

**No. 115811**  
**IN THE SUPREME COURT OF ILLINOIS**

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Roger Kanerva, Susan Haury, Mary Frances Welters, Colleen Votsmier and Neil Hoover, on Behalf of a Class of Persons Similarly Situated,	)	On Motion for Direct Appeal
	)	Pursuant to Rule 302(b)
	)	Previously in the Appellate Court of
	)	Illinois, Fourth Judicial District,
	)	No. 4-13-0242
Plaintiff-Appellants,	)	
	)	There on Appeal from the Circuit Court of
v.	)	the Seventh Judicial Circuit, Sangamon
	)	County, No. 2012 MR 582
Malcom Weems, Director of the	)	
Illinois Department of Central	)	Consolidated with:
Management Services; The Board of	)	Sangamon County, No. 2012 L 162
Trustees of	)	Madison County, No. 2012 L 987
the State Employees' Retirement	)	Randolph County, No. 2012 L 35
System of Illinois; and Judy Barr	)	
Topinka, Comptroller of the State	)	The Honorable Steven H. Nardulli
of Illinois,	)	Judge Presiding
	)	
Defendant-Appellees.	)	

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**Amicus Curiae Brief**  
**By Certified Classes of Participants in the City of Chicago Annuitant Healthcare**  
**Plans**

**Submitted by**  
**The Korshak and Window Participant Classes**  
**Of Participants in the City of Chicago Annuitant Healthcare Plans**

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Dated: July 8, 2013

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## Reasons for *Amicus Curiae* Brief

This is an *amicus curiae* brief on behalf of certified classes of participants in the City of Chicago's annuitant healthcare programs, who have, from 1987 to the present, been in ongoing litigation with the City and their respective Funds' trustees, over the issue of retiree healthcare. Pursuant to the most recent interim settlement, we are resuming the pursuit of their rights to lifetime healthcare coverage under the City of Chicago's annuitant healthcare plans.

These participants have been repeatedly certified as classes of participants in litigation known as the "Korshak" case, which has proceeded from 1986 to the present, in the Circuit Court of Cook County, (Docket No. 01CH4962, prev. 87CH10134) as well as the First District Appellate Court (No.1-98-3465), the most recent settlement of which covered the period through June 30, 2013, with the right of participants to revive the litigation to assert their rights to permanent (i.e., lifetime) healthcare coverage in their retirement, which we have recently revived in the Circuit Court of Cook County.

While we recognize and support the State Employees' Claims under various theories of Vesting<sup>1</sup>, Contract, and Estoppel<sup>2</sup>, we write for the sole purpose to alert the Court regarding certain important misstatements of facts and law in the Sangamon County Circuit court's March 19, 2013 Order, which, in turn, were the basis of the court's broad and inaccurate declaration that "Health insurance benefits are not guaranteed pension benefits protected by the Pension Protection Clause."

As we will show herein, (1) the clause protects "benefits of participation" in a retirement fund, not just "pensions", (2), the Pension Code *does* explicitly create

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<sup>1</sup> *Marconi v. City of Joliet*, 2013 IL App (3d) 110865 (May 2, 2013) at ¶¶34, 38 and 45.

<sup>2</sup> *Dell v. City of Streator*, 193 Ill.App.3d 810 (3d Dist. 1990).

healthcare benefits for some retirees, such as the City of Chicago participants, whose healthcare benefits have been in the Pension Code since at least 1983, and (3) the Sangamon County Court's broad declaration that healthcare benefits are not protected, beyond being merely wrong, threatens the legitimate entitlement of participants whose healthcare benefits *are* explicitly declared in the Pension Code as benefits of participation in their particular Fund.

Accordingly, we respectfully submit that, in order to avoid inappropriate collateral damage to retirees whose claims actually stem from explicit Pension Code provisions, this honorable Court should reverse Circuit Judge Nardulli's holding, or at least parse back his broad declarations to only the law applicable to this case, and remand with instructions or a declaration of the law in a way that accurately reflects both the Illinois Constitution, the Illinois Pension Code, as well as contract law in this area.

**I. 1970 Illinois Constitution’s Article XIII § 5 Explicitly Protects “benefits of participation” in a Government Retirement System, Not Just “pensions.”**

The colloquialism “Pension Protection Clause” is shorthand that people sometimes use to identify the clause misstates both its actual language and meaning. What is protected is not just the receipt and amount of pension payments. At minimum, the clause protects beneficiaries’ “benefits of participation” contained in the Pension Code.

As this court’s previous decisions make clear, the fundamental meaning of the Constitution’s Art. XIII, §5 protections, is that “the Clause safeguards the pension benefit rights contained in the Pension Code when a public employee begins contributing to the pension system whether or not the employee is eligible to retire.”<sup>3</sup>

Or, in the court’s own words, from the controlling decision *Buddell v. Board of Trustees, State University Retirement System of Illinois*, 118 Ill.2d 99, at 104-5 (1987):

In our case the rights claimed by the plaintiff are those that were contained within the Pension Code itself and not provided for in some statutory provision relating to other matters which incidentally affect pension benefits. The right to purchase pension credit for military service was contained within the Pension Code when the plaintiff entered the employment in 1969, and was contained in the Pension Code on the effective date of our 1970 Constitution. Whether the plaintiff’s pension rights were, at the time of his initial employment, contractual or noncontractual is not important. **There can be no doubt, however, that upon the effective date of article XIII, section 5, of our 1970 Constitution, the rights conferred**

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<sup>3</sup> Madiar, Eric Michael, *Is Welching on Public Pension Promises an Option for Illinois? An Analysis of Article XIII, Section 5 of the Illinois Constitution* (May 7, 2013) at 36. Available at SSRN: <http://ssrn.com/abstract=1774163>. (The article is perhaps the best analysis of virtually all known cases dealing with these issues, from Illinois and elsewhere.)

**upon the plaintiff by the Pension Code became contractual in nature and cannot be altered, modified or released except in accordance with usual contract principles.** (Emphasis added.)

**II. The Pension Code Does Establish Health Benefits for Participants of Some Funds, and Have Been in the Pension Code Since at Least 1983.**

**1. The Declaration below that “the Pension Code does not provide for health insurance subsidies” is simply wrong.**

Contrary to the court’s declaration below that “the Pension Code does not provide for health insurance subsidies”, the fact is: there are numerous provisions in the Pension Code providing health insurance benefits or subsidies under a variety of Pension Code-established systems:

- Art.5: Policemen’s Annuity and Benefit Fund-Cities Over 500,000; Group Health Benefits 40 ILCS 5/5-167.5
- Art. 6: Firemen’s Annuity and Benefit Fund-Cities Over 500,000; Group Health Benefits 40 ILCS 5/6-164.2
- Art. 8: Municipal employees’, Officers and Officials’ annuity and Benefit Fund – Cities over 500,000 inhabitants; Group Health Benefits 40 ILCS 5/8-164.1
- Art. 9: County Employees’ And Officers’ Annuity and Benefit Fund – Counties over 3,000,000 inhabitants – Group Healthcare Benefits 40 ILCS 5/9-239 (P.A. 86-1025, 87-794)
- Art. 11: Laborers’ and Retirement Board Employees Annuity and Benefit Fund – Cities Over 500,000 inhabitants – Group Health Benefits 40 ILCS 5/11-160.1
- Art. 12: Park Employees’ and Retirement Board Employees’ Annuity and Benefit Fund – Cities Over 500,000 inhabitants; Group Health Benefits 40 ILCS 5/12-190(b).
- Art. 16: Teachers’ Retirement System of the State of Illinois – ability to participate in group health benefits for active employees, 40 ILCS 5/16-150.1
- Art. 17: Public School Teachers’ Pension and Retirement Fund – Cities of Over 500,000 inhabitants; 40 ILCS 5/17-142.1
- Art. 22: Division 1-Transit Authorities; Group Health Benefits in 40 ILCS 5/22-101B

**2. The Group Health Benefits and Subsidies for Participants in Four City of Chicago Annuity & Benefit Funds, have been explicitly in the Pension Code since at least 1983.**

Contrary to Sangamon County Judge Nardulli's declaration that "[t]he terms of the Illinois Pension Code, 40 ILCS 5/1 et seq., do not provide for health insurance subsidies...." Decision at Page 4 of 7), Group Health benefits and subsidies for participants in the City of Chicago's four relevant annuity and benefit funds have existed continuously in the Illinois Pension Code since at least 1983. (Ill Stat. ch 108-1/2, (now 40 ILCS), ¶§ 5-167.5 (Police), 6-164.2 (Firemen), [created by P.A. 82-1044, effective 1/1/1983], 8-164.1 (Municipal Employees) and 11-160.1 (Laborers) [added by P.A. 84-23, eff. 7/18/1985; subsequently amended by P.A. 86-273 eff. Aug. 23, 1989; P.A. 90-32, §5, eff. June 27, 1997; P.A. 92-599, §10, eff. June 28, 2002; P.A. 93-42, §5, effective July 1, 2003; most recently by P.A.98-43, enacted June 28, 2013, explicitly extending the subsidies by the four City of Chicago Annuity & Benefit Funds to December 31, 2016.

Group Health Benefits for City Annuitants have been a benefit of Participation in the City's Annuity & Benefit Funds since at least 1982.

The City Had Historically Paid For Retiree Healthcare Costs. Since the mid-1970's, the City had been paying a significant portion of the costs of the annuitants' medical benefits. Indeed, the City has actually functioned as the self-insured carrier for the annuitants' health care plans for all four relevant Funds.

In 1982, the City of Chicago's annuitant healthcare plan was incorporated into the Pension Code as the statutory embodiment of a "handshake" agreement between the City's Byrne administration, the Police and Fire Unions and/or Funds trustees-- under which the Plans were obligated to obtain coverage for their participants, the City agreed



to provide healthcare coverage to annuitants at a fixed-rate monthly premium(\$55 for non-Medicare qualified, \$21 for Medicare-qualified persons) that was to be subsidized by the Police and Fire Funds' payment of the annuitant's monthly premium, that was in turn financed by a special tax levy for the Funds. This was understood and intended to be both a benefit of a person's employment by the City and participation in the annuitant's respective annuity and benefit fund.

Statutory Levy/Subsidy. Incorporating this agreement, P.A.82-1044 was enacted into the Illinois Pension Code obligating the Policemen's Fund (5-167.5) and the Firemen's Fund (6-164.2) to contract to provide group health insurance for all annuitants, with the basic monthly premium to be contributed by the City in an amount of \$55.00 per month for annuitants who are not qualified for the Medicare program; \$21.00 for Medicare-qualified annuitants.

No Medicare Coverage For Retirees whose original hire date precedes March 1, 1986. One of the recognized needs for this protection was that local government employees who were originally hired prior to the March 31, 1986 effective date of the federal Combined Omnibus Budget Reconciliation Act of 1985 ("COBRA," PL 99-272) cannot qualify for healthcare coverage under the Medicare plan by their government employment, regardless of their length of service. Accordingly, none of the class members of the 1987 Participant Class or the Pre-8/23/89 retiree participants Class qualify for Medicare coverage by reason of their public employment.

Unique Position of these retirees, and their substantial numbers. Although the class member annuitants who began their service for the City prior to March 1, 1986 are

the last class of City workers who will not be protected by the Medicare program, their numbers are substantial, the last of whom could not have begun retiring before 2006.

Establishment of Group Health Benefits as a Benefit of Participation in the City's Funds: Police And Firemen's Funds. Since January 12, 1983, and continuing through 8/22/1989 (the date of enactment of P.A.86-273) Pension Code Sections 5-167.5, 6-164.2, respectively, required the Police and Firemen's Funds' Boards to each contract for group health insurance and required the City to pay for a portion of its cost, for electing annuitants, out of the City's levy for its contribution to the Police Fund.

\* \* \*

- (b) The Board shall contract with one or more carriers to provide health insurance for all annuitants.

\* \* \*

- (d) The Board shall pay the premiums for such health insurance for each annuitant with funds provided as follows:

The basic monthly premium for each annuitant shall be contributed by the city from the tax levy prescribed in Section 5-168 [6-165 for Firemen's Fund], up to a maximum of \$55 per month if the annuitant is not qualified to receive Medicare benefits, or up to a maximum of \$21 per month if the annuitant is qualified to receive Medicare benefits.

If the basic monthly premium exceeds the maximum amount to be contributed by the city on his behalf, such excess shall be deducted by the Board from the annuitant's monthly annuity, unless the annuitant elects to terminate his coverage under this Section, which he may do at any time.

The agreement reflected mutual desires of the Participants, the City and the Funds,<sup>4</sup> but the key part of the statutory structure was that Participants received their health benefits from the Funds.

Statutory Subsidy: Municipal And Laborers' Funds. During 1984, legislation was added to the Illinois Pension Code, P.A. 84-23, establishing similar Group Health Care Plans under the Pension Code for Municipal and Laborers Funds annuitants. Here too, the plan was one provided by the Fund.

The Municipal and Laborers' Funds statutory directive for group health benefits differed from Fire and Police. The Municipal and Laborers' Boards were directed to "approve" a plan, and were to subsidize the coverage at a flat \$25.00 per month. Section 11-160.1 Ill.Rev.Stat. Ch. 108-1/2, Sec. 11-160.1 (eff. August 16, 1985) for the Laborers' Fund, Pension Code Section 8-164.1, Ill.Rev.Stat Ch. 108-1/2, Sec. 8-164.1 (eff. July 19, 1985) for the Municipal Fund. Those statutes provide in relevant part:

"Each employee annuitant in receipt of an annuity on the effective date of this Section and each employee who retires on annuity after the effective date of this Section, may participate in a group hospital care plan and a group medical and surgical plan approved by the Board if the employee annuitant is age 65 or over with at least 15 years of service. The Board, in conformity with its regulations, shall pay to the organization underwriting such plan the current monthly premiums up to the maximum amounts authorized in the following paragraph for such coverage.

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<sup>4</sup> The City was able to provide a valuable benefit without having to fund a pay increase out of its budget; the Funds were able to contract for the healthcare coverage (with the City as the carrier) without invading their pension assets, and the Police and Fire employees and annuitants could anticipate and rely on adequate healthcare for life at no net cost to the annuitant, fixed-rates for coverage of spouses and dependents.

As of the effective date the Board is authorized to make payments up to \$25 per month for employee annuitants age 65 years or over with at least 15 years of service.

If the monthly premium for such coverage exceeds the \$25 per month maximum authorization, the difference between the required monthly premiums for such coverage and such maximum may be deducted from the employee annuitant's annuity if the annuitant so elects; otherwise such coverage shall terminate."

Municipal and Laborers provisions purport to create non-protected benefits.

Different from the already existing provisions for Police and Firemen, the 1984 legislation creating Pension Code Sections 8-164.1 and 11-160.1 characterized the group hospital and medical care benefits provided for Municipal and Laborers' Funds participants as *not* being pension or retirement benefits under Section 5 of Article XIII of the Illinois Constitution of 1970. Subsequent amendments of the City's annuitant Group Health benefits have adopted similar language, purporting to define the Group Health benefits as not those protected by Art. XIII, §5.<sup>5</sup>

Legal issue of the legality of creating a non-protected benefit of participation. It has never been determined that the Municipal and Laborers Funds' limiting statutory language is effective to strip these benefits of participation in a statutory pension plan of their Art. XIII, Sec. 5 protection against diminution or impairment.

Prior to August 23, 1989, the Police and Fire provisions had never contained such limiting language. See Pension Code §§5-167.5 and 6-164.2. Consequently, regardless of whether the limiting language is effective at all, there is no dispute that the those

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<sup>5</sup> P.A. 90-32, §5, eff. June 27, 1997; P.A. 92-599, §10, eff. June 28, 2002; P.A. 93-42, §5, effective July 1, 2003; most recently by P.A.98-43, enacted June 28, 2013, explicitly extending the subsidies by the four City of Chicago Annuity & Benefit Funds to December 31, 2016.

Chicago Police and Fire annuitant participants, whose participation began before the August 23, 1989 P.A. 86-273 have healthcare benefits that are both contained in the Pension Code and protected by Article XIII, §5 against being diminished or impaired.

### **III. The Decisions from Sister States with Similar Constitutional Provisions Can be Harmonized with Illinois Decisions by Applying the Protection to Benefits Established for Participants in Retirement Systems.**

Indeed the oft-cited decisions from Alaska<sup>6</sup>, Hawaii<sup>7</sup> and New York<sup>8</sup>, may be harmonized by this rule: regardless of the other concepts under which retiree healthcare benefits may be protected, those that are contained within the retirement system's statutory provisions<sup>9</sup> or flow from one's being a participant in the retirement system<sup>10</sup> obtain the additional State constitutional protections for "benefits of participation," while healthcare provisions contained in other statutes, such as State Civil Service<sup>11</sup> or employment Laws may well find their protections elsewhere. Nonetheless, the holdings from all cited jurisdictions uniformly declare that healthcare benefits are protected by the State Constitutions' similar provisions where the healthcare provisions are contained in the retirement systems' statutes (such as our Pension Code) are protected by constitutional provisions.

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<sup>6</sup> *Duncan v Retired Public Employees of Alaska*, 71 P.3d 882 (S.Ct.Alaska June 13, 2003)

<sup>7</sup> *Everson v State of Hawai'i*, 122 Hawai'i 402, 228 P.3d 282 (S.Ct.Hawai'i, March 25, 2010)

<sup>8</sup> *Lippman v Bd. Of Ed. Sewanhaka Cent. H.S.D.*, 66 N.Y.2d 313, 496 N.Y.S2d 987, (Court of Appeals, Nov. 26, 1985)

<sup>9</sup> *Duncan*, 71 P.3d at 885, fn4: applicable statute reads: "Each person who is entitled to receive a monthly benefit from the retirement system shall be provided with major medical insurance coverage."

<sup>10</sup> *Everson*, 122 Hawai'i at 419-420.

<sup>11</sup> *Lippman*, 66 N.Y.2d at 319, noting "The more particularly is this so because the health insurance premium payment provision is contained not in the Retirement and Social Security Law but in Civil Service Law §167, which provides health insurance benefits not only to retired employees but also to employees still in service..."

#### **IV. Conclusion**

Accordingly, the Participant Classes in the City of Chicago Annuitant Group Health Plans respectfully request this honorable court to reverse the decision below and remand with directions to revise the court's declarations below, so as not to harm the claims of other Annuitant Group Health Participants, whose entitlement to benefits is explicitly established in the Pension Code.

Respectfully submitted,

*Korshak and Window Participant Classes*  
By Class Counsel:

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## **CERTIFICATE OF COMPLIANCE**

I certify that this brief conforms to the requirements of Rule 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 11 pages.

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Clinton A. Krislov

**CERTIFICATE OF SERVICE**

I, Clinton A. Krislov, an attorney, certify that on July 8, 2013, I caused the original plus one (1) copy of the foregoing ***Amicus Curiae* Brief by Certified Classes of Participants in City of Chicago Annuitant Healthcare Plans** to be filed with the:

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and that I caused one copy to be served upon the parties listed below via U.S. mail, postage prepaid and properly addressed, by depositing same in the mailbox located at 20 N. Wacker Drive, Chicago, Illinois on July 8, 2013:

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