes of employees, like those in the Korshak and Window subclasses, would retain healthcare benefits under the City's new plan but others, particularly those hired after 1989, would not.

¶ 8 Plaintiffs attempted to revive the 1987 lawsuit in the circuit court of Cook County, but the court ordered them to interpose their claims in a newly-filed complaint (this case). Once the new case was filed, the City removed it to federal court. After the federal district court dismissed the retirees' claims (*Underwood v. City of Chicago*, No. 13 C 5687, 2013 WL 6578777, at *17

(N.D. Ill. Dec. 13, 2013)), the United States Court of Appeals for the Seventh Circuit affirmed the dismissal of the federal claims, but remanded the matter to state court for a resolution of the "novel issues of state law." *Underwood v. City of Chicago*, 779 F.3d 461, 465 (7th Cir. 2015).

¶ 9 Back in state court, the City filed a motion to dismiss. The plaintiffs' third amended complaint has claims for: improper diminution of pension benefits under the Illinois Constitution (count I), breach of contract (count II), estoppel (count III), impairment of contract (count V), and equal protection and special legislation challenges to the City's plan of action (counts VI and VII).[1] The parties and the courts have discussed the retirees as broken down into four subclasses: (1) the Korshak subclass, made up of people who retired before December 31, 1987; (2) the Window subclass, made up of people who retired between January 1, 1988 and August 23, 1989; (3) subclass three, made up of people who retired on or after August 23, 1989; and (4) subclass four, made up of people who were hired after August 23, 1989.

¶ 10 While the motion to dismiss was still pending and before the trial court entered a judgment on the merits of plaintiffs' claims, plaintiffs filed a motion for a preliminary injunction. The trial court denied the sought-after injunctive relief. Plaintiffs appealed that ruling and, after examining plaintiffs' claims insofar as they related to preliminary injunctive relief, we affirmed. *Underwood v. City of Chicago*, 2016 IL App (1st) 153613, ¶ 32 (appeal denied, No. 121498, 2017 WL 603503 (Ill. Jan. 25, 2017)).

¶ 11 In resolving the motions to dismiss, the trial court held that plaintiffs could not state a claim on the 1987, 1997, or 2003 amendments under the Illinois Constitution's pension protection clause because the settlements on which the claims are based provided only time-limited benefits. The trial court did, however, hold that the members of the Korshak subclass, the

[1] Count IV was a claim for a due process violation under federal law. It was dismissed in the federal case and did not call for an answer from the defendants in this case.

Window subclass, and subclass three could state a claim based on the 1983 and 1985 amendments that did not contain the same limiting language that the subsequent amendments did. The trial court dismissed the remaining claims, denied the plaintiffs' motion for class certification, and made a finding that there was no just reason to delay appeal of its judgment on the claims it dismissed (See Ill. S. Ct. R. 304(a)). The retirees later filed a renewed motion for a preliminary injunction, which the trial court also denied.

¶ 12 The case is now before the court on an interlocutory appeal principally concerning the propriety of the trial court's ruling on motions to dismiss filed by the City and the Funds. The retirees' renewed request for injunctive relief is also part of their appeal.

¶ 13 ANALYSIS

¶ 14 The trial court dismissed the retirees' claims under section 2-615 of the Illinois Code of Civil Procedure. A section 2-615 motion to dismiss attacks the sufficiency of a complaint and raises the question of whether a complaint states a cause of action upon which relief can be granted. 735 ILCS 5/2-615 (West 2012); *Fox v. Seiden*, 382 Ill. App. 3d 288, 294 (2008). All well-pleaded facts must be taken as true, and any inferences should be drawn in favor of the nonmovant. *Jones v. Brown-Marino*, 2017 IL App (1st) 152852, ¶ 19. A section 2-615 motion to dismiss should not be granted unless no set of facts could be proved that would entitle the plaintiff to relief. *Id*. We review the dismissal of a plaintiff's claims *de novo. Sandholm v. Kuecker*, 2012 IL 111443, ¶ 55.

¶ 15 I. Claims Under the Pension Protection Clause (Count I)

¶ 16 The pension protection clause of the Illinois Constitution has been the focus of considerable public attention recently. As the State, cities, and other public employers attempt to rein in their pension obligations and workers and retirees attempt to secure all the benefits they

have been promised, many of the disputes have made their way through our courts. The decisive legal mechanism in many of these cases has been the pension protection clause. See, *e.g.*, *In re Pension Reform Litigation*, 2015 IL 118585, ¶ 89.

¶ 17 The pension protection clause of the Illinois Constitution states that "[m]embership 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." Ill. Const. 1970, art. XIII, § 5. The pension protection clause is intended to eliminate the uncertainty that surrounded public pension benefits (*People ex rel., Sklodowski v. State*, 182 Ill. 2d 220, 228 (1998)) and to provide public employees with a basic protection against the complete abolition of their rights or the reduction of their benefits after they have already embarked upon employment (*Miller v. Retirement Board of Policemen's Annuity*, 329 Ill. App. 3d 589, 597 (2001)).

¶ 18 A. Claims Based on the 1997, 2002, and 2003 Settlements and Amendments

¶ 19 The retirees argue that they are entitled to "lifetime healthcare coverage" "for each annuitant class, as it best was during their participation." For that to be the case, we would have to find that the Illinois Constitution's pension protection clause (Ill. Const. 1970, art. XIII, § 5) protected the benefit levels in the 1997, 2002, and 2003 amendments for life for any member of any subclass that participated in the plan while the particular amendment was in effect. The retirees' argument for permanent coverage on these terms has a significant emphasis on the Illinois Constitution's pension protection clause (Ill. Const. 1970, art. XIII, § 5) and the Illinois Supreme Court's decision in *Kanerva v. Weems*, 2014 IL 115811, so we begin there. However, we find that neither the Illinois Constitution nor the *Kanerva* decision extend the settlements' benefit levels to retirees beyond the temporal scope of those agreements.

¶ 20 The Illinois Supreme Court has interpreted the pension protection clause to protect not only the retirement annuity itself from diminution, but instead has held that all of the benefits flowing from one's participation in a public pension system are constitutionally protected. *Kanerva v. Weems*, 2014 IL 115811, ¶ 40. Including, specifically, health insurance subsidies. *Id.* at ¶ 41, ¶ 57.

¶ 21 The retirees here maintain that their situation is the same as the retirees in *Kanerva*. They are part of a qualifying public pension system. Their healthcare subsidies have come from their participation in that system. Their public employer obligated itself to contribute to the cost of their healthcare. And, therefore, the City's plan to cease making healthcare contributions in accordance with the 1997, 2002, and 2003 amendments is unconstitutional.

¶ 22 However, the plaintiffs here are not in the same situation as the retirees in *Kanerva*. In that case, the healthcare subsidies were an open-ended obligation of the State, bestowed on the employees without condition. The same is not true here. In this case, the benefits that the retirees are trying to protect were conditional benefits that have since expired.

¶ 23 In 1987, the City sought to stop paying for retirees' healthcare coverage and initiated legal action in order to get a declaration of the parties' rights and obligations. The result was that a settlement was reached in 1989 and extended in 1997 and 2003 to offer subsidies and coverage, but each settlement contained an expiration date. The last amendment obligated the City until June 30, 2013 only and expressly provided that the City's obligations under that settlement terminated at that point. That was what the parties agreed upon and the General Assembly adopted.

¶ 24 As we explained when we affirmed the trial court's decision to deny the injunctive relief sought by the retirees, the settlements and attendant amendments did not create lifetime benefits

because the benefits came with an expiration date. *Underwood v. City of Chicago*, 2016 IL App (1st) 153613, ¶ 23, ¶ 27. The expiration date was embedded in the benefit itself, and the benefit does not endure beyond the expiration date by application of the pension protection clause. Employees that began to participate in the retirement system in 1989 forward, like those already enrolled, were vested with the rights provided in the amendment in effect when they became employed and subsequent amendments enacted during their employment, but they never had any contractual, statutory, or constitutional commitment that benefits at those levels would become permanent or extend beyond the contract's own term. Therefore, no member of any subclass can state a cause of action under count I insofar as the claim is based on the 1989, 1997, or 2003 settlements.

¶ 25 The pension protection clause enables employees to "lock in" pension rights that exist when they become employed or those that spring up thereafter during their employment. *Bosco v. Chicago Transit Authority*, 164 F. Supp. 2d 1040, 1056 (N.D. Ill. 2001). All that the employees here could lock in during the amendment periods was the City's obligation to provide healthcare benefits as expressly provided for and conditioned by the statute. The scope of the pension protection clause's application is "governed by the actual terms of the contract or pension." *Kerner v. State Employees' Retirement System*, 72 Ill. 2d 507, 514 (1978) (citing 1970 Const., art. XIII, sec. 5, Constitutional Commentary, at 302 (Smith-Hurd 1971)). The time limitation here was a condition of the employment relationship to which those employees consented. See *id*. There was never any contractual or statutory commitment by the City to provide the benefit levels in the amendments beyond the life of the amendments themselves. And without a contractual or statutory commitment to create a benefit, there is nothing that the pension protection clause can protect.

¶ 26 While the pension protection clause guarantees the vested rights of a public employee as provided in the contract that defines a participant's retirement system membership, it does not change the terms of that contract or the essential nature of the rights it confers. *Matthews v. Chicago Transit Authority*, 2016 IL 117638, ¶ 59. The retirees' argument is that they are entitled to benefits on the best terms that were ever provided to them, without regard to the limitations that encumbered those benefits. Such an interpretation would be an unwarranted extension of the pension protection clause that would enable the clause to create and define benefits rather than protect existing ones. A right cannot be protected if it does not exist. Here, the retirees have no enduring right to the benefit levels in the 1989, 1997, and 2003 amendments that the pension protection clause could possibly protect.

¶ 27 There is nothing in the Illinois Constitution or in any statute or precedent that prohibits the legislature from attaching conditions to the receipt of a statutory benefit, such as the limited time period here. To the contrary, where the legislature grants a right, it is free to define the parameters and application of that right. *Kaufman, Litwin & Feinstein v. Edgar*, 301 Ill. App. 3d 826, 831 (1998). There is nothing to prohibit the legislature from granting a privilege for a limited period of time or from incorporating an expiration date into an amendment. *In re Petition for Detachment of Land from Morrison Community Hospital District*, 318 Ill. App. 3d 922, 930 (2000). This is especially true where the statute merely codified the parties' own agreement. The pension protection clause does not affect the contours of the rights themselves—that is for the General Assembly to delineate when it grants benefits in the first instance.

¶ 28 After *Kanerva* was decided, our Supreme Court also explained that the pension protection clause does not present "an obstacle to a contractual provision that permits subsequent modification of public retirement benefits." *Matthews*, 2016 IL 117638, ¶ 66. Thus, importantly,

"where a public employee becomes a member of a retirement system under a statute that includes a provision which may operate to deny him benefits in the future, that provision does not become an unconstitutional impairment of his retirement benefits because he agreed to it as a condition of his membership in the system." *Id*. at ¶ 61. That means that where a benefit is conditional when conferred, the pension protection clause does not operate to remove the condition. And parties are free to contract for benefits, including temporary ones. See *id*. at ¶ 66.

¶ 29 All of the foregoing analysis is a long way of saying that no retiree can state a claim for healthcare coverage as it was provided under the time-limited amendments under count I of the third amended complaint. When the amendments expired, the benefits granted therein expired. The pension protection clause does not give the retirees lifetime coverage in the manner that the coverage existed under the amendments, and the expiration of those benefits is not a diminution or impairment of any protected benefit flowing from participation in a public pension system.

¶ 30 B. Do the Retirees Have a Claim for Any Enduring Benefit and How Is the Benefit Defined?

¶ 31 Our holding that the 1989, 1997, and 2003 amendments do not create lifetime coverage under the pension protection clause is not the end of the analysis. Before those amendments were enacted, the parties agreed upon and the General Assembly adopted healthcare benefit plans in 1983 and 1985 that contained no such limitations. The benefits conferred under those amendments are unconditional healthcare benefits commensurate with the benefits provided by the statute covering the retirees in *Kanerva*—and they cannot be diminished.

¶ 32 Although the issue is essentially moot for the Korshak and Window subclasses, the trial court held that the members of subclass three could state a claim under count I for benefits based on the 1983 and 1985 amendments under the pension protection clause. The trial court, however, held that the members of subclass four could not state a claim under count I for benefits based on

the 1983 and 1985 amendments because they began participating in the retirement system during the operative period of the 1989 settlement and, thus, were subject to its expiration and left with nothing.

¶ 33 The idea contemplated by the parties upon settling the 1987 Korshak litigation was that the parties would continue to negotiate during the settlement period and, if they could not resolve their issues by the end of it, the parties would be restored to their pre-settlement positions and litigation could (and assuredly would) resume. The result is that when the settlement expired, the parties' rights and obligations returned to the status existing when the 1987 litigation began. Under the 1983 and 1985 amendments, employees were given an open-ended, unconditioned fixed-rate subsidy for their healthcare coverage, and those benefits, like the ones offered in *Kanerva*, are protected. When the 1987 litigation was settled (put on hold), no one ever anticipated, and there is no legal basis to conclude, that once the settlement expired, the City's obligations would be terminated as a matter of law.

¶ 34 In the 1989 settlement, the parties agreed to "negotiate in good faith toward achieving a permanent resolution of this dispute" until the end of the settlement period and that "[f]ailing agreement, the parties shall be restored to the same legal status which existed as of October 19, 1987 ***." When no permanent solution was reached by 1997 and the City tried to terminate the plan unilaterally again, the case ended up before this court where we held that "under the express terms of the settlement agreement, the [retirees] are entitled to reargue the claims originally asserted" in the 1987 case. *Ryan v. City of Chicago*, No. 98-3465, at p. 7 (Rule 23 Order June 15, 2000).

¶ 35 It was not until the 2003 settlement was executed that the parties agreed that the City would have the unilateral authority to end the program entirely, meaning that all persons that

participated in the retirement system before that agreement was executed still maintained a vested right to the unconditional 1983 and 1985 amendments. Therefore, the retirees in subclass four that began to participate in the retirement system before the 2003 settlement was executed have a claim under count I based on the 1983 and 1985 amendments under the pension protection clause.

¶ 36 For the first time in the 2003 agreement, the parties agreed that, at the expiration of that agreement, "the City may offer additional healthcare plans at its own discretion and may modify, amend, or terminate any of such additional healthcare plans at its sole discretion." So for the first time in 2003, the City obtained the requisite legal authority and put any new entrant to the retirement system on notice that, if and when the time-limited 2003 plan was terminated, there would be no further coverage at all. And because of the pension protection clause, such a promulgation can only be applied prospectively to employees whose participation in the system begins thereafter.

¶ 37 Even those retirees that began participating in the system after 1989 still had vested rights in the 1983 or 1985 amendments. The post-1989 participants did not start under a benefit plan that said *all* healthcare benefits would expire at the end of the settlement period. They started on a time-limited plan which stated that they would be reinstated to the pre-settlement status quo at the time the settlement expired. The settlements never expressed that future annuitants were to be treated differently or precluded from also reverting to the pre-settlement status quo. When the 2003 settlement expired in 2013, the rights of employees whose participation started before the 2003 settlement was executed merely reverted to the status existing when the *Korshak* case was filed in 1987. So, being back at that point, the City is obligated to those retirees under the 1983 and 1985 amendments.

¶ 38 When the case was before us for a review of the denial of a motion for a preliminary injunction, our main inquiry was into whether the 2016 benefits were a sufficient substitute for the 1983 and 1985 levels. *Underwood*, 2016 IL App (1st) 153613, ¶ 26. Our review at that point was also whether the trial court abused its discretion in denying the preliminary injunctive relief. *Id*. The fact of the matter is that the 1983 and 1985 amendments offered healthcare benefits with no strings attached. The settlements acted as a substitute for those benefits on an interim basis and did not diminish them, but in fact, enhanced them. See *id*. at ¶ 25-26. However, when the settlements ceased to operate as a matter of law, the retirees still had the 1983 and 1985 benefits to fall back on—benefits that cannot legally be diminished.[2]

¶ 39 The next question then is what is the "benefit" that is actually protected? The United State Court of Appeals for the Seventh Circuit alluded to this question in its opinion remanding the case to state court.

> "There is, moreover, a potentially important question that the parties have not addressed: What 'benefits' does the Pensions Clause protect? Plaintiffs assume that it covers in-kind benefits such as health care, no matter the cost to the employer. Yet pensions promise a particular amount of money (for defined-benefit plans) or the balance in a particular fund (for defined-contribution plans), not a particular quantum of buying power. If the cost of automobiles, food, or health care rises, the Pensions Clause does not require the state to supplement pensions beyond the promised level. A parallel approach for health care would imply that the Pensions Clause locks in the amount of the promised subsidy but

[2] In dicta in our opinion affirming the denial of preliminary injunctive relief, we imprecisely stated that subclass four had "no ascertainable claims to lifetime healthcare benefits." *Underwood*, 2016 IL App (1st) 153613, ¶ 23. However, as alluded to in the preceding sentence of that opinion and encapsulated the opinion as a whole, our review concerned the interim settlement agreements, which we reaffirm today did not create any right to lifetime coverage.

> does not guarantee a particular level of medical care. *Kanerva* implies as much by saying that the state's *contributions* to health-insurance premiums are the protected benefit." (Emphasis in original). *Underwood v. City of Chicago*, 779 F.3d 461, 463 (7th Cir. 2015).

We hold that the pension protection clause protects the latter—the fixed-rate subsidy itself. When the benefit at issue is a defined subsidy, the clause protects the pensioner's right to that contribution at that specific level. The recipients get what the statute or contract that grants the right expressly says they get. *Matthews*, 2016 IL 117638, ¶ 59, ¶ 66.

¶ 40 Under the 1983 amendment, the City is obligated to pay towards its retirees' healthcare $55 per month for non-Medicare-eligible retirees and $21 per month for Medicare-eligible retirees). Ill Rev. Stat. 1983, Ch. 108–1/2, par. 8–167.5 (eff. Jan.12, 1983). Under the 1985 amendment, the City is obligated to pay $25 per month for its municipal employees and laborers and retirement board employees. Ill Rev. Stat. 1985, Ch. 108–1/2, par. 11–160.1 (eff. Aug.16, 1985). The retirees contend that the pension protection clause should be considered to protect their abstract right to "healthcare coverage." But that is not what the Illinois Constitution provides. The pension protection clause protects a specific tangible benefit that cannot be diminished or impaired. See *Kanerva*, 2014 IL 115811, ¶ 38, ¶ 57. It is the subsidy itself that is protected. Under count I, the pension protection clause protects the benefits in the 1983 and 1985 amendments for any retiree that began participating in the retirement system before the 2003 settlement was executed. The 1983 and 1985 amendments represent the highest level of benefits to which the retirees ever had an enduring right. For the reasons set forth in section A above, the pension protection clause entitles the retirees to nothing more.

¶ 41 C. Statute of Limitations and Jurisdiction

¶ 42 In the trial court, the City maintained that all of the retirees' claims under the 1983 and 1985 amendments are barred by the statute of limitations. At least one of the retirement funds joined in this argument. This argument applies to our previously-expressed holding as it challenges whether any of the retirees, but particularly subclasses three and four, can state a claim based on the 1983 and 1985 amendments after the passage of so much time. The City and the Funds contend that the retirees' claims under the 1983 and 1985 amendments are contract-based, and even with the application of the pension protection clause, are subject to and barred by the 10-year statute of limitations for contract claims (735 ILCS 5/13-206 (West 2012)). The trial court ruled that the statute of limitations issue was moot as to the Korshak and Window subclasses because the parties had agreed upon some form of coverage that the City would provide for those members. The trial court held that as for subclass three, there was a question of fact about when the members discovered their injury under the discovery rule, so it denied the City's motion to dismiss in that regard. Then the court held that as for subclass four, they had no claim for relief in any event, so it was unnecessary to address the applicability of the statute of limitations for those members. We hold that none of the claims made under count I of the third amended complaint are time-barred.

¶ 43 The parties agreed in the 1989 settlement that "failing agreement" on a "permanent resolution of this dispute" they would be restored to their same legal status as it existed on October 19, 1987. The parties never reached a permanent solution. Then, when the City tried to unilaterally end the program again, we held that the retirees are "entitled to reargue the claims originally asserted" in the 1987 case. *Ryan v. City of Chicago*, No. 98-3465, at p. 7 (Rule 23 Order June 15, 2000). The 2003 settlement agreement again put off a judicial resolution of the

suit, tolling the limitations period by agreement and once again expressly reserving the retirees' rights to pursue their claims for permanent coverage. The parties continued to settle for periods up until 2013 (and really until 2017) when, still having not arrived at a permanent solution, the City terminated its healthcare plan. The limitations period never expired for the retirees' claims.

¶ 44 The trial court applied the limits attached to the post-1987 settlements against the retirees, but did not give the retirees the benefit of the favorable terms of those same agreements—such as that the retirees always reserved their rights and that the parties would return to their pre-litigation positions when the settlements expired. It is also important to note that the settlements were originally between the Funds and the City, but they were imposed on the retirees because the agreements were always understood to simply delay a judicial resolution on the merits unless the parties could agree on an enduring solution.

¶ 45 A cause of action accrues, and the limitations period begins to run, when the party seeking relief knows or reasonably should know of its injury and that it was wrongfully caused. *Feltmeier v. Feltmeier*, 207 Ill. 2d 263, 285 (2003). Because there was never a permanent solution and because the City did not end its healthcare coverage until January 1, 2017, the retirees' claims are not time-barred. Every time the City attempted to terminate the healthcare plan, the retirees promptly instituted legal action and did so successfully until the City relented and entered into a new settlement. In addition, and while the rights invoked by the retirees were initially granted by contractual settlements, under count I of their third amended complaint, the retirees' claim for relief is a facial challenge to the constitutionality of the City's action based on the pension protection clause. The benefits are constitutionally protected from diminishment. Any inaction on the part of the retirees was a result of the City's inducement through settlements and their justifiable reliance that when the settlements expired they would be entitled to revive

their claims for coverage.

¶ 46 The Funds argue that we lack jurisdiction to consider the applicability of the 1983 and 1985 amendments to the Korshak, Window, and subclass three subclasses. This argument is based on the fact that the trial court held that those subclasses *could* state a claim based on the 1983 and 1985 amendments and, therefore, denied that portion of the motions to dismiss. However, the claims under count I of the complaint that relate to subclass four were dismissed in their entirety, and we have jurisdiction to review the dismissal under Illinois Supreme Court Rule 304(a). The Korshak and Window subclass members' claims are essentially moot as the parties have settled. So, subclass three remains, but our application of the law to the dispute between the City and subclass four necessarily touches on the rights of subclass three.

¶ 47 II. Contract and Estoppel Claims (Counts II and III)

¶ 48 Aside from the constitutional claims based on the pension protection clause, the retirees argue that they are entitled to lifetime coverage based on a contract or estoppel theory. Count II of their third amended complaint is for common law breach of contract and count III is for common law estoppel. As we explained above, any person that entered the retirement system before the 2003 settlement went into effect does have lifetime coverage under the pension protection clause. Therefore, the only important inquiry remaining is whether the retirees are entitled to the benefit *levels* they claim they are entitled to as a result of any of the remaining theories set forth in the operative complaint.

¶ 49 The trial court dismissed the retirees' contract claim on the basis that they failed to attach any contract to their complaint. The trial court also indicated that the City of Chicago Annuitant Medical Benefits Plan Handbook was insufficient to support a claim for breach of contract because the handbook contains no promise or offer for lifetime healthcare coverage. Moreover,

and as we noted in our opinion affirming the denial of the retirees' motion for a preliminary injunction (*Underwood*, 2016 IL App (1st) 153613, ¶ 26), the handbook expressly stated that coverage would terminate "the date the Plan is terminated." There are other references to coverage being terminated in the annuitant handbook, and the retirees cannot point to anything in the handbook or in any other document that conveys an offer or promise that would obligate the City to provide lifetime coverage much less to provide coverage at any particular benefit level.

¶ 50 On appeal, the retirees focus their argument concerning their contract claim on the statute of frauds. Seemingly backing away from previous positions that there was an oral agreement for this lifetime contract, the retirees argue that the handbook and some other written communications are sufficient. But again, none of these communications contractually obligate the City to provide lifetime benefits. Indeed, since 1987, the City has had an eye towards ending the plan and has been very careful about expressing the limitations on the coverage it has provided. There is no documentary evidence to support the retirees' claim for healthcare coverage for life on a contractual basis and its reliance on oral assurances is misplaced because lifetime contracts must be in writing (*McInerney v. Charter Golf, Inc.*, 176 Ill. 2d 482, 490-91 (1997)).

¶ 51 As for the retirees' estoppel claim, the allegations in the operative complaint itself are wholly insufficient. But the retirees' argument is that the City is estopped from changing or terminating coverage because the City issued benefit handbooks and held pre-retirement seminars. The retirees contend that the City is estopped from changing a retiree's coverage to a level below the highest level during a retiree's participation in the retirement system. In order to apply equitable estoppel against a municipality, a plaintiff must plead specific facts that show: (1) an affirmative act by either the municipality itself or an official with express authority to bind

the municipality; and (2) reasonable reliance upon that act by the plaintiff that induces the plaintiff to detrimentally change its position. *Vaughn v. City of Carbondale,* 2016 IL 119181, ¶ 48. The retirees have failed to plead or even support an argument with facts to support such a claim.

¶ 52 Moreover, since we have already held that the retirees are entitled to coverage under the amendments that remained intact, the only issue to address is the level of benefits that the retirees claim they are entitled to because of estoppel. But the retirees point to nothing at all to show they were promised a particular benefit level, especially for life. And any reliance on the 1989, 1997, and 2003 settlements would not be reasonable because those agreements expired by their own terms and could not support a claim for lifetime coverage at those levels. The retirees have also pivoted to an apparent authority theory, suggesting that because presenters at seminars told them they would have lifetime coverage, they have a claim for estoppel. But the retirees fail to allege how the presenters might have been authorized to bind the City to a commitment to lifetime coverage (especially at any particular benefit level), and apparent authority is not enough to bind a municipality, actual authority is required (*Patrick Engineering, Inc. v. City of Naperville***,** 2012 IL 113148, ¶ 40).

¶ 53 III. Remaining Constitutional Claims (Counts V, VI, VII)

¶ 54 The retirees interposed a claim in their third amended complaint that the City's plan impermissibly impairs a contract and they have also lodged equal protection and special legislation challenges.

¶ 55 The contracts clause provides that the government cannot pass laws that impair the obligation of contracts. Ill. Const., art. I, § 16. To determine whether a law impermissibly impairs a contract, we examine: (1) whether there is a contractual relationship; (2) whether the

law at issue impairs that relationship; (3) whether the impairment is substantial; and (4) whether the law serves an important public purpose. *Nissan North America, Inc. v. Motor Vehicle Review Board*, 2014 IL App (1st) 123795, ¶ 37. The retirees do not develop any argument about the dismissal of this claim in their appeal, so the claim is forfeited. Ill. S. Ct. R. 341(h)(7)(eff. Jan. 1, 2016) (points not argued on appeal are forfeited). The contracts clause does not fit the case. For one example, the contract between the parties, the settlements at issue, expired by their own terms, not any government action. Anyhow, as pled, the claim fails because the allegations, if proved, would be insufficient to support a claim for any violation of the contracts clause. The retirees cannot state a claim on count V of the third amended complaint.

¶ 56 As for the retirees' equal protection and special legislation challenges, those types of challenges are judged by the same standard. *General Motors Corp. v. State of Illinois Motor Vehicle Review Board*, 224 Ill. 2d 1, 30-31 (2007). Both focus on whether a law treats similarly situated individuals differently. *Id*. The constitutional guarantee of equal protection requires that the government treat similarly situated individuals in a similar manner. *American Federation of State, City, Municipal Employees (AFSCME), Council 31 v. State, Department of Central Management Services*, 2015 IL App (1st) 133454, ¶ 30. Similarly, the Illinois Constitution provides that the General Assembly cannot pass special laws when a general law is or can be made applicable. *Id*. at ¶ 31; Ill. Const. 1970, art. IV, § 13. This means that the General Assembly is prohibited from passing laws that confer a special benefit on a select group to the exclusion of others that are similarly situated. *Best v. Taylor Machine Works*, 179 Ill. 2d 367, 391 (1997).

¶ 57 The retirees argue that the City's plan violates the constitution because it discriminates among retirees based on when they retire. That claim, however, has nothing to do with the

benefit levels themselves and, because of our holding on the pension protection clause issue, the level of benefits is the retirees' only outstanding grievance. Our holding on other issues results in none of the retirees being treated differently based on the date of retirement—they are all entitled to the same fixed-rate subsidy based on when they *entered* the retirement system. Therefore, the retirees cannot state a claim on count VI or VII of the third amended complaint. As we have noted, the City has agreed separately to fund some portion of the Korshak and Window subclass members' healthcare coverage. This opinion merely speaks to what the City is constitutionally obligated to provide. It, of course, may provide other benefits by agreement, as it did for a number of years under the 1989, 1997, and 2003 time-limited settlements.

¶ 58 IV. Injunctive Relief

¶ 59 The retirees include arguments about injunctive relief in their brief on appeal. They were attempting to preserve the status quo at the end of 2016 so that the City's plan to terminate coverage entirely could not go into effect. We addressed the retirees' requests for injunctive relief on motion[3] and, because the end of 2016 has already arrived, the retirees' request for injunctive relief is moot. *Moseley v. Goldstone*, 89 Ill. App. 3d 360, 365-66 (1980).

¶ 60 V. Conclusion

¶ 61 To summarize our holding, the settlements that held the 1987 *Korshak* litigation in abeyance from 1989 until 2013 have no enduring effect. The pension protection clause does not protect any term of those settlements because the settlements expired by their own terms as the parties agreed upon. However, the pension protection clause locked in the 1983 and 1985 fixed-rate subsidies for any employee that began participating in the system by the time the 2003 settlement was executed. Up until that point, all annuitants retained the rights that an annuitant had before the 1987 litigation began. Among those rights was the right to a fixed-rate subsidy

[3] On December 7, 2016, we denied the retirees' motion for an injunction.

that, under the Illinois Constitution, cannot be diminished or impaired for those employees already in the system.

¶ 62 Therefore, we agree with the trial court that the members of subclass three can state a claim on count I based on the 1983 and 1985 amendments, but we hold that the members of subclass four that began participating in the retirement system before the 2003 settlement became operative also have a claim under count I.

¶ 63 None of the retirees have a right to lifetime coverage based on contract, estoppel, or any constitutional theory other than the pension protection clause. Similarly, none of those other theories entitle the retirees to a benefit level greater than that provided by the 1983 and 1985 amendments.

¶ 64 On remand, the court will have to find a workable solution to address how the subsidy will be funded as the court already indicated it would do for subclass three under the 1983 and 1985 amendments. Now, the court will need to include any participant in the system before the 2003 settlement was executed into that matrix in accordance with this opinion.

¶ 65 The result here will predictably leave both sides unhappy. The retirees have intimated that the 1983 and 1985 fixed-rate subsidies are insufficient because the amount of the benefit covers little of their ever-rising healthcare premiums. On the other hand, the City has been boastful of its heretofore success in eliminating the retiree healthcare plan altogether, and its interest in the badly-needed financial savings from eliminating the program is legitimate. However, after 30 years of litigation and millions of dollars spent, the result compelled by the application of our constitution, statutes, and precedent is that the retirees are entitled to lifetime healthcare coverage, albeit at modest levels—a result that should, but unlikely will, put an end to hostilities.

¶ 66 Accordingly, we affirm all but the trial court's ruling that the members of subclass four have no claim whatsoever under count I. Instead, we hold that any retiree that began participating in the system before the 2003 settlement was executed has a claim for relief based on the 1983 and 1985 amendments by operation of the pension protection clause.

¶ 67 Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.