

**No. 18-2180 (19-0358 cons.)
IN THE APPELLATE COURT OF ILLINOIS,
FIRST DISTRICT**

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 388 Other Named Plaintiffs listed,

Plaintiffs-Appellants,

v.

CITY OF CHICAGO, a Municipal Corporation,
Defendant,

and

Trustees of the Policemen's Annuity and Benefit
Fund of Chicago; Trustees of the Firemen's
Annuity and Benefit Fund of Chicago; Trustees
of the Municipal Employees' Annuity and
Benefit Fund of Chicago; and Trustees of the
Laborers' & Retirement Board Employees'
Annuity & Benefit Fund of Chicago, et al.,
Defendants-Appellees.

From the Circuit Court of Cook
County, Chancery Division.

Trial Judge: Hon. Neil Cohen
Case No. 13-CH-17450
304(a) Interlocutory Appeal

**Plaintiffs-Appellants' Motion for Rehearing
(Requesting Modification to the Court's Opinion)**

Oral Argument Requested

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Rehearing Argument Requesting Modification to the Court's Opinion

Plaintiffs-Appellants request rehearing and modification to the Court's June 30, 2020 Opinion. While we welcome the Court's reversal of the 304(a) Orders before it, but, in order to avoid another two years of anticipated litigation for retirees (most of whose City employment did not qualify them for Medicare coverage) (in a case now seven years in the most recent revival) we respectfully request the Court to Modify its ruling by addressing the following issues that *are* before this Court:

- (1) To decide the Funds' obligation to contract for coverage (colloquially "provide a plan"), which is the question certified to this Court. (A12 ¶1). Prior to this Court's 2017 *Underwood II* decision the Circuit Court had directly ruled that it was the Funds' obligations to contract for coverage. Further, it was the Funds' own litigation position that they had that obligation and fulfilled it by contracting the City as insurer. This question can be answered on this appeal because the Funds' obligation under the statutes is a pure issue of law of statutory interpretation.
- (2) While we certainly agree with the expansion of the protected class to include all those hired by July 1, 2003; nonetheless, the Circuit Court's refusal to certify its *exclusion* of the pre-8/23/1989 retirees from the certified issue of those included in the Funds' statutory subsidies, and giving no basis for refusing certification, is an abuse of discretion that this court has jurisdiction to hear and correct without further delay. Again, this is a pure law question (whether the *City's* agreeing to provide coverage to the pre-8/23/89 retirees on

certain terms for life excuses the *Funds* from their obligation to subsidize) that this Court can and should decide without further remand.

(3) We seek modification or clarification, as well, that the court’s *sua sponte* declaration at ¶53 (that “It is absolutely law-of-the-case that the plaintiffs have no right to receive—and that neither the City nor the Funds have any obligation to provide—any additional monetary contributions or to guarantee affordable healthcare.”) should only apply to their obligations *under the statute* (and does not preclude pending assertions by Plaintiffs (of the Funds’ *Korshak* claims that they had fulfilled their obligations by contracting the City as the insurer). (See Our Opening Brief at 10-13, 30-33).

(4) Also, we seek clarification that this Court’s comment at ¶55, that the 2003 Settlement provided the City “unilateral authority to end the program entirely”, misreads the 2003 Settlement which explicitly limits that right to terminate to “additional” plans the City might choose to provide in the future. (2003 Settlement Agreement p. 10 ¶H; Complaint, Exhibit 13) (A52)

Argument

We seek rehearing that the Court can decide as a matter of law that the plain language of the 1983 and 1985 statute requires the Funds to contract coverage and provide a plan for their annuitants.

The Court can reach this question first because *it is* the question posed by the Circuit Court (A10-11 and A12) (Opening Brief) in its 304(a) findings.

While remand is appropriate, the Funds’ obligation to provide a Plan was already decided by Judge Cohen (*for* the Retirees, before he misconstrued this Court’s 2017

Underwood II decision). Additionally, the record is before the Court - the Funds are already bound to their assertion that they had the obligation and fulfilled it by contracting with the City.

In practical terms, remand on this question adds years of litigation to this case which is already decades old, seven years from its last revival, for issues that have been briefed and already decided on questions of law.

(1) The Funds' Obligation to Provide A Plan is a Question of Law, should be found in Retirees' favor based upon a plain reading interpretation of 1983 and 1985 statutes. Even if remanded and decided, coming back to this Court the question would be heard *de novo*.

At paragraphs 50-53, this Court declares that the issue of the Funds' obligation to provide coverage had not been decided in the 2017 Appellate *Underwood II* decision; but, rather than decide it, remands the case back to the Circuit Court to decide that issue as if it were an open question.

The question the Circuit Court explicitly posed here at A 12 (Opening Brief) was the finding whether the Police, Fire, Municipal and Laborers' City of Chicago Pension Funds have an obligation to provide healthcare plans for their annuitants under the 1983 and 1985 statutes. The answer is: they do, it has already been decided, and would be reviewed *de novo* by this Court in any event.

The question is one of statutory interpretation and is a matter of law.

Hendricks v. Board of Trustees of the Police Pension Fund of Galesburg, 2015 IL App (3d) 140858, ¶¶ 10-11, held that a statutory interpretation question is a matter of law, and the appropriate standard of review is *de novo*. Citing, *Ryan v. Board of Trustees of the General Assembly Retirement System*, 236 Ill. 2d 315, 319 (2010) the *Hendricks* court held:

“we agree with plaintiff that the issue before us is one of statutory interpretation and that the appropriate standard of review, therefore, is de novo. [citation omitted.] In reaching that conclusion, we note that the issue in this case is very similar to the issue in Ryan, where the supreme court was called upon to determine whether the former governor's entire state pension was forfeited under a pension disqualification statute. [citation omitted.] Our supreme court commented that the facts in that case were not in dispute, much as in the present case, and that the issue was one of statutory construction.”

In *Mattis v. State Universities Retirement System*, 212 Ill. 2d 58, 76 (2004) the Illinois Supreme Court similarly held, “The interpretation of statutory provisions is a question of law. Accordingly, we review the appellate court's interpretation of the relevant Pension Code provisions de novo.” *Id.*

The statutes’ obligation that the Funds must *provide* a Plan for the annuitants is set forth in our Opening Brief, at 5, 9 and 25. The applicable Pension Code statutes, which this Court declared to be the constitutionally protected benefit, all directly require the Funds to provide a health care coverage Plan for their annuitants; explicitly requiring the Police and Firemen Funds to contract with a carrier, and explicitly empowering Municipal and Laborers annuitants to enroll in a healthcare Plan provided by their Funds.

(2) The question can be decided because the Funds are bound to their own assertions that they had the obligation to contract for coverage for their annuitants, and fulfilled it by contracting with the City as the insurer.

These four Funds’ Trustees are bound by their *Korshak* litigation pleading and position that explicitly acknowledged that they are obligated to provide that coverage and asserted that they had fulfilled that obligation by contracting the City as the insurer (precisely because these annuitants did not earn Medicare qualifying quarters from their City employment).

The Funds’ own testimony in the *City v. Korshak* trial (FAC, Ex. 27, R. C 8681) shows that the Funds argued and explicitly recognized the Funds’ (their own) obligations

under their statutes to provide and subsidize healthcare coverage for their annuitants. See, Our Opening Brief at p. 10-13, 30-33, and Reply Brief at p. 6-9.

(3) Judge Cohen already ruled for Retirees, prior to the 2017 *Underwood II* Appellate decision.

Even if this Court continues to hold “the denial of a motion to dismiss is not a ruling that disposes of one or more parties or claims and is thus not the proper subject of an appeal” *Underwood III*, at ¶ 47, and “we were not affirming any denial of a motion to dismiss because that was not before us” *but for the perceived prohibition of reaching the question, now reversed, the Circuit Court held already that the Funds are obligated to provide a Plan* and a remand to reaffirm its previous decision is redundant.

We did not only argue that this Court affirm the dismissal of claims against the City, its affirmance of all of the rulings below included the Circuit Court’s repeated rulings that it was the Funds who had the obligation to provide a benefit under the statutes, we *also* argued that the Circuit Court repeatedly stated that *the Funds have the primary obligation to provide coverage for their members and to subsidize* the costs in the amounts in the 1983 and 1985 Pension Code provisions. The Circuit Court’s March 3, 2016 “Clarification” Order declared:

The City is correct that it does not have any obligation under the 1983 or 1985 amendments to subsidize or provide healthcare for the Funds' annuitants. That obligation is placed on the Funds. However, the City does have an obligation to contribute, through the collection of the special tax levy, the monies used by the Funds to subsidize/provide healthcare for the Funds' annuitants. Therefore, both the Funds and the City have certain obligations under the 1983 and 1985 amendments and both the City and the Funds are proper parties to Count I. (March 4, 2016 Order, at 5) (Emphasis added.) R. C 5254

This was reaffirmed in the Circuit Court’s July 21, 2016 Order upholding Count I of the Third Amended Complaint:

3. The 1983 and 1985 Amendments: No Time Limitations

The 1983 amendments obligated the Fire and Police Funds to contract for group healthcare coverage for their annuitants and to subsidize the monthly premiums for their annuitants.

The 1985 amendments obligated the Municipal and Laborers Funds to approve a group health insurance plan and subsidize monthly premiums for their annuitants by making payments to the organization underwriting the group plan.

The 1983 and 1985 amendments did not set forth *any* termination date for the Funds' obligations. (July 21, 2016 Order, at 8.) (Emphasis added.) R. C 6113

As shown, the Circuit Court repeated its view of the Fund’s obligation:

The Funds’ Obligation to Provide a Plan		
11/2/2015	43:12 – 44:9	In asking Attorney Burke (Firemen’s and Municipal Fund) why the statute doesn’t apply, Judge Cohen reads the Police and Firemen pension code where it says the board shall contract with one or more carriers to provide group health insurance; “I don’t see that as authorized. I see that as the legislature telling you to do it. You shall do it.” (emphasis added.) R. C 2027 at 2069-70
12/3/2015	Circuit Court Memorandum and Order at pg. 10, ¶ C	1983 and 1985 amendments obligated the Funds to contract for/approve group healthcare coverage for their annuitants. R. C 2180, 2189
3/3/2016	Circuit Court Memorandum and Order at pg. 5, ¶ II. A.	The City does not have any obligation to subsidize or provide healthcare for the Funds’ annuitants. That obligation is placed on the Funds. R. C 5250, 54
7/6/2016	80:12-17	Attorney Donham (Laborers Fund): “I agree. There’s no language in the statute that says ‘lifetime coverage.’ ... What they say is you had to approve a plan. And plaintiffs allege in the complaint that the City approved – I mean, that the Fund approved the City plan.” R. 115, 135

7/21/2016	Circuit Court Memorandum and Order pg. 8, ¶ 3.	1983 and 1985 amendments obligated the Funds to contract for/approve group healthcare coverage for their annuitants. The 1983 and 1985 amendments were in effect when the Korshak Sub-Class, the Window Sub-Class and Sub-Class 3 entered into the Funds' retirement systems. R. C 6106, 6113 Order appealed from, <i>see</i> Appeal No. 16-2357, Amended Notice of Appeal, R. C 6245, 6250.
8/31/2016	39:8-16	FABF/MEABF Attorney Burke asking what is the Court's ruling on 1983 and 1985 statutes? and the Court replies "Mr. Burke, it's in my opinion not once, not twice, but at least three times, you got to do it." R. 201, 211
12/5/2016	50:21-51:16	"And so I held actually in my written opinions" that the Funds have an obligation to provide a plan.
7/6/2017	33:7-23	Each of the funds' attorneys are to look and see what their obligations are under the statutes and come up with plans to fulfill those obligations, per Justice Simon. "That's not a suggestion. It's an order." R. C 6695, 6703
8/9/2017	77:22-78:2 80:10-14	LABF Attorney Donham: "As far as 2018, the statutory obligation of the Laborers' Fund is to approve a plan." FABF/MEABF Attorney Boeckman: "As Ms. Naber mentioned, the statute doesn't require us to necessarily be the plan's sponsor, but that we need to contract with a health insurance carrier and then pay up to that 55 or \$21 subsidy." R. C 11510
9/12/2018	Memorandum and Order at pg. 6, ¶ B. 2.	Circuit Court finds (reversed now) that the Appellate Court ruled only the subsidy is a protected benefit. R. C 9972, 9977

Remand for deciding this issue is an unnecessary exercise because the Circuit Court's view has been repeatedly stated; and regardless, any future review here would be *de novo*.

(4) The *Underwood II* decision says the recipients get what the statutes say – which includes a Plan.

On rehearing this court can see in clear focus that *Underwood II*, 2017 IL App 1st 162356 affirmed a plain reading of the statute that the Funds have the obligation to provide healthcare plans for their annuitants.

- “The recipients get what the statute or contract that grants the right expressly says they get.” *Underwood v. City of Chicago*, 2017 IL App (1st) 162356, ¶ 39, A 33.
- “Moreover, since we have already held that the retirees are entitled to coverage under the amendments that remained intact, the only issue to address is the level of benefits that the retirees claim they are entitled to because of estoppel. *Underwood v. City of Chicago*, 2017 IL App (1st) 162356, ¶ 52, A 38.

And, when this Court held that the retirees were entitled to a “benefit level” in the 1983 and 1985 statutes, *Id.* at ¶ 63, A 41, and continued by explaining that “the result compelled by the application of our constitution, statutes, and precedent is that the retirees *are entitled to lifetime healthcare coverage*, albeit at modest levels—a result that should, but unlikely will, put an end to hostilities,” (emphasis added) *Id.* at ¶ 65, A 41, it included all listed benefits, and held that the subsidy was hand in hand with, and the stated benefit of, offering a healthcare coverage Plan.

Renewed Request for Reassignment

Finally, we repeat our request for reassignment on remand due to the hostility of the Circuit Judge to the claims, his repeated indulgence of every City request to extend the City’s responses, and repeatedly refusing to order the defendants to ever answer, repeatedly deferring class certification then deciding it unnecessary, so that class members’ rights are being decided without due process notice to them, ordering instead the plaintiffs to repeatedly refile new complaints, resetting the case always back to the beginning. The court below has long ago eviscerated any confidence of the annuitants

that the Circuit Court will fairly or timely decide the case and so we ask the Court to reassign the case to a new judge.

CONCLUSION

This Court can reach a substantive decision about the meaning of the Funds' statutory obligation to – contract for coverage, provide a plan for their annuitants. We seek ruling in our favor based on 1) the Funds' repeated *Korshak* positions that the statutes require them to provide coverage for their annuitants, and 2) their assertions that they had fulfilled that obligation by contracting the City as the insurer, along with the Circuit Court's own repeated decisions below that the Funds have the obligation, all within the Record on this Appeal.

Dated: July 21, 2020

By: /s/Clinton A. Krislov
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PROOF OF SERVICE

I, Kenneth T. Goldstein, an attorney, on oath state that I caused a copy of the foregoing **Appellants' Motion for Rehearing** to be filed and served on Defendants, Intervenor, and the Illinois Appellate Court, with the Court's Electronic filing service provider, Odyssey Efile IL, and served by E-Mail (as indicated on the Service List below) on July 21, 2020 and resubmitted and reserved with a green cover on July 22, 2020.

s/Kenneth T. Goldstein

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Certification of Compliance

I certify that this brief conforms to the requirements of Rule 341(a) and (b), and Rule 367. The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(c) certificate of compliance, and the certificate of service is 10 pages.

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