

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION**

MICHAEL W. UNDERWOOD, *et al.*,

Plaintiffs,

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.

No. 13 CH 17450

Hon. Neil Cohen

**DEFENDANTS THE TRUSTEES OF THE FIREMEN'S ANNUITY
AND BENEFIT FUND OF CHICAGO AND THE TRUSTEES OF THE MUNICIPAL
EMPLOYEES' ANNUITY AND BENEFIT FUND OF CHICAGO RESPONSE
BRIEF TO PLAINTIFFS' MOTION TO COMPEL FUNDS TO:
1) BRING SUBSIDIES CURRENT AND CONTINUE, AND, 2) PROVIDE
A RETIREE HEALTHCARE PLAN FOR THEIR ANNUITANTS**

Defendants, the Trustees of the Firemen's Annuity and Benefit Fund of Chicago (the "Fire Fund") and the Trustees of the Municipal Employees' Annuity and Benefit Fund of Chicago (the "Municipal Fund") (and/or together "the Funds") respectfully submit their response brief on the sole issue of the responsibility of the City of Chicago (the "City") to pay for the cost of the healthcare premium subsidies¹ pursuant to the June 29, 2017 Appellate Court Mandate in

¹ This Brief addresses the sole issue of the responsibility of the City to pay for the monthly healthcare premium subsidies pursuant to the June 29, 2017 Appellate Court Order as directed by this Court in its May 23, 2018 Order

Underwood v. City of Chicago, 2017 IL App (1st) 162356 (the “Appellate Court Mandate”, the “Appellate Court Order”, or the “Mandate”, attached and incorporated herein as Exhibit B).²

INTRODUCTION

On June 29, 2017, the Appellate Court affirmed in part and denied in part this Court’s July 21, 2016 Order ruling on the City’s and Funds’ motion to dismiss Plaintiffs’ Third Amended Complaint and remanded the case back to this Court for further proceedings. The Appellate Court specifically held that Fund annuitants could not state a claim for healthcare benefits under the time-limited provisions under the 1989, 1997 and 2003 amendments. The Appellate Court further held that those Fund annuitants hired on or before the execution date of the 2003 settlement are entitled to the specific monthly healthcare subsidy provided under the 1983 and 1985 amendments. ¶¶35, 40. In reviewing the claim for healthcare benefits under the 1983 and 1985 amendments, the Appellate Court affirmed this Court’s holding that the issue was “moot” for the Korshak and Window subclasses because *the City* had agreed in writing to provide them benefits above the subsidy levels provided for in the 1983 and 1985 amendments. ¶¶35, 42, 46 (emphasis added). The Appellate Court also held that Fund annuitants did not have a right to lifetime healthcare coverage based on contract, estoppel, or any constitutional theory. ¶63.

Further, the sole healthcare “benefit” recognized by the Appellate Court is the payment of certain monthly subsidies to qualified Fund annuitants (other than for the purported Korshak and Windows sub-classes) who joined the Funds prior to the April 4, 2003 execution date of the 2003 settlement and who are not members of the Korshak and Windows purported sub-classes³. ¶¶

attached and incorporated herein as Exhibit A. The Funds respectfully reserve all rights to respond at a later date to the other arguments raised in Plaintiffs’ Motion.

² The *Underwood* Plaintiffs’ Petition for Leave to Appeal to the Illinois Supreme Court was denied on November 22, 2017. *Underwood v. Trustees of Policemen’s Annuity & Benefit Fund of Chicago*, 93 N.E.3d 1056 (Ill. 2017).

³ The Funds’ position is that those annuitants must meet the qualifications of the 1983 and 1985 statutes. The 1983 amendment states that only those participants who are in receipt of an age and service annuity are entitled to the

32, 40. The Funds agree that those annuitants who qualify for such monthly subsidies are likewise entitled to a retroactive lump-sum payment representing those monthly subsidies dating back to January 1, 2017.

Importantly, the Appellate Court noted that on remand that this Court is responsible for finding a “workable solution to address how the subsidy would be funded”. ¶64. The sole issue presented in this brief is what entity is responsible for paying the monthly subsidy to Fund annuitants consistent with the Appellate Court Order.

ARGUMENT

I. THE ILLINOIS APPELLATE COURT EXPRESSLY ORDERED AND MANDATED THAT THE PENSION PROTECTION CLAUSE DOES NOT PROTECT THE UNDERWOOD RETIREES’ ABSTRACT RIGHT TO “HEALTHCARE COVERAGE.”

The City will argue, *inter alia*, that this Court should simply apply the plain language of the 1983 and 1985 amendments to support its argument that it is the Funds’ obligation to pay for the monthly subsidies. However, that argument is in direct conflict with the clear direction from the Appellate Court. In its review of what is actually protected under the 1983 and 1985 amendments, the Appellate Court limits the applicability of the 1983 and 1985 statutes solely to the right of Funds annuitants to receive a monthly subsidy payment *paid by the City*. The Appellate Court, quoting the United States Court of Appeals for the Seventh Circuit, is clear that participants of the respective Funds do not have an abstract, legal right to healthcare coverage and that the protected “benefit” under the Pension Protection Clause of the Illinois Constitution is solely the fixed-rate subsidy under the 1983 and 1985 amendments. ¶39.

The Funds must discharge its fiduciary duties consistent with the provisions of the Illinois Pension Code and have no authority or power in excess of the express provisions of the

monthly subsidy. Similarly, the 1985 statute clarifies that only employee annuitants age 65 or over with 15 years of service are entitled to the monthly subsidy. The Funds will need direction from the Court with respect to this issue.

Illinois Pension Code, 40 ILCS 5/1-109(d). Currently, neither the 1983 nor the 1985 amendments are contained in the Pension Code as they were replaced by the successor amendments providing certain time-limited healthcare benefits. Because the Appellate Court Order only revived the portion of the 1983 and 1985 amendment relating to the payment of the monthly subsidies, this Court cannot accept the City's argument to merely apply the entire provisions of the 1983 and 1985 amendments. Instead, this Court must respect and affirm the obligations of the parties consistent with the direction from the Appellate Court. *Brandon v. Caisse*, 172 Ill. App. 3d 841 (2d Dist. 1988).

II. THE ILLINOIS APPELLATE COURT EXPRESSLY ORDERED AND MANDATED THAT UNDER THE 1983 AND 1985 STATUTORY AMENDMENTS, THE CITY (NOT THE FUNDS) IS OBLIGATED TO PAY THE SPECIFIC TANGIBLE SUBSIDIES PROVIDED FOR THEREIN.

When reviewing the Appellate Court Order, the only mention of any obligation of the Funds is contained in the "Background" section of the Order. Conversely, when analyzing the obligations of the City, the Appellate Court repeatedly and expressly refers to the City's obligation to provide annuitants with the subsidies delineated under the 1983 and 1985 amendments:

- (1) "When the 2003 settlement expired in 2013, the rights of employees whose participation started before the 2003 settlement was executed merely reverted to the status existing when the Korshak case was filed in 1987. So, being back at that point, *the City is obligated to those retirees* under the 1983 and 1985 amendments." ¶37. (emphasis added).
- (2) "Under the 1983 amendment, *the City is obligated to pay* towards its retirees' healthcare \$55 per month for non-Medicare-eligible retirees and \$21 per month for Medicare-eligible retirees. Ill Rev. Stat. 1983, Ch. 108-1/2, par. 8-167.5 (eff. Jan. 12, 1983)." ¶40. (emphasis added).
- (3) "Under the 1985 amendment, *the City is obligated to pay* \$25 per month for its municipal employees and laborers and retirement board employees. Ill Rev. Stat. 1985, Ch. 108-1/2, par. 11-160.1 (eff. Aug. 16, 1985)." ¶40. (emphasis added).

- (4) “This opinion merely speaks to what *the City is constitutionally obligated to provide.*” ¶57. (emphasis added).

The Underwood plaintiffs, the City, the Funds and this Court must respect and obey the Illinois Appellate Court Order that *the City* (not the Funds) is obligated to pay for the monthly subsidies. (See *Brandon v. Caisse*, 172 Ill. App. 3d 841 (2d Dist. 1988): “[f]ollowing transmittal of the judgment of the reviewing court to the circuit court, the circuit court may thereafter do only those things which are directed in the mandate, and has no authority to act beyond its dictates.”).

The Appellate Court Order is unambiguous that *it is the obligation of the City* to pay for the monthly subsidy to qualified Fund annuitants. As such, the Funds request that this Court affirm the Appellate Court direction that the City is obligated to pay for the monthly subsidies to qualified annuitants.

III. THE APPELLATE COURT’S AFFIRMATION OF THE TRIAL COURT’S RULING THAT THE SUBSIDY ISSUE IS “MOOT” WITH RESPECT TO THE PURPORTED KORSHAK AND WINDOWS SUB-CLASSES SUPPORTS THE FUNDS’ ARGUMENT THAT THE SUBSIDY PAYMENT IS A CITY OBLIGATION.

In addition to the Appellate Court’s unambiguous direction that it is the City’s obligation to pay the monthly subsidies to qualified annuitants, the Appellate Court Order also affirms this Court’s ruling that the subsidy payment issue under the 1983 and 1985 amendments is “moot” with respect to the purported Korshak and Windows sub-classes. (See ¶¶32, 46 “[t]he Korshak and Window subclass members’ claims are essentially moot *as the parties have settled...*”; see also ¶42 “...issue was moot as to the Korshak and Window subclasses because the parties *had agreed upon some form of coverage that the City would provide for those members.*”)

This affirmation is significant as it highlights that the Appellate Court views the provision of

the monthly subsidies as a *City obligation* because the City agreed to “settle” the claim for healthcare subsidies with the purported Korshak and Windows subclasses. As this Court is well aware, the City sent a May 15, 2013 letter to annuitants notifying them that it intended to phase out its provision of healthcare benefits and also provided the following “settlement” with respect to the purported Korshak and Window subclass members (attached and incorporated herein as

Exhibit C):

“After January 1, 2014, *the City* will provide a healthcare plan with a continued contribution from the City of up to 55% of the cost for that plan for their lifetimes to the City retirees who are members of the Korshak and “Window” Sub-Classes, meaning those City annuitants who retired prior to August 23, 1989. In short, *the City* will continue to substantially subsidize these retirees’ healthcare plan as it does today.” (emphasis added).

The Funds were not involved in any manner with the “settlement” for the purported Korshak and Window subclass members highlighted in the May 15, 2013 correspondence. Instead, it was *the City that agreed to provide a continuing subsidy of 55%* to the purported Korshak and Window sub-classes (plainly an admission of its responsibilities). The Appellate Court, in recognizing such “settlement”, affirmed this Court’s holding that any additional claim for monthly subsidies for the purported Korshak and Windows sub-classes is now moot. ¶46. Such holding only makes sense when viewing the provision of monthly subsidies as *a City obligation versus a Fund obligation*.

Considered in another light, had the Appellate Court intended for the payment of the monthly subsidies to be a Fund obligation, it would not have affirmed this Court’s ruling that the claims under the 1983 and 1985 amendments for such annuitants was “moot”. Instead, the Appellate Court would have held that those annuitants were entitled to the 55% “settlement” subsidy paid by the City in addition to a monthly subsidy paid by the Funds. The Appellate Court, however, clearly finds that provision of monthly healthcare subsidies is *a City obligation*

and therefore, any claims under the 1983 and 1985 amendments are “moot” because the City and the Korshak and Windows sub-classes “settled” pursuant to the terms of the May 15, 2003 correspondence.

The Appellate Court directs this Court to find a “workable solution to address how the subsidy would be funded” and in its review of the City’s “settlement”, the Appellate Court clearly affirms its holding that the payment of the monthly subsidies is *a City obligation*. As such, this Court should affirm the Appellate Court’s direction that the payment of the monthly subsidies is an obligation of the City.

IV. THE CITY’S DENIALS OF ITS OBLIGATION TO PAY THE SUBSIDIES IS FOUNDED UPON: 1) ITS SELECTIVE READING OF JUSTICE SIMON’S 6/29/2017 OPINION; 2) ITS INHERENT ASSERTIONS IMPLYING JUSTICE SIMON’S CONFUSION; AND 3) ITS DISREGARD AS TO THE FUNDAMENTAL EMPLOYER-EMPLOYEE RELATIONSHIP UNDERPINNING ITS CONSTITUTIONAL RESPONSIBILITIES.

A. The City’s Selective Reading Of Justice Simon’s 6/29/2017 Opinion.

It is plain that when Justice Simon’s June 29, 2017 Order favors the City, the City vigorously cites to the Court’s opinion. For example, the City has repeatedly noted to this Court that, consistent with the Appellate Court’s Order, it has no further obligations to annuitants with respect to healthcare benefits as the Appellate Court held that the benefits provided under the successor amendments to the Pension Code were time-limited benefits. ¶29. (See also ¶65: “[o]n the other hand, the City has been boastful of its heretofore success in eliminating the retiree healthcare plan altogether...”). In relating to its obligations under such time-limited amendments, the City consistently asserts that the plain reading of the Appellate Court Order must prevail.

When, however, Justice Simon’s opinion expressly articulates *the City’s* constitutional obligations under relevant law to its employee annuitants (even expressly citing to the relevant

amendments), the City asserts that the Court obviously failed to review the relevant amendments and the law; failed to understand the meaning of the relevant amendments and the law; failed to be diligent in its consideration of the relevant statutes and the law and was somehow confused as to its rulings. In essence, the City would have this Court hold that the Appellate Court wholly failed to understand the fundamental employer-employee relationship relating to the City's constitutional obligations to the City's employee annuitants relating to the payment of monthly subsidies under the 1983 and 1985 amendments.

B. The City's Inherent Assertions Implying Justice Simon's Confusion.

The City is essentially requesting that this Court hold that Justice Simon, in ruling that it is *the City's obligation to pay* the monthly subsidies, completely ignores and errs or is somehow confused in failing to apply the plain language of the 1983 and 1985 amendments. However, it is clear that the Appellate Court had the benefit of reviewing both the 1983 and 1985 amendments and relied on certain portions of those amendments in holding that qualified Fund annuitants have a constitutionally protected right to the level of monthly subsidy payments provided under such amendments. Indeed, the Appellate Court remands the case back to this Court to find a "workable solution to address how the subsidy would be funded" (by the City). ¶64. If the Appellate Court merely relied on the funding provisions of the 1983 and 1985 amendments, it would be unnecessary for the Appellate Court to remand the case to this Court to rule on how the subsidy payments are to be funded and paid by the City to those qualified annuitants.

In addition, the Appellate Court had another opportunity to "fix" or "amend" its June 29, 2017 Order if it concluded that it had erred in holding that it was *the City's obligation to pay for the monthly subsidies*. Plaintiffs, disagreeing with the Appellate Court's Order, filed a Petition

for Rehearing on July 20, 2017. In such Petition for Rehearing, Plaintiffs alleged that the Appellate Court erred in its analysis of the 1983 and 1985 amendments by limiting the protected benefits to the explicit statutory subsidies. Had the Appellate Court felt it necessary to “amend” its June 29, 2017 Order to clarify the obligations of the parties under the 1983 and 1985 amendments it could have done so consistent with the Plaintiffs’ Petition for Rehearing. Instead, in denying Plaintiffs’ Petition for Rehearing, it affirmed its June 29, 2017 Order as the Mandate in this case, including its holding that it is the *City’s obligation to pay for the monthly subsidies*.

Indeed, the Appellate Court Order was further affirmed by the Illinois Supreme Court’s review of Plaintiffs’ Petition for Leave to Appeal the Appellate Court Order (the “PLA”), filed on September 14, 2017. Plaintiffs’ PLA requested that the Supreme Court review all issues raised in the Appellate Court’s June 29, 2017 Order. The Supreme Court’s denial of Plaintiffs’ PLA further affirms that the Appellate Court Order, including its ruling that *it is the City’s obligation to pay the monthly subsidies*, is the Mandate that this Court must follow.

C. The City’s Disregard As To The Fundamental Employer- Employee Relationship Under-Pinning Its Constitutional Responsibilities.

In its holding that the Pension Protection Clause mandates that qualified Fund annuitants hired by the City before the execution of the 2003 settlement agreement must receive a monthly healthcare subsidy *paid by the City*, the Appellate Court Order consistently relies on the Illinois Supreme Court’s decision in *Kanerva v. Weems*, 2014 IL 115811, 13 N.E.3d 1228. In *Kanerva*, the Illinois Supreme Court analyzed whether the Pension Protection Clause applies to an Illinois *public employer’s obligation* to contribute to the cost of healthcare benefits covered by the State retirement systems. ¶35. The State Employees Group Insurance Act of 1971 [5 ILCS 375/1 et seq.], the subject of the *Kanerva* litigation cited by Plaintiff, states that its purpose is “to provide

a program of group life insurance, a program of health benefits and *other employee benefits* for persons in the service of the State of Illinois...” 5 ILCS 375/2. (emphasis added). In detailing the necessary levels of coverage for such healthcare program, the State Employees Group Insurance Act specifically states: “the program of health benefits shall provide for protection against the financial costs of health care expenses incurred in and out of hospital including basic hospital-surgical-medical coverages. The program may include, but shall not be limited to, such supplemental coverages as out-patient diagnostic X-ray and laboratory expenses, prescription drugs, dental services, hearing evaluations, hearing aids, the dispensing and fitting of hearing aids, and similar group benefits as are now and may become available.” 5 ILCS 375/6(a). In *Kanerva*, the Court held that the General Assembly *and the State, as the public employer*, were precluded from diminishing or impairing the provision of healthcare insurance premiums whose rights were governed by the version of the Group Insurance that was in effect prior to the enactment of Public Act 97-695. *Kanerva v. Weems*, 2014 IL 115811, ¶ 57, 13 N.E.3d 1228, 1244. (Emphasis supplied)

Moreover, the Illinois Supreme Court in *Kanerva* emphasized the fundamental underpinnings to Article XIII, Section 5 of the Illinois Constitution and to its holdings, *inter alia*, by citing to the statements of Delegate Green at the Constitutional Convention: “Delegate Green, who first proposed the provision which became article XIII, section 5, began his presentation to the convention by stating that it does two things: ‘*it first mandates a contractual relationship between the employer and the employee*’; and secondly, it mandates the General Assembly not to impair or diminish those rights.” ¶46. (Emphasis Supplied) Clearly, the Illinois Supreme Court and the Appellate Court view the provision of healthcare benefits as an *employer-employee benefit* protected by the Illinois Constitution. Consistent with *Kanerva*, the Appellate Court

Order in this case recognizes the constitutional obligation of *the City*, as the employer, to provide certain healthcare subsidy payments to qualified employee annuitants.

CONCLUSION

Due to the current statutory funding provisions found in the respective Articles of the Illinois Pension Code, the Funds receive a fixed, static dollar amount from the City in order to meet the obligations of its members.⁴ It is the Funds' understanding that the City will not increase the contributions paid by the City to the Fund to cover the payment of the extra cost of the healthcare subsidy pursuant to the Appellate Court Order.

The Appellate Court Mandate directs this Court with respect to the City's obligation to pay the healthcare subsidies consistent with the Appellate Court Order. With respect to the 1983 amendment, the Appellate Court Mandate instructs that, "*the City is obligated to pay* towards its retirees' healthcare \$55 per month for non-Medicare-eligible retirees and \$21 per month for Medicare-eligible retirees". ¶40. In addition, with respect to the 1985 amendment, the Appellate Court Mandate again instructs that, "*the City is obligated to pay* \$25 per month for its municipal employees and laborers and retirement board employees." ¶40. For this Court to hold otherwise would mean that this Court intends to compel the Funds to increase its already precarious deficit spending while operating on a fixed schedule of funding from the City.⁵

The Illinois Supreme Court has recognized that the fiduciary duty owed to Fund participants is a duty "owed to all participants in the pension fund" and that "perhaps the most

⁴ See Section 6-165 of the Illinois Pension Code for the Fire Fund and Section 8-173 for the Municipal Fund. 40 ILCS 5/6-165(a); 40 ILCS 5/8-(a-5)(1).

⁵ In the event that this Court overrules the Appellate Court Mandate and holds that it is the Funds' obligation to pay the monthly subsidy to qualified annuitants, the Funds have several operational and administrative issues concerning such payments that will need to be resolved by this Court. By way of example, such issues include, but are not limited to: (i) does the Mandate direct that the monthly subsidies should be paid directly to qualified annuitants or does it require payment directly to a qualified healthcare insurance provider; (ii) are taxes withheld from the retroactive lump sum payment owed to qualified annuitants; and (iii) if a qualified annuitant is receiving fully subsidized healthcare coverage from a spouse or the City, are they also entitled to a subsidy provided in the Appellate Court Mandate?

important function of a pension board is to ensure that there are adequate financial resources to cover the Board's obligations to pay current and future retirement and disability benefits to those who qualify for such payments." *Marconi v. Chicago Heights Police Pension Board*, 2006 Ill. LEXUS 2098, 73, modified on denial of rehearing May 29, 2007.

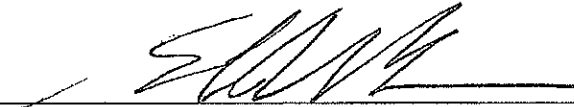
If this Court requires the Funds to pay the subsidies contrary to the Appellate Court Order, such requirement would be in direct conflict with the Funds' fiduciary duty to protect its respective corpus of assets to ensure that all annuitants receive benefits when due under the Illinois Pension Code. The Funds have no authority or power to levy for any additional funding to cover the cost of the monthly subsidies. The City is the source of funding for all obligations of the respective Funds. As such, the Funds request that this Court affirm the Appellate Court's direction that it is the City's constitutional obligation to pay for the monthly subsidies provided under the Appellate Court Mandate.

WHEREFORE, the Trustees of the Firemen's Annuity and Benefit Fund of Chicago and Trustees of the Municipal Employees' Annuity & Benefit Fund of Chicago respectfully request that this Court affirms the Illinois Appellate Court Mandate that it is the City's obligation to pay the monthly subsidies to qualified annuitants consistent with the Appellate Court Order.

Respectfully submitted,

**TRUSTEES OF THE FIREMEN'S ANNUITY AND
BENEFIT FUND OF CHICAGO AND TRUSTEES OF
THE MUNICIPAL EMPLOYEES' ANNUITY &
BENEFIT FUND OF CHICAGO**

By


One of Their Attorneys

Edward J. Burke
Mary Patricia Burns
Vincent D. Pinelli
Sarah A. Boeckman
eburke@bbp-chicago.com
mburns@bbp-chicago.com
sboeckman@bbp-chicago.com
BURKE BURNS & PINELLI, LTD.
70 West Madison Street, Suite 4300
Chicago, Illinois 60602
(312) 541-8600
Firm ID # 29282

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Underwood et al

v.

No.

13 CH 17450City of Chicago et al

ORDER

This matter coming to be heard with due notice, it is ordered:

1. The Court shall hold a hearing for the petition to intervene, on June 13, 2018 at 11:00 A.M. on the 13th of June at 11:00 A.M.
2. The City & Funds shall respond to Plaintiff motion providing subsidy on June 15, 2018 & replies on June 29, 2018, and Clerk status on July 2, 2018 at 9:00 A.M. Each Fund may file its own Brief or unified Brief.
3. The City & Funds shall respond to Plaintiff's motion regarding providing a "Plan" on July 13, 2018, Plaintiff's reply on July 27, 2018, & Clerk status set for July 30, 2018 at 9:00 A.M.
4. The court strikes the Hearing date set for May 30, 2018.

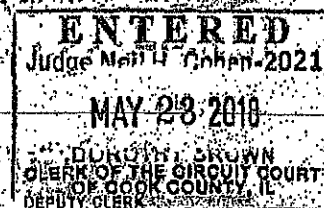
Attorney No. 91198Name: Ken GoldsteinAtty. for: PlaintiffAddress: 20N Wacker #1200City/State/Zip: Chicago IL 60606Telephone: 312-606-0500

ENTERED:

Dated: _____

Judge _____

Judge's No. _____



NOTICE
The text of this opinion may be changed or corrected prior to the time for filing of a petition for rehearing or for the calling of the same.

2017 IL App (1st) 162356

No. 1-16-2356 and 1-16-2357 (cons.)

FIRST DIVISION

June 29, 2017

MICHAEL W. UNDERWOOD, JOSEPH M. VUICH,
RAYMOND SCACCHITTI, ROBERT McNULTY,
JOHN E. DORN, WILLIAM J. SELKE, JANIECE R.
ARCHER, DENNIS MUSHOL, RICHARD
AGUINAGA, JAMES SANDOW, CATHERINE A.
SANDOW, MARIE JOHNSTON, and 338 other
Named Plaintiffs listed.

Plaintiffs-Appellants,

 γ

CITY OF CHICAGO, a Municipal Corporation,

Defendant.

and

TRUSTEES OF THE POLICEMEN'S ANNUITY AND
BENEFIT FUND OF CHICAGO; TRUSTEES OF THE
FIREMEN'S ANNUITY AND BENEFIT FUND OF
CHICAGO; TRUSTEES OF THE MUNICIPAL
EMPLOYEES' ANNUITY AND BENEFIT FUND OF
CHICAGO; and TRUSTEES OF THE LABORERS &
RETIREMENT BOARD EMPLOYEES' ANNUITY
& BENEFIT FUND OF CHICAGO, et al.,

Defendants-Appellees.

Appeal from the Circuit Court
of Cook County.

No. 13 CH 17450

Honorable Neil H. Cohen
Judge Presiding

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

OPINION

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

No. 16-2356 and 16-2357 (cons.)

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

¶ 2

BACKGROUND

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

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

No. 16-2356 and 16-2357 (cons.)

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

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

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

No. 16-2356 and 16-2357 (cons.)

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

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

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

No. 16-2356 and 16-2357 (cons.)

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

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

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

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

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

No. 16-2356 and 16-2357 (cons.)

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

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

¶ 13 ANALYSIS

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

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

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

No. 16-2356 and 16-2357 (cons.)

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

¶ 17 The pension protection clause of the Illinois Constitution states that “[m]embership in any pension or retirement system of the State, any unit of local government or school district, or any agency or instrumentality thereof, shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired.” Ill. Const. 1970, art. XIII, § 5. The pension protection clause is intended to eliminate the uncertainty that surrounded public pension benefits (*People ex rel., Sklodowski v. State*, 182 Ill. 2d 220, 228 (1998)) and to provide public employees with a basic protection against the complete abolition of their rights or the reduction of their benefits after they have already embarked upon employment (*Miller v. Retirement Board of Policemen's Annuity*, 329 Ill. App. 3d 589, 597 (2001)).

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

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

No. 16-2356 and 16-2357 (cons.)

¶ 20 The Illinois Supreme Court has interpreted the pension protection clause to protect not only the retirement annuity itself from diminution, but instead has held that all of the benefits flowing from one's participation in a public pension system are constitutionally protected.

Kanerva v. Weems, 2014 IL 115811, ¶ 40. Including, specifically, health insurance subsidies. *Id.* at ¶ 41, ¶ 57.

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

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

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

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

No. 16-2356 and 16-2357 (cons.)

because the benefits came with an expiration date. *Underwood v. City of Chicago*, 2016 IL App (1st) 153613, ¶ 23, ¶ 27. The expiration date was embedded in the benefit itself, and the benefit does not endure beyond the expiration date by application of the pension protection clause.

Employees that began to participate in the retirement system in 1989 forward, like those already enrolled, were vested with the rights provided in the amendment in effect when they became employed and subsequent amendments enacted during their employment, but they never had any contractual, statutory, or constitutional commitment that benefits at those levels would become permanent or extend beyond the contract's own term. Therefore, no member of any subclass can state a cause of action under count I insofar as the claim is based on the 1989, 1997, or 2003 settlements.

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

No. 16-2356 and 16-2357 (cons.)

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

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

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

No. 16-2356 and 16-2357 (cons.)

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

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

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

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

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

No. 16-2356 and 16-2357 (cons.)

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

¶ 33 The idea contemplated by the parties upon settling the 1987 Korshak litigation was that the parties would continue to negotiate during the settlement period and, if they could not resolve their issues by the end of it, the parties would be restored to their pre-settlement positions and litigation could (and assuredly would) resume. The result is that when the settlement expired, the parties' rights and obligations returned to the status existing when the 1987 litigation began.

Under the 1983 and 1985 amendments, employees were given an open-ended, unconditioned fixed-rate subsidy for their healthcare coverage, and those benefits, like the ones offered in *Kanerva*, are protected. When the 1987 litigation was settled (put on hold), no one ever anticipated, and there is no legal basis to conclude, that once the settlement expired, the City's obligations would be terminated as a matter of law.

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

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

No. 16-2356 and 16-2357 (cons.)

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

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

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

No. 16-2356 and 16-2357 (cons.)

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

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

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

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

No. 16-2356 and 16-2357 (cons.)

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

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

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

¶ 41

C. Statute of Limitations and Jurisdiction

No. 16-2356 and 16-2357 (cons.)

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

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

No. 16-2356 and 16-2357 (cons.)

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

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

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

No. 16-2356 and 16-2357 (cons.)

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

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

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

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

No. 16-2356 and 16-2357 (cons.)

injunction (*Underwood*, 2016 IL App (1st) 153613, ¶ 26), the handbook expressly stated that coverage would terminate “the date the Plan is terminated.” There are other references to coverage being terminated in the annuitant handbook, and the retirees cannot point to anything in the handbook or in any other document that conveys an offer or promise that would obligate the City to provide lifetime coverage much less to provide coverage at any particular benefit level.

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

¶ 51 As for the retirees’ estoppel claim, the allegations in the operative complaint itself are wholly insufficient. But the retirees’ argument is that the City is estopped from changing or terminating coverage because the City issued benefit handbooks and held pre-retirement seminars. The retirees contend that the City is estopped from changing a retiree’s coverage to a level below the highest level during a retiree’s participation in the retirement system. In order to apply equitable estoppel against a municipality, a plaintiff must plead specific facts that show: (1) an affirmative act by either the municipality itself or an official with express authority to bind the municipality; and (2) reasonable reliance upon that act by the plaintiff that induces the

No. 16-2356 and 16-2357 (cons.)

plaintiff to detrimentally change its position. *Vaughn v. City of Carbondale*, 2016 IL 119181, ¶ 48. The retirees have failed to plead or even support an argument with facts to support such a claim.

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

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

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

¶ 55 The contracts clause provides that the government cannot pass laws that impair the obligation of contracts. Ill. Const., art. I, § 16. To determine whether a law impermissibly impairs a contract, we examine: (1) whether there is a contractual relationship; (2) whether the law at issue impairs that relationship; (3) whether the impairment is substantial; and (4) whether

No. 16-2356 and 16-2357 (cons.)

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

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

¶ 57 The retirees argue that the City's plan violates the constitution because it discriminates among retirees based on when they retire. That claim, however, has nothing to do with the benefit levels themselves and, because of our holding on the pension protection clause issue, the

No. 16-2356 and 16-2357 (cons.)

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

¶ 58

IV. Injunctive Relief

¶ 59 The retirees include arguments about injunctive relief in their brief on appeal. They were attempting to preserve the status quo at the end of 2016 so that the City's plan to terminate coverage entirely could not go into effect. We addressed the retirees' requests for injunctive relief on motion³ and, because the end of 2016 has already arrived, the retirees' request for injunctive relief is moot. *Moseley v. Goldstone*, 89 Ill. App. 3d 360, 365-66 (1980).

¶ 60

V. Conclusion

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

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

No. 16-2356 and 16-2357 (cons.)

already in the system.

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

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

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

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

¶ 66 Accordingly, we affirm all but the trial court's ruling that the members of subclass four

No. 16-2356 and 16-2357 (cons.)

have no claim whatsoever under count I. Instead, we hold that any retiree that began participating in the system before the 2003 settlement was executed has a claim for relief based on the 1983 and 1985 amendments by operation of the pension protection clause.

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



DEPARTMENT OF FINANCE
CITY OF CHICAGO

May 15, 2013

IMPORTANT NOTICE – PLEASE READ CAREFULLY

Dear City of Chicago Annuitant:

I am writing to update you of developments regarding retiree healthcare benefits. Under the Korshak Settlement Agreement, the City of Chicago agreed to provide support for healthcare coverage to annuitants through June 30, 2013. The Settlement Agreement also required that the City establish a Retiree Healthcare Benefits Commission ("RHBC") that, among other duties, was to make recommendations on the state of retiree healthcare benefits, their related cost trends, and issues affecting the offering of retiree benefits after July 1, 2013. Earlier this year, the RHBC fulfilled its duties and provided Mayor Emanuel with its report. Those recommendations can be found online at <http://www.cityofchicago.org/city/en/depts/fin/provdrs/ben.html>.

After reviewing the findings of the report, and after hearing many of the concerns expressed by retirees, employee representatives and industry experts, the City has decided the following:

1. The City will extend current coverage and benefit levels through December 31, 2013. This additional time will allow retirees to maintain coverage for a full plan year, recognizing what we heard from many retirees who have planned deductible and out of pocket expenditures based on an expectation of full year coverage. The City will, however, adjust the benefit levels provided under the current plan starting January 1, 2014.
2. After January 1, 2014, the City will provide a healthcare plan with a continued contribution from the City of up to 55% of the cost for that plan for their lifetimes to the City retirees who are members of the Korshak and "Window" Sub-Classes, meaning those City annuitants who retired prior to August 23, 1989. In short, the City will continue to substantially subsidize these retirees' healthcare plan as it does today.
3. For all annuitants who retired on or after August 23, 1989, in light of the evolving landscape of national healthcare and challenges faced by Chicago taxpayers, the City will need to make changes to the current retiree healthcare plan. These changes will likely include some adjustments in premiums and/or deductibles, some benefit modifications and, ultimately, the phase out of the plan by the beginning of 2017. The City expects to announce the details of this revised structure this summer, so that all retirees, current and future, will have all the information they need to appropriately prepare for this important component of retirement planning. With the changes taking place in the national healthcare market, we will ensure retirees have the information needed to navigate the options available for their healthcare needs going forward, both for Medicare and non-Medicare eligible retirees. As you know, retirees who are eligible for Medicare will continue to receive Medicare coverage, and supplemental Medicare plans are available from many insurance companies – as there are today – for retirees who wish to purchase additional coverage. And retirees who are not eligible for Medicare will have a broad range of healthcare plan options available to them as the Illinois health insurance exchange goes into effect in 2014.

One additional note – as you may know, the current retiree healthcare subsidy provided by the four Chicago pension systems is set to expire on June 30, 2013. If this subsidy is not reauthorized, retirees will likely be responsible for bearing any additional cost for their healthcare plan that is currently borne by their respective pension funds.

We look forward to working with you in the coming months to ensure you have all the information you and your family will need to make sound decisions regarding your retiree healthcare.

Respectfully,

Amer Ahmad, City Comptroller