

THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - CHANCERY DIVISION

CITY OF CHICAGO a Municipal Corporation,)
Plaintiff-Counterdefendant,))
vs.)No. 01 CH 4962
MARSHALL KORSHAK, et al,)
Defendant-Counterplaintiff,))
-and-)
MARTIN RYAN, et al.,)
Intervening Plaintiffs,))
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 392 OTHER NAMED PLAINTIFFS LISTED)
in EXHIBIT 1,)
Plaintiffs,))
-v-)2013 CH 17450
CITY OF CHICAGO, a Municipal Corporation,)Previous Nos.:
Defendant,))
-and-)No. 01 CH 4962
)No. 87 CH 10134
)
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.)

Record of proceedings had at the hearing of the above-entitled cause, before the Honorable NEIL H. COHEN, one of the Judges of said Court, on April 18, 2019, in Room 2308, Richard J. Daley Center, Chicago, Illinois, commencing at 2:00 p.m.

A P P E A R A N C E S

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BY: Mr. David R. Kugler
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For the Trustees of the Policemen's
Annuity and Benefit Fund of Chicago;

1 THE COURT: Please be seated. Thanks
2 for coming.

3 This is Mr. Underwood, et al., versus
4 the City of Chicago in 13 CH 17450.

5 We're here today -- tell me if I'm
6 wrong. My agenda is oral argument on the motion to
7 disqualify, the motion for class cert, and the motion
8 to dismiss the sixth amended complaint.

9 Are there other things to deal with
10 too?

11 MR. KRISLOV: There would be the
12 subsidies, the reconciliations of the uncashed checks
13 for an update on where we are, because we haven't
14 heard anything from them since the last time we were
15 here, and I presume they'll be able to -- they said
16 they'd be able to report --

17 THE COURT: I don't know if we're
18 going to do that today. I want to really relegate my
19 time to argue this on the three matters that are teed
20 up right now.

21 I would like you to -- Jen, I'd like
22 you to submit a report, and I will give you a short
23 date for us to challenge and question her about all
24 those things, but let's keep our eye on the ball

A P P E A R A N C E S (Continued)

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By: Mr. Patrick E. Deady
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For the Intervenor.

1 today just with regard to this.

2 Anything else you want me to be
3 warming up in the bullpen, so to speak, for the
4 future?

5 What about your petition?

6 MR. KRISLOV: The scheduling on our --

7 THE COURT: You can sit. It's okay.

8 MR. KRISLOV: -- attorneys' fees
9 dealing with the audit and reconciliation.

10 We had stopped things in mid argument,
11 and so what I would suggest is that we schedule a new
12 date for a resumed argument on the fees.

13 THE COURT: Well, we were having a
14 mediation on it. It wasn't an argument.

15 MR. KRISLOV: We were in the midst of
16 argument when you invited to us mediate, and the
17 mediation was not successful.

18 THE COURT: Yeah, so now my view is --
19 and I'll listen to yours, but not today -- is that we
20 need to have an evidentiary hearing on it and go
21 forward with it as soon as possible.

22 But it's got to be -- I've got to make
23 findings of fact, and for that, I've got to have an
24 evidentiary hearing. So you tell me.

1 MR. KRISLOV: The reason we don't need
2 to do -- we were going along without needing that,
3 because everything was in a category of one through
4 seven, I believe, as to whether it would be
5 compensable under that concept or not. It wasn't
6 like we didn't the spend time.

7 They had originally asked for a
8 delayed schedule so they could take discovery, and
9 then they didn't take any discovery, and still went
10 two times extending it or just not responding until
11 we finally came to argument. So our view is that we
12 just finish the arguments, and we could then put it
13 in your hands.

14 THE COURT: Well, the last I heard was
15 that the City had questions and wanted to challenge
16 the actual time that you put down, not only as to the
17 categories, but the actual time.

18 If they have no challenge to that, I
19 certainly don't, and that's fine.

20 But if they do, I need --

21 MR. KRISLOV: That bus has left --
22 that horse has been gone from the barn for a long
23 time.

24 If they were going to challenge on

1 time to -- give me one second, please.

2 (Brief pause.)

3 THE COURT: Are the parties able -- I
4 know we've been through this a number of times. I
5 intend on having my written opinions in your hands by
6 May 3rd.

7 Are you able to return thereafter, the
8 next week, anytime? Clint, you and Ken first.

9 I do have a trial set for the 13th
10 through the 17th that's going to go, but if you can
11 return between May 6th and May 10th, I'll find
12 time for you.

13 MR. KRISLOV: The 6th at 10:00 is
14 not available, but that probably won't take long if
15 we did it at 11:00.

16 THE COURT: No, I have a major case at
17 11:00. I'm available in the afternoon on the 6th.

18 MR. KRISLOV: The problem is, I have a
19 class that I teach at 4:00 o'clock that day, so --

20 THE COURT: Okay. I have a mediation
21 scheduled on the 7th at 11:00, and I'm able -- how
22 about 1:00 o'clock on the 8th?

23 MR. KRISLOV: That will be fine,
24 Judge.

1 that basis, their time would have been before that
2 hearing.

3 THE COURT: All right. Well, we'll --
4 we're going to be setting another date for this, and
5 you can inform me of your positions, and we can
6 figure that out then. It will be a short period of
7 time.

8 I intend on going forward with oral
9 arguments in a particular order. First, we'll do the
10 motion to disqualify, then the motion for class cert,
11 and, finally, the motion to dismiss.

12 And then I will take them under
13 advisement, and I will set a date to return. It's my
14 plan, and I'm certain that I will stick to this plan,
15 barring unforeseen circumstances, to have written
16 opinions as to each one of these motions.

17 And I'd like to be given ten days to
18 do that. I'm not sure I will need that. A lot of
19 this has been -- is the product of prior orders of
20 mine, and there's some cutting and pasting that can
21 be done just for factual things, but we shall see.

22 I'd like to be given ten days to issue
23 three separate opinions on this, so I'm going to be
24 suggesting that we put this over for that period of

1 MR. DEADY: Judge, I'm going to be out
2 of town till the 8th. I'll be back on Thursday and
3 Friday, but I might not be in the case by then,
4 Judge.

5 THE COURT: How's 1:00 o'clock on the
6 9th?

7 MR. DEADY: Fine, Judge.

8 THE COURT: Clint?

9 MR. KRISLOV: Yes, that's fine.

10 THE COURT: City.

11 MR. PRENDERGAST: Yes.

12 THE COURT: Funds.

13 MS. BOECKMAN: Yes.

14 THE COURT: 5-9 at 1:00 p.m. will be
15 our next date. We'll talk about everything you've
16 read from me and the subsidies reconciliation and
17 petition and where we go next.

18 All right. We have a motion to
19 disqualify Mr. Deady from the case for the reasons
20 enunciated by Mr. Krislov, and we'll take that first.

21 I will advise all the parties, as you
22 can see, I've read all the briefs. I'm familiar with
23 your arguments and the law as you've phrased it, but
24 I do wish to hear what you have to say for the record

1 and personally.

2 So, Mr. Krislov, it's your motion, you
3 may proceed.

4 MR. KRISLOV: Thank you, Your Honor.

5 I have nothing personal against

6 Mr. Deady. The problem arose because while we oppose
7 Mr. Deady's intervening his half a dozen firemen,
8 that it was untimely.

9 We only recently discovered that

10 Mr. Deady had represented the insurance company who
11 insured the Laborers' trustees and had sued the
12 Laborers' Fund and all of our plaintiffs for a
13 declaration that the insurance company didn't have to
14 pay anything of the liability of the Laborers'
15 trustees.

16 THE COURT: Do you think it matters
17 that he was merely of local counsel for somebody and
18 just went to -- did no substantive work but just went
19 to take continuances on behalf of counsel for the
20 folks?

21 MR. KRISLOV: He was down as trial
22 counsel if the case went to trial.

23 And we think that -- we read the
24 things that he had submitted. I mean, we raised it,

1 brought it to his attention. He then said that the
2 agreement that ALTERRA had with the Laborers'
3 trustees was confidential and that I should try to
4 get it from Mr. Donham.

5 Now, subsequently, he was able to get
6 it by a Freedom of Information Act request, and it
7 turns out that his client paid some of the defense
8 costs of the Laborers' Fund trustees.

9 Whether his clients are aware of that
10 or not is a matter for him and his clients, but we
11 don't think that Mr. Deady's -- I mean, Mr. Deady
12 intervened hoping to get some of the subsidies that
13 we were already looking for.

14 Under the circumstances, Mr. Deady
15 could not represent the firemen as a class. That
16 would be an absolutely disqualifying conflict. He
17 was representing somebody adverse to the claims in
18 this case.

19 THE COURT: Well, I've already dealt
20 with the intervention, and we're not going to be
21 rehashing that.

22 You've made your record with regard to
23 that, and that's fine, but that's not the subject of
24 this motion.

1 MR. KRISLOV: No, this motion deals
2 with, first, the conflict, which was clear. There
3 was a conflict for sure, when he was represents the
4 insurance company and is down as trial counsel if it
5 goes to trial.

6 He represented an interest that was,
7 on his own complaint, adverse to the interest of the
8 retirees who were seeking a recovery against the
9 Funds and their trustees.

10 So whether he -- whether that conflict
11 continues, once we've raised that clear conflict, it
12 was then his burden, and it is strictly construed for
13 disqualification.

14 We don't have --

15 THE COURT: You don't believe -- you
16 think just by raising it sustains your burden of
17 going forward. You think you only have a burden of
18 going forward.

19 MR. KRISLOV: Yes.

20 THE COURT: You don't think you have a
21 burden of proof?

22 MR. KRISLOV: No. He has the burden
23 of proof.

24 THE COURT: Okay.

1 MR. KRISLOV: Once we've raised a bona
2 fide conflict, he has the burden of proof that the
3 conflict does not exist, and we think that he has not
4 met that.

5 THE COURT: Okay.

6 Pat.

7 MR. DEADY: Your Honor, with respect
8 to the motion -- and I do take these kind of motions
9 seriously, Judge. My problem with this particular
10 motion is I still don't understand what the direct
11 adverse conflict is.

12 I understand his position with respect
13 to my prior representation. At least all of the
14 cases in the Professional Rules of Conduct in
15 Illinois talk about a direct conflict in the same
16 case or in another case that you're currently
17 representing two people or two individuals, or have a
18 former client that's directly adverse.

19 ALTERRA, the insurance company in this
20 case, is a former client. We represented them, as
21 you say, as a local counsel in a coverage action that
22 involved whether or not the policy that was issued to
23 the Laborers' Fund would cover this particular claim
24 if it was successful or the defense cost of that

1 claim.

2 That was a case that was settled in
3 2015, over three years ago, and there is no
4 continuing relationship between my firm and myself
5 and ALTERRA, the insurance company.

6 My problem with Mr. Krislov's analysis
7 is that when you look at the cases that talk about
8 some consecutive or seriatim representation, there
9 has to be some indication that I obtained some
10 confidential information that is going to prevent me
11 from advocating on behalf of the clients I have in
12 this case.

13 It's clearly not a 1.7(a)(1) issue,
14 Judge. It's whether there's something about my
15 representation in the former case that's going to
16 directly impact my ability to represent the
17 firefighter intervenors in this case. And I just
18 don't think -- and I've laid it out in my motion,
19 Judge -- or response. I provided you both with
20 affidavits of myself, Mr. Donham, who was the lawyer
21 of the Funds at the time, and I just don't see the
22 direct conflict.

23 And I don't think he's met his burden,
24 and I would respectfully disagree. He carries a

1 heavy burden to establish that an attorney should be
2 excluded based on a conflict of interest. And that's
3 the position in my brief.

4 And unless you have any other
5 questions, Judge, we can get on to the other matters.

6 MR. KRISLOV: The conflict is that his
7 client helped fund the defense against us, paid
8 \$40,000 to offset the Laborers' defense against us.
9 And their complaint was clearly ALTERRA against the
10 Laborers' Annuity and Benefit Fund and Michael
11 Underwood, et al. He was clearly, at worst -- I
12 understand his position that he doesn't have any
13 connection with them now, but he represented the --
14 an insurance company that helped -- that has helped
15 fund the defense against our interests.

16 THE COURT: How will that create a
17 significant risk that his clients will not be
18 represented appropriately and in a materially
19 complete way by Mr. Deady? Where's the bridge
20 between your argument and the actual prejudice that
21 will -- not could, but will result to his clients as
22 they are right now?

23 MR. KRISLOV: We moved for class
24 certification. We seek to represent and we have

1 clients who are firemen. We have clients in all four
2 Fund categories. We have clients in virtually every
3 category. We have 400 signed clients --

4 THE COURT: I'm missing your point.

5 MR. KRISLOV: Mr. Deady's client
6 representation is not inadequate. He is merely
7 seeking to participate in what we have, in effect --

8 THE COURT: Well, that may be why
9 you're doing this. That's fine, but that's not the
10 analysis.

11 I don't really care about how it
12 affects you and your representation of who you're
13 representing, and representing well. The question
14 is, as a result of this issue that you raise, how
15 will it materially affect his ability to represent
16 his clients who have chosen him?

17 They've chosen him, and the law tells
18 me, it seems to me, Clint, that I have to respect a
19 client's choice of an attorney unless there's a
20 significant risk that he can't represent them well.
21 So it's not about you. It's about his clients.

22 So tell me, how will --

23 MR. KRISLOV: There --

24 THE COURT: Let me just finish.

1 How will their -- what is the
2 significant risk that his clients will suffer as a
3 result of him representing them instead of you?

4 MR. KRISLOV: I think that you've got
5 it backwards. It's what is the significant risk that
6 we are inadequately representing all members of the
7 class.

8 THE COURT: No, it's not that. You
9 look at it from the point of view of the client. The
10 client -- we sometimes forget that it's the client
11 who runs things. It's the client who chooses the
12 attorney.

13 In this case, Mr. Deady's clients have
14 chosen him for whatever reason. It's not my -- it's
15 not for me to ask them or -- that's who they've
16 chosen.

17 And you're right. If there's a
18 significant risk that he will be ineffective and
19 prejudicial to that representation, he should go out.

20 But I need proof of that. It's not
21 the way it will affect you and your representation of
22 the folks that you are representing. You can
23 represent them and have really, really well.

24 The fact that Deady's clients have

1 chosen him rather than you is largely irrelevant in
2 terms of that dynamic. And in terms of my review of
3 this, it seems to me that it's everything that
4 they've chosen him instead of you, and that you bear
5 a burden of showing me how that is going to not hurt
6 you but hurt his clients because of that conflict.

7 So I'm willing to hear that.

8 MR. KRISLOV: (a), it disrupts our
9 case. This has been --

10 THE COURT: Once again, it's not about
11 you.

12 MR. KRISLOV: It's not about us. We
13 have -- the people --

14 THE COURT: It's about his clients --

15 MR. KRISLOV: It's about the class
16 members.

17 THE COURT: -- not those people. It's
18 not about them.

19 MR. KRISLOV: Yes --

20 THE COURT: It's about his clients
21 having a right in America to choose the person they
22 want to represent them. His clients have chosen him.

23 We haven't yet ended, you know, freedom of choice in
24 this country, I hope. You know, they've chosen him,

1 and you brought up to me the fact that he's
2 represented someone that there's a conflict within
3 the past, perhaps.

4 So I'm asking you, where's the
5 significant risk to his clients if he continues?

6 MR. KRISLOV: There is the appearance
7 of conflict and impropriety. If he can represent the
8 insurance company against the annuitants and then
9 say, well, now I'm going to represent some
10 annuitants, that's fine. If they want to file their
11 own case, if they want to file their own case and go
12 forward, it's a free country. I'm not trying to
13 interfere with freedom here.

14 But we've spent 30 years involved in
15 this case in which they just sat, and when they
16 decided -- when somehow somebody decided that there
17 were some subsidies --

18 THE COURT: Well, you don't have a
19 monopoly on everything, Clint. New clients came in,
20 new folks come in, and I granted their motion to
21 intervene, which you objected to. You didn't want
22 them in the case, at least not through another
23 counsel.

24 MR. KRISLOV: Your Honor, I don't

1 object to an intervenor coming in.

2 THE COURT: Well, you did this time.

3 You did?

4 MR. KRISLOV: But please do not make
5 this about me.

6 THE COURT: You did.

7 MR. KRISLOV: I did object to them
8 coming in.

9 THE COURT: Okay. So don't tell me
10 you didn't when you did.

11 MR. KRISLOV: I didn't say I didn't
12 object to their coming in.

13 But the fact is, while our motion for
14 class certification has been pending and deferred for
15 six years, and we finally get the subsidies ordered,
16 they decide they want to come in and claim the
17 subsidies, whatever.

18 If you don't think that there's a
19 conflict, so be it. We'll continue.

20 But then we'd like to get to class
21 certification, which we believe --

22 THE COURT: We're doing it today.
23 We're talking about it today.

24 MR. KRISLOV: And it's only been six

1 years. So if we can get to that -- if you're going
2 to let Mr. Deady stay in, so ruled.

3 We disagree. We disagree with the
4 standard you're applying, and we don't think it's
5 fair. But we shall -- we wish to proceed whichever
6 way you want to go on this one.

7 THE COURT: Well, it's not what I
8 want, it's just what the law says, so -- I don't have
9 a horse in this race.

10 All right. Let's move on.

11 The motion for class cert.

12 MR. KRISLOV: Yes, Your Honor.

13 Here's the problem that we have.

14 By deferring class cert, by deferring
15 class certification until now and doing it at the
16 same time as the City's and the Funds' multiple
17 motions to dismiss, you have put the class in a very
18 difficult situation, and it is -- it's a danger to
19 their due process because they have a right -- they
20 have a right to adequate representation and to not be
21 bound by a decision until the class has been given
22 notice and an opportunity to choose, all 24,000 of
23 them, to either ride along with this case with the
24 decisions that you've made to date and will make in

1 the future or opt out. They have an absolute right
2 to opt out.

3 If you decide that you're going to
4 dismiss the sixth amended complaint and then give
5 them -- and then certify the class based on that
6 finding, you have prejudiced the class, and the class
7 has been prejudiced and their due process has been
8 violated.

9 The way that the proceeding is
10 supposed to work is, the Court is to reach the motion
11 for class certification as soon as practicable.

12 Now, as Mr. Prender- --

13 THE COURT: But you've discussed this
14 with me, what, ten times? I've heard this before,
15 but here we are, and we're discussing the motion for
16 class certification, not the process by which we
17 haven't done it in the past, even with motions to
18 dismiss the first complaint all the way up through
19 now, the sixth amended complaint.

20 It's your position, and I understand
21 it, that it was fine to delay class certification
22 pending a result of the motion to dismiss the first
23 complaint, but it was wrong for me to do that up until
24 the sixth, but here we are.

1 So it's -- you know, that's fine.
2 You've made the record consistently, and I do
3 understand your position, but here we are, and
4 there's -- it's no use beating a dead horse. I did
5 make those decisions.

6 And now here I am asking you to argue
7 about class certification, and you prefer not to, so
8 let's do it.

9 MR. KRISLOV: I will do that.

10 The class, as we generally know, are
11 annuitants of the City of Chicago who have -- who
12 have a right under the statute -- under the statutes
13 to retiree healthcare coverage, and, as we believe,
14 that they have rights under estoppel by authorized
15 City employees and by contract --

16 THE COURT: Let me ask you a question,
17 because that's the subject of, of course, the motion
18 to dismiss as well.

19 MR. KRISLOV: Sure.

20 THE COURT: I've already ruled that
21 there was no contract. You argued well,
22 vociferously, persuasively up to a point, and I ruled
23 against you.

24 MR. KRISLOV: Different contract.

1 THE COURT: What's the different
2 contract? Because the appellate court agreed there
3 was no contract.

4 MR. KRISLOV: The appellate court
5 dealt with the City's obligations, and the appellate
6 court didn't address the statute that said that the
7 Funds have an obligation to provide coverage, and the
8 Funds' explicit acknowledgment that they did have
9 that obligation -- that is in our complaint, that's
10 in our motion -- and that they fulfilled that by
11 contracting with the City to be the insurer.

12 That is the testimony, the pleadings,
13 the arguments that the Funds made in the Korshak
14 trial.

15 Now, for these purposes, all you
16 really have to do for class certification is focus on
17 who would be in the class, whether they satisfy the
18 four points required for Illinois law, and they do.

19 So let's talk about who is in the
20 class.

21 The class, which we believe is
22 appropriate, are all annuitants who became
23 participants in a pension fund, meaning their hire
24 date, by one of three or four dates.

1 Many of these annuitants are here
2 today. They need the coverage. They are a uniquely
3 vulnerable group because they are the last group --

4 THE COURT: What coverage?

5 MR. KRISLOV: They need the coverage
6 that the City promised them and their Funds --

7 THE COURT: I've ruled against that,
8 and the appellate court's agreed. And it's up on
9 appeal as to whether --

10 MR. KRISLOV: Yes.

11 THE COURT: -- as to whether that --

12 MR. KRISLOV: It is. But that is a
13 live issue. And anything that's a live issue for
14 these people should be within --

15 THE COURT: I don't have jurisdiction
16 to deal with that.

17 MR. KRISLOV: Yes, you have
18 the jurisdiction to decide --

19 THE COURT: You've appealed me.
20 You've taken it away from me.

21 MR. KRISLOV: You have the
22 jurisdiction to decide who is in the class.

23 Your decision that we appealed was
24 who -- which one of those subclasses is entitled to

1 the subsidy.
 2 You ruled that everybody who became a
 3 participant by the earliest date of April 4th,
 4 2003, is entitled to the subsidies, and --
 5 THE COURT: That's the date of
 6 execution.
 7 MR. KRISLOV: Well, that's --
 8 THE COURT: That I ruled.
 9 MR. KRISLOV: That's the date of
 10 signing. That's -- because the appellate court used
 11 three terms: They used execution, operative and
 12 effective date.
 13 THE COURT: I remember. But that's
 14 the date that I found to be the date --
 15 MR. KRISLOV: That's the date. We
 16 disagree with you --
 17 THE COURT: -- of execution that you
 18 just will say it's signing but not execution.
 19 MR. KRISLOV: Right.
 20 THE COURT: To be fair to everyone.
 21 MR. KRISLOV: And that because they
 22 use the term "effective date" as well, it must
 23 mean -- the three things must mean the same thing.
 24 There was no -- I don't think anybody disputes that

1 the appellate court meant they should mean the same
 2 thing.
 3 We think the most accurate date is
 4 everybody -- is the settlement class defined in the
 5 2003 settlement, which is everybody who started work
 6 by 2013 --
 7 THE COURT: So, really, can I define
 8 that class differently than that specific class --
 9 MR. KRISLOV: Yes.
 10 THE COURT: -- than I have already for
 11 purposes of appeal?
 12 MR. KRISLOV: Yes. Because what
 13 you're doing is, you're deciding the rights of all of
 14 these people who, within all these people, have
 15 different subcategories of classifications or rights.
 16 But the people whose -- the people
 17 whose rights we are ascertaining should be all people
 18 who under the 2003 settlement became future
 19 partici- -- future annuitants by the June 30, 2013
 20 date.
 21 Within that group --
 22 THE COURT: First hired by
 23 June 30th, 2013.
 24 MR. KRISLOV: Yes.

1 Within that group, whether they were
 2 hired by April 4th, 2003; June 30, 2003; August 27,
 3 2003; or June 30, 2013, that may vary who gets what
 4 rights, but those are subclasses.
 5 The group whose interests we are
 6 adjudicating are all of those people who became
 7 participants by the settlement class date, which
 8 would be June 30, 2013.
 9 Nobody disputes that numerosity is
 10 met. We have about -- we have at least 24,000 people
 11 within that, and we probably have more since a number
 12 of those people who began working by mid 2013 are
 13 still working for the City. So that the number of
 14 people within the class certainly satisfies
 15 numerosity.
 16 Commonality, meaning do they have
 17 common questions of law or fact, they do, because the
 18 question is, how do we interpret the statute, the
 19 City's actions, the Funds' actions within that, and
 20 so they are -- each category within that has a common
 21 issue of law based on that particular group's facts
 22 on date of hire.
 23 Typicality is the test of -- is the --
 24 are the named plaintiffs' claims typical of the rest

1 of the class members, and the answer is nobody really
 2 disputes they are. Because one -- within any
 3 category, any annuitant's right to healthcare
 4 benefits is the same as any other person within that
 5 subgroup category.
 6 As to adequate representation, that is
 7 a test of both the named plaintiff, which is
 8 Mr. Underwood, as the lead named plaintiff, who is
 9 there in the back of the room, and a number of other
 10 people here are in different categories.
 11 Mr. Underwood is a policeman. There
 12 are numerous people who are firemen, municipal. We
 13 have lots of municipal and lots of laborers, and they
 14 are -- no one disputes that they are adequate
 15 representatives, and they are willing to fulfill
 16 their duty to be adequate representatives, which is
 17 to watch over and make sure that I do a really good
 18 job.
 19 And, finally, the adequate
 20 representation -- oh, and they don't have any
 21 conflicts this in this respect.
 22 Finally, the question of adequacy of
 23 representation also goes to counsel.
 24 And I think --

1 THE COURT: That's fine.
 2 MR. KRISLOV: And I hope at least Your
 3 Honor would agree that I have done, to this point, an
 4 adequate representation of the --
 5 THE COURT: No, you did great in
 6 representing their interests.
 7 MR. KRISLOV: Accordingly, Lee versus
 8 Allstate says take the class as an objective
 9 definition. You must be objective, precise.
 10 And the purpose of identifying the
 11 class is to have it so that everybody who gets notice
 12 can look at the definition and say, ah, I am a class
 13 member, or I'm not a class member.
 14 If I am a class member, this would say
 15 anybody who is -- became a future annuitant by
 16 June 30, 2013, people could look and say, ah, I know
 17 that. That's an objective date. I'm in, and then I
 18 know that this litigation is proceeding and is going
 19 to affect my rights. And so I, as one of the 22-,
 20 24,000 people, have a right to say, you know, I'm
 21 going to -- I'm just going to let it ride and see how
 22 it comes out, or I'm going to intervene like
 23 Mr. Deady's clients chose to before the certification
 24 notice has gone out, or every one of them has the

1 right to opt out and has the right to --
 2 THE COURT: So explain to me how I can
 3 certify a class of folks who became subject to -- who
 4 were hired by June 30th, 2013, when I've already
 5 ruled that only the annuitants who entered the system
 6 prior to the execution date of the 2003 settlement
 7 were the ones who were subject to the subsidies. How
 8 can I do that?
 9 MR. KRISLOV: You can do that because
 10 you ruled on those subsidies.
 11 The question of who's on -- of whether
 12 that date is right or not, that's on appeal. And all
 13 of those people can choose to say, gee, you know, I
 14 wouldn't want to stay in this case, period,
 15 because --
 16 THE COURT: I'm not talking about
 17 their ability to opt out. We all know that folks
 18 have an ability to opt out if they want.
 19 I'm talking about whether they belong
 20 to the definition the class that you want me to
 21 certify.
 22 You seek to extend it past that which
 23 I've already ruled upon, it seems to me, so how can I
 24 do that?

1 MR. KRISLOV: You ruled that the
 2 subsidies were available for all annuitants who
 3 became employed by --
 4 THE COURT: The execution date --
 5 MR. KRISLOV: -- April 4th, 2003.
 6 THE COURT: Which you and I differ on.
 7 MR. KRISLOV: And that issue is up on
 8 appeal right now.
 9 THE COURT: Okay. But let's go along
 10 with mine, just hypothetically.
 11 How can I now extend it from
 12 April 4th, 2003, to June 30th, 2013?
 13 MR. KRISLOV: You could extend the
 14 class period for the definition of the class.
 15 It may be that people -- the after
 16 April 4th, 2003, to August 4 -- to 2013, it may be
 17 that, ultimately, the appellate court determines that
 18 they are entitled to the subsidies as well.
 19 They are then still within this
 20 litigation --
 21 THE COURT: But we aren't there yet.
 22 Where we are right now, until an appellate court
 23 reverses me, if they do, is we have a class that ends
 24 as of April 4th, 2003.

1 MR. KRISLOV: No, we don't have a
 2 class at all.
 3 THE COURT: Well --
 4 MR. KRISLOV: No, because the only
 5 people --
 6 THE COURT: No, I understand that.
 7 MR. KRISLOV: The only people this is
 8 binding on today are the people -- are the 400 named
 9 plaintiffs who brought this case. That's the only
 10 people that it's binding on today.
 11 The whole purpose of --
 12 THE COURT: But it's the law of the
 13 case. It's going to be the same regardless of
 14 whether someone wants to opt in or not. It's still
 15 going to be only within the terms of the law of the
 16 case.
 17 MR. KRISLOV: You're conflating two
 18 things that don't --
 19 THE COURT: Explain it to me.
 20 MR. KRISLOV: You have ruled to this
 21 point that they have to pay subsidies to everybody
 22 who became a participant by April 4th, 2003.
 23 THE COURT: Yes.
 24 MR. KRISLOV: It doesn't rule out the

1 rest of it. That's just a ruling to this point, and
2 that ruling is up on appeal as to that date.

3 And the appellate court will determine
4 which date is the appropriate date among the three or
5 four that I mentioned, and that will be part of the
6 case too.

7 And so there's no -- that you ordered
8 the Funds to pay the subsidies to people --

9 THE COURT: Is that a reason to wait,
10 until we hear from the appellate court to certify it?

11 MR. KRISLOV: No. Because, then,
12 the -- if you certify now with the narrowest class,
13 you're sort of -- you're prejudicing -- well, you're
14 making this harder than it need be.

15 The purpose of the class certification
16 is to deal with everybody on a judicially,
17 economically efficient basis. And what we're dealing
18 with, and what we've been dealing with since --
19 certainly, since the 2003 settlement are the rights
20 of everybody who became a future annuitant by
21 June 30, 2013.

22 If some of them don't have the right
23 to subsidy or they do, that will all be determined
24 within the confines of --

1 THE COURT: That has been determined.

2 MR. KRISLOV: Well, it has -- it has
3 only --

4 THE COURT: It's been determined not
5 only by me but by the appellate court.

6 MR. KRISLOV: No, that part hasn't
7 been. That part has not been.

8 The appellate court said that
9 everybody who -- everybody is in for the subsidies,
10 and we view the appellate court as deciding the
11 City's responsibility rather than the Funds as part
12 of it, and the Funds' obligation to provide coverage
13 is before the appellate court, and who they have the
14 obligation to provide coverage to, it's all before
15 the appellate court.

16 And so -- but they are all going to be
17 determined within the confines of this case, whether
18 there, the Supreme Court, wherever.

19 The whole purpose is to have an
20 economically efficient way to address all of these
21 people's claims within the proceeding. And so you're
22 not contradicting. You're just saying, look, at this
23 point, I've already -- I decided that the only people
24 that I'm going to order the subsidies --

1 THE COURT: Who are entitled to those
2 subsidies, per me.

3 MR. KRISLOV: Per you -- are -- from
4 this --

5 THE COURT: For whatever value that
6 is.

7 MR. KRISLOV: You know -- whatever.
8 We disagree as to date. The date will ultimately be
9 decided, and it will be decided by the appellate
10 court in the confines of this case.

11 So that saying we're only going to
12 certify the class as the earliest possible time, for
13 one thing, that violates the whole concept of giving
14 preference to -- in any uncertainty to the
15 pensioners.

16 Nonetheless, what you're doing is,
17 you're necessarily bifurcating this case into yet
18 another case, yet another case, yet another case.

19 You'll be saying, well, I'm only going
20 to certify it for the people that I said should be
21 entitled to the subsidy, even though -- but supposing
22 you say I'm only going to certify it for people who
23 became participants by April 4th, 2003, and the
24 appellate court rules, as we think they will, that it

1 has to be one of the later dates.

2 Now you've got to come back and
3 recertify the case for people who -- now you're -- it
4 would be prejudicial to them, bring them back and say
5 they're going to be bound by the prior decisions of
6 this Court. They'd say I'm opting out, or whatever.
7 If you break them up --

8 THE COURT: But that's your argument
9 about them now anyway, that they weren't in it
10 because I didn't certify them, and it's prejudiced
11 them and their ability to argue about it.

12 So that's there anyway, per you.

13 MR. KRISLOV: Well, they have -- your
14 rulings to date are only by you against the people
15 who were -- so --

16 THE COURT: Sure. Well, that's my
17 point. So that's always going to be the case.

18 MR. KRISLOV: Well, in rulings down
19 the road, we will deal with the rest of the members
20 the class.

21 THE COURT: Sure. And that's what
22 we're going to have to do on remand if that's what
23 happens.

24 So that's not the biggest impediment

1 to life, the life of this case.

2 MR. KRISLOV: That this case should go
3 on forever is beyond my resources. And so the fact
4 that -- if you want to make it this --

5 THE COURT: I can't certify a class
6 just based upon your resources. That's not one of
7 the factors.

8 So that's not something I --
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1 So I'm listening to you on that.

2 MR. KRISLOV: That's only for a fee on
3 a small portion, Your Honor. But whatever.

4 Back to class certification, if we
5 might.

6 The concept is, you should certify the
7 case to proceed for the class of the people whose
8 interests are being adjudicated.

9 You're -- you've essentially held, to
10 this point, you think that the only people who have
11 rights in this are the people who became participants
12 by April 4th, 2003.

13 Presently, that issue is up on appeal
14 and will be decided by the appellate court as to
15 whether it's April 4, 2003, or as long as June 30,
16 2013. But that will still be decided within the
17 confines of this case. And so the certification
18 should be for the large group.

19 And while we don't -- well, we think
20 we've met all the criteria. We have an objective
21 determination. We have people who need this
22 representation.

23 These people are not merely
24 complaining about the aches and pains of senior

1 MR. KRISLOV: Oh, yes, it is. Yes, it
2 is, Your Honor. Because making this case impossible
3 for any plaintiff to bring, except somebody who has
4 the City's resources and the Funds' willingness to
5 spend unlimited amounts --

6 THE COURT: I didn't say that at all.

7 MR. KRISLOV: That is exactly --

8 THE COURT: I didn't just say that.

9 MR. KRISLOV: That is exactly how
10 structuring in this fashion has delayed us for six
11 years and will delay us if you separate this out as
12 well --

13 THE COURT: Well, all right --

14 MR. KRISLOV: You'll get to deal with
15 somebody other than me, because we will not be in
16 business.

17 THE COURT: That would be a shame.

18 MR. KRISLOV: Well, that would -- you
19 know, it won't be for my not having -- it won't be
20 for my not having expended all my available
21 resources, which, as you know --

22 THE COURT: You know, your petition
23 for attorneys' fees is being dealt with now at the
24 same time.

1 years. We have people in the courtroom who have
2 suffered cancer, who have been hospitalized for weeks
3 at a time, people who have been near death. They
4 come here because they seek justice by this Court.

5 The City should not be allowed -- and
6 the reason we're here -- I'll deal with this on the
7 motion -- on their motion to dismiss our complaint
8 and with sanctions more -- but these people have
9 serious health problems.

10 They put their trust in their City
11 employer because they could not rely on Medicare.
12 Could not.

13 And the City, though the Court has to
14 this point said, well, we're not going to make you
15 provide -- fulfill your promises --

16 THE COURT: It's not what the Court
17 said.

18 MR. KRISLOV: That is what the Court
19 said.

20 THE COURT: The appellate court said
21 that too.

22 It just was not part of the contract.
23 I held that -- that was affirmed. PLA was rejected
24 on it.

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1 I don't know what I can tell you about
2 that, except I'm with you on the emotion. I'm with
3 you on that. For the last five years I've been
4 telling folks to go to the ACA. I know how expensive
5 it is. Believe me, I know. I know all about the
6 ACA, and I know all about preexisting conditions. I
7 know about it legally, and I know about it from a
8 practical point of view and a personal point of view.
9 But when there's not a contract, I
10 cannot create one out of thin air. I've got an oath.
11 Even though I wanted to, and I couldn't.
12 And the appellate court said it wasn't
13 there.
14 MR. KRISLOV: And we have -- in our
15 new complaint we have a contract that goes around
16 that, and we'll address that on the motion to
17 dismiss.
18 THE COURT: And that's -- I'd really
19 like to hear about that on the motion to dismiss, but
20 in terms of the roughmonus (phonetic) -- I don't know
21 how to spell it, don't ask me.
22 MR. KRISLOV: We're not asking for
23 roughmonus --
24 THE COURT: I can't give you a

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1 contract where there was none.
2 MR. KRISLOV: Your Honor --
3 THE COURT: I can't do it. I have an
4 oath.
5 I can't create a contract where there
6 was none.
7 MR. KRISLOV: If you want me to
8 explain our contract claim --
9 THE COURT: We will in the motion to
10 dismiss, but let's deal with anything more on the
11 class cert.
12 MR. KRISLOV: We have satisfied what
13 we are required to show for class certification. We
14 have shown an objectively defined class that is
15 numerous, has common questions, each claim is typical
16 and has adequate representation.
17 It is appropriate to certify the class
18 and to certify it as we request.
19 THE COURT: Thank you.
20 For the City.
21 MR. PRENDERGAST: Good afternoon, Your
22 Honor.
23 THE COURT: Hi. You don't have to
24 look at the clock. Take your time.

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1 MR. PRENDERGAST: Well, I'm looking at
2 the clock, because I know you've read the briefs --
3 THE COURT: I have, but speech is
4 important too.
5 MR. PRENDERGAST: Plaintiffs' request
6 for an order granting class certification against the
7 City should be denied for a threshold of reasons.
8 They failed to state a viable claim. But we're going
9 to deal with that.
10 But the reason why -- I know you're
11 dealing with those two things together, so I'm not
12 going to get into the motion to dismiss.
13 THE COURT: No, we're going to come up
14 on that in just a moment.
15 MR. PRENDERGAST: Right. But it's a
16 separate -- I believe we have a valid motion to
17 dismiss. If I'm right about that, they don't have a
18 viable claim. If they don't have a viable claim,
19 they cannot -- you cannot certify a class.
20 I expect that you --
21 THE COURT: But with regard to the
22 motion to dismiss, I've already refused your motion
23 with regard to Count 1.
24 Wouldn't you agree?

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1 I've done that not once, but all
2 through all of the different variations on the
3 complaint, although your argument is they're really
4 all the same.
5 Count 1 still stands, yes?
6 MR. PRENDERGAST: Well, Count 1, if
7 you limit it just to the subsidies, the appellate
8 court and you have both spoken to that.
9 THE COURT: I'm sorry?
10 MR. PRENDERGAST: You and the
11 appellate court have both spoken to the --
12 THE COURT: Yeah, so you think it's
13 mooted out as to Count 1.
14 MR. PRENDERGAST: The '83 and '85
15 subsidy.
16 But as I'll indicate, there are --
17 THE COURT: Excuse me, sir. I'm not
18 interrupting your social hour, am I?
19 GALLERY MEMBER: Only a little bit.
20 Thank you.
21 THE COURT: Okay. Thank you.
22 MR. PRENDERGAST: I don't know what
23 your question was, Judge. That caught me --
24 THE COURT: It wasn't directed at you.

1 My question was, is Count 1 mooted out
2 now?

3 MR. PRENDERGAST: Well, Count 1, in
4 effect, is mooted out, but we can talk about that in
5 the motion to dismiss.

6 THE COURT: Okay.

7 MR. PRENDERGAST: I mean, because your
8 -- because those subsidies are being paid to
9 everybody, whether they got class notice or not.

10 They couldn't -- if they don't want
11 the money, they can send it back. But they're all
12 getting it. The necessity of a class action under
13 those circumstances is highly questionable.

14 We've argued that it would be
15 premature to address any motion for class
16 certification prior to addressing the legal
17 sufficiency of the complaint, so we're doing that all
18 at one time today. I'm going to -- so consider
19 whatever we ultimately say on that --

20 THE COURT: Yes. For the third time,
21 we're arguing them all today.

22 MR. PRENDERGAST: But even at the --

23 THE COURT: Shall we get on to it?

24 MR. PRENDERGAST: Yes. I'm just

1 deferring that part of the argument, if I may.

2 THE COURT: Okay. Good.

3 MR. PRENDERGAST: The proposed class
4 definitions, however, in this complaint, are
5 inconsistent with decisions of this Court, which is
6 precisely the conversation you just had with
7 Mr. Krislov.

8 For example, plaintiff stated that
9 their defined classes, subclasses, must reflect the
10 decisions of this Court and the appellate court if
11 they fail to propose a class or subclasses that
12 comply with those various issues.

13 I don't know how you can certify a
14 class after you've determined and the appellate court
15 has affirmed when they -- when you denied that the
16 pension funds had an obligation to provide a plan.
17 That's still in their complaint, and it's on appeal
18 again. You've already decided only those city
19 employees before April 4, 2003. Mr. Krislov is still
20 trying to argue about that.

21 And if I can just digress for one
22 minute. We have on a number of occasions here, the
23 Court has waited to see what the appellate court is
24 going to do, and Mr. Krislov comes up and argues this

1 morning -- this afternoon -- that you shouldn't wait
2 for the appellate court; that the appellate court has
3 some of the very issues we're arguing about right
4 here, and yet indicating in his view, I believe, that
5 the -- how the appellate court resolves those will be
6 outcome determinative in some respect, or at least
7 relevant to what your determination would be.

8 And yet you asked the question,
9 "Should I wait until the appellate court rules?" And
10 he said no.

11 So if he's going to say no, then he's
12 on -- then the rulings that currently exist are the
13 rulings that drive this boat. So he can't have it
14 both ways. He can't argue as if he's won in the
15 appellate court. He's, quote, stuck, if you will,
16 with the decision that's on appeal, that he's
17 appealing.

18 And he's also stuck with all of the
19 prior decisions that have been made by this Court and
20 by the appellate court on such things as the
21 effective date.

22 So when he tries to define a class
23 differently than it's been already defined, without
24 defining the facts -- differently than how it's

1 already been limited by prior decisions, his class
2 definitions don't work. And so he can't get class
3 certification on this petition.

4 Maybe if he had come in here and said
5 "I want a class -- I'm going to amend my complaint.
6 I'm going to accept the prior rulings of this Court
7 and the appellate court, and there's now going to be
8 a much smaller class, but I'm only going to sue on
9 that class. But that class I still have." If he
10 came in and tried to do that, we could address that.

11 But he wants, as he put it, the larger
12 group certified. That would mean you'd have to
13 certify a class of persons who you've already
14 determined do not state a cause of action, are not
15 entitled to relief. You've determined that; the
16 appellate court has affirmed it.

17 The reason we're on the sixth amended
18 complaint is we've had almost as many appeals, and
19 those appeals shape the character of this case as of
20 today.

21 Consistent with the appellate court's
22 recognition of the Korshak and Window annuitants'
23 claims were mooted, that's the word the appellate
24 court used, by the City's decision to provide these

1 annuitants with benefits that exceeded the subsidies,
2 and they did that not in connection with this
3 litigation, but voluntarily, 2013, we nonetheless
4 find a motion for class certification that includes
5 relief for the Korshak and Window annuitants.

6 So if you certify the class he wants
7 you to certify, you can ignore your prior decision
8 and the appellate court's prior decision that the
9 Korshak and Window annuitants are receiving more
10 under the 2013 commitment that the City made, that
11 they will even make under the 1983 and 1985 statutes.

12 Ignoring these decisions, plaintiffs
13 propose a class of subclass definitions that
14 inexplicably include Korshak and Window. They're not
15 in it. They're moot. You can't do a class
16 certification on them if it's a moot claim.

17 At the January 16 hearing, this Court
18 noted the appellate court's directive in Underwood in
19 the 2017 decision held that only those annuitants who
20 participated in the City retirement system prior to
21 April 4, 2003, the date on which the 2003 settlement
22 was executed, were eligible for subsidies.

23 Their class definitions? Ignore that.
24 That decision was rendered by you. That decision's

1 been affirmed by the appeal. It doesn't make any
2 difference. We're on the sixth amended complaint,
3 which when we get around to arguing about it is
4 mirror of the fourth amended complaint, which you
5 also dismissed with prejudice.

6 And they track each other absolutely.

7 Third, the plaintiffs' proposed class
8 and subclass definitions do not conform to the
9 requirements of the 1983 and 1985 amendments. They
10 further define who is eligible to receive a subsidy.

11 Both the '83 and '85 amendments
12 require for a person to be eligible for a subsidy,
13 that he or she must be an employee annuitant, not a
14 surviving spouse or child annuitant, and
15 participating in a group health plan.

16 And the 1985 amendments which apply to
17 annuitants participating in the Municipal and Laborer
18 Funds limit the subsidies to annuitants age 65 and
19 older with 15 years of service.

20 The January 16, 2019 hearing, this
21 Court held that the subsidies are payable to employee
22 annuitants only and not to annuitants' surviving
23 spouses and children, and only to those Municipal and
24 Laborer annuitants who are age 65 and older with 15

1 years of service.

2 Their class definitions ignore that
3 ruling, so in order to certify the class, you have to
4 ignore those rulings as well.

5 As to the group health plan, and I'm
6 sure the Funds will speak to this, this Court held
7 that to be eligible for a subsidy, the annuitant must
8 have paid for a health insurance plan, regardless of
9 whether it is a group plan, after December 31, 2016,
10 but also must transition to a group health plan by
11 2020 to have their healthcare premium deducted from
12 their monthly annuity benefit, by their -- their
13 respective Fund in order to receive subsidy payments
14 prospectively. Their class definitions ignore that.

15 Most of what your colloquy here with
16 Mr. Krislov pertained to was the fact that you're
17 asking -- as you put it -- you're asking me to
18 certify a class contrary to the rulings of what --
19 contrary to rulings that would include putative class
20 members that have been -- for whom there has been
21 consistent rulings that they do not have a viable
22 claim or cause of action.

23 In short, their proposed class
24 certification ignores all of this, all of these

1 requirements. Even if class certification were
2 warranted, the Court would have to deny the present
3 motion.

4 The -- probably the more -- as strong
5 as I think these points are, the fact that we're on
6 the sixth amended complaint, and it raises one claim
7 after another that has already been decided, which
8 we'll talk about later, is the most important -- I
9 wouldn't even say the most important reason, but it's
10 just a completely controlling reason why you deny
11 class certification here.

12 I know you're going to decide the
13 motion to dismiss and the motion for class
14 certification together. I know you received a
15 memorandum yesterday. I don't know if you've seen
16 it.

17 THE COURT: I did, on the due process
18 aspects.

19 MR. PRENDERGAST: Yeah. Interesting
20 about that, we haven't filed a response to it.
21 Obviously, we didn't get it until late yesterday
22 afternoon.

23 If you want a response to it, I'll get
24 you one.

1 THE COURT: It's up to you.
 2 MR. PRENDERGAST: I'll do that, but I
 3 can speak very briefly to it in this respect.
 4 THE COURT: Sure.
 5 MR. PRENDERGAST: When we were last
 6 here, you were very direct with counsel for
 7 plaintiffs when he started talking about
 8 constitutional due process.
 9 And you said: Do you have authority
 10 for that? He said, oh, yes. And give it to me. And
 11 he said, I'll have it for you this afternoon. It
 12 never arrived. The next thing we got was this
 13 memorandum.
 14 That memorandum yesterday says nothing
 15 about Illinois decisions on that question of due
 16 process. It says nothing about the Illinois
 17 decisions on the question of whether you decide a
 18 motion to dismiss before you decide a motion for
 19 class certification.
 20 There is an Illinois Supreme Court --
 21 1981 Supreme Court case called Schlessinger, which
 22 I'll be glad to provide the Court, which is
 23 absolutely on point.
 24 THE COURT: Do you have the cite,

1 please.
 2 MR. KRISLOV: Schlessinger against
 3 Olsen, 86 Ill.2d --
 4 THE COURT: One second, Clint. Would
 5 you just speak a little slower for me?
 6 86 Ill.2d?
 7 MR. KRISLOV: 86 Ill.2d 314.
 8 But that's cited within Oliveira
 9 against Amoco, which is 201 Ill.2d 134, which is a
 10 2002 case.
 11 MR. PRENDERGAST: Yes.
 12 MR. KRISLOV: That is an Illinois
 13 decision.
 14 MR. PRENDERGAST: Let me say this.
 15 You're right about Oliveira. You're
 16 entirely right about Oliveira.
 17 Oliveira held if you decide class --
 18 the motion to dismiss before you decide class
 19 certification, that cited Schlessinger for that
 20 proposition.
 21 What's interesting is Schlessinger
 22 deals with no other issue than that issue, which
 23 comes first. The trial court said the motion to
 24 dismiss should be decided first; the appellate court

1 said the class certification should be decided first.
 2 The Supreme Court reversed the appellate court,
 3 affirmed the trial court in absolute terms.
 4 What's interesting about it is
 5 Mr. Krislov has the cite of that case on the tip of
 6 his tongue, but you will not see that case in his
 7 memorandum that he sent you yesterday.
 8 MR. KRISLOV: It is.
 9 MR. PRENDERGAST: The Supreme Court
 10 Authority --
 11 MR. KRISLOV: It's on the -- on the
 12 third page if you want to look --
 13 MR. PRENDERGAST: No, it's buried in a
 14 cite from another case. It's not discussed.
 15 MR. KRISLOV: Oliveira?
 16 MR. PRENDERGAST: No, Schlessinger.
 17 MR. KRISLOV: Okay.
 18 MR. PRENDERGAST: That's the only
 19 place it appears. It's not brought to your
 20 attention, Judge.
 21 And when you said "Show me a
 22 constitutional case," I tell you one thing, that
 23 memorandum he filed last night is full of federal
 24 court cases, most of which don't even use the word

1 "due process," and none of which held that as a
 2 matter of due process, you must decide the motion for
 3 class certification first.
 4 The authority he's giving you doesn't
 5 say what he wants it to say, and the Illinois cases
 6 are absolutely in the other direction, Oliveira
 7 included, which is the one -- I mean, if you read the
 8 quote from Oliveira in his short memorandum from
 9 yesterday, it absolutely supports our position.
 10 So that was the authority he was
 11 supposed to have given you before we got here today,
 12 not just yesterday, but a couple of weeks ago, but it
 13 got dropped over the transom last night. We did the
 14 research on it. I've looked at all those federal
 15 cases. There's not a single one of them that says as
 16 a matter of law, you must decide class certification
 17 before the motion to dismiss.
 18 I know it's a fairly academic question
 19 for us today because you are going to decide both of
 20 them together, but I couldn't pass up the temptation
 21 of having done a little research to understand what
 22 you have before you.
 23 Getting back to the class
 24 certification question, Judge, everything else that

1 we have to say is said in our briefs. You've been
 2 very patient, and we appreciate it.
 3 I'll have nothing further to say until
 4 Mr. Krislov speaks again.
 5 THE COURT: Thank you.
 6 MR. DONHAM: Your Honor, may I be
 7 heard?
 8 THE COURT: Oh, yes. I'm so sorry.
 9 Yes, Cary.
 10 MR. DONHAM: Your Honor, I'm going to
 11 agree with everything that Rich said, but I do have a
 12 different issue to address.
 13 First, on this idea -- well, one thing
 14 that Clint forgot to mention is the fourth
 15 requirement of Section 2-801, which is -- it talks
 16 about class certification being a means to efficient
 17 resolution of a case.
 18 And so what I say here, to what end is
 19 the class going to be certified, and how is that
 20 going to efficiently resolve this case?
 21 Let me say this: That, number one,
 22 issues have been decided. And the idea of notice
 23 going out to all possible class members, that's
 24 already been decided.

1 And the -- whether a class is
 2 certified or not, true, class member- -- only the
 3 plaintiffs would be bound by the judgment.
 4 However, as Clint pointed out in his
 5 amended memorandum, and I'm looking at his footnote
 6 four, where he's quoting the Underwood appellate
 7 decision, the court said, as we explained above, any
 8 person who entered the retirement system before the
 9 2003 settlement went into effect does have lifetime
 10 coverage under the pension protection clause.
 11 So right there, that's a
 12 constitutional issue. Those people have a
 13 constitutional right to the '83 and '85 subsidies.
 14 That's what the appellate court held. The petition
 15 for leave to appeal that had attempted to expand that
 16 was denied. So there's no question about who is
 17 entitled to get the subsidy.
 18 And we've already presented forms of
 19 notice to these people. You've already ruled as to
 20 who is going to get the subsidy. Arguably -- and
 21 we're not disputing it, but, arguably, I think you
 22 might have recognized that we may have even expanded
 23 the people who could get the subsidy, the people who
 24 were in the plan, and that's --

1 THE COURT: Sarah persuaded me it was
 2 the right thing do.
 3 MR. DONHAM: And I don't disagree with
 4 that, Your Honor; our client doesn't disagree with
 5 that.
 6 THE COURT: All of the Funds acceded
 7 to that.
 8 MR. DONHAM: That's absolutely
 9 correct. But the point is, how is certifying the
 10 class going to more efficiently resolve the case when
 11 the issues as to who is going to get the money, and
 12 the form of notice is already before Your Honor, and
 13 will provide it, I don't see it.
 14 And one other --
 15 THE COURT: That's a syllogistic
 16 circle, as we used to say.
 17 Clint believes that it should be a
 18 larger group of people.
 19 MR. DONHAM: Well, let me respond to
 20 that.
 21 He talks about -- and let's leave
 22 aside the dispute -- if the argument were -- if there
 23 were a need for a class and the issue was between the
 24 April 4th and June 30th, 2003 date, I could see

1 that argument.
 2 Trying to expand this to June 30th of
 3 2013 is, I believe, completely baseless, because the
 4 appellate court held that it went to the effective
 5 date of the settlement, which was, according to Your
 6 Honor, April 4, 2003.
 7 Now, in his motion, Clint refers to
 8 the Korshak settlement agreement. But that -- the
 9 order that entered that agreement also dismissed that
 10 case with prejudice. That settlement agreement has
 11 no effect. This is a different case.
 12 And so you can't rely on what -- to
 13 whatever extent he doesn't explain how that's going
 14 to affect us, he just says that it should.
 15 But there's no basis at all going
 16 back -- especially to the appellate court opinion,
 17 which ruled which annuitants have a right.
 18 So that's my point. I apologize if I
 19 repeated anything that Rich said.
 20 THE COURT: No, that's -- thank you
 21 for your offer.
 22 Sarah, Mr. Kugler, Mr. Deady, anybody
 23 want to say anything from the other Funds?
 24 MR. DEADY: Judge, I have just one

1 point with respect to the due process issue and with
2 respect to what Mr. Donham said and discussions over
3 that.

4 I understand that the Court has found
5 with respect to the named plaintiffs that they have
6 the subsidy. They don't have any rights to a
7 contract, they don't have any rights under some kind
8 of estoppel theory. You made all those
9 determinations as to the named class -- the named
10 plaintiffs, excuse me.

11 I guess my problem is, Judge, is that,
12 along with Mr. Krislov's point, is that my belief is
13 the due process requirement of notice should go out
14 to those people that will know, number one, I may or
15 may not get the subsidy based on the Court's ruling,
16 and I may agree and want to opt in, or I may think I
17 have a claim for either a contract or under some
18 other estoppel theory that wasn't properly presented,
19 or I have some other plans, and I want to opt out.

20 And I think my point is we're trying
21 to efficiently deal with all of these potential
22 class --

23 THE COURT: Then why I should I expand
24 the people to whom notice should be sent past the

1 rulings of this Court or the appellate court? Why
2 should I do that?

3 MR. DEADY: Because your ruling
4 affects the people that think they may have -- it
5 affected people who have claims under -- contracting
6 claims under estoppel, and that they should get
7 notice that those claim are no longer -- are not
8 going to be honored. They're only going to have the
9 subsidy.

10 And I think that they're entitled to
11 have that notice in terms of -- it may only be for
12 those people as has been defined by the Court and not
13 people that might have thought that they were going
14 to be covered otherwise.

15 So I think it's a question of
16 efficiency and in trying to resolve the case in an
17 efficient manner. I think that these people that may
18 not fall within the narrow confines of your ruling
19 that might otherwise have been described as class
20 members --

21 THE COURT: So let's go along with it,
22 Pat. What kind of notice should we give the people?

23 "Notice -- here's notice. You may
24 think that you have a contractual theory which

1 entitles you to a healthcare plan or subsidies, but
2 the Court's already ruled you don't. Sorry."

3 Is that it?

4 MR. KRISLOV: No. There's more.
5 There's more. The Court -- the notice will say,
6 "There's this case pending. Your rights are affected
7 by it. The Court has ruled to this point" --

8 THE COURT: They don't have rights,
9 unfortunately, per my rulings.

10 MR. KRISLOV: Your rulings that they
11 don't have rights, they may want to opt out because
12 they have an absolute right to opt out of that and to
13 pursue their own claims.

14 Their claims --

15 THE COURT: So how do you phrase it,
16 Clint? What's your suggestion?

17 "You may think you have rights, or the
18 Court's already ruled you don't, but you may have a
19 different point of view."

20 MR. KRISLOV: "And so you can opt out
21 and sue direct -- and sue on your own, and everybody
22 else that thinks that he's wrong" -- and there is a
23 case pending in the appellate court challenging the
24 timing.

1 We can -- you can do a notice of
2 pendency of class litigation.

3 THE COURT: Should we wait until that
4 case is decided?

5 MR. KRISLOV: No. Because those right
6 -- because at that point -- I mean, Mr. Donham will
7 tell you, look, it's really efficient to rule on all
8 these people's rights without giving them notice. It
9 is efficient.

10 That is not America. You want to have
11 this discussion about -- if the Court would like to
12 have this discussion about what is America, American
13 justice --

14 THE COURT: Anytime.

15 MR. KRISLOV: American justice is --
16 due process is that you have a right to notice of
17 proceedings that affect your rights.

18 If the Court is deciding things that
19 may bind you, you have a right to notice and an
20 opportunity to be heard, opt out, sit and watch.
21 That's what due process is about.

22 Mr. Prendergast rejiggering this
23 business about Oliveira, Oliveira and Schlessinger
24 are quite clear.

1 If you read them and you get the --
 2 THE COURT: Well, that's a separate
 3 issue.
 4 MR. KRISLOV: No, that's the -- okay.
 5 That's --
 6 THE COURT: It's a separate issue.
 7 MR. KRISLOV: Okay.
 8 To what end. Mr. Donham, the purpose
 9 is to give people notice that their rights are being
 10 affected. Who does that harm?
 11 THE COURT: But the Court has ruled
 12 that they don't have these rights.
 13 MR. KRISLOV: Well, they have -- then
 14 you especially better give them notice.
 15 THE COURT: Not only me. The
 16 appellate court has ruled that.
 17 MR. KRISLOV: No, the appellate
 18 court --
 19 THE COURT: So -- so you're right. If
 20 you have rights, you should be given notice and
 21 opportunity to fight for them.
 22 If you have no rights, you're not
 23 entitled to notice or opportunity.
 24 MR. KRISLOV: Yes, you are, because if

1 the Court's ruling that you have no rights is to be
 2 binding against those people, they have a right to
 3 opt out and pursue the claim; and that those issues
 4 are themselves on appeal in this proceeding, that
 5 will affect their rights.
 6 THE COURT: Maybe we should wait.
 7 Maybe we should wait until the appeal is decided.
 8 MR. KRISLOV: No, because at that
 9 point -- if we waited -- if we just decide
 10 everybody's rights --
 11 THE COURT: When we know.
 12 MR. KRISLOV: When we know what your
 13 rights are, we're going to give you notice of what
 14 the Court has decided.
 15 That's not due process, Your Honor.
 16 That is the reverse. That's saying we're not going
 17 to let you know until after we decide and it's become
 18 final. We're not going to let you even know that the
 19 proceedings are occurring.
 20 Your admonition to people who were in
 21 the courtroom, "Go apply with ACA because, you know,
 22 we don't know how this will turn out."
 23 THE COURT: It wasn't an admonition.
 24 It was a prayer.

1 MR. KRISLOV: Pardon?
 2 THE COURT: Go on.
 3 MR. KRISLOV: It was a direction,
 4 suggestion or a warning. Great. For the people who
 5 were in the courtroom, that's terrific. For all the
 6 rest of the people, there was no notice to them that
 7 they have no rights or if they had rights, or that
 8 the rights under the statute are going to be this, or
 9 under contract.
 10 All these people's rights are being
 11 determined, and they have a right to know that these
 12 proceedings are going on, and the notice can be done
 13 easily and effectively because these defendants are
 14 in contact with these annuitants, whether they're
 15 current employees, former employees --
 16 THE COURT: I do understand.
 17 MR. KRISLOV: Pardon?
 18 THE COURT: I do understand what
 19 you're saying.
 20 MR. KRISLOV: And so it's very easy to
 21 give people notice and the opportunity to protect
 22 their rights.
 23 THE COURT: Well, you jumped in while
 24 Mr. Deady was talking, which is your wont, and that's

1 okay, but, Pat, would you like to finish?
 2 MR. DEADY: That was my point exactly.
 3 For the record, I agree with Mr. Krislov.
 4 THE COURT: Well, he still wants you
 5 out of the case, so it's too bad.
 6 So anything you'd like to say?
 7 MS. BOECKMAN: No, I do agree with
 8 Mr. Donham that we had included in our brief the
 9 concern that plaintiffs' motion fails to meet the
 10 class certification requirement for the fair and
 11 efficient adjudication of this controversy.
 12 I believe when the appellate court
 13 ruled with respect to the remaining sole pension
 14 benefit under Count 1, it believed that this case was
 15 finalized, because it did send it back for the sole
 16 purpose for you to figure out how to fund that
 17 limited subsidy under the 1983 and 1985 amendment.
 18 Regardless of whether people are
 19 opting in or opting out, you don't have the ability
 20 under the Pension Code -- once a benefit's a
 21 protected benefit under the constitution, you don't
 22 have the ability to opt out of that benefit. You are
 23 entitled to that benefit, and the Funds have said,
 24 since your ruling on who exactly gets that subsidy

1 and how that subsidy is paid out, the Funds have said
2 that they intend to treat every annuitant who meets
3 those qualifications in the same manner. They get
4 the subsidies or they don't because they don't meet
5 the eligibility requirements.

6 Whether or not they're one of the 400
7 named plaintiffs in this lawsuit is immaterial to the
8 Funds. We intend to pay those subsidies if they meet
9 that eligibility requirement.

10 I'm concerned that class certification
11 will confuse annuitants, make them feel that they do
12 have to opt in or make some sort of affirmative
13 statement to Mr. Krislov in order to receive that
14 subsidy, and they don't have to do that.

15 As we've indicated, we stand ready and
16 willing, and do our draft correspondence to send to
17 those annuitants, putting them on notice that it's
18 our understanding that they are eligible for the
19 subsidy payments.

20 THE COURT: Mr. Kugler.

21 MR. KUGLER: Just to be very brief, I
22 would also resonate the same argument as was made by
23 both Mr. Donham and Ms. Boeckman.

24 The only thing I have to say is, I

1 feel like I'm going around in circles. The appellate
2 court has ruled. This Court has ruled.

3 And as a result of those rulings, only
4 a defined number of persons actually still have a
5 claim in this case insofar as the subsidy is
6 concerned.

7 I know Mr. Prendergast raised the
8 Schlessinger case. I'm not saying it, that case is
9 saying it, but no class action can proceed unless you
10 have a viable claim.

11 There's a lot of people that, you
12 know, that Mr. Krislov's claiming have claims in this
13 case. But insofar as the rulings are concerned,
14 there's only a limited number of people that even
15 still have a viable claim.

16 So insofar as any class action being
17 certified, it should be only limited to those
18 individuals that still have claims left in this case.

19 Now, again, I agree with what Ms.
20 Boeckman said. Insofar as the subsidies, the Funds
21 have always asserted that we intend to comply with
22 the appellate court and this Court's ruling.

23 We're not just paying subsidies for
24 the 400 or whatever plaintiffs are on this case.

1 Whoever meets the eligibility criteria, regardless of
2 whether they're named or not named, the Funds intend
3 to comply with paying those subsidies.

4 So, you know, we're advancing, you
5 know, what Mr. Deady and Mr. Krislov has said, that
6 it would almost seem like the Funds should only be
7 paying subsidies for the people that they've named,
8 and that's not what we're doing here.

9 The courts have said that these people
10 are eligible regardless of whether they're named or
11 not in this case, and the Funds intend to comply with
12 that.

13 So, I mean, I agree that while class
14 certification is not even necessary to advance this
15 litigation, if class certification were warranted, it
16 can only be for a defined number of people and not
17 the classes as asserted. That's all I have to say.

18 THE COURT: Richard, did you want to
19 say something?

20 MR. PRENDERGAST: Just one point, Your
21 Honor.

22 The law of this case has included the
23 dismissal of estoppel claims, breach of contract
24 claims, due process claims, contract clause --

1 constitutional contract clause claims.

2 Those matters have all been resolved
3 without having class certification, and everybody
4 understands that those appellate court decisions are
5 going to control anybody else who wants to try to opt
6 out and assert those very same claims.

7 So this whole argument about the need
8 to ignore all the prior decisions of the Court, take
9 a complaint that seeks to state claims on behalf of
10 classes that are defined in a way that are contrary
11 to the decisions of this court and the appellate
12 court, and then resist the idea that they should not
13 have a class certified, because these people can come
14 back in on their own, they come back in on their own,
15 all of these rulings on these claims have already
16 been made by the appellate court, the stare decisis.
17 They control any future proceeding. Not res
18 judicata. They're stare decisis. And, presumably,
19 the trial courts and the appellate court are going to
20 follow them.

21 So it's for this reason that I focused
22 my argument on the extreme --the extent to which the
23 the complaint seeks class certification --

24 THE COURT: Is viable.

1 MR. PRENDERGAST: Well, not only
2 viable to that, but the classes that he seeks to
3 certify are not possibly certified based upon prior
4 substantive rulings.

5 So for all those reasons and the
6 reasons other counsel have raised, I respectfully
7 request that you do not deny class certification,
8 Judge.

9 THE COURT: Clint, you get last ups on
10 this.

11 MR. KRISLOV: Two things: The
12 settlement, the 2000 settlement, defines the
13 settlement class as all current and former City
14 employees who would become one of the Funds' future
15 annuitants on or before June 30, 2013 and their
16 eligible dependents.

17 At paragraph J, after the termination
18 of the settlement period, class members retain any
19 right they currently have to assert any claims with
20 regard to the provision of annuitant healthcare
21 benefits, other than the claims arising under the
22 prior settlement, etcetera.

23 The settlement class being everybody
24 through June 30 through -- who started working for

1 the City through June 30, 2013, had a right to assert
2 their claims. And that's what we did in 2013 when we
3 filed this case to begin with. And that's what that
4 class was doing.

5 Within the parameters of that
6 definition, this Court decided that some people do
7 have a claim; some people don't. It decided
8 initially the funds had an obligation to provide,
9 then it decided that they just have an obligation to
10 subsidize.

11 The issue of what the -- of who is
12 included in the subsidy based on date is before the
13 appellate court. The issue of whether the Funds have
14 the obligation under the statute to provide that
15 coverage is before the appellate court.

16 All those things will be decided
17 within the confines of this case. And those people,
18 including all those people who were within the
19 settlement class for whom this case was filed, are
20 entitled to notice that these proceedings are going
21 on, and that may adjudicate their rights.

22 Some adjudications this Court has made
23 to this point, some are on appeal, some will be on
24 appeal. Whatever it is, they'll all be decided

1 within the confines of this case.

2 There is no harm and, indeed, there is
3 a big plus to giving these people notice that these
4 proceedings are going on and will affect them,
5 because they will.

6 As Mr. Prendergast points out, he
7 admits that none of the these proceedings will be res
8 judicata against anybody but the 400 who stuck their
9 neck out and actually signed to pursue this. He said
10 well, it will be stare decisis.

11 Well, the fact is, this is going to
12 affect their rights. They have a right to know that
13 this Court is making decisions on their rights.
14 There's nothing wrong with giving them notice.

15 And the concern that they're going to
16 be confused, I'm confident that they will understand
17 that the proceedings will affect their rights, and
18 they need to make a decision to either ride with
19 them, opt out and sue on their own before another
20 judge. I wouldn't blame them; wouldn't necessarily
21 agree with them, but whatever. Doesn't matter.
22 Their rights are being determined by this Court and
23 within these proceedings by the appellate court as
24 well.

1 It is appropriate to give them notice
2 so that they know that the proceedings are occurring
3 and -- sorry.

4 The aspect of whether they're going to
5 think that they have come through us to apply for
6 benefits, you know, these things --

7 THE COURT: I don't think that's a
8 concern one way or the other.

9 MR. KRISLOV: If anybody thought for a
10 second that I was taking advantage of these people --

11 THE COURT: Not an issue, Clint.

12 MR. KRISLOV: But it's unnecessary to
13 go there.

14 The fact of the matter is, it's time
15 to certify the case and give notice to all the people
16 whose interests are being affected or being decided.

17 THE COURT: Or have been.

18 MR. KRISLOV: Well, they're not final
19 yet. Oh, yeah. Their statement that who is within
20 the group hasn't been finally decided yet, and who is
21 in what is to be provided hasn't been finally decided
22 yet.

23 And the Korshak/Windows thing, they're
24 getting your decision to exclude the Korshak and

1 Windows people from the subsidies, that -- they have
2 a right to know that that's occurring, but that's --
3 you know, you did not certify that so we could appeal
4 it.

5 THE COURT: But that's been handled by
6 the appellate court. You got everything that you
7 could for those folks.

8 MR. KRISLOV: With all due respect,
9 Your Honor, what the appellate court said is that
10 their claim was essentially moot by settlement.

11 There was no settlement. What
12 happened was, the City said --

13 THE COURT: Then your beef is with
14 them, and that's why you took Appeal A, and it was
15 rejected.

16 MR. KRISLOV: No.

17 THE COURT: Your beef is with them.
18 What they said is that it's moot.

19 MR. KRISLOV: Not -- that doesn't mean
20 it is moot. Essentially moot is different from
21 moot as a --

22 THE COURT: You and I disagree.

23 MR. KRISLOV: We may. And that will
24 be decided -- that issue as well will be decided by

1 the appellate court within the context of this --

2 THE COURT: So we wait?

3 MR. KRISLOV: No.

4 THE COURT: Okay.

5 MR. KRISLOV: Give them notice that
6 these things are --

7 THE COURT: I'll decide it. I'll
8 decide it then.

9 MR. KRISLOV: Sorry.

10 THE COURT: It's okay.

11 MR. KRISLOV: They're entitled to
12 notice that these things are occurring within the
13 confines of these proceedings, whether here or on
14 appeal.

15 They are affected --

16 THE COURT: I heard you.

17 MR. KRISLOV: -- and they're entitled
18 to notice.

19 THE COURT: I heard you.

20 MR. KRISLOV: Thank you, Your Honor.

21 THE COURT: You're welcome.

22 All right. Lastly, for today's
23 purposes, we will deal with the arguments on the
24 motion to dismiss. The movants there are the City,

1 primarily, so, City, your motion, your argument.

2 MR. PRENDERGAST: Well, I don't think
3 we're alone.

4 THE COURT: No, I didn't say you were.
5 I'll hear what Cary and Sarah and Mr. Kugler have to
6 say, or Mr. Burke and Mr. Deady.

7 So, please.

8 MR. PRENDERGAST: If there is any
9 issue that has been thoroughly briefed, or issues,
10 they are the issues raised in this motion to dismiss.

11 MR. KRISLOV: Your Honor, could I --
12 not to interrupt Mr. Prendergast, but could we take a
13 five minute break before we start this segment?

14 THE COURT: Sure. Oh, sure. That's
15 just fine. We'll give you more than that. We'll see
16 you at around twenty to 4:00. And then take as long
17 as you need.

18 But I'll be looking for you around
19 twenty to 4:00. I'm sorry. I should have done that.
20 You're quite right, Mr. Krislov. Apologies.

21 (Brief recess.)

22 THE COURT: Back on the record. With
23 regard to your motion to dismiss the sixth amended
24 complaint.

1 MR. PRENDERGAST: We moved to dismiss
2 this complaint because plaintiffs' counsel has chosen
3 to replead the exact same claims, now Counts 2
4 through 7 of the sixth amended complaint that this
5 Court previously held were stricken -- this is a
6 quote -- stricken with prejudice, pursuant to Section
7 2-619 is barred by law of the case, close quote,
8 after they were alleged as part of the fourth amended
9 complaint.

10 And the reason we don't have a fifth
11 amended complaint, you may recall, is because when it
12 was filed, it's a mirror version of the sixth. It
13 was withdrawn for whatever reason, and the sixth was
14 filed.

15 So the sixth was really filed after
16 the fourth in terms of us doing anything with it.
17 It's the same complaint as you previously dismissed
18 with prejudice.

19 In your ruling on September 12th, Your
20 Honor, you said, "As this Court found, Counts 2
21 through 7" -- this is speaking of the fourth amended
22 -- "2 through 7 were previously dismissed with
23 prejudice. The dismissal of those claims was
24 affirmed by the appellate court in Underwood v. City

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1 of Chicago, citation. And plaintiffs' request for
2 review of the appellate court's decision by the
3 Illinois Supreme Court was denied."
4 That's page five of your opinion.
5 So as a result, on September 12th,
6 2018, this Court held Counts 2 through 7 have been,
7 quote, finally decided and cannot be relitigated,
8 close quote.
9 These claims can, once again, be
10 dismissed out of hand because there's just nothing
11 new to them.
12 With respect to Count 1, the appellate
13 court held that the plaintiffs can state a claim
14 under Count 1 limited to the fixed rate subsidies
15 embodied in the 1983 and the 1985 amendments to the
16 Pension Code. The plaintiffs have still not stated a
17 claim in their sixth amended complaint.
18 Count 1 of the sixth amended complaint
19 includes allegations that plaintiffs are entitled to
20 more than the benefits protected by the 1983 and 1985
21 amendments to the code and seeks relief for, quote,
22 illegal impairment of contract, close quote, which is
23 a claim previously dismissed with prejudice.
24 Defendants here are certainly well

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1 within their rights to move to strike these
2 paragraphs that are contrary to the appellate court's
3 mandate and this Court's decisions.
4 Furthermore, with respect to Count 1,
5 Count 1 still does not state a claim against the
6 City. It does not say that the City has failed to
7 pay the tax levy amounts to the Funds or that the
8 Funds are unable to pay the subsidies under the 1983
9 and 1985 amendments. Indeed, the Funds are
10 undertaking the process of paying the subsidies as we
11 speak.
12 So they haven't -- Count 1 doesn't
13 state anything against the City that's a viable
14 claim.
15 The newly added claims fare no better.
16 Count 8 purports to be a direct claim against the
17 Funds and their trustees to provide their statutory
18 required coverage and subsidies and a derivative
19 count to enforce their contract with the City as an
20 insurer and pursue the statutory requirement tax levy
21 against the City.
22 THE COURT: Is that 8 or 9?
23 MR. PRENDERGAST: That is 8. That is
24 a quote from 8.

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1 8 should first be dismissed because it
2 does not comply with Section 5-2/2-603's unambiguous
3 pleading requirement that each count must be pleaded
4 -- or each claim must be pleaded in a separate count;
5 secondly, it should be dismissed because the
6 plaintiffs have failed to state a claim against the
7 City with respect to its derivative claim to pursue
8 tax levy amounts, as they have not and cannot
9 allege -- they have not alleged and they cannot
10 allege that the City has failed to levy the taxes
11 required by the Pension Code.
12 So the idea of the derivative claim is
13 they're going to stand in the shoes of the Funds to
14 assert the Funds' claims against the City, that the
15 City is not paying its tax levy.
16 Well, there's never been a question in
17 this case whether the City is paying the tax levy.
18 And in addition to that, the
19 plaintiffs do not have standing to derivatively
20 pursue the tax levy claims because the Funds have
21 pursued any claims related to tax levy against the
22 City, and as you know, we've had our disagreements
23 here, and the annuitants' benefits are protected
24 regardless of any tax levy contributions to the

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1 Funds, because the City has to ensure the payment of
2 those benefits protected by the Pension Code,
3 regardless of what amounts remain in the Funds. That
4 goes all the way back to the Supreme Court's decision
5 in the state case on the pension reform case for the
6 state.
7 So the Funds have certainly asserted
8 their claims against the City where there are claims
9 against the City. In that circumstance, you can't
10 bring a derivative claim, because in order to bring a
11 derivative claim, you've got to maintain that the
12 corporation isn't bringing the claim that it should
13 be bringing. In this case, the Funds stands are
14 treated like a corporation, if, indeed, you can bring
15 a derivative claim at all.
16 But in any event, it's a claim against
17 the Funds -- against the City on behalf of the Funds,
18 without making a demand on the Funds to do anything
19 different and, certainly, without making any claim
20 that the Funds are not bringing their claims against
21 the City as they come up.
22 The Funds have made a number of
23 arguments about their fiduciary duties and have been
24 represented by counsel, who are committed to their

1 fiduciary duties. And when they think the City has
2 fallen short, they have certainly been adverse to the
3 City, in this litigation and in other pending
4 litigation.

5 Lastly, with respect to plaintiffs'
6 claim to enforce the Funds' contracts with the City
7 as the insurer, the plaintiffs have failed to
8 identify or attach any such contract, and this Court
9 and the appellate court have previously rejected the
10 argument that the City has an obligation to the
11 annuitants for the funds beyond what is set forth in
12 the 1983 and 1985 Pension Code amendments, and that
13 is the tax levy.

14 Lastly, with respect to Counts 9
15 through 11, which are the last counts, plaintiffs
16 have attempted to plead three claims: Breach of
17 contract, implied contract, and terms and conditions
18 of employment.

19 In one single paragraph, which
20 violates the rules of the sixth amended complaint by
21 incorporating by reference the counterclaims that the
22 four City pension funds asserted 30 years ago in the
23 Korshak -- the original Korshak case, the Korshak
24 case brought -- Funds sued the City, tried to put

1 together a conglomeration of claims that were
2 asserted 30 years ago. That case settled years and
3 years ago.

4 That clearly violates 5-2603's
5 unambiguous pleading requirement that each claim must
6 be pleaded in a separately designated count in
7 separately numbered paragraphs.

8 Even if plaintiffs fix that defect,
9 these claims are barred by the law of the case, given
10 the appellate court's holding the plaintiffs have no
11 right to lifetime health benefits based upon such
12 contractual -- quasi-contractual theories of
13 recovery.

14 Plaintiffs' counsel have tried to
15 raise this contract or quasi-contract theory. In
16 every way, shape and form, it's been rejected every
17 time they've tried to do it. Law of the case
18 controls here. The sixth amended complaint, exactly
19 like the fourth amended complaint that was dismissed
20 with prejudice, has to be dismissed now.

21 Thank you very much, Judge. We stand
22 on our briefs for the rest of it.

23 THE COURT: Cary.

24 MR. DONHAM: Thank you, Your Honor.

1 Just a couple of points.

2 On the Count 1, and I think Sarah
3 alluded to this, Count 1 as far as -- it has two
4 basic aspects as far as I can read it. One is to
5 deal with the subsidies, and the second is to provide
6 a healthcare plan.

7 Your Honor already dismissed the
8 portion relating to provide a healthcare plan.
9 Plaintiffs asked for and received Rule 304(a)
10 language. They've appealed that. There's no
11 jurisdiction in this Court with regard to that aspect
12 of Count 1.

13 As far as the subsidy -- and I can --
14 let me add that we raised that in our motion, and the
15 plaintiffs did not dispute that in their response to
16 the motion.

17 THE COURT: I read it.

18 MR. DONHAM: Second, and I think you
19 will have read this too, that Your Honor's already
20 ruled that the subsidies should be paid and to whom
21 they should be paid. Therefore, that part of the
22 count is moot. There's nothing left to decide.

23 So, therefore, Count 1, there's
24 nothing left. It's either lack --

1 THE COURT: Well, is the right remedy
2 to dismiss it or to let it stand pending the appeal?

3 MR. DONHAM: I think you should
4 dismiss it as moot.

5 THE COURT: But I can't. I don't have
6 jurisdiction. It's on appeal.

7 MR. DONHAM: Well, you can dismiss
8 what's left of it. You can dismiss the part that has
9 to do with the payment of the subsidies.

10 Then as far -- and we agree with Rich
11 as far as Counts 2 through 7 goes. They're seeking,
12 like, a third bite at the apple here.

13 And the plaintiffs' claim that they've
14 substantially revised the fourth amended complaint,
15 we've provided a track changes version of that
16 attached to our motion to show how little -- how few
17 the changes were.

18 And the law of the case and res
19 judicata apply not only to what was actually alleged,
20 it's what could have been alleged. And so to say
21 that they've revived their contract counts by
22 referring to testimony from a representative from the
23 Fire Fund, Municipal Fund and the Policemen's Fund,
24 not -- by the way, they don't have any testimony from

1 anyone from the Laborers' Fund that they cite to.
 2 But those -- those were all referenced
 3 in prior argument. There's nothing new there, so
 4 those counts should be dismissed for law of the case,
 5 once again, and by based on res judicata.

6 As far as Count 8 goes, there's no
 7 basis for Count 8. They don't allege anywhere that
 8 the Funds have failed to pay the subsidies that were
 9 authorized up until December 31, 2016.

10 After that date, the Funds have -- the
 11 LABF have no statutory authority to pay any subsidies
 12 until, I believe it was November of 2017, when the
 13 PLA was denied, and then the case was ultimately
 14 remanded to this Court.

15 Since that time, there's really been
 16 no dispute by the Funds that we have to pay the
 17 subsidies. We've been in a dispute with the City as
 18 to the funding of those subsidies, not as to the
 19 payment of those subsidies.

20 And we've agreed -- we've tendered
 21 notices to Your Honor as to how that should be --
 22 those should be paid. So there's really no basis for
 23 Count 8, even if there is authority to file a
 24 derivative count, which I highly -- I think that's

1 very questionable, given that there's no authority in
 2 Article 11 for such a derivative count.

3 And then I don't believe that -- I
 4 just go along with what Rich said as for Counts 9
 5 through 11 and rely on our brief for the rest of it.

6 THE COURT: Thanks, Cary.
 7 Sarah.

8 MS. BOECKMAN: Cary pretty much stole
 9 my thunder. He said a lot of what I would have said.

10 I would just add with respect to Mr.
 11 Krislov's argument about the Funds' testimony in the
 12 Korshak litigation, we have included in our brief the
 13 fact that he raised that in front of the appellate
 14 court, and, obviously, the appellate court did not
 15 find that binding. He raised it before the appellate
 16 court issued their final opinion, which then was
 17 upheld through denial of the PLA by the Supreme
 18 Court. So we note that, and just note that for the
 19 record.

20 And the only other thing I would say
 21 is that with respect to Count 8, the derivative
 22 claim, it was the Funds' position until you ruled
 23 against us that it was the responsibility based on
 24 the appellate court mandate for the City to pay the

1 subsidies. You disagreed and held that it was the
 2 Funds' responsibility to pay the subsidies.

3 So as far as -- in fact, Mr. Krislov
 4 agreed with the City's position on that argument, so
 5 when he says now that we should be asking the City
 6 for financing of that subsidy, I'm a little unclear
 7 what he means, because you have held that at the end
 8 of the day, we aren't getting any additional
 9 financing. We get what the tax levy provides,
 10 nothing more, nothing less, period.

11 So as far as financing of these
 12 subsidies on a go-forward basis, we will, of course,
 13 we always add on our tax levy. The Funds' tax levy
 14 request that we send to the City, we always include
 15 the actual amount that would be required to fully
 16 fund the Fund for that year.

17 But by law, we get a much --
 18 significantly less amount than what that number is.
 19 So that's the statutory makeup that we have to live
 20 by, but you acknowledged that and held specifically
 21 that the Funds don't get any additional funding from
 22 the City.

23 So that's all I'd like to say. The
 24 rest, I think our brief adequately highlights our

1 issues and concerns with Mr. Krislov's sixth amended
 2 complaint.

3 THE COURT: Thank you.
 4 Mr. Kugler.

5 MR. KUGLER: Just for the record, I
 6 have nothing further to add. I would just be merely
 7 repeating the same arguments that both Cary and
 8 Sarah, as well as Richard, just made.

9 So I concur with everything they said.

10 THE COURT: Thank you. Mr. Krislov.

11 MR. KRISLOV: As to Count I, Count I
 12 has been upheld and is proceeding ahead, even if it
 13 is proceeding ahead on the subsidies, which the Funds
 14 all said they didn't have to pay, and they're having
 15 to pay as a result of the enforcement of Count 1,
 16 even on the limited basis that this Court has
 17 ordered. And it's not done. It's still in process.

18 And although, as I offered at our last
 19 hearing to work with them on it, I know it's them
 20 calling when the phone don't ring, as the song goes.

21 THE COURT: I don't know that song,
 22 but I understand it.

23 MR. KRISLOV: But the fact is, they
 24 haven't done anything in the past few weeks to keep

1 this -- to keep the -- get the subsidies going.
 2 And they don't dispute that for, I
 3 think to the extent of about \$8 million, they could
 4 pay those subsidies today, because --
 5 THE COURT: I take your point, it's
 6 still ongoing with regard to that --
 7 MR. KRISLOV: Count 1 is still
 8 ongoing.
 9 THE COURT: That part.
 10 MR. KRISLOV: And the ultimate
 11 determinant of what Count 1 enforces is still -- is
 12 before the appellate court, and the outcome of that
 13 we don't know and won't know until they rule on that.
 14 With respect to the estoppel claim,
 15 which is Count 3, we have changed -- we have -- it's
 16 a different estoppel count, because it alleges now,
 17 while Mr. Prendergast says, well, it's all the same
 18 thing, we explicitly allege that it was that these
 19 statements that were given to these retirees, that
 20 were given to City employees, were done by repeated
 21 authorized personnel, authorized by repeated
 22 administrations of the City.
 23 That would satisfy the -- that would
 24 satisfy the requirements for estoppel even by

1 municipality. And the Funds really can't dispute
 2 that. They would say that that was what was told to
 3 these people, and that's what these people will -- to
 4 a person -- not just the people in the courtroom, but
 5 most everybody else who worked for the City who
 6 attended a preretirement seminar or received that
 7 information.
 8 And so if it was, indeed, authorized
 9 by repeated City administrations, that is
 10 enforceable, and so --
 11 THE COURT: But how does that differ
 12 from your allegations that you made before, that
 13 there's a contract because certain statements were
 14 made not once, not twice, but at different meetings?
 15 MR. KRISLOV: At different --
 16 THE COURT: And so that's repeated
 17 authorized -- statements by authorized personnel --
 18 MR. KRISLOV: No, that's --
 19 THE COURT: -- which was raised
 20 before.
 21 MR. KRISLOV: That's the Count 5
 22 contract.
 23 And I'll accede to the idea that they
 24 have not accepted the contract direct from the people

1 from the City to the retirees, but by estoppel
 2 because -- the count is different because it says
 3 this was authorized information, authorized to be
 4 communicated by repeated City administrations.
 5 So as an authorized communication,
 6 that would be enforceable, and that's the thing that
 7 in --
 8 THE COURT: But how does it differ,
 9 Clint, from your prior estoppel count?
 10 MR. KRISLOV: Because we did not make
 11 the explicit statement -- we did not make the
 12 explicit assertion that the statements were
 13 authorized by the City administration, and that's the
 14 difference.
 15 For number 6, which is the equal
 16 protection, that probably doesn't differ much, but
 17 the fact is for all the people who were participants
 18 at the same time as the Korshak and Windows people
 19 were participants, they had the same rights that the
 20 Korshak and Windows people had.
 21 And that, we think, because this was
 22 determined by your hire date rather than your
 23 retirement date, whether special legislation will
 24 hold muster, which is Count 7, because within the

1 Pension Code, everything is defined by a city with a
 2 population, for these purposes, of over 500,000 or a
 3 million.
 4 And the appellate court under Justice
 5 Simon did sort of whisk that one away without
 6 seriously addressing it, but the fact is, the reason
 7 the Pension Code lays things out in the categories
 8 that it does is that to identify people by -- as
 9 having rights by their employment by a named city is
 10 the essence of special legislation.
 11 The guts of what we're talking about
 12 on the contract and the derivative claim is a little
 13 different in Counts 8 through 11 -- sorry -- 9
 14 through 11.
 15 The direct claim is against the Funds
 16 because as their people testified -- and this is new
 17 in the complaint, and we have their explicit
 18 testimony acknowledging -- in fact, that was their
 19 assertion in the Korshak case, and Mr. Ford made the
 20 argument on behalf of all four of them, and
 21 Mr. Donham would not seriously dispute that all four
 22 Funds took the same position, and their executive
 23 director testified he wouldn't testify any
 24 differently from any of the other executive

<p style="text-align: right;">Page 98</p> <p>1 directors. The Funds explicitly said, we have an 2 obligation -- we have two obligations. We have an 3 obligation to provide coverage to our annuitants and 4 to subsidize it.</p> <p>5 And they've recognized that the reason 6 -- the main reason that they have that obligation, 7 they recognize the vulnerability of these people, the 8 unique position that their annuitants were in, that 9 they would not qualify by their City employment for 10 Medicare coverage, and that's why they contracted, 11 they fulfilled their obligation by contracting with 12 the City.</p> <p>13 Now, whether or not you decide -- 14 whether or not you're holding that they didn't have 15 that obligation stands or falls, the fact is, they 16 asserted that they contracted with the City, and that 17 the City had an obligation to them.</p> <p>18 And that's the contract which we seek 19 to enforce by Counts 8 through 11, which is that the 20 Funds contracted with the City, the City to be the 21 insurer for these people, for these annuitants, 22 because they needed it and because the Funds believed 23 it was their obligation to provide it.</p> <p>24 Now, even if you hold that -- while we</p>	<p style="text-align: right;">Page 100</p> <p>1 MR. KRISLOV: The Funds -- I think 2 it's 8 -- no, 8 is the Pension Code. The -- let's 3 see where the -- oh, sorry. Exhibit 3, the Korshak 4 Funds' counterclaims.</p> <p>5 They each, all four of them, asserted 6 that they had a contract or quasi contract with the 7 City, or that they had arranged with the City to make 8 this a term of employment. And that contract we want 9 to enforce. Even if the Funds, who were asserting 10 them originally, now abandoned their role.</p> <p>11 I would say shame on them. The City 12 promised to provide the coverage. The City thinks 13 they can get off without fulfilling its promises, 14 shame on them.</p> <p>15 THE COURT: What is your response to 16 Cary's argument that you have no standing to make a 17 derivative claim?</p> <p>18 MR. KRISLOV: The case that we started 19 in my first class case, which was actually a 20 derivative case, was Ryan against the City of 21 Chicago, where we discovered that the City was using 22 moneys belonging to the Pension Funds to invest for 23 itself and keeping the earnings.</p> <p>24 The Funds not only didn't take an</p>
<p style="text-align: right;">Page 99</p> <p>1 disagree with you, obviously, because the statute 2 says, certainly, explicitly for Police and Fire, that 3 the Funds must provide coverage, must provide a plan 4 for their annuitants to offset the cost.</p> <p>5 Even if you ignore the language of the 6 statute, which I disagree with you in your 7 interpretation, but whatever, the fact is, the Funds 8 asserted that they had contracted with the City to be 9 the insurer. We want to enforce that contract even 10 if the Funds now abandon that.</p> <p>11 We have a right as the intended 12 beneficiary of that contract to enforce that 13 contract.</p> <p>14 THE COURT: What contract? 15 MR. KRISLOV: The contract -- 16 THE COURT: Is it something that's 17 textually demonstrable. 18 MR. KRISLOV: The fund -- if you look 19 in the exhibit, the Funds made the allegation that 20 they had contracted. That is in an exhibit -- that 21 is their pleadings.</p> <p>22 MS. BOECKMAN: You can look at your 23 reply too, which I've attached, your appellate court 24 reply. You make the same argument --</p>	<p style="text-align: right;">Page 101</p> <p>1 action with us, they authorized the City to represent 2 them against us. And only when we recovered 3 judgment --</p> <p>4 THE COURT: I don't know that case. 5 What case? 6 MR. KRISLOV: It's an exhibit -- 7 THE COURT: What authority do you have 8 as matter of law that you can cite to me? Not 9 experiential --</p> <p>10 MR. KRISLOV: No, it's not -- 11 THE COURT: Just tell me what case 12 says that you can stand in the shoes of the Funds and 13 raise a derivative claim? 14 MR. KRISLOV: In our -- 15 THE COURT: Case. 16 MR. KRISLOV: In our opposition -- 17 THE COURT: Please. 18 MR. KRISLOV: In our opposition -- 19 THE COURT: Yeah, what's the cite? 20 MR. KRISLOV: -- to the City and 21 Funds' motion at page five. 22 THE COURT: What's the citation? 23 MR. KRISLOV: Ryan versus City of 24 Chicago, 274 Ill.App.3d 913.</p>

1 THE COURT: Thank you.
 2 MR. KRISLOV: And there is the -- in
 3 there the previous cited -- oh, at the top of the
 4 page, that's the 148 Ill.App.3d -- that's 148
 5 Illinois Appellate Reporter 3d 638, 1986.
 6 THE COURT: Okay, thank you.
 7 MR. KRISLOV: And that is a derivative
 8 case that participants, that we brought for
 9 participants, derivatively for those Pension Funds
 10 against the City, and we obtained substantial amounts
 11 for those Funds from the City.
 12 So derivative standing is well
 13 established. Been there, done that, and there's
 14 nothing that -- they don't have anything to suggest
 15 that there isn't.
 16 You know, they just say --
 17 THE COURT: Well --
 18 MR. KRISLOV: Well, but they --
 19 THE COURT: If that doesn't assume
 20 that there is, just because you say so.
 21 Are there allegations of fact upon
 22 which you rely that you can point to for this cause
 23 of action that you're raising, the derivative one?
 24 MR. KRISLOV: Sure. The allega- --

1 for the derivative one that the Funds had a contract?
 2 THE COURT: Yeah.
 3 MR. KRISLOV: In that --
 4 THE COURT: It was hard for me to go
 5 through all the different pleadings, which were
 6 voluminous, to find your factual allegations to
 7 support it.
 8 MR. KRISLOV: Yes, I'll -- in addition
 9 to Exhibit 3, there's also -- give me a second.
 10 THE COURT: Sure. This is regarding
 11 your Counts 9 through 12, right, that we're talking
 12 about?
 13 MR. KRISLOV: Yes. It's actually 9
 14 through 11.
 15 THE COURT: 9 through 11.
 16 MR. KRISLOV: 127(a) at page 36, the
 17 Funds' trustees acknowledge their statutory
 18 obligation to provide coverage for their annuitants.
 19 The Funds' trustees explicitly acknowledge their
 20 statutory obligation to provide and subsidize
 21 coverage for their annuitants.
 22 And then there are about three
 23 pages -- two pages of testimony that we did it as
 24 paragraph 127(a) so as not to disturb the other

1 numbering to make it easier to go through.
 2 We have the whole Korshak trial, which
 3 is Exhibit 27. But in the next few pages, Kevin
 4 Ford, on page 37, the Police Fund's attorney and lead
 5 counsel for all the Funds, this is the Funds' only
 6 obligation, to make these payments toward the
 7 premiums, as well as to arrange for the insurance.
 8 The Police Fund executive director --
 9 still on page 37, his testimony: As I understand it,
 10 the statute calls for the Police Annuity and Benefit
 11 Fund to arrange for hospitalization of coverage for
 12 its annuitants and to contribute a specified amount
 13 toward the cost of that insurance.
 14 On cross-examination by the City, Andy
 15 Beckett asked him: Your understanding of Section
 16 5-167.5 of the Policemen's Annuity Act -- sorry -- of
 17 the Policemen's Annuity Fund Act required several
 18 things of the Pension Fund?
 19 Answer: That is correct. One of
 20 those things, the subsidy.
 21 Later on: And it is also directed the
 22 Funds -- the Fund -- to enter into a contract of
 23 insurance.
 24 THE COURT: But let me ask you a

1 question.
 2 MR. KRISLOV: Yes.
 3 THE COURT: I've already decided that
 4 there is no contract between the City and the Funds
 5 to provide healthcare to the Funds.
 6 MR. KRISLOV: No.
 7 THE COURT: Yes.
 8 MR. KRISLOV: No.
 9 THE COURT: I decided that the City's
 10 only responsibility is to levy taxes. That's what I
 11 decided.
 12 And isn't that the law of the case,
 13 whether you agree with it or not? Isn't that already
 14 the law of the case, Clint?
 15 MR. KRISLOV: This is different. This
 16 is whether or not there was a -- what you said was
 17 that the statute only requires the Funds to
 18 subsidize.
 19 What we're saying here as that whether
 20 or not you recognize -- whether you were right or
 21 wrong, that's the issue up before on appeal is to
 22 whether the Funds have an obligation to provide --
 23 whether or not they did, we think they did, because
 24 the statute says that, but whatever. Whether or not

1 they still asserted, well, even if they didn't have
 2 the --
 3 THE COURT: You're losing me. I'd
 4 like you to keep your eye on the ball and answer my
 5 question directly, without all the asides.
 6 You say there's a different
 7 contractual theory.
 8 MR. KRISLOV: Yes.
 9 THE COURT: What is it?
 10 MR. KRISLOV: The contractual theory
 11 is that rather than a contract that the annuitants
 12 have with the City or the Funds, this is a contract
 13 that the Funds have with the City.
 14 THE COURT: So you're doing -- getting
 15 there indirectly, when I've already found that,
 16 directly, there is no contract between the City and
 17 the annuitants. You say there's somehow a contract
 18 between the City and the Funds by which the
 19 annuitants benefit, yes?
 20 MR. KRISLOV: Yes. And that the
 21 Funds --
 22 THE COURT: And where is the evidence
 23 of a contract between the City and the Funds, from
 24 the City's point of view? Where's the document?

1 I see it -- I know there's a statute
 2 that requires the City to levy taxes to support the
 3 subsidies. Okay. That's fine. Textually
 4 demonstrable.
 5 Where is the contract in your
 6 allegations? Where is the documents upon which you
 7 rely for me to find a contract?
 8 MR. KRISLOV: The Funds' complaint --
 9 THE COURT: Kevin Ford?
 10 MR. KRISLOV: The Funds' complaints --
 11 both Kevin Ford and the executive directors all
 12 say --
 13 THE COURT: Where's the City saying we
 14 have a contract with the Funds?
 15 It's fine that Kevin Ford, who's a
 16 wonderful man, believes that there might have been
 17 some sort of a contract or responsibility.
 18 Let's assume that for the sake of
 19 argument, because you say its textually demonstrable,
 20 although it wasn't clear in my reading of the
 21 voluminous attachments.
 22 But I just want to know -- since it
 23 takes two to tango, we know that -- where's the City
 24 obligating itself to a contract with the Funds to do

1 that so that your annuitants can thereby benefit and
 2 have standing here, derivatively?
 3 MR. KRISLOV: Each of the Funds in
 4 Exhibit 3, each of the Funds counterclaimed again --
 5 this was initiated by the City, and so each of the
 6 Funds counterclaimed against the City in the -- for
 7 breach of contract.
 8 Verified counterclaim for injunction
 9 or other relief, this one by the Laborers',
 10 Mr. Donham.
 11 THE COURT: Yes, okay. That's great.
 12 You've explained to me from the Funds' point of view
 13 they had a theory in which there was a contract of
 14 some sort.
 15 Now I'm asking you, where's the City
 16 accepting that? Where's there a ruling holding that
 17 the City's responsible to that and was party to a
 18 contract?
 19 MR. KRISLOV: We're not asking for
 20 summary judgment at this point. We're just
 21 establishing there was a contract. These writing --
 22 THE COURT: You're not establishing
 23 anything. You're having something from Kevin Ford
 24 saying we believe that they should.

1 MR. KRISLOV: No. It is the Funds',
 2 each the four Funds' counterclaims saying that they
 3 have a contract with the City to provide this
 4 coverage, and that --
 5 THE COURT: And how does that differ
 6 from my ruling where I already ruled the City has no
 7 obligation to do so, first, and, secondly, that it's
 8 up on appeal? Want to wait? Fifth time. Shall we
 9 wait? Fifth time.
 10 MR. KRISLOV: We can wait sixth time
 11 until all these people are dead.
 12 THE COURT: You don't want to wait.
 13 Okay.
 14 MR. KRISLOV: I'm willing to -- what I
 15 requested was for us to put this --
 16 THE COURT: When the appellate court
 17 rules, and if they rule that there is no such
 18 contract, are you done?
 19 MR. KRISLOV: They have not ruled that
 20 there is no such contract.
 21 THE COURT: No. If they do rule that
 22 way as a result of the appeal that's pending --
 23 MR. KRISLOV: No --
 24 THE COURT: -- are you done?

1 MR. KRISLOV: They won't rule as a
2 result. The appeal that's pending doesn't deal with
3 that issue. The appeal that's pending, because
4 you've only certified under rule --

5 THE COURT: I certified what you asked
6 me to certify.

7 MR. KRISLOV: No, you did not. You
8 certified only part of it. You certified as to the
9 date of execution issue.

10 THE COURT: That's true.

11 MR. KRISLOV: You refused to certify
12 as to the Korshak issue, and there's nothing in there
13 about the contract issue and as to whether the Funds'
14 contract with the City can be derivatively enforced
15 against the City, and that's what we're seeking to
16 enforce by this count, and this count is open. And
17 they can answer it.

18 And if the City can deny it, deny that
19 they engaged in any such thing, that's why having
20 these people answer the complaint already would bring
21 things a long way along to getting this resolved.

22 If the City wants to deny that there
23 ever was such an agreement, I'll be surprised. They
24 may do it, but there will be documentation and

1 communications between the City and the pension Funds
2 over the deal that was made to provide these people
3 coverage.

4 And these people need the coverage and
5 the City should be -- whether we do it directly or
6 derivatively, these people are entitled to that
7 coverage that they were promised and that the City
8 had -- that the Funds had contracted with the City to
9 provide.

10 THE COURT: Okay. I understand where
11 you're coming from.

12 MR. KRISLOV: In that respect, Your
13 Honor, the complaint, (a), because Count 1 is
14 proceeding, cannot be dismissed, and because there
15 are these other new counts, which are factually
16 different from the past and assert different legal --
17 legally different assertions, this complaint should
18 be allowed to go forward.

19 THE COURT: Thank you.

20 Any response? I asked Clint a lot of
21 questions. I'm specifically interested in the City's
22 point of view with regard to the nature and the
23 sufficiency, actually, of the allegations in the
24 complaint of a contract between -- that exists

1 between the City and the Funds to provide healthcare
2 to the annuitants.

3 MR. PRENDERGAST: Your Honor, the
4 argument that there's a contract right here has been
5 raised time and again by the plaintiffs and rejected
6 time and again by you and by the appellate court.
7 Now Mr. Krislov comes in and says Mr. Ford, who was
8 representing the Police Fund, and someone else who's
9 representing someone else, argued one way or the
10 other about whether there was some kind of a
11 contractual obligation. They made an argument one
12 day in court. They probably put it on paper
13 somewhere.

14 You asked the right question: Where's
15 the contract? There's no contract alleged in this
16 complaint. What they did was, they pulled together
17 the transcripts and memoranda and arguments of
18 counsel that were -- at least some of them, they
19 selectively did so, and they tacked them onto the end
20 of the complaint, violated every rule of pleading in
21 terms of the appropriate way to plead, you know,
22 succinct statement of facts.

23 But then went beyond they and, again,
24 the oral argument went beyond that. They make the

1 argument that if two lawyers in the courtroom
2 disagree 30 years ago about whether there was a
3 contractual obligation of some kind, you should
4 listen to the one that said there was a contract,
5 assume there was a contract, let them plead that
6 because of that allegation there was a contract --
7 you know, there is a pleading requirement when you
8 allege breach of contract that requires you to attach
9 the contract.

10 And that's for the very reason that
11 you were just asking, Mr. Krislov, where is the
12 contract? There isn't one. And it's way too late,
13 30 years after they first got engaged in the Korshak
14 case, to come in the Underwood case, which was only
15 filed because you wouldn't reopen the Korshak case,
16 so they started all over again, just like they do
17 with the sixth amended complaint. They start all
18 over again.

19 And we can go on and on, and the last
20 time we were here we were accused of prolonging this
21 matter because we kept on filing motions to dismiss.
22 You only file motions to dismiss when you get a new
23 complaint filed. This new complaint is totally
24 insufficient in terms of its pleading or any kind of

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1 a contract claim.
2 And counsel is standing here and
3 cannot identify the contract he's talking about.
4 Doesn't attach it to his complaint; doesn't specify
5 it in his complaint; and pretends that -- he's
6 stating a cause of action that's not subject to
7 dismissal. He's wrong.
8 With respect to the estoppel claim, if
9 I can allude to that for a minute, the estoppel claim
10 was rejected by this Court. It was rejected by the
11 appellate court. It was rejected based upon case law
12 a couple years earlier on promissory estoppel claims
13 of this nature.
14 It was upheld by the -- the dismissal
15 was upheld by the appellate court, and the claim
16 reappears in this complaint, just like it reappeared
17 in the fourth amended complaint.
18 You will notice I hope, Judge, that
19 during the course of Mr. Krislov's argument, he did
20 not once address the fact that this is a mirror image
21 of the fourth amended complaint, and that with
22 respect to the fourth amended complaint, you said it
23 is stricken with prejudice, and you also said Counts
24 2 through 7 are dismissed, as they have been finally

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1 decided and cannot be relitigated, close quote.
2 That's your quote from that
3 September 12th, 2018 decision.
4 We are back here revisiting all of the
5 arguments that were made a year ago, two years ago,
6 four years ago. They have been routinely rejected.
7 They were rejected in large part by the Seventh
8 Circuit. They've been rejected time and again by the
9 appellate court; they've been rejected by this Court.
10 They don't get any better with age.
11 So he doesn't have a contract claim.
12 He doesn't have an estoppel claim. On his claim with
13 respect to Count 1, he simply doesn't respond to the
14 fact that the sixth amended complaint includes in
15 Count 1 the allegations that plaintiffs are entitled
16 to more benefits that are protected in the -- under
17 the 1983 and 1985 amendments.
18 THE COURT: Well, I still fall back on
19 the fact that I'm -- half of Count 1 is up on appeal,
20 and I really don't have jurisdiction to do much with
21 regard to that or anything with regard to that.
22 And I haven't heard any argument to
23 dissuade me from that position.
24 MR. PRENDERGAST: Well, I'll give it

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1 to you. The fact that he has appealed a prior ruling
2 of this Court while the case is still before you and
3 we're progressing with the case doesn't give him a
4 right to file the exact same claim that he's taking
5 on appeal.
6 THE COURT: That's okay.
7 MR. PRENDERGAST: I mean, the Court
8 clearly has jurisdiction to deal with that.
9 And also, with the appellate court's
10 finding in the previous opinion by Justice Simon is
11 the subsidy itself that is protected under Count 1.
12 The pension protection clause protects the benefits
13 in the 1983 and 1985 amendments for any retiree who
14 began participating in the retirement system before
15 the 2003 settlement was executed.
16 THE COURT: Yes.
17 MR. PRENDERGAST: Going on, the 1983
18 and '85 amendments represent -- and we've quoted this
19 15 times, "The highest level of benefits to which the
20 retirees ever had an enduring right."
21 THE COURT: Yeah.
22 MR. PRENDERGAST: All right. That's
23 been settled. That's been resolved.
24 THE COURT: Yeah.

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1 MR. PRENDERGAST: So to the argument
2 that we keep on coming back with motions to
3 dismiss --
4 THE COURT: No, that part's settled.
5 The other part, the healthcare plan, is not, at least
6 not on review, and they're entitled to do that.
7 MR. PRENDERGAST: No, but they're not
8 -- I agree. I also would suggest to you, they're not
9 allowed to seek benefits -- after this quote from the
10 appellate court, in Count 1 to seek benefits as they
11 do beyond the benefits protected under the '83
12 and '85 subsidy amendments, and that's what they seek
13 to do. That's one of the reasons why Count 1 has to
14 be dismissed.
15 Another reason it has to be dismissed
16 is it alleges illegal impairment of the contract.
17 That has already been ruled on. That has already
18 been rejected.
19 So when they say, we already won in
20 Count 1, all they won in Count 1 was the right to the
21 subsidies in '83 and '85.
22 And just to put it in context --
23 THE COURT: But they won that.
24 MR. PRENDERGAST: Let me put that in

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1 context too, if I might.
2 At the time '83 and '85 actually came
3 up, we were in about 2015, and we were saying to the
4 Court, the -- he was seeking an injunction against
5 reducing the subsidy that was being gradually reduced
6 up to 2016.
7 And we were saying to the Court,
8 that's not a diminution in benefits because he's
9 still getting more than he gets under the '83 and '85
10 amendment.
11 After 2016, and the case went up on
12 appeal, that was the record that went up on appeal,
13 and Justice Simon seized on that and said, well, the
14 1983 and 1985 amendments are still good for some
15 people. They're moot as to the provisional class
16 coverage, Korshak and Window, and you've got problems
17 --
18 THE COURT: Those classes he said it's
19 mooted out because they're covered, and you pointed
20 out, and I think everyone agrees, they're getting
21 more from the City than --
22 MR. PRENDERGAST: Right, because of
23 the 2013 --
24 THE COURT: Right.

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1 MR. PRENDERGAST: -- undertaking by
2 the City, which was not an agreement with counsel, it
3 was not involved in this case. It was an initiative
4 the City took in 2013 to deal with those annuitants
5 and they're getting more than they would get anyway.
6 So what you have is count after
7 count -- I won't repeat what I've said before -- that
8 mirror the counts of the fourth amended. They've
9 have been rejected with prejudice. They have been --
10 there's nothing left for them.
11 The only enduring right they have is
12 the subsidies under '83 and '85. That's what they're
13 getting now retroactively to '17 and '18 and going
14 forward, because the Court said that that's what
15 they're entitled to.
16 But beyond that, there's nothing in
17 Count 1 that provides any basis for relief, and there
18 are things in Count 1 that have already been decided,
19 like the contract issue, and this idea of there was a
20 contract because Kevin Ford argued something one day
21 30 years ago. I've been officing with Kevin Ford for
22 40 years. I was probably around when he was in court
23 that day.
24 THE COURT: That's probably how you

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1 got the good side of you.
2 MS. NABER: Your Honor, may I add on
3 that point, too?
4 For the settlement agreement that was
5 entered in the Korshak agreement, it's a derivative
6 action, now that I understand it better, given that I
7 really didn't understand what the claim was about as
8 it was alleged in the complaint.
9 He's saying that he's going to stand
10 in the shoes of the pension Funds to raise claims
11 that were brought in Korshak.
12 But in the settlement agreement, the
13 Funds agreed that they will at any time assert any,
14 one, claims on behalf of any annuitant for premiums
15 or other payments made under any prior City health
16 plan, including the settlement agreement, or, two,
17 claims based on the City's pre-1980 conduct or
18 statements.
19 Therefore, the Funds have no claims
20 that Mr. Krislov --
21 THE COURT: No derivative claims
22 because they've been limited by --
23 MS. NABER: The Korshak settlement
24 agreement.

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1 THE COURT: -- by the Funds themselves
2 is your argument.
3 MR. PRENDERGAST: Which was approved
4 by the Court.
5 MR. KRISLOV: That's not in their
6 pleading.
7 THE COURT: That's an interesting
8 argument.
9 MR. KRISLOV: It's an interesting
10 argument, but that wasn't what was intended.
11 THE COURT: That's all right. Let
12 him --
13 MR. KRISLOV: That wasn't what was
14 intended. What was intended was to --
15 THE COURT: I'm just listening to the
16 words.
17 MR. KRISLOV: What was intended was to
18 preserve whatever rights annuitants had, whether it's
19 to enforce the Funds' --
20 THE COURT: I don't see anything in
21 there that tells me the intent was to preserve the
22 rights of the annuitants to sue derivatively instead
23 of the Funds, since we're talking about words and
24 intent.

1 Intent is found by the words. I'm not
2 going to read intent into things when words say just
3 the opposite. Let's just deal with ordinary
4 contractual construction.

5 MR. KRISLOV: At this point, if they
6 want to assert that in response to -- on their
7 answer, then they can do that.

8 But I don't think the -- that
9 agreement was not intended to relieve the City of
10 whatever obligations it owed to the annuitants
11 directly or indirectly. There was -- the intent was
12 to --

13 THE COURT: Well, your argument is
14 that it's the City's to the Funds, not the City to
15 the annuitants.

16 I've already ruled there was no
17 contract between the City and the annuitants. That
18 was upheld on appeal.

19 Now you're trying to do it indirectly,
20 an end-around, and that's great. I understand. I
21 think it's real clever and nice. And you're trying
22 to do it through the Funds' contractual relationship
23 which you allege existed with the City.

24 But that is limited by the very

1 language that Ms. Naber just uttered, and --

2 MR. KRISLOV: But we didn't waive --
3 we didn't waive by that any rights that we had
4 under --

5 THE COURT: You get as many rights as
6 they had to begin with, and you don't get more than
7 they had. That's just ordinary agency law too.

8 You don't get more than you claim you
9 derived from them. You are limited by their rights,
10 not more.

11 MR. KRISLOV: We are limited in
12 asserting the claims that they could assert.

13 THE COURT: Yeah.

14 MR. KRISLOV: But the contractual
15 relationship, of which we were the beneficiary, we
16 believe we should still be able to enforce.

17 That's what was -- that's what the
18 Funds asserted. And it wasn't just Kevin Ford and
19 some guy. It was every one of the executive
20 directors who testified.

21 That's what the testimony, which is
22 added to the sixth amended --

23 THE COURT: I don't see any contract
24 there, Clint, that Kevin Ford -- Kevin Ford, by his

1 testimony, does not equal a contract.

2 MR. KRISLOV: It's not Kevin Ford's
3 testimony. It is the testimony --

4 THE COURT: That's what you cited to
5 me when I asked you where's the --

6 MR. KRISLOV: No, I cited --

7 THE COURT: You're going to let me
8 finish a sentence, I promise you, you are.

9 When I said to you, where's the
10 evidence, since I couldn't figure it out from all
11 your voluminous attachments, where's the evidence of
12 a contract, and you cited to me, just a few minutes
13 ago, Kevin Ford said it.

14 MR. KRISLOV: That was one thing.

15 THE COURT: What's the other?

16 MR. KRISLOV: The other things were,
17 as I stated before, and the court reporter can read
18 it back --

19 THE COURT: No, it's okay. Perhaps I
20 forget. It's only been four hours.

21 Go ahead.

22 MR. KRISLOV: The Police Funds
23 executive director, James Waters: As I understand
24 it, the statute calls for the Police Annuity and

1 Benefit Fund to arrange for hospitalization of
2 coverage for its annuitants --

3 THE COURT: That doesn't make a
4 contract, that guy's understanding. I don't know who
5 that guy is, and I don't see any --

6 MR. KRISLOV: He's the executive
7 director of --

8 THE COURT: Great. Another Fund guy.
9 Show me the City signing on to it.

10 MR. KRISLOV: I don't have to. At
11 this point --

12 THE COURT: Okay.

13 MR. KRISLOV: What I have to show you
14 is something in writing, and the Funds' assertion --

15 THE COURT: That's not in writing.

16 MR. KRISLOV: -- in the counterclaims
17 -- the Funds' assertions are in writing in their
18 counterclaims when they say that they had contracted
19 that the City -- that they had contracted with the
20 City. There's an implied contract, or a quasi
21 contract, or a contract, depending on which Fund's
22 counterclaim said they had a contract with the City
23 to provide this coverage --

24 THE COURT: And what's your response

1 to the Funds by themselves limiting?

2 MR. KRISLOV: That's not how that term
3 was intended. That is not intended to limit the
4 benefits that were enforceable for the annuitants.

5 It was if the Funds couldn't make any --

6 THE COURT: It was meant to limit the
7 Funds' ability to do something about that and the
8 requirement that they might put on the City, you say,
9 to do so.

10 So they limited themselves, and you
11 derive it's a derivative suit. Whatever power,
12 whatever rights, whatever benefits you're claiming
13 from them, and it was stopped, ended. So was yours.

14 You don't get more than they had.

15 MR. KRISLOV: Let them --

16 THE COURT: This isn't magic.

17 MR. KRISLOV: Let them put that in
18 writing, and we will respond on that one.

19 Your Honor, it is not appropriate to
20 just grant them whenever they come up with something
21 to --

22 THE COURT: Oh, stop. You know,
23 Clint, we're done. When you start telling me about
24 what's appropriate for me --

1 MR. KRISLOV: Sorry. I withdraw that.
2 But their assertion, they --

3 THE COURT: It's been four and a half
4 hours, and we're all getting a little testy, and that
5 shouldn't be, and I apologize to you as well.

6 But, you know, I've heard what you had
7 to say.

8 Is there anything else you want to say
9 in response to this motion to dismiss?

10 MR. KRISLOV: That response is not in
11 their brief in writing.

12 THE COURT: I agree with you.

13 MR. KRISLOV: So we would be happy to
14 address that one to explain why that should not be in
15 interpreted in the way that you --

16 THE COURT: No. I'm just going to do
17 it based on the sixth amended complaint, not that
18 response, believe me.

19 MR. KRISLOV: Okay. Well, if you do
20 it based on the sixth amended complaint, then I
21 think --

22 THE COURT: Well, that's what I should
23 do, right? That would be appropriate, right?

24 MR. KRISLOV: Yes. That would be

1 appropriate.

2 THE COURT: All right. Anything else?

3 MR. KRISLOV: The Funds' executive
4 directors' testimony in the pleadings are enforceable
5 against them for any number of reasons.

6 One is adverse admissions; one is
7 judicial estoppel -- well, that's two; three is mend
8 the hold. Having taken a position on the contract
9 claim, they cannot then change it later on in the
10 litigation.

11 And this is not a separate, as
12 Mr. Donham tries to make this, as if this were some
13 totally separate thing from the Korshak litigation.
14 This is the resumption of the Korshak litigation,
15 which we were entitled to assert the rights of all
16 the people who became participants by the June 30,
17 2013 date. This is the right we're asserting.

18 It is time for them to answer the
19 complaint if they can. And they can. They just
20 don't want to because with the dodges that they have,
21 they're hoping not to respond factually.

22 The Count 1 stuff, I listened to
23 Mr. Prendergast --

24 THE COURT: You heard my response to

1 that. I've told you three times already that I'm not
2 dismissing it. I may dismiss it in part, part of it
3 being moot.

4 The other part is going on, certainly,
5 just based upon your appeal. I'm not -- I can't
6 dismiss that. I don't have jurisdiction to dismiss
7 that part.

8 MR. KRISLOV: Well, also it's
9 procedural, and the subsidies --

10 THE COURT: Yeah, and you won.

11 MR. KRISLOV: Well, okay.

12 THE COURT: You won that part, got it?
13 You don't have to shoot a dead horse. You won, in
14 part.

15 MR. KRISLOV: Perhaps we ought to have
16 a judgment on the subsidies, then, and maybe that's
17 what we should be looking for.

18 But at this point --

19 THE COURT: This is a motion to
20 dismiss, right now.

21 MR. KRISLOV: -- denying their motion
22 to dismiss is appropriate and should be done.

23 THE COURT: Thanks, Clint. Let me say
24 thank you. It's been illuminating and really

1 important, and I thank you.
2 Most importantly, I'd like to thank
3 the annuitants who are here, and I want to wish
4 everybody who's celebrating a happy Easter and a very
5 happy Passover to those who are celebrating as well.
6 I wish you all the best, and I'll see you later, next
7 time.

8 (Proceedings adjourned at 4:41 p.m.
9 April 18, 2019.)
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1 REPORTER'S CERTIFICATE
2

3 I, JERRI ESTELLE, CSR, RPR, doing
4 business in the City of Chicago, State of Illinois,
5 do hereby certify that I reported in computerized
6 shorthand the foregoing proceedings as appears from
7 my stenographic notes.

8 I further certify that the foregoing
9 is a true and accurate transcription of my shorthand
10 notes and contains all the testimony had at said
11 proceedings.

12 IN WITNESS WHEREOF, I hereunto set my
13 hand as Certified Shorthand Reporter in and for the
14 State of Illinois on April 30, 2019.

15 *Jerri Estelle*
16 Jerri Estelle, CSR, RPR
17 License Number: 084-003284
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