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

MICHAEL W. UNDERWOOD, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 13 CH 17450
	)	
CITY OF CHICAGO, a Municipal Corporation,	)	Hon. Neil Cohen
	)	
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.	)	

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 to Plaintiffs' Motion to Compel (the "Motion to Compel") on the sole issue of whether the Funds are responsible for providing a group retiree healthcare plan[1] pursuant to the June 29,

[1] This Brief addresses the sole issue of the responsibility of whether the Funds are responsible for providing a group retiree healthcare plan pursuant to the June 29, 2017 Appellate Court Order as directed by this Court in its May 23, 2018 Order attached and incorporated herein as Exhibit A. On June 15, 2018, the Funds filed a brief with respect to

2017 Appellate Court Mandate in *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 of Chicago's (the "City") 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 did not have a right to lifetime healthcare coverage based on contract, estoppel, or any constitutional theory. ¶63. 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-classes[3]. ¶¶ 32, 40. Importantly, the Appellate Court limited the responsibilities of this Court on remand to solely finding a "workable solution to address how the subsidy would be funded". ¶64.

The sole issue presented in this brief is whether the Funds have a responsibility to provide a group retiree healthcare plan for qualified Fund annuitants consistent with the Appellate Court Order. The Funds also adopt the arguments set forth by the Laborers' Annuity and Benefit Fund of Chicago with respect to Plaintiffs' failure to meet the requirements for

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the City's responsibility to pay the monthly healthcare premium subsidies pursuant to the June 29, 2017 Appellate Court Order.

[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 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.

injunctive relief in Plaintiffs' Motion to Compel and incorporates those arguments by reference herein.

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."

In its Motion to Compel, Plaintiffs 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 provide a group retiree healthcare plan[4]. Indeed, Plaintiffs state that this Court repeatedly ruled on December 3, 2015, March 3, 2016, July 21, 2016 and August 31, 2016, that the Funds have an obligation to provide a retiree healthcare plan pursuant to the 1983 and 1985 amendments. (Plaintiffs' Motion to Compel, p. 3). The Appellate Court Mandate, however, limits the applicability of the 1983 and 1985 statutes solely to the right of Fund annuitants to ***receive a monthly subsidy payment paid by the City***. Importantly, any "ruling" by this Court referred to by Plaintiffs occurred prior to the Appellate Court's June 29, 2017 Order that specifically limited the protected benefit to the tangible, fixed-rate subsidies.

The Appellate Court Mandate, "upon transmittal to the trial court, vests the trial court with authority only to take action that conforms with the mandate." *In Re Marriage of Ludwinski*, 329 Ill.App.3d 1149, 1152, 769 N.E.2d 1094, 1098 (2002). This Court "must follow the specific directions of the appellate court's mandate to the letter to insure that its order or decree is in accord with the decision of the appellate court." *Ludwinski*, 329 Ill.App.3d at 1152.

[4] Importantly, the 1985 amendment governing the MEABF Fund simply states that employee annuitants aged 65 or older with at least 15 years of service may participate in a group hospital care plan and a group medical and surgical plan approved by the Board. Plaintiffs have acknowledged that such requirement is "permissive" in nature for the MEABF. Viewed in light of the Appellate Court's Mandate that the sole benefit protected is the monthly subsidies paid by the City, Plaintiffs have no legal basis for requesting that this Court hold that the MEABF Fund, under the 1985 amendment, has a legal obligation to provide a group retiree healthcare plan for qualified annuitants.

Plaintiffs' argument that the Funds have a responsibility to provide a group retiree healthcare plan is in direct conflict with the Appellate Court's Order. The language in the Appellate Court's Mandate is clear, specific and binding.

In finding that certain benefits provided under the 1983 and 1985 amendment are protected by the Pension Protection Clause, the Appellate Court specifically reviewed what "benefits" are actually protected in those amendments. 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 a 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.

Indeed, in reviewing the benefits under the 1983 and 1985 amendments, the Appellate Court states the following:

> "Under the 1983 amendment, ***the City*** is obligated to pay towards it 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." ¶40 (emphasis added).

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 had held that qualified annuitants also have a right to participate in a

group healthcare plan provided by the Funds, the Appellate Court would certainly have remanded the case back to this Court to not only find a "workable solution to address how the subsidy would be funded" but also how the Funds would implement the group retiree healthcare plan.

II. THE ILLINOIS SUPREME COURT SUPPORTS THE APPELLATE COURT'S HOLDING THAT THE SOLE BENEFIT PROTECTED BY THE ILLINOIS CONSTITUTION IS THE TANGIBLE SUBSIDY BENEFIT TO QUALIFIED ANNUITANTS.

In its holding that the Pension Protection Clause solely protects a monthly healthcare subsidy paid by the City to qualified Fund annuitants, 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. In *Kanerva*, the Supreme Court emphasized and held that the State, as the public employer, was precluded from diminishing or impairing the provision of healthcare insurance premiums (i.e. the tangible subsidy payments) whose rights were governed by the version of the Group Insurance that was in effect prior to the enactment of Public Act 97-695. ¶ 57.

Similarly, the United States Court of Appeals for the Seventh Circuit, cited by the Appellate Court in this case (¶39), relied on *Kanerva* to hold that the protected benefit ***does not cover in-kind benefits such as health care,*** but instead solely protects a particular amount of money.

> "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 does not guarantee a particular level of medical care.***" *Underwood v. City of Chicago*, Ill., 779 F.3d 461, 463 (7th Cir. 2015). (emphasis added).

Plaintiffs have repeatedly asserted that the Funds are obligated to provide a group retiree healthcare plan and that such plan must be affordable for annuitants, particularly for those annuitants who are not eligible for Medicare due to the dates of their respective service at the City. Plaintiffs are essentially seeking the "quantum of buying power" that the Seventh Circuit and *Kanerva* expressly reject as protected by the Pension Protection Clause of the Constitution. Instead, the sole protected benefit, as recognized in the Appellate Court Mandate, is the specific, tangible benefit of the fixed-rate monthly subsidies paid by the City.

III. THROUGH ITS SUBSEQUENT FILINGS, PLAINTIFFS IMPLICITLY ADMIT THAT THE APPELLATE COURT FAILED TO PROVIDE ANNUITANTS WITH A RIGHT TO HEALTHCARE COVERAGE FROM THE FUNDS.

As this Court is aware, following the entering of the June 29, 2017 Appellate Court Order, Plaintiffs, disagreeing with the Appellate Court's Order, filed a Petition for Rehearing on July 20, 2017 (attached and incorporated as **Exhibit C**). 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. Such claims include, but are not limited, to the following:

> (1) "If indeed this Court's enforcement of the 1983 and 1985 Statutes is the Protected Benefit, then the Protected Benefit is far more than just the City's parsimonious and meager subsidy amount. ***While the subsidy is what this Court focuses on, the Statute, particularly for Police and Fire, requires far more, imposing a duty on the Fund's Board (i.e., the Trustees) to provide a group health insurance for all of their annuitants...***"
>
> (page 3 of the Petition for Rehearing)
> (emphasis added)

(2) "The Opinion, at ¶¶ 30 and 48-50, discounts the existence of any written agreement. But what the ***court overlooks, from our complaint (SRC 1) at ¶¶ 68-70 and 71-75, and Exhibits 8A-E, SRC 348-393, is that the 1983 and 1985 statutes did not merely provide a subsidy; the statutes squarely required the Four Annuity and Benefit Funds to provide health insurance for all annuitants***..." (page 5 of the Petition for Rehearing) (emphasis added)

In their Petition for Rehearing, Plaintiffs requested that the Appellate Court "correct" its June 29, 2017 Order. Had the Appellate Court felt it necessary to "correct" its June 29, 2017 Order to clarify the obligations of the Funds under the 1983 and 1985 amendments to include healthcare plans 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 Plaintiffs' ***sole benefit*** is the City's obligation to pay a monthly subsidy to qualified annuitants.

In addition, 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. In their PLA, Plaintiffs requested that the Supreme Court review all issues raised in the Appellate Court's June 29, 2017 Order, including the claim that the Appellate Court erred in holding that the sole protected benefit was the City's obligation to pay a monthly subsidy to qualified annuitants. *See* Plaintiffs' PLA attached and incorporated as **Exhibit D** Such claims in Plaintiffs' PLA include, but are not limited, to the following:

(1) "***[t]he appellate court's decision, adopts a restrictive view, that the only benefits protected by Article 13 §5 are the explicit statutory subsidy provisions***, applying Seventh Circuit dicta, expressing its traditional hostility to retirement benefits, rather than this Court's direction in *Kanerva v. Weems*, 2014 IL 115811, *that pension provisions are to be construed liberally in favor of the pensioners*." (page 2 of the PLA) (emphasis added)

(2) "At ¶¶30 and 48-50, the [Appellate Court June 29, 2017] decision rejects the substantial "writings" in the form of Handbooks issued by the City and

the Funds, ignores the Funds own assertions of a contract with the City, and ignored as well, ***that the 1983 and 1985 statutes require more than just a subsidy; the statutes squarely required the Four Annuity and Benefit Funds to provide health insurance for all annuitants.***" (page 3 of the PLA) (emphasis added)

(3) "But even if enforcement of the 1983 and 1985 Statutes were the extent of the Protected Benefit, then the Protected Benefit is far more than just the City's meagre subsidy amount. ***While the subsidy is what the Appellate court focuses on, the Statute, especially for Police and Fire, actually requires far more, imposing on the Fund's Board (i.e. the trustees) to provide group health insurance for all of their annuitants...[a]nd while the 1985 Pension Code Group Health Care Plan provisions for Municipal (8-164.1) and Laborers (11-160.1) were permissive***; nonetheless, all found Funds' original filings asserted that they had, in fact, contracted for the City to affirmatively act as the actual Health insurance providers..." (page 20 of the PLA) (emphasis added)

(4) "But what the [Appellate] court ignored, from our Complaint at ¶¶68-71ff, A24 and Ex¶¶8, A370, ***is that the 1983 and 1985 statutes did not merely provide a subsidy; the statutes squarely required the Four Annuity and Benefit Funds to provide health insurance for all annuitants...***" (page 21 of the PLA) (emphasis added)

Further, in its Reply in Support of its Petition for Leave to Appeal filed on November 7, 2017 (*See* Plaintiffs' Reply in Support of its PLA attached and incorporated as **Exhibit E**), Plaintiffs repeatedly request that the Supreme Court overrule the Appellate Court's conclusion that the sole benefit is the City's obligation to provide a monthly subsidy:

(1) "***The idea that the guaranteed benefit is just the statutory subsidy, and only in the statutory amount, ignores the Circuit Court's declaration that the statute obligates the Funds to provide Plans to cover their annuitants' healthcare costs, reads the statute narrowly, violating Kanerva.*** And, whether it reflects the Seventh Circuit "musings" (City Answer at 11) or its own narrow holding, the Appellate Court below utterly contradicts *Kanerva*'s direction to interpret pension benefits liberally in favor of retirees." (p. 5 of the PLA Reply) (emphasis added)

(2) "Indeed, the Circuit Court's willingness to indulge the City and Funds in every aspect of their defense, written or verbal, while refusing to afford the most minimal protections of the class' healthcare interests are highlighted by

> the court's most recent rulings: refusing to order the City to provide [Plaintiffs' counsel] copies of its mailings to annuitants, refusing to allow plaintiffs' counsel stuffer access to the City and Funds' mailings to the annuitants, ***along with the judge's refusal to actually enforce its own rulings that the Funds are required to provide an affordable health care Plan to their participants, or even to contribute their statutory subsidies while the case pends...***"
>
> (p. 8 of the PLA Reply)
> (emphasis added)

The Supreme Court's denial of Plaintiffs' PLA further affirms that the Appellate Court Order, including its ruling that Plaintiffs' ***sole benefit*** is the City's obligation to pay the monthly subsidies to qualified annuitants is the Mandate that this Court must follow.

In their Motion to Compel, Plaintiffs are, in essence, asking this Court to reconsider and reverse the Appellate Court's denial of Plaintiffs' Petition for Reconsideration and the Supreme Court's denial of Plaintiffs' PLA. In doing so, this Court would be issuing an Order in direct conflict with the Appellate Court Mandate and would disrupt the judicial economy, consistency and finality of the proceedings to date in this case. This Court's prior rulings on the issue of the Fund's responsibility to provide a group retiree healthcare plan to qualified annuitants has no bearing on the current posture of this case. Instead, all parties to this case must follow the clear direction from the Appellate Court Mandate that the sole protected benefit for qualified annuitants is limited to the monthly subsidy payments paid by the City.

CONCLUSION

The Appellate Court Mandate directs this Court with respect to the future proceedings in this case and is binding on all parties. In the Conclusion section of the Appellate Court Order, the Appellate Court emphasizes that the sole protected benefit is the monthly subsidies on four separate occasions:

(1) "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." ¶61.

(2) "...the right to a fixed-rate subsidy that, under the Illinois Constitution, cannot be diminished or impaired for those employees." ¶61.

(3) "On remand, the court will have to find a workable solution to address how the subsidy will be funded..." ¶63.

(4) "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." ¶65.

For this Court to hold that the protected benefit extends to the provision of a group retiree healthcare plan, would be in direct conflict with the Appellate Court's Mandate and the Illinois Supreme Court's *Kanerva* holding that the City's subsidy payments to health-insurance premiums are the sole protected healthcare benefit.[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 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. The Appellate Court clearly directed this Court to find a "workable solution to address how the subsidy will be funded" and

[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 legal concerns concerning the provision of a group retiree healthcare plan that will need to be resolved by this Court. By way of example, such issues include, but are not limited to: (i) if the Court rules the FABF Fund is responsible for providing a retiree healthcare plan under the 1983 amendment, the language of the 1983 amendment states that the monthly subsidies are to be paid for such health coverage, indicating that the monthly subsidies are only paid to those annuitants participating in that particular group retiree healthcare plan; (ii) Plaintiffs have alleged on numerous occasions that the required retiree healthcare plan must be "affordable", particularly for those annuitants who are not eligible for Medicare coverage due to their service with the City. However, the 1983 amendment simply requires a group healthcare plan "for protection against the financial costs of health care expenses incurred in and out of hospital including basic hospital-surgical-medical coverages and major medical coverage" and Plaintiffs have failed to provide any facts proving that requiring the Funds to provide a plan would grant the requested "affordable" healthcare coverage for Plaintiffs; and (iii) the 1985 amendment governing the MEABF Fund is silent with respect to any requirement to contract or provide a healthcare plan, and simply states that the MEABF has the authority to "approve" a healthcare plan. Plaintiffs have failed to state how the "approval" of a healthcare plan imposes any obligations on the MEABF Fund to provide an affordable healtheare plan for qualified annuitants.

the Funds stand willing and able to assist the parties in ensuring that those qualified annuitants receive the monthly subsidies due and owing to them from the City pursuant to the Appellate Court Mandate. Obligating the Funds to perform any duty in excess of the Appellate Court Mandate subjects the Funds to a possible breach of its fiduciary duties owed to all participants of the Funds.

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 the sole healthcare benefit protected by the Pension Protection Clause of the Illinois Constitution 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: /s/Sarah A. Boeckman
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EXHIBIT A

Exhibit A

Order (Rev. 02/24/05) CCG,N002

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Underwood et al
v.
City of Chicago et al.

No. 13 CH 17450

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 Underwood Plaintiffs' Motion for Preliminary Injunction

2. The City & Funds shall Respond to Plaintiff motion for Preliminary Injunction 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 plaintiffs motion regarding Providing a "Plan" on July 13, 2018, Plaintiffs 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.

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Name: Ken Goldstein
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Telephone: 312-606-0500

ENTERED:
Dated: MAY 29 2018

ENTERED
Judge Neil H. Cohen-2021
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

Judge
Judge's No.

EXHIBIT
A

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

EXHIBIT B

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

FIRST DIVISION
June 29, 2017

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

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

OPINION

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

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

¶ 2 BACKGROUND

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¶ 13 ANALYSIS

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

¶ 15 I. 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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¶ 41 C. Statute of Limitations and Jurisdiction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¶ 58 IV. Injunctive Relief

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

¶ 60 V. Conclusion

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

already in the system.

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

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

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

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

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

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

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

EXHIBIT C

In The Illinois Appellate Court
No. 16-2356 (Consolidated with 16-2357)

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

Plaintiffs-Appellants' Petition for Rehearing of the Court's June 30, 2017 Opinion

Oral Argument Requested

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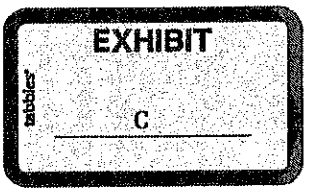

A. Interpreting the Benefits to be Protected as Just the Statutory Subsidy, Misunderstands *Kanerva* - Article XIII, Section 5 Protects *Benefits* Not Just a Statutory Subsidy.

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

While the issue presented in *Kanerva* was whether a statutory healthcare subsidy to former State employees is or is not a protected benefit, which could be legislatively reduced, ("Thus, the question presented is whether a health insurance subsidy provided in retirement qualifies as a benefit of membership." *Id.*), *Kanerva*'s definition of what is protected is not limited to the subsidy, or even to the Pension Code[2], but embraces and protects whatever benefits participants receive by their being participants in an Illinois retirement system:

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

[2] The statutory provision there (5 ILCS 375/10) was a subsidy for former state employees. Despite its not being a Pension Code provision, it was still protected as a benefit of participation by Article XIII, Section 5.

precisely why Judge Green (Complaint, Ex. 5, May 16, 1988 transcript, at 63-66, SRC 218-286) declared that it was "well within the ambit of the city's authority to provide healthcare benefits to retired employees." He correctly found it illogical to believe that the City's paying health claims made on behalf of approximately 26,000 persons for millions of dollars over a period of seven years could have occurred without the affirmative action of appropriation, and finding the funds involved as far too substantial to have slipped through the cracks.

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

Accordingly, this Court's rejection of the contract claim (supported by the Funds' original Korshak filings) (Complaint Ex. 3, SRC 64-180) ignores that there was a contract, from which *the Funds themselves asserted that they had a contract with the City*, for which the Retirees were intended beneficiaries, under which the City had *affirmatively agreed to and did act*[3] as an insurer of the retirees, contractually charging a premium set to the amount of the statutory Fund Subsidy, which the Fund paid; thus the benefit was that (a) for police and firemen, the annuitant paid only for spouse and dependent coverage, and (b) for municipal and laborers, that they paid only the amount in excess of their Fund subsidy.

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[3] Course of dealing and the parties' conduct serves as a basis for evidence of a contract and terms of a contract. *Technology Solutions Co. v. Northrop Grumman Corp.*, 356 Ill. App. 3d 380, 385 (1st Dist. 2005).

to be the insurance provider for their retirees, with premiums priced at the Police and Fire Subsidy amounts, thus paid for the annuitant for life by their Fund (and this is supported by the Police Fund's handbook (Complaint, SRC 1, ¶¶30-31, and Exhibit 7, SRC 333).

Handbooks need not say "lifetime" (*Kanerva* at ¶53-55, the statute there did not use the word either); they need only list something as a benefit for which eligibility is determined by one's being an annuitant. Consequently, the **City of Chicago Annuitant Medical Benefits Plan Handbook** states:

> ELIGIBILITY
> You will be eligible for coverage if you are: ...
>
> -An Annuitant, of the City of Chicago. "Annuitant" means a former employee who is receiving an age and service annuity from one of four retirement funds. (Complaint Exhibit 6, at 2, SRC 292)

And, the Police Annuity and Benefit Fund Handbook "Your Service Retirement Benefits", (Complaint Ex. 7 at 10, SRC 333, 342) just stated it as a benefit:

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

This Court's focus on the lack of the words "for life" ignores that *Kanerva* had no such language of qualifying permanence other than being a "former employee"; and the Handbooks, both for the City of Chicago Annuitant Health Benefit Plan and the Police Fund Annuitant Handbook, (the Fund pays the Annuitant's premium) required only that the person be an "annuitant", a state that continues for life.

City Annuitant Medical Benefits Plan Handbook: Notwithstanding this Court's attraction to the Seventh Circuit's presumptions *against* vesting of healthcare benefits, an employer's reservation of a right to amend or terminate a health plan must be explicit and

302-816 and 3613 SR 329-839. Consequently, they were uniquely entitled to rely on the City's repeated assurances to them that they were earning lifetime coverage with the City, and needn't worry about their not having Medicare coverage. The assurance of coverage negated City employee participants' need to accrue Medicare quarters. Indeed, between the courts' rulings in *Dell v. Village of Streator* (applying estoppel) and *Matthews v. CTA* (declaring that employees generally cannot rely on estoppel to bind a municipality, in the absence of official action) basic fairness would support applying *Matthews* declaration only *prospectively*; especially with people (first hired by April 1, 1986) who have nowhere else to go, because none of their City employment qualifies them for coverage under the federal Medicare program.

Moreover, this Court ignores the Funds' assertions in their countercomplaints that the City had engaged in continuous affirmative actions; recognized by even Judge Green in the City's affirmatively agreeing to be the insurer, not merely a subsidizer, is sufficient affirmative municipal action to support the estoppel claim, certainly at the pleading stage. Complaint Ex. 3, SRC 64-180.

E. *Patrick Engineering* Does Not Preclude as a Matter of Law.

Also, this Court's (Opinion at ¶52) treating *Patrick Engineering* as preclusive at the pleading stage, against years of presenters presenting the City's Annuitant Medical Benefits Plan as a permanent plan, covering all premiums for the annuitant is documented, and over a period of time that is undisputed; such that, as Judge Green ruled back in 1988, it could not have been done without actual authority.

II. The Court's Extension of the Protected Class to the 2003 Agreement's Execution Date Needs Correcting.

The court's declaration at ¶¶ 35-37 that the 2003 Agreement acknowledged a City right to amend or terminate existing retiree healthcare plans is also wrong.

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

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

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

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

which was never convened after its January 11, 2013[4] Report, since its chairman, then-City Comptroller Amer Ahmad, resigned in July 2013, following which he was indicted and pled guilty to a kickback scheme from his previous employment by the State of Ohio, fled the country, but was then extradited back in 2015, and is serving his sentence in federal prison.

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

counsel the knowledge of who is being represented. As "soon as practicable after the commencement...the court shall determine" requires hearing of class certification to provide dues process for the entire class. The never-ending delay and deferral serves only defendant and against the class and class counsel.

V. The Court Should Hold Oral Argument in this Case, Without it the Court Disserves our Justice System, and Erodes Respect for the Court's Process.

The Court's repeated determination to rule without oral argument, despite the repeated requests by all of the briefing parties, displays an unfortunate disrespect for these retirees who have served this community with their lives and careers.

Although Supreme Court Rule 352(a) authorizes the court, even where the parties have all requested oral argument, to dispose of the case without oral argument, that provision is to be exercised "sparingly" where no substantial question is presented:

> **Rule 352. Conduct of Oral Arguments**
> (a) **Request; Waiver; Dispensing With Oral Argument.** A party shall request oral argument by stating at the bottom of the cover page of his or her brief that oral argument is requested. ....If any party so requests, all other parties may argue without an additional request.
>
> .....
>
> After the briefs have been filed, the court may dispose of any case without oral argument if no substantial question is presented, but this power should be exercised sparingly.

This is no such case. The nearly thirty thousand retirees were promised and assured that one of their benefits of employment was lifetime healthcare coverage, paid by their Fund. Whether this court agrees with them or not, this case has not, has never been a "no substantial question presented" case, and these retirees should be treated with the respect of an oral argument, even if the court chooses not to enforce the City's and Funds' promises to them. It is an important aspect of retirees' (indeed all parties) perception that they have received due process, that their claims have been at least listened to, by the

The retirees are people, with needs, vulnerabilities, and the real health ravages that retirees face. They have served this community over their lives and careers and they deserve better, than being treated as mere mail recipients of Court decisions.

This Court's decision would allow the City to escape accountability for promises made to its employees over many years, some of them uniquely vulnerable, because they relied on the City's honesty, precisely because their City work could not qualify them for federal Medicare coverage. And, this Court leaves them dumped and without a life preserver, putting the burden now on *them* to have challenged the authority of the City's pre-retirement seminar speakers over many years.

Accordingly, this Court should grant rehearing, and actually grant oral argument, and reverse the decisions below and order the Circuit court to issue a Preliminary Injunction, restoring coverage under the City's Annuitant healthcare Plan, and restore the rates and/or the appropriation to the 2013 levels, until this litigation has concluded, and make the following declarations of law and directions on remand to the Circuit Court:

A. **Certify the case as a class action** for City of Chicago Retiree Healthcare Plan Participants, with the following proposed classes (each of i, ii, and iii, with sub-sub class of pre-4/1/1986 hireds):

   i. Korshak subclass-12/31/1987 annuitant participants,

   ii. Window subclass-retired Post-Korshak, but pre-8/23/1989,

   iii. Pre-8/23/1989 Hirees,

   iv. Participants –First hired date after 8/23/1989;

   all represented by undersigned Counsel;

B. Declare the pre 8/23,1989 retiree participants' entitlement, the 8/23/1989 terms of the City of Chicago Annuitant Medical Benefits Plan, is a benefit protected by 1970 Illinois Constitution, Article XIII, Section 5, and Order resumption of the

Certificate of Service

I, Kenneth T. Goldstein, an attorney, on oath state that on **July 20, 2017** I caused the foregoing **Petition for Rehearing** to be electronically filed/served on Defendants and upon the Illinois Appellate Court.

s/Kenneth T. Goldstein

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Certification of Compliance

I certify that this brief conforms to the requirements of Rule 341(c) and 367. The length of this brief, excluding the pages containing the cover, the statement of point and authorities, the Rule 341(c) certificate of compliance, and the certificate of service is 15 pages, and 4,646 words.

s/Kenneth T. Goldstein

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City of Chicago
Amended and Restated
Annuitant Medical Benefits Plan
For Medicare Ineligible Annuitants

PURPOSE

The purpose of the City of Chicago Annuitant Medical Benefits Plan For Medicare - Ineligible Annuitants (hereinafter referred to as the "Plan") is to provide medical benefits to Medicare-Ineligible Annuitants and their Dependents.

This Plan was established on September 1, 1985 and was subsequently amended on June 30, 1988. Current law requires that this Plan, as in effect on June 30, 1988 be offered to Annuitants and their Dependents through December 31, 1997, subject to increases in cost to the Annuitant under this Plan.

This Plan is hereby amended and restated, effective January 1, 1992.)

(This Plan document describes the medical benefits offered by the City of Chicago (hereinafter referred to as "City"), effective January 1, 1992, to Medicare-ineligible persons receiving annuity benefits from the retirement funds covering City employees. The City is not obligated to continue these benefits for any period, nor at any particular level or cost, nor in whole or in part and hereby reserves the right to amend, modify or terminate the benefits provided under this Plan in any manner at any time, subject to applicable law. Current law requires that the City health care plan available as of June 30, 1988 be offered to Annuitants and their Dependents through 1997, though the cost to Annuitants may increase. This Plan is the same medical plan that has been offered to Annuitants since 1985.)

The City may supplement this Plan for any reason, including but not limited to changes in benefit levels and changes in the law. Changes in the Plan will be available from the City Benefits Management Office upon the request of the Annuitant.

This Plan is available for review in the City Benefits Management Office, or the Municipal Reference Library, during regular business hours.

EXHIBIT D

Exhibit D

In the Supreme Court of Illinois

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

Plaintiffs-Appellants' Petition for Leave to Appeal

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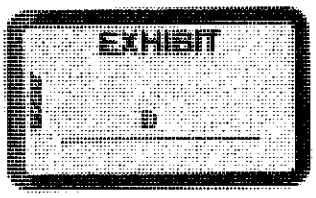

1. **Prayer for Leave to Appeal.**

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

2. **Jurisdictional Statement.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VI. Oral Argument.

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

VII. Equal Protection.

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

VIII. Special Legislation.

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

Statement of Facts

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

G. The Third Amended Complaint

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

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[20] May 15, 2013 letter (Comp. Ex. 21), S.A. 1, S.R. C 847. A865. Indeed, the City artfully reworded its commitment to extend the settlement benefits and pay from "at least 55 %" to "up to 55%" of healthcare costs; and it refused to audit the charges which had actually been overstated, requiring refunds to retirees averaging $5 million each year.
[21] A. 31, Judge Cohen's dismissal of *City v. Korshak* Motion to Revive and File an Amended Complaint.
[22] *Underwood v. City of Chicago*, 779 F.3d 461 (7th Cir. Ill. 2015)

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

H. The Appealed-From Rulings in the Case Below

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Circuit Court listed its conclusions of law as:

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

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

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

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

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

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

Petitioners sought rehearing, asserting that:

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

The Appellate Court denied rehearing August 3, 2017.

Argument

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> After July 1, 2008, the City may make changes to the design of the Settlement Healthcare Plans only with the approval of a majority of the members of a commission, the Retiree Health Benefits Commission ("RHBC"), impaneled by the City to consider proposed plan design changes. The RHBC will consist of experts who will be objective and fair-minded as to the interests of both retirees and taxpayers. The RHBC will also consist of a representative of the City of Chicago and a representative of the Funds.

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

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

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

VIII. Oral Argument.

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

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

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

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

IX. Equal Protection and Special Legislation.

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

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

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

Conclusion

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

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

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

Dated: September 8, 2017

By: /s/Clinton A. Krislov
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EXHIBIT E

No. 122673
In the Supreme Court of Illinois

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

Plaintiffs-Appellants-Petitioners' Reply in Support of Their Petition for Leave to Appeal

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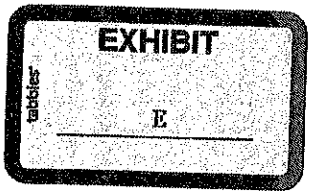

The City's Answer continues its decades-long effort to prevent these retirees from having this Court address the important unresolved issues in adjudicating the rights of 30,000 City of Chicago retirees, whose core claims are for promised lifetime healthcare coverage for the last group of City employees whose City work did not qualify them for coverage under the federal Medicare program.[1]

The City's Answer (i) ignores the never disputed allegations of the complaint at issue; instead asserting just an alternative story, (ii) mischaracterizes the holding below, which conflicts with this court's *Kanerva v. Weems,* 2014 IL 115811, direction to interpret liberally in favor of retirees, and (iii) asserts that every favorable outcome to it is merely the application of "settled law", when they clearly are not.

Ignoring the allegations of the Complaint at issue, the City's Statement of Facts is an artfully cherry-picked story. On a 2-615 motion to dismiss, the court is to accept the allegations in the Plaintiffs' Complaint, not an alternative story proffered by the City Defendant.

Moreover, the City's alternative story is both highly selective and wrong. Among the fictional facts submitted by the City are:

1. That the City speakers at the Pre-retirement seminars are not identified. The fact is, the Complaint (at Exhibits 18 and 19) does identify some of the people who spoke at the pre-retirement seminars, actually including their depositions from the Korshak litigation.

2. There is no basis for the City's assertion that it launched this litigation over the Funds' refusal to deduct "the premium amounts that exceeded the funds' subsidies" (City at 3). Rather, the actual evidence cited in the Complaint (at ¶12 and Exhibits 1, 9) uncontestably shows that the City launched the litigation as part of a "game plan" to offset its liability for converting Pension Tax levies belonging to the Funds.

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[1] Local government employees hired before April 1, 1986 (federal Combined Omnibus Budget Reconciliation Act of 1985 ("COBRA," PL 99-272 § 13205(a)), do not accrue qualifying quarters for federal Medicare coverage, regardless of their age or length of service.

3. Omits the Pension Funds' original contract-based counterclaims (Complaint Exhibit 3) against the City, asserting that it had made lifetime retiree healthcare a term of employment.

4. The first three settlements were not by "the parties"; they were by the City with the Funds, and were approved over participants' objections (the 1988 Settlement) or without even apprising them, and the *Korshak* and subsequent Settlements explicitly obligated the City to negotiate in good faith to reach a permanent resolution, and preserving participants' rights to restore their claims—obligations the City has repeatedly refused to fulfill. (Complaint, Exhibits 10, 11, 12 and 13).

5. The most recent 2003 Settlement was not a *final* settlement (City Answer at 4); it was instead the most recent of four settlements, all of which explicitly declare participants' rights to restore the original Korshak litigation and assert their claims. (Exhibits 10, at ¶J and 13, at ¶J).

6. The City's description (City at 5) of the "current litigation" also omits any acknowledgement of its opposition to having this case referred to this Court for adjudication of these issues back in 2013.

7. The City's citation to the discredited "Retiree Health Benefits Commission" and the RHBC's concocted "recommendations" omits mention that (1) they were not binding; and (2) erroneous on their own face, because the report's own charts show the plateauing of retiree health benefits because the core group here (not Medicare qualified because they began working for the city prior to April 1, 1986) are a finite number continuously being replaced by subsequent Medicare qualified retirees at one third of the cost.

8. Omitting any mention of the lower court's entertaining every City request for delay, diversion or denial, or the determination of the Circuit Court's "linear" determination to address every City and Funds challenge, refusing to even order the City to answer or respond, deferring class certification and its protections until after deciding the merits of the claims in violation of ILCS 5/2-802 determination of a class "[a]s soon as practicable".

All of which brings us back to the fundamental problem, that the core group of people here (people who began working for the City prior to April 1, 1986) are the last group of City employees who did not accrue Medicare coverage from their City work, and so reasonably relied on the promises made to them that lifetime healthcare was a permanent benefit for being a city retiree. This is itself the factor which was never an issue in either *Kanerva* or *Matthews*, and deserves this court's consideration now.

Argument in Reply: The City's Argument is no more honest than its fact statement.

I. The City's Misrepresentation of *Kanerva*, *Matthews* and the Seventh Circuit's Rulings.

The misstatements regarding the litigation and the Settlements.

The most important misstatements are the City's mischaracterization of the Settlements as *ended* or "final" (City Answer at 4), omitting that the Settlements explicitly obligated the City to negotiate in good faith for a permanent resolution, and explicitly stating the participants' rights to restore the litigation and assert their rights to lifetime healthcare.

The City has obdurately refused to honor that obligation, obstructed that effort, and complied only when Ordered by the Illinois Appellate court. The City successfully forced participants to file a new complaint, which the City then removed to federal court, into a multi-year boondoggle, and blocked Plaintiffs' efforts to have these issues referred to this court, only to return to the state court, and forced to begin anew. In short, despite Petitioners' efforts to address the important issues of retirees' promised lifetime healthcare benefits on an expeditious basis, the City (now joined by the Funds) has devoted itself to delay and diversion; running out the clock to deprive the retirees of having this court actually adjudicate these important issues for the last group of retirees whose City employment left them without coverage under the federal Medicare program.

The Illinois Constitutional, contract, and estoppel issues arising from that interplay have not been addressed by any Illinois court; not by *Kanerva*, nor *Matthews v. CTA*, 2016 IL 117638. The City's dismissing this as not material (City Answer at 19) is ridiculous, **because it is at the core of why these people reasonably relied on the**

City's promises, because they uniquely would not earn qualifying Medicare quarters, regardless of how long they worked for the City, nor what age they reached; and why they are at such peril right now.

And, this is compounded by the fact that those who availed themselves of the City retiree plan past age 65 cannot even buy their way into Medicare coverage without paying substantial penalties for life. As we calculate this, many would incur annual costs exceeding $1,000 per month before even qualifying to buy, at yet further monthly costs for a Medicare supplement, which most others see as their sole premium cost. The Court should grant this PLA to reach these important and material unresolved issues of law.

The City's footnote 6, at page 19, goes well beyond anything in the record, but also omits things that are actually in the record, showing that the options actually available for non-Medicare-eligible retirees have extremely high premiums, and the ACA policies preclude treatment coverage for doctors at the major provider groups in Chicago, excluding doctors at University of Chicago, Northwestern, NorthShore, Advocate, and Rush (Testimony by City Benefits Manager Nancy Currier). In short, the City's statements that these retirees have many equivalent options is simply untrue. The City's dispatching its retirees to inferior plans, at huge cost, under which they can no longer be treated by their existing providers, as applied to retirees in senior years with real health challenges, is perhaps the most quintessential situational definition of unfeeling irreparable harm, since Marie Antoinette. The Court should grant this PLA to reach and resolve these hurtful actions by the City against its Retirees.

The City's expressed concern for the retirees' situation, at 13, that it has arranged to sponsor a retiree healthcare plan, omits the facts that the BCBS plan premiums ($1496

or $1514 per month for an individual, $2696 for a couple and over $3700 each month for a family[2]) are a nearly unbearable 30 to 60% of most annuitants' annuities; in one case constituting 150% of the persons monthly annuity.

The idea that the guaranteed benefit is just the statutory subsidy, and only in the statutory amount, ignores the Circuit Court's declaration that the statute obligates the Funds to provide *Plans* to cover their annuitants' healthcare costs, reads the statute narrowly, violating *Kanerva*. And, whether it reflects the Seventh Circuit "musings" (City Answer at 11) or its own narrow holding, the Appellate Court below utterly contradicts *Kanerva's* direction to interpret pension benefits liberally in favor of retirees. Interpreting the benefit as purely limited to the statutes, and ignoring the contract and estoppel claims originally made by the pension funds themselves, ignores what even the pension funds asserted; i.e. that they had an agreement with the City for the City to provide the coverage as the insurer. Thus, the Court should grant the PLA to reinforce that *Kanerva* is not mere window dressing.

At 14, the City's gloss over the Appellate Court's clear error in picking a protected class date as the date of *execution* of the 2003 agreement, ignoring that it would not become *effective* until subsequent *approval* by the court, and calls it a "final" settlement, ignoring that the Settlement explicitly preserves the retirees' restoration rights and the inclusion of the protected rights for all those who become or became "future annuitants" (i.e., hired) by the Agreement's *June 30, 2013* expiration date.

At 15, the City acknowledges that its authorization to alter or terminate plans was limited to *additional plans* created by the City; rather than the Appellate Court's totally

[2] See attached October 25, 2017 transcript at 34-35.

baseless interpretation that the 2003 agreement conceded the City's authority to end all healthcare plans at the end of the Agreement; again ignoring (though we sought rehearing on most of these issues) that this Agreement, like its predecessor Agreements, all explicitly preserved the retirees' rights to reassert their claims as they were when the *Korshak* case was first launched.

The City's footnote 6 at 19, asserting that we have not yet demonstrated how many class members lack access to Medicare benefits, ignores that we are still at the Complaint stage, without any discovery of the demographics since 1988, ignoring that at the complaint stage our allegations must be taken as true; indeed the Circuit Judge has refused to order the City or the Funds to Answer the Complaint, let alone provide the number of people who are or are not Medicare qualified; all despite the fact that these numbers are totally within the City and Funds' possession, because they know how many of the class IIIA people are under age 65, and those who have been on the City or the Funds' nonMedicare rates. Regardless, the idea that some of the people actually do qualify for Medicare just makes the City's cost of providing coverage to nonMedicare retirees that much cheaper. Nor has anyone suggested that people who do qualify for Medicare would conceal the fact in order to opt for a more expensive NonMedicare plan, rather than just buying an easily affordable supplement.

II. Class Certification was not Addressed Below, and the Decision Rendered Without Oral Argument.

This PLA should be granted to reign in the Due Process problem of rendering class wide decisions before a Class is certified and give notice that their rights are being decided.

The Circuit Court's refusal to certify the class let alone notify the 20,000+ participants that this litigation is pending is unfair; violating 735 ILCS 5/2-802 and 803 by depriving the class of notice of the issues that are being decided over their rights. The City's footnote 6 defense, that "the Circuit Court has indicated its intention to address class certification promptly *after* this case is remanded to it" highlights the problem; namely, that the class' rights on the merits of their claims are being determined without their input or assistance. While this Court has permitted the deferral of class certification until after an initial motion to dismiss, the idea that the case would go on for more than four years and actually adjudicate the merits of the claims without notifying the class makes a mockery of due process.

It might well be different if this was a case in which there were factual differences between participants within each subclass. Here the determinations have been, and continue being made, as purely legal issues based on the objective facts defining the classes and subclasses, based on Date of Hire, Date of Retirement, dates of statutes, and their legal effect. The nonsense of deferring class certification here is only underscored by the context here, that the courts are deciding the rights of these nearly 30,000, and defining them as classes and subclasses; just without certifying the case to proceed with the protections required by 2-801ff.

Additionally, the Appellate Court's determination to repeatedly decide important public issues without a public hearing at Oral argument adds to the perception of indifference to these 30,000 City retirees. These issues and litigants deserve to be heard in public, not decided only on the papers.

III. The Circuit Court's Accommodation to the City.

Indeed, the Circuit Court's willingness to indulge the City and Funds in every aspect of their defense, written or verbal, while refusing to afford the most minimal protections of the class' healthcare interests are highlighted by the court's most recent rulings: refusing to order the City to provide [Plaintiffs' counsel] copies of its mailings to annuitants, refusing to allow plaintiffs' counsel stuffer access to the City and Funds' mailings to the annuitants, along with the judge's refusal to actually enforce its own rulings that the Funds are required to provide an affordable health care Plan to their participants, or even to contribute their statutory subsidies while the case pends (despite the fact that neither the City nor any of the Funds appealed the Circuit Court's declarations that the subsidies are for life, and the Appellate Court's ruling that it applies for all persons hired by mid-2003), all display a lack of due process, let alone humane consideration for people whose healthcare premiums now amount to 30 to 60% of their annuities, in some cases 150% of their annuities. These actions by the City and treatment by the Court takes this case out of a mere money damages situation. Even Judge Green, 30 years ago, enjoined the City from adversely changing the terms of the Plans while the case was pending.

But it gets worse still. The Funds and the City are holding even the meager 1983 and 1985 subsidies hostage to lever Plaintiffs into dropping this Petition. *See* attached October 25, 2017 transcript at 22:3-25:24, where the City and Funds make it clear that they will consider paying the subsidies if Plaintiffs drop this Petition, "If you dismiss the PLA and this case come back to you, we'd be subject to the appellate court order. *Id.*, at 23:23-24:2.

And the Circuit Court recognizes that for the tactic it is, but without forcing them to continue the subsidies he held they owe, or for the Funds to provide a Plan/subsidy as he and the Appellate Court held. Thus, what the annuitants are faced with is essentially extortion.

From the beginning of the restoration that began in 1998 and returned most recently in 2013, the City, now joined by the Funds, has done whatever is needed in order to drag this out, delay, frustrate, and prevent this court from ever addressing the retirees' claims. While we join the Circuit Court's professed desire that this court take the case[3], it is only by this Court's actually granting review, that retirees' claims may finally be heard.

The one thing on which we agree with the Circuit Court -- that this Court should grant review for these participants.[4]

IV. There is Nothing Settled About the Law on Breach of Contract and Estoppel as Applied Here.

As to breach of contract, the Funds themselves originally asserted that the City, in Agreement with them, had made lifetime healthcare coverage a term of employment to City employees. Indeed, on this the Funds should have been precluded from changing their position on this contract claim.[5] The "mend the hold" doctrine precludes a party

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[3] "I hope they do.", October 25, 2017 transcript at 25:18.

[4] *See* attached transcript October 25, 2017, at 27-28."Personally, ...I think the PLA should be accepted and be dealt with, and we should get an answer on this, not only for this situation, but future situations where this might arise."

[5] *Israel .v National Canada Corp*, 276 Ill App 3d 454, 462 (1996) (holding that a party must stand by the first defense raised once litigation has begun), *and see*: Sitkoff, "*Mend the Hold*" and Erie: *Why an Obscure Contracts Doctrine Should Control in Federal Diversity Cases*, 65 University of Chicago L. Rev. 1059: "Under the Illinois (minority) version of the rule, absent a good faith justification for a change in position, a defendant in a breach of contract action is confined to the first defense raised once the litigation is underway."

pleading one position in a contract action from later repudiating it in another. *Trossman v. Philipsborn*, 373 Ill. App. 3d 1020 (1st Dist. 2007).

V. Estoppel

Neither *Matthews* nor *Patrick Engineering Inc. v. City of* Naperville, 2012 IL 113148, precludes estoppel where, as here, over a number of years, City presenters (and we did identify presenters; *see* Complaint exhibits 18 and 19) were authorized. Nonetheless, even if we hadn't identified them, this is at the complaint stage prior to discovery (in the Korshak litigation, no one disputed that the City had made such promises). The City has not even answered the complaint to deny that such promises were given.

VI. Equal Protection and Special Legislation Issues Have Not been Addressed by this Court.

A. Equal Protection with Pension Protection

Nor has this court addressed the equal protection legality of the City's honoring its healthcare promises based on retirement date, rather than participation date. The fundamental distinction here is that the City is recognizing its obligation to provide lifetime coverage for only those who retired by August 23, 1989, while disavowing any obligation for those annuitants who, because they were participants by August 23, 1989, have the same rights. *Buddell v. Bd of Trustees*, 118 Ill 2d 99 (1987). No decision deals with that issue. *Kanerva* addresses all identical rights under a statute, and *Buddell* makes it clear that the Constitution protects all persons who were participants on the applicable date, not just retirees at that date.

B. Special Legislation.

As to special legislation, a statute identifying benefits as "by reason of employment by [a named city]" has never been upheld by this court.

C. Time Delimited Benefits.

The Circuit Court and Appellate Court's declaration that the 1989, 1997, and 2003 Pension Code amendment statutes (Complaint, Exhibits 8B-D) created benefits that were time delimited, has also never been addressed. That is, whether the Pension Protection Clause of our Constitution protects against reducing those benefits in subsequent years.

CONCLUSION

In short, the City's assertion that the favorable decisions below are all "settled law" is no more honest than its recitation of fact, and is simply the continuation of its decades-long determined efforts to prevent these retirees from ever having their substantial and unique claims adjudicated by this Honorable Court.

It is time for these loyal City servants to finally have their day before this court.

For this, the last group of City retirees whose City work did not qualify them for federal Medicare coverage, this Court should grant leave to appeal, order briefing, hear oral argument, reverse the decisions below, and order the Circuit Court to issue a Preliminary Injunction, restoring coverage under the City's Annuitant healthcare Plan, and restore the rates and/or the appropriation to the 2013 levels, until this litigation has concluded, and make the following declarations of law and directions on remand to the Circuit Court:

A. **Certify the case as a class action** for City of Chicago Retiree Healthcare Plan Participants, with the following proposed subclasses (each of i, ii, and iii, with sub-sub class of pre-4/1/1986 hireds):

i. Korshak subclass-12/31/1987 annuitant participants,

ii. Window subclass-retired Post-Korshak, but pre-8/23/1989,

iii. Pre-8/23/1989 Hirees,

iv. Participants –First hired date after 8/23/1989;

all represented by undersigned Counsel;

B. Declare the pre 8/23/1989 retiree participants' entitlement, the 8/23/1989 terms of the City of Chicago Annuitant Medical Benefits Plan, is a benefit protected by 1970 Illinois Constitution, Article XIII, Section 5, and Order resumption of the fixed-rate subsidized $55/$21 monthly premium retiree healthcare plan, fully subsidized by the Funds;
and/or

C. Declare that retirees vest for life in the retiree healthcare terms at the best of their hire or retirement date;

D. Declare that the 1989 and later statutory annuitant healthcare statutory amendments are invalid, for (i) unconstitutionally purportedly stripping the benefits of the protections of Article XIII, Section 5, (ii) invalidly diminishing their benefits by their time limitations, and (iii) invalidly limiting their benefits to persons who are annuitants "by reason of employment by the City of Chicago".

E. Enjoin the City and Funds from reducing the group health benefits provided to class members from the level any of them have been provided as a participant, from when plaintiffs and the class members began their participation in the Plan to the present and order the City to restore the appropriated funds for annuitant healthcare to their 2013 levels pendent lite or permanently;

F. Order the City to restore the post-2013 premium rates charged back to the levels charged in the lowest levels for any participant, and refund all premiums collected in excess of those amounts

G. Award Plaintiffs' Attorneys fees and costs;

H. Any and all other relief the Court deems just and proper.

Dated: November 7, 2017

By: /s/Clinton A. Krislov
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