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

Michael W. Underwood, et al.,	)	
	)	
Plaintiffs,	)	
vs.	)	
	)	
CITY OF CHICAGO, a Municipal Corporation,	)	
	)	No. 13-CH-17450
Defendant,	)	Calendar 13
	)	
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.	)	

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS
and
PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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The essence of the plaintiffs' claims are:

(i) the City and the four defendant annuity and benefit funds have provided a fixed rate subsidized healthcare benefit for the participants in the four Funds,

(ii) the plaintiffs (participants at the key date of 8/23/1989 and participants whose participation began after 8/23/1989) are entitled to enforce these as lifetime benefits from both the City and their respective fund at the best level provided during the person's participation.

This court has previously upheld these claims against the City, and preserved Participants' right to assert these claims against both the City and the Funds, and should uphold the current complaint, and should grant summary judgment on Participants' entitlement to lifetime healthcare under the best terms during any participant's employment or retirement, leaving only the determination of the terms of each participant category's entitlement.

Procedural history. Plaintiffs' complaint incorporates and asserts the claims made or assertable by both the Annuitants and Funds in counterclaims filed against the City's October 19, 1987 complaint. *City v. Korshak*, No. 87 CH 10134 (Circuit Court, Cook County, Ill.) (Ex's. 2-4.)

Circuit Judge Hon. Albert Green dismissed the City's complaint, upheld the Funds' and Participants' counterclaims against the City, and conducted a June 1988 trial. Prior to the court rendering its decision, the City and the trustees of the four Funds entered into a ten-year settlement, approved over the objection of the certified annuitant class, which preserved the annuitants/ participants' rights to restart the case at the City's October 19, 1987 filing date, and assert whatever claims the participants could have asserted.

Participants' 1998 motion to restart the case was initially rebuffed, restored by the

Appellate Court, then settled in 2003 with participants' approval, again preserving the restoration rights. Upon the June 30, 2013 expiration of the 2003 settlement, the participants moved to restart the case within the *City v. Korshak* case, were denied by this court, directing participants to file it as a new case. Upon that filing in this court, the City removed the case to federal court, which wrongly dismissed the claims, in its view that the Illinois Supreme Court would hold that retiree healthcare benefits are not protected by the Illinois Constitution's Article XIII, §5, "pension protection clause". Staying this case until the Illinois Supreme Court's *Kanerva v. Weems* declaration that retiree healthcare benefits are protected benefits of participation and cannot be reduced, the Seventh Circuit vacated the District Court's dismissal, and directed this case be remanded to this court for adjudication of the state law claims.

The substantive claims to lifetime retiree healthcare under the City and Funds' fixed rate subsidized plan. Beginning by 1980, the City provided healthcare benefits for its retiree participants in the four City Annuity and Benefit Funds. Originated in the Byrne administration by an arrangement with the Police, as a substitute for a pay increase, the coverage was done as follows: the relevant Pension Code provisions directed the four Funds' trustees to provide or administer health plans for their retiree participants.[1] In a three-way contract among the City, the Funds and the Participants, the Funds obtained coverage from the City, the City provided retiree healthcare coverage, received a subsidy from the Funds per their respective statutes, and premiums withheld from annuitants' checks (generally for spouse and dependent coverage).

As informed at Pre-Retirement Seminars conducted by the City[2], Participants thus reasonably expected and enjoyed a lifetime fixed rate health plan provided by the City at monthly

1 *See* Exhibit 6
2 *See* Exhibit 15, Sample Pre-Retirement Seminar Schedules

charge of $21 (for Medicare qualified) or $55 (NonMedicare), which was (for police and fire retirees) entirely paid by their fund. Municipal and Laborers Fund participants had the same rates, and were subsidized $25 monthly by their funds. The essential elements of the three-party contract were that they city provided health insurance, the pension funds subsidized it, and annuitants generally had to pay only for spouse and dependent coverage.

The City's Offset "Game Plan". After the City was caught converting tax levies belonging to the Funds, and faced a $35 million liability (in 1987) the Washington administration created a "game plan"[3] to negotiate an offset by asserting that the City had been illegally funding retiree healthcare under appropriations which, in some of the years, did not mention "annuitants", asking the trustees to forego the "Ryan" case award to the Funds in exchange for the City's pledge not to rescind retiree healthcare[4].

When the trustees declined the gambit, the City sued the trustees (*City v. Korshak* et al; Marshall Korshak being the first named police fund trustee) for a declaration that the City was not obligated to provide retiree healthcare coverage and to recover the $58 million it had allegedly paid in retiree healthcare benefits over the preceding years.

The trustees of the four funds identically moved to dismiss the City's complaint, and counterclaimed, asserting that the City had provided such coverage under a three-party agreement (City, Funds, and participants) and that the City's actions to terminate coverage constituted a breach of a term of employment, implied contract, contract and estoppel. Participants intervened, seeking dismissal of the City's complaint, and enforcement of the fixed rate subsidized retiree healthcare plan for life, as protected by the Illinois Constitution's Article XIII §5, and principles of

3 Exhibit 9, Testimony of City Comptroller Ronald Picur, 143:9-144:7.

4 Exhibit 1, Minutes of Policeman's Fund Trustees Meeting, May 11, 1987, describing City proposal, and Trustees' rejection.

contract, estoppel.

On May 12, 1988 (following briefing and argument) the Circuit Court (Hon. Albert Green) dismissed the City's complaint, upheld the Trustees' and Participants' counterclaims[5]; and the case proceeded to a trial in June 1988. Following the submission of stipulations, evidence and testimony from multiple witnesses, the court took the matter under advisement for its decision. Prior to the court reaching a decision, the City and the four Funds' trustees entered into a ten-year settlement[6] (approved over participants' unanimous class objection) that allocated costs among the three groups (City-at least 55% of costs, Funds-increased subsidies and Participants-charged the remainder) parties for the period through 12/31/1997, explicitly reserving the participants the right to revive their claims if no "permanent resolution" was reached by the end of the settlement.

When that settlement concluded without a permanent resolution, the participants moved to revive their claims, and, as ordered by the Appellate Court[7], the claims were revived, the litigation resumed, the City and Funds unilaterally extended their settlement for another few years, and the parties (this time including the participants classwide approval) entered into another ten-year interim settlement (the 2003 Settlement-under which the City would pay at least 55% of healthcare costs, the Funds' subsidies were continued and increased; with participants to pay the rest, but with rates audited and corrected for actual experience), again reserving participants' rights to revive their claims for permanent healthcare coverage under the terms they'd enjoyed since 1980, at least those in effect at the October 19, 1987 date the City had initiated the Korshak litigation; for Participant classes, defined as those who were participants on 12/31/1987 (the "Korshak" class), later joined by those who became participants or retired during the "window" period between the

5 Exhibit 5, Transcript of May 16, 1988 hearing before Hon. Albert Green.
6 *See* City/Funds Agreement and Order, Exhibit 10 hereto.
7 Exhibit 12, City v Korshak, Illinois Appellate Court June 15, 2000 Order restoring case to active Calendar.

12/31/1987 Korshak class, and the 8/23/1989 date the statute (P.A. 86-273) was enacted to set the subsidies pursuant to the original Korshak settlement.

With the 2003 Settlement approaching its June 30, 2013 expiration, the City rejected Participants Class Counsel's requests to negotiate a permanent resolution, instead declaring that it was unilaterally extending the 2013 Settlement's benefits for the period July1 2013 through December 31, 2016, subsidized by the Funds under legislation enacted to continue the subsidies for that period, and end retiree healthcare coverage entirely, by January 1, 2017.

Participants thus filed this suit, to enforce their right to healthcare benefits as lifetime benefits.

In short, this battle, brewing since 1987, finally comes to a head. Although the constitutional protection of healthcare benefits was not decided by our Supreme Court until last year, the law of Illinois is quite simply that, under the 1970 Illinois Constitution, Article XIII §5, any benefits (including healthcare benefits[8]) provided to a participant in an Illinois government pension fund or retirement system, are protected benefits that simply cannot be reduced[9].

Accordingly, participants are entitled, both as a matter of law, and for life, to enforce the best package of healthcare benefits that existed during their "participation" in one of the Funds. The participation for any employee consists of the best benefit levels that existed during one's employment or retirement. Thus, those who began their participation (i.e., were first hired) prior to August 23, 1989 are entitled, both as a matter of law and for life, to the fixed rate subsidized plan that applied then for their particular plan. For those that began their participation after August 23, 1989, they are similarly entitled for life, to the best healthcare plan that has existed

8 *Kanerva v. Weems*, 2014 IL 115811 (July 3, 2014)
9 *Heaton v. Quinn (in re State Pensions)*, 2015 IL 118585 (May 8, 2015)

since then, whether during their employment or retirement. Finally, for those who began their participation (first hired) after June 30, 2014, they are entitled to lifetime healthcare benefits no less than the City plan instituted on July 1, 2014.

I. The Defendants' Motions to Dismiss

The City's motion. Recognizing that it has lost the Constitutional issue, the City abandons its previous position that healthcare benefits are not protected benefits, but now asserts (i) that it did not explicitly promise to provide the healthcare benefits *for life*, nor do the applicable statutes explicitly reference a "lifetime" benefit, (ii) that the City had no obligation to provide the retiree healthcare it provided (i.e., no breach of contract), and (iii) regarding equitable estoppel, that the City made no affirmative act by an official with express authority to bind it, and that participants cannot show reasonable reliance on the assurances they received from City personnel of a lifetime healthcare benefit.

We will show that (i) all of these issues were already addressed in the original *Korshak* litigation which upheld these same claims, and proceeded to trial, (ii) that benefits provided to pension fund participants are, by Article XIII §5, *inherently* lifetime benefits, without having to explicitly designate them as such, (iii) the City affirmatively provided the benefit within its legal home rule powers, and with more than sufficient writings and actions to defeat the Statute of Frauds claim, affirmatively binding itself to the benefit, issuing writings and explicitly appropriating for it in many years, and (iv) there are ample facts to show that the participants' reliance on the benefits was reasonable and binding, to estop the City from reneging on the benefits.

The four Funds' motions to dismiss (asserting no enforceable contract) are ironic at best,

considering that all four of them, in their original *Korshak* counterclaims against the City, pled that they were part of an enforceable three-way contract with the City, under which the Funds (statutorily obligated to provide healthcare coverage to their annuitants) contracted the City as their participants' healthcare provider, the City provided the healthcare coverage itself, and set rates, which the Funds either (for Police and Fire annuitants) paid fully or (for Municipal and Laborers annuitants) subsidized participants, that the City absorbed healthcare costs above those rates it charged. Ignoring that they are judicially estopped by their past litigating positions in this litigation, the Funds now drop any concerns for their annuitants, and assert newly concocted, but still baseless defenses, in their three motions to dismiss.

The Firemen's and Municipal Employees Funds trustees make the remarkable[10] arguments that (i) they do not have the legal capacity or authority to be sued, (ii) that their statutory authority to provide and subsidize healthcare benefits were not explicitly labelled "lifetime" benefits, so may be reduced whenever one of their statutes changes, (iii) that the claims against them are time barred, and that Counts (iv) and (v) federal claims were dismissed. The Laborers' Fund parrots the same arguments, and the Police Fund "adopts" them, but recognizes that there were contracts to provide coverage, to which the City, Funds and Participants were all parties.

We will show that (i) the first argument is ridiculous, (ii) the second ignores the Constitutional prohibition against reducing benefits (without having to label them "lifetime") even by a subsequent statute, (iii) the assertion of time-bar rests on the Funds' assertion of a position they never took and a misstatement of the reservation claims and restoration of the October 19, 1987 status, restoring participants' claims as they were on October 19, 1987. In short, these

10 Especially considering that they refused to accept service unless their trustees were omitted from the case, apparently planning to then assert that the wrong entity had been sued.

claims cannot be time-barred, both by the explicit terms of the Settlements' reservations, and because all four Funds are judicially estopped from denying the existence of an enforceable contract, their asserted contractual obligation, claims that were explicitly preserved by both *Korshak* settlements.

The Laborers Fund trustees mimic the City's motion, (similarly asserting that neither they, nor their statute, explicitly promised the benefits would be "for life"), similarly ignoring the Supreme Court's declaration that benefits, including healthcare benefits, that are provided for participants in an Illinois retirement system, are inherently lifetime benefits. The Laborers also assert the statute of limitations time bar, ignoring the Korshak settlements' reservation of revival rights for any claims that were assertable when the City initiated the litigation October 19, 1987.

The Police Fund trustees, perhaps closer to honest with the court, and their previous positions in the Korshak litigation, do not support the city's motion, nor those of the other Funds, but assert that they did not provide or promise to provide "lifetime" coverage. Yet, even this is quizzical, because their statute obligated the Funds trustees to either approve or provide a retiree healthcare plan. And they did… by contracting with the City as the provider; which is what Judge Green held when he first upheld the participants' complaint. And, the Police Fund explicitly informed its members that "The hospitalization premium for the retired employees is paid by the Retirement Board."11

The Law: Retiree Healthcare Benefits provided to participants in Illinois State and Local government retirement systems are Constitutionally protected for life.

If the law in this area was arguably less clear in 1987, it has more recently become strong and unequivocal that healthcare benefits provided to participants in Illinois state and local

11 Exhibit 7, Police Fund pamphlet: Your Service Retirement Benefits.

retirement systems are constitutionally protected for life against being reduced. As our Supreme Court recently declared, in *Kanerva v Weems*[12] a participant's retiree healthcare benefits are protected benefits that cannot be reduced for life (emphasis added):

> **[*¶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 question" that it encompasses "health insurance benefits offered to public employee retirees").
>
> **[*¶41]** No principle of statutory construction supports a contrary view. …. If they had intended to protect only core pension annuity benefits and to exclude the various other benefits state employees were and are entitled to receive as a result of membership in the State's pensions systems, the drafters could have so specified. But they did not. The text of the provision proposed to and adopted by the voters of this State did not limit its terms to annuities, or to benefits conferred directly by the Pension Code, which would also include disability coverage and survivor benefits. Rather, the drafters chose expansive language that goes beyond annuities and the terms of the Pension Code, defining the range of protected benefits broadly to encompass those attendant to membership in the State's retirement systems. **Then, as now, subsidized health care was one of those benefits.** For us to hold that such benefits are not among the benefits of membership protected by the constitution would require us to construe *article XIII, section 5*, in a way that the plain language of the provision does not support. We may not rewrite the pension protection clause to include restrictions and limitations that the drafters did not express and the citizens of Illinois did not approve. See *Prazen, 2013 IL 115035, ¶¶ 37-38*
>
> ….
>
> **[*¶54]** Defendants observe that health care costs and benefits are governed by a different set of calculations than retirement annuities. While that is unquestionably true, it is also legally irrelevant. The criterion selected by the drafters and approved by the voters is status based. Whether a benefit qualifies for protection under *article XIII, section 5*, turns simply on whether it is derived from membership in one of the State's public pension systems. If it qualifies as a benefit of membership, it is protected. If it does not, it is not. How the benefit is actually computed plays no role in the inquiry.
>
> **[*¶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**

12 2014 IL 115811, in which we and the City both filed amicus briefs, because of the relevance to this case.

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.

[*¶56] CONCLUSION

[*¶57] For the foregoing reasons, we conclude that the State's provision of health insurance premium subsidies for retirees is a benefit of membership in a pension or retirement system within the meaning of *article XIII, section 5, of the Illinois Constitution*, and the General Assembly was precluded from diminishing or impairing that benefit for those employees, annuitants, and survivors whose rights were governed by the version of *section 10* of the Group Insurance Act that was in effect prior to the enactment of Public Act 97-695. Accordingly, the circuit court erred in dismissing plaintiffs' claims that Public Act 97-695 is void and unenforceable under *article XIII, section 5*.

On the issue of diminution, as well as whether the legislature can create a benefit of participation that is time-limited or not constitutionally protected, *Heaton v Quinn (in re State Pensions)*, 2015 IL 118585, makes it clear; the answer is *no*:

[¶15] The solution proposed by the drafters and ultimately approved by the people of Illinois was to protect the benefits of membership in public pension systems not by dictating specific funding levels, but by safeguarding the benefits themselves. As we discussed in *Kanerva v. Weems*, 2014 IL 115811, ¶¶ 46-47, 383 Ill. Dec. 107, 13 N.E.3d 1228, Delegate Green explained that the pension protection clause does this in two ways: "[i]t first mandates a contractual relationship between the employer and the employee; and secondly, it mandates the General Assembly not to impair or diminish these rights." 4 Record of Proceedings 2925 (statements of Delegate Green). Subsequent comments by other delegates reaffirmed that the provision was designed to confer contractual protection on the benefits of membership in public retirement systems and afford beneficiaries, pensioners or their dependents "'a basic protection against abolishing their rights completely or changing the terms of their rights after they have embarked upon the employment—to lessen them." *Kanerva v. Weems*, 2014 IL 115811, ¶ 46, 383 Ill. Dec. 107, 13 N.E.3d 1228 (quoting 4 Record of Proceedings 2929 (statements of Delegate Kinney)).

[¶16] The purpose of the clause and its dual features have never been in dispute. As we noted in *People ex rel. Sklodowski v. State*, 182 Ill. 2d 220, 228-29, 695 N.E.2d 374, 230 Ill. Dec. 884 (1998), the clause "served to eliminate any uncertainty as to whether state and local governments were obligated to pay pension benefits to the employees," and its "plain language" not only "makes participation in a public pension plan an enforceable contractual relationship," but also "demands that the 'benefits' of that relationship 'shall not be diminished or impaired.'" The "politically sensitive area" of how the benefits would be

financed was a matter left to the other branches of government to work out. *Id.* at 233.3 That article XIII, section 5, created an enforceable obligation on the State to pay the benefits and prohibited the benefits from subsequently being reduced was and is unquestioned.

….

[¶45] … The pension protection clause clearly states: "[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*." (Emphasis added.) Ill. Const. 1970, art. XIII, § 5. This clause has been construed by our court on numerous occasions, most recently in *Kanerva v. Weems*, 2014 IL 115811, 383 Ill. Dec. 107, 13 N.E.3d 1228. We held in that case that the clause means precisely what it says: "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." *Id.* ¶ 38.

[¶46] This construction of article XIII, section 5, was not a break from prior law. To the contrary, it was a reaffirmation of principles articulated by this court and the appellate court on numerous occasions since the 1970 Constitution took effect. ***HN6*** Under article XIII, section 5, members of pension plans subject to its provisions have a legally enforceable right to receive the benefits they have been promised. *People ex rel. Sklodowski v. State*, 182 Ill. 2d 220, 229-32, 695 N.E.2d 374, 230 Ill. Dec. 884 (1998); *McNamee v. State*, 173 Ill. 2d 433, 444-46, 672 N.E.2d 1159, 220 Ill. Dec. 147 (1996). The protections afforded to such benefits by article XIII, section 5 attach once an individual first embarks upon employment in a position covered by a public retirement system, not when the employee ultimately retires. See *Di Falco v. Board of Trustees of the Firemen's Pension Fund of the Wood Dale Fire Protection District No. One*, 122 Ill. 2d 22, 26, 521 N.E.2d 923, 118 Ill. Dec. 446 (1988).

The bottom line to all of this is that the mere fact that a retirement benefit is provided to participants in an Illinois State or local government pension or retirement system, means that it is, as a matter of law, constitutionally guaranteed for life against being reduced or impaired. It need not be labelled as “lifetime”, and it does not require a statutory creation. In order to be permanent and protected, it needs only be legally provided.

II. The City’s assertions, that there is no enforceable contract for lifetime annuitant healthcare coverage, are wrong, and all have been correctly rejected long ago by this court.

A. The City’s Statute of Frauds Defense.

Here, just like in *Kanerva*,

> 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. **(Kanerva, at ¶40)**

There are ample writings to defeat any Statute of Frauds Defense. For the terms of that benefit, (indeed, in a writing that itself obliterates the City's statute of frauds argument, an annuitant needed only to look at the City's Annuitant Healthcare Handbook to conclude that he or she had lifetime healthcare coverage. From the City-issued handbook (Your City of Chicago Annuitant Medical Benefits Plan" (Exhibit 6) for eligibility:

> **ABOUT THE CITY OF CHICAGO**
> **ANNUITANT MEDICAL BENEFITS PLAN**
> The City of Chicago Annuitant Medical Benefits Plan is available to you, an Annuitant of the City, whether or not you are eligible for Medicare benefits.
>
> This booklet briefly reviews the Plan. *Please read it carefully.* If you have questions, call or visit the City Benefits Management Office, 7th Floor, Kraft Building, 510 N. Peshtigo Court, Chicago, Illinois 60611, (312) 744-0777.
>
> **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,
> • The spouse of a deceased Annuitant if…
> • A dependent of a deceased Annuitant if …
> • Your spouse….
> • Your unmarried children under age 25, if …
> • Your unmarried children under age 19, if,,
> • Your unmarried children of any age incapable of self-support due to …
> • Children for whom you have been appointed legal guardian if …
> …

Nor was there a reservation of right to the City or the Funds to terminate; and, certainly since *Kanerva* it seems undisputable that neither could just terminate the plan unilaterally without violating the Constitution.[13]

Nor were the pre-8/23/1989 Pension Code statutes limited to a specific time period. The applicable Pension Code statutes[14] did not contain a time period until the passage of the settlement period statutes in P.A.86-273, which was passed on August 23, 1989, to incorporate the first Korshak settlement, then extended by the City and Funds, and similarly amended in 2003 for the ten-year period of the settlement that went through 2013[15.]

Finally, the same Statute of Frauds arguments by a City were rejected in *Dell v. City of Streator,* 193 Ill.App.3d 810 (Ill. App. Ct. 3d Dist. 1990), affirming the enforcement of similar oral promises made to nonunion employees, both on contract and estoppel bases (that the City could not be conscionably permitted to enjoy the fruits of the employee's lifetime labor, and was estopped to evade the promised benefits). Moreover, there are substantial writings to document

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13 Nor would it be equitable to permit the City to terminate coverage for Class members who began working for the City prior to April 1, 1986. Participants' Need for Permanent Coverage Because their City employment does not qualify them for Medicare coverage. For the overwhelming number of *Korshak* and *Window class* participants, (all people who became participants before August 23, 1989), the need for the City's coverage is particularly acute, because, Local government employees who were originally hired and began their work prior to April 1, 1986 (federal Combined Omnibus Budget Reconciliation Act of 1985 ("COBRA," PL 99-272 § 13205(a)) cannot qualify for healthcare coverage under the Medicare plan by their government employment, *regardless of their length of service*.

14 *See* Exhibit 8, Pension Code §§ 5- 167, 6- 142.2, 8- 192 and 11- 181, in effect from October 19, 1987 through August 22, 1989, until amended by P.A. 86-273 on August 23, 1989.

15 The post-1983 statutes present two other issues which the court will eventually have to decide. As most squarely depicted in the initial *Korshak* settlement statutes, it is unlikely that the legislature's labelling something that is a benefit of participation as not to be protected by Art. XIII, §5; as well whether a time limitation is legal, and also whether a Pension Code provision that applies explicitly limited to participants "by reason of employment by the City of Chicago" (i.e., rather than generally to participants in Funds created in "cities with populations over 500,000") is itself an unconstitutional "Special Legislation" prohibited by 1970 Illinois Constitution Art. IV §13 ["The General Assembly shall pass no special or local law when a general law is or can be made applicable. Whether a general law is or can be made applicable shall be a matter for judicial determination"] in the creation of benefits, and whether P.A.86-273's labelling of the participation benefits as not protected benefits is valid at all, or whether as to people who became participants during their duration, can be reduced, are all questions this court will eventually have to address, as well).

the terms of the contract and its permanence: e.g., the Benefits Plan Book issued by the Mayor's office[16], coupled with explicit appropriations for annuitant healthcare by the Chicago City Council[17,] plus the Pre-Retirement Seminars conducted by the City[18], altogether, and certainly at this stage, suffice to withstand the City's motion to dismiss, which is exactly what Judge Green decided when he dismissed the City's complaint, and upheld the Countercomplaints of both Participants and the Funds.

B. The Circuit Court's rulings in the Korshak case, coupled with the positions asserted in it, dispose of virtually all of the bases asserted for dismissal.

(i) The Circuit Court's rejection of the City's motion to dismiss for lack of a contract, authority, etc.

At the beginning of the Korshak litigation, the City made a virtually identical motion to dismiss the Funds' and Participants' counterclaims asserted here. After exhaustive briefing and argument, Judge Green dismissed the City's complaint against the Funds trustees (implying that only the participants would be the appropriate plaintiffs for such a claim), and upheld the Funds' and Participants counterclaims being asserted here (Korshak, May 16, 1988 Memorandum and Order, Exhibit 9 at 43-57)(**emphasis and formatting added to assist in navigating through lengthy opinion**):

> Plaintiff brought this action seeking a writ of mandamus to compel the funds' Boards to enter into contracts for group health care for their funds' annuitants pursuant to their statutory obligations.
> **The authority creating these fund Boards is found in Articles 5, 6, 8, and 10 of the Illinois Pension Code**, the Illinois Revised Statutes Chapter 108 1/2. [Now 40 ILCS]. Relevant sections of this chapter set forth the obligations of the Boards governing these funds.
> The Policemen's Annuity Fund Act, Illinois Revised Statute, Chapter 108 1/2, Section 5-167,and the Firemen's Annuity Fund Act, Chapter 108 1/2, Section

16 Exhibit 6, "Your City of Chicago Annuitant Medical Benefits Plan"
17 Exhibit 16, Appropriations for annuitant healthcare by the Chicago City Council
18 Exhibit 15, PreRetirement Seminar Agenda Samples

6-164.2, since January 12, 1983 have provided in relevant part for the funds to enter into a contract with an insurance carrier to provide group health insurance for all annuitants.

(44)It states,... "The Board shall pay the premiums for such health insurance for each annuitant with funds provided as follows. The basic monthly premium for each annuitant shall be contributed by the city from the tax levy prescribed in Section 5-168 up to a maximum of $55 per month if the annuitant is not qualified to receive Medicare benefits or up to a maximum of $21 per month if the annuitant is qualified to receive Medicare benefits."

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

The statutory provisions establishing the Boards for the Municipal Employees and the Laborers and Retirement Employees have been in effect since 1985, Illinois Revised Statutes, Chapter 108 1/2, Section 8-192 and Section 11-181. These two funds draw their authority from Section 8-164.1 and Section 11-160.1, which are identical and provide (45) that: one, each annuitant who is over 65 years of age and had at least 15 years of municipal employment may participate in a group hospital care plan and a group medical and surgical plan, a plan approved by the -- in a plan approved by the Board; two, the Board is authorized to make health insurance payments from the city's tax levy up to $25 per month per annuitant; and three, if the monthly premium exceeds the $25 statutory authorization; one, the excess may be deducted from the annuitant's annuity at his election, or else; B, the coverage shall terminate.

Count 2 of the plaintiff's complaint seeks to recover funds which the city alleges it wrongfully expended without (46) a statutorily required appropriation on behalf of annuitants of the four funds from 1980 to the present.

The annuitants of all four funds have been receiving health insurance through the city, which is a self-insurer.

The funds allege that approximately 26,000 persons, including annuitants, their surviving spouses, and dependents, participate in the program.

The city alleges that its excess costs for health insurance on behalf of these annuitants for the period 1980 through June 1987 total approximately 58.8 million dollars over and above the premiums paid by the funds for the annuitants' health insurance costs.

The Policemen's Fund in its memo in support of its motion to dismiss alleges the following: that since 1964 many of its fund annuitants have participated in a group medical benefits program sponsored by the city, that the program has been administered (47) on a self-funded, "claims made," and I emphasize *claims made* basis since the mid-1970s, that there is no insurance policy issued by an insurance company to cover claims made by the annuitants, that, rather, when a covered claim is submitted by a covered individual, whether an active employee or a covered annuitant, the city simply reimburses the private carriers which, as the

city's agents, administer the program and pay the claims made by the covered individuals.

The memo further alleges that the monthly rates charged by the annuitants were periodically increased between the mid-1960s and April of 1982.

Since the program became self-funded, the city has been paying a portion of the costs of the annuitants' medical benefits, and the fund has deducted the premium specified by the city.

The Policemen's Fund alleges that the city established monthly premiums for the annuitants which have remained unchanged (48) from their effective date of April 1, 1982 until the present date, notwithstanding the fact that the actual cost of the annuitants' coverage increased dramatically during that period.

Since 1982 the city has paid the cost of the fund's annuitants' medical benefits to the extent it exceeds the established premiums.

The Policemen's Fund memo further alleges that the fund was never directed by the city to make deductions for retired employees nor to increase the amounts being deducted from the annuitants' monthly checks for the cost of their dependents' health benefits.

In mid-October of 1987 the fund's executive director received a letter from the city corporation counsel advising the fund that from 1980 to the present the city paid health care costs for the annuitants of the four pension funds in excess of the contributions made by the funds for the costs.

(49)

The letter stated that the city viewed the … "payments," …, as illegally made and had, therefore, filed suit seeking to recover the monies plus interest.

Finally, the letter advised the funds that the city would cease making health care payments to pension fund annuitants as of January 1, 1988.

The motions to dismiss filed by the other three funds allege virtually the same facts.

As to Count 1, the funds allege that the city has failed to state a cause of action for its writ of mandamus.

First, they argue the city is not the proper party to seek a writ of mandamus, because the city has no legal right to compel the funds' performance of their statutory duties. Defendants urge that the statute addresses group health insurance for the funds' annuitants and directs the Board to take certain actions with respect to that (50) coverage.

They argue that the city itself is given no rights, duties, or responsibilities with respect to the annuitants' health insurance coverage.

Defendants allege that thus the city has no right to seek a writ of mandamus to compel the Board to act under the statute.

Secondly, the defendants urge that even assuming the city has standing, a writ of mandamus is not available to compel the discretionary acts described in the statute.

The statute requires the funds to select a carrier to provide health insurance to the annuitants and to enter into a contract for such coverage.

The statute specifies many criteria to be considered in selecting a carrier.

Defendants urge that the discretion required of them to do so is not proper subject matter for a writ of mandamus.

Third, the defendants urge that (50) the plaintiff's Count 1 is further deficient in that it fails to allege facts demonstrating defendants have breached their duty to enter into a contract.

Defendants argue that facts alleged by plaintiff actually demonstrate that the funds have fulfilled their duty to contract for insurance, as their annuitants have been receiving health insurance through the city's self-insurance program.

Defendants argue that the city is the carrier for their annuitants' insurance.

This court agrees that the city's Count 1 fails to state a cause of action for a writ of mandamus to issue. Its conclusion that the defendants have not performed their statutory duty to contract with an insurance carrier is contradicted by its own factual allegations that the annuitants have, at all relevant times, been covered by the city's own plan.

Clearly, the city has acted as a carrier to the annuitants. In addition to being factually deficient, this count is defective in that plaintiff [City] has no standing 51 to compel the funds to perform under the statute.

The city's argument that it is a proper plaintiff because it is asserting a, **"public right"** must fail for two reasons.

….

For all these reasons, this court finds it must dismiss plaintiff's Count 1.

Thus, the court does not find it necessary to consider defendants' arguments as to laches, the Statute of Limitations, or estoppel as to this count.

Count 2 of the city's complaint purports to state a claim for restitution.

…. this court must agree with the defendants that the city simply has not pleaded its facts sufficient to state a claim for restitution. Central to such a claim is an allegation of unjust enrichment. Even this basic element has not been pled. (56)

…

This court finds that the defendants are not the proper parties for the plaintiff to seek restitution from.

The city urges that defendants' affirmative defenses of laches, the Statute of Limitations, and estoppel cannot lie against (57) it as a public body.

However, the law provides exceptions to this general rule when a public body acts in a proprietary, as distinguished from its governmental, capacity, citing *Hickey vs. Illinois Central Railroad*, 35 Il.2d 427.

This court has determined that the operation of a self-insurance program more properly fits in the mold of a proprietary act. Further, the city's argument that the illegality of the ultra vires nature acts makes it immune to the equitable defenses raised by the defendants is not persuasive.

Accordingly, this court finds that the defendants have properly raised these equitable defenses and that they effectively bar and defeat the claim based on the city's Count 2, and for those reasons this court shall also dismiss Count 2 of the city's complaint.

(ii) The court (Judge Green), then turning to the Funds' and Participants' counterclaims, upheld the claims asserted here and denied the City's motion to dismiss:

> Now, I will address the city's motion to dismiss the four separate counterclaims.
>
> The defendant funds each brought (58) a counterclaim seeking to enjoin the city from terminating the annuitants' medical coverage and to stop paying most of the cost of that coverage.
>
> **The counterclaims allege in separate counts that; first, the city has breached a term and condition of employment; second, the city's intent to terminate coverage is a breach of an implied agreement; third, breach of contract based on the city's annuitant medical benefits plan; and fourth, equitable estoppel.**
>
> Alternatively, the complaints seek to enjoin the city from terminating coverage until the funds are able to contract for similar medical benefits coverage with a private insurance carrier.
>
> The city brings its motion to dismiss the four counterclaims for failing to state a cause of action on which injunctive relief may properly be granted. Particularly, the city alleges that the claims do not plead sufficiently that irreparable harm will result from a failure to grant injunctive relief or that no adequate remedy exists at law.
>
> (59)
>
> **As to each count, the city alleges defendants have failed to plead the elements of either an implied contract or an express contract existing between the parties.**
>
> The city further argues that even if such elements were sufficiently pled, no cause of action can lie because such contracts, if any, were not lawfully made by the city.
>
> The city urges that its expenditure of the monies, absent required statutory prior appropriations, renders any contract, implied or otherwise, null and void.
>
> The city further argues that the Boards have no standing on behalf of annuitants to assert these claims. The city attacks the counterclaims' counts which seek equitable estoppel, urging that there could have been no justified reliance on expenditures made without prior appropriation.
>
> Finally, the city argues that the ultra vires nature of its acts preclude the applicability of equitable estoppel.
>
> (60)

The court will address first the issue of standing. The city urges that the claims, if any, belong to the annuitants and not the Board. Defendants argue that both the Boards of the funds and their annuitants have an interest here.

They argue that because the statutes grant them authority to enter into contracts with one or more carriers to provide health care insurance to the annuitants, and it is their opinion that they have done so with the city as a carrier, thus the Boards are the real parties in interest here as to any issue regarding whether the city is obligated to continue to provide that insurance.

This court finds the defendants have standing to bring these claims against the city. The Illinois Revised Statutes, Chapter 17, Paragraph 16.65, gives trustees a (61) specific statutory power to sue in a representative capacity on behalf of a trust. Defendants here have by statute been placed in a trustee relationship to their respective annuitants.

Secondly, the city urges that the defendants have not sufficiently pled a cause of action for injunctive relief.

This court must disagree. Defendants have pled facts on four separate theories which, if proved, would establish that a protectable right or interest exists. Additionally, facts set forth establish that irreparable harm would result if the city is allowed to terminate coverage. The annuitants would be at risk for any health care costs which might occur while they are uninsured. Further, the task of obtaining new coverage, especially for these retirement age annuitants, would be made even more difficult if the city were simply allowed to drop them.
(62)

Accordingly, the impending threat that the city will terminate coverage renders any remedy at law inadequate here.

The standards for preliminary injunction are set forth in *Eleven Homes, Inc. vs. Old Farm Homes Associates*, 111 Il.App.3d 30.

They are; one, that he possess a clearly ascertained right which needs protection; two, that he will suffer irreparable harm without the injunction; and three, that there is no adequate remedy at law for his inquiry -- injury, and that; fourth, that he is likely to succeed on the merits.

Defendants have satisfied these requirements.

The city next attacks Counts 1, 2, and 3 of each countercomplaint, claiming they fail to state a cause of action against the city.

When considering a Section 2-615 motion to dismiss, the trial court must accept as true all facts well pleaded as well as reasonable inferences which can be drawn from those facts, ….

Having done so, this court finds that the counterclaims have sufficiently pled causes of action sounding in breach of a term and condition of employment, breach of an implied contract, and breach of contract.

The city argues that even if this court finds that defendants have stated a claim for breach of a contractual relationship, it must then find that contract void for illegality or unenforceable because it was an ultra vires act by the city.

As to the alleged ultra vires nature of the city's action, this court disagrees.

The state statute specifically allows municipalities to provide various types of group insurance for their employees, and I cite Illinois Revised Statutes, Chapter 24, Section 10-4-2 of the Illinois Municipal Code.

Additionally, as a home rule unit, the city is entitled to, … "exercise any power and perform any function pertaining (64)to its government and affairs;" ..That's the Illinois Constitution, Article 7, Section 6-A. Therefore, it is well within the ambit of the city's authority to provide health care benefits to retired employees.

The city has not adequately demonstrated to this court that illegality should defeat defendants' claims for injunctive relief. It is merely stated in a conclusory manner that the city's provision of health care benefits to the funds' annuitants was illegal because the monies were spent without a prior appropriation. Even this is not clear where defendants have alleged that funds were specifically appropriated for the annuitants' benefits in at least one year and generally in the others.

It is illogical to believe that the claims paid on behalf of approximately 26,000 persons to the tune of an alleged 58.8 million dollars could be expended over a period of seven years but for the appropriation of the (65) funds in some fashion.

The sums involved are far too substantial to have slipped through the cracks. This court has not been advised by the city of the manner in which these monies could have been spent absent an appropriation.

That the city chose to designate from year to year in the line item appropriation

from which the funds were paid is not important.

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 estoppel cannot lie against it as a governmental entity will not defeat defendants' claims.

Generally, the doctrine of equitable estoppel refers to reliance by one (66) party on the words or conduct of another, resulting in the relying party's change of position and subsequent harm therefrom, and I cite *Gary Wheaton Bank vs. Meyer*, 130 Il.App.3d 87. Equitable estoppel arises when one by his conduct intentionally or through culpable negligence induces another to believe and have confidence in certain material facts. The other party, having the right to do so, then relies on the acts and is misled, citing the Gary Wheaton case at Page 96. Although the intent to mislead is not required, the reliance must be reasonable. That's still at Page 96.

Although governmental bodies enjoy a qualified immunity, some situations may arise which justify invoking the doctrine of estoppel, even against the state acting in its governmental capacity, and I cite *Hickey vs. Illinois Central Railroad*, 35 Il. 2nd 927.

> The party asserting estoppel (67) has the burden of proving it by clear, precise, and unequivocal evidence, and I cite *Carey vs. The City of Chicago*, 134 Il. Ap. 3d 217.
>
> At this juncture the court does not need to find that the defendants have made their case, merely that they have sufficiently stated a cause of action.
>
> **It is this court's opinion that the defendants have adequately stated a claim for equitable estoppel.**
>
> **Accordingly, this court will deny the city's motion to dismiss the four separate counterclaims brought by the defendants.**
>
> And now I ask the $64 question. … how much time does the city desire to answer?

And, denied the City's request to amend, viewing it as futile:

> MS. BECKETT: … We'd also like leave to amend our complaint for mandamus and restitution, if the court believes that's possible.
> THE COURT: Facts are facts, Miss Beckett, I must respectfully assert, and I don't think there's any possibility of your changing the facts. (68) I'm going to deny the filing of an amended complaint by the city at this juncture.
> ….

Accordingly, and for the reasons described above and by Judge Green in his ruling, the City's new motion to dismiss on the same grounds, should be denied. Indeed, the mere provision of healthcare benefits to retirees by the City and the Funds, on just the submissions herewith, abundantly support the entry of partial summary judgment for participants, leaving only the determination of the specific package of benefits to which each group of participants is entitled.

III. On the Fund Trustees' assertion that they cannot be sued.

The assertion that the Funds cannot be sued by Participants to enforce the trustees' obligations to continue their healthcare benefits is utterly dispatched by Judge Green's decision's clear implication that participants, rather than the City, would be appropriate parties with standing to enforce the trustees' obligations to provide and subsidize healthcare coverage.

IV. The Funds' assertions that the claim is time-barred or that there is no contract obligation rest on an outrageous misstatement of the trustees' own position.

A. The statute of limitations/time-bar argument misstates the Fund/trustees' position.

The Funds' assertion that the claim is time-barred rests on their assertion that they put someone on notice in 1987 that they disavowed any obligation to provide healthcare or subsidies, that participants did not reserve their claims against the Funds, and that participants waived their rights by failing to sue them within ten years thereafter. (See: Fire and Municipal memo at 12, Laborers memo at 11 , perhaps nonspecifically adopted by the Police Fund's memo at 3).

The problem with their argument is that it's factually not true.

The LABF's assertion that it "disclaimed any obligation to provide retiree healthcare coverage in 1987, when the City initiated the Korshak litigation" is no more accurate than their citation to our current Complaint at ¶¶ 91-94. LABF Memo at 11.

The Funds' assertion that Participants failed to reserve the right to assert claims against the Funds, ignores both (a)the language they quote from the Korshak December 15, 1989 Settlement Approval Order[19](it may be appropriate to point out here that that 1989 settlement agreement was between the City and the Funds, *never* agreed to by the participants) which, failing a permanent resolution of the dispute by the end of 1997, "restored [the parties] …to the same legal status which existed as of October 19, 1987…."; i.e., not just the claims against the City, and (b) Judge Green's description of it[20] :

> The City and the Funds have agreed that at the conclusion of the 10 years covered by the settlement the parties will return to the same positions they were in before the proposed settlement was negotiated.
>
> In the words of the stipulation between the City and

19 *See* December 15, 1989 "Agreed Order", signed by the City and the Funds only, and to which the Participants objected, Ex. 10.

20 See December 12, 1989 Opinion and Memorandum of Judge Green, approving the City/Funds Settlement over the Participant classes' objections, Ex. 11.

the Funds, which was read into the record before this Court on November 27, 1989:

> On January 1, 1998, the parties will be in the same legal positions they were in as of June of 1988. To the extent the City had any obligation in June of 1988, they will have that same obligation or obligations on January 1, 1998.

Consequently, the annuitants have not "given up" anything through this settlement. (Other than the claimed right to have the City pay ˜ than 50% of the costs between March of 1990 and December of 1997.)

On January 1, 1998, if some "permanent .solution" has not been achieved, the annuitants will be permitted to reargue the claims which were asserted in the Funds' Counterclaims as well as the Intervenors' initial pleading. (*id*. At 21-22)

Similarly, the 2003 Settlement extended these revival rights fully through at least June 30, 2013:

> J. After the termination of the Settlement Period, Class Members retain any right they currently have to assert any claims with regard to the provision of annuitant healthcare benefits, other than claims arising under the prior settlement of this Action or under the 1989, 1997, or 2002 amendments to the Pension Code, or for damages relating to the amounts of premiums or other payments that they have paid relating to healthcare under any prior health care plans implemented by the City, including this Settlement Agreement. The Funds agree that they will not, at any time, assert any: (1) claims on behalf of any annuitant for premiums or other payments made under any prior City healthcare plan, including this Settlement Agreement; or (2) claims based on the City's pre-1988 conduct or statements. However, if any separate action relating to health benefits is brought after the end of the Settlement Period against a Fund or its Trustee(s), the Fund or Trustees(s) may seek to assert a cross claim or third party complaint against the City in its defense. (2003 Settlement Agreement, at 11, ¶J; Ex. 13 hereto).

thus entitling the annuitants/participants the right to assert any claims in the Funds' or the Participants' pleadings, or anything else they could have asserted on October 19, 1987--the date that the City filed its suit, and before the Funds and Participants counterclaimed.

Moreover, the Funds' trustees' assertions here that they had in 1987, in or outside the

Korshak litigation, disavowed any obligation beyond the statutory subsidy, is simply untrue.

First, it misstates the positions they asserted to their members, and in the Korshak litigation.

For the Policemens' Fund, the trustees issued a pamphlet to retirees, "Your Service Retirement Benefits", at 10 (Ex. 7) in which the Board explicitly informed the participants that **"The hospitalization premium for the retired employee is paid by the Retirement Board"**

> As a general rule, the City Plan, the hospitalization you had as an active member of the Police Department, may be continued only at the time you apply for annuity. (1) **The hospitalization premium for the retired employee is paid by the Retirement Board.** The premium for any eligible dependent would be automatically be deducted from your annuity checks, beginning with your first check. (emphasis added)

The Fire Fund had the same deal for its participants. We'll eventually see what the Municipal and Laborers Funds issued their participants.

B. The Funds are also estopped from asserting the lack of an enforceable contract because they have previously asserted, successfully, that there *is* an enforceable three-way contract among the City, Funds and Participants.

As well, as of October 19, 1987 (the City's notice date) and the filings by the four Funds in the Korshak litigation in their counterclaims against the City, the Funds did *not* assert that they had *no* obligations beyond the Pension Code statutory provisions. Rather, all four of them asserted that notwithstanding the Pension Code provision, there was/is a three-party contract among the City, the Funds and the Participants. From the Policemen's Fund trustees countercomplaint (the other Funds asserted identically in their filings, (See Exhibit 7) that there was a contract, regardless of the Pension Code statutory provision.

In their counterclaims to the City's original Korshak complaint, the four funds' trustees

virtually identically asserted that the arrangement of retiree healthcare benefits constitutes a three-way contract that is enforceable (Police Fund Counterclaim follows; same assertions in Counterclaims filed by Firemen's Municipal, and Laborers Funds**.** Per the Funds' facts supporting an enforceable three-way contract (From the Police Fund CounterComplaint[21]**)** **(emphasis added)** the Funds assert the factual basis and the claim than an enforceable contract exists among the City, Funds and Annuitants**:**

> 10. Effective April 1, 1982, the City established the following monthly rates for the Fund's annuitants' medical benefits coverage:
>
> Under Age 65 - Single$ 55.00
> Under Age 65 - Family of Two: $110.00
> Under Age 65- Family of Three or more $150.00
> Medicare Eligible- Single$21.00
> Medicare Eligible- Two $42.00
> One Over 65, One Under Age 65: $76.00
>
> 11. Notwithstanding the provisions of Section 5-167.5 of the Policemen's Annuity Fund Act, and notwithstanding the fact that the actual cost of the coverage has increased dramatically since 1982, these rates for the Fund's annuitants• medical benefits coverage have remained unchanged to the present date. Since April of 1982 the City has paid the cost of the Fund's annuitants' medical benefits to the extent that they exceed the rates established at that time.
>
> 12. Both the Fund and the City have at all times been aware that the rates in effect since the mid-1970's were substantially less than the actual costs incurred by the City in paying the Fund's annuitants' medical claims under the Plan (together with the costs of administering that Plan). In September of 1984, for example, the City prepared a report titled "City of Chicago Annuitant Medical Care Benefits" in which it demonstrated the large disparity between contributions from the Fund, and the similar funds for other retired City employees, and the actual costs being incurred by the City. A copy of that report is attached hereto as Exhibit B.
>
> 13. The 1984 "City of Chicago Annuitant Medical Care Benefits report proposed that the rates paid by the annuitants be increased by 100%, effective two months later, in November of 1984, and increased by another substantial percentage three months after that, in January of 1985.
>
> 14. Despite this and other periodic "proposals" from the City that the annuitants' health insurance rates be increased, the Fund was never directed to begin making deductions for retired employees with individual coverage or to

21 Exhibit 3.

increase the amounts being deducted from the annuitants' monthly checks for the cost of their dependents' health insurance.

15. In mid-October of 1987, the director of the Fund received a letter from the Corporation Counsel for the City advising the Fund that from 1980 to the present the City has paid health care costs for the annuitants of the City's four pension funds in excess of the contributions made by the funds towards those costs. A copy of that letter is attached hereto as Exhibit C. That letter further advised the Fund that the payments made by the City were not the subject of any appropriation and were thus illegal and must be repaid. The letter also advised the Fund that the City had filed a complaint in the Circuit Court of Cook County, naming as defendants the trustees of the four funds, asking that $59 million be repaid ($27 million from the policemen's fund), plus interest, and that the funds contract for health benefits as required by statute. Finally, the Corporation Counsel advised the Fund that he had directed the City's Benefits Office to cease making health care payments to pension fund annuitants as soon as each of the respective pension funds enters contracts for health insurance but in no event no later than January 1, 1988.

16. The complaint referred to in the Corporation Counsel’s letter was filed on October 19, 1987, and is styled *City of Chicago v. Marshall Korshak* et al., 87 CH 10134. A true and accurate copy of that complaint is attached hereto as Exhibit D.

COUNT I - TERM AND CONDITION OF EMPLOYMENT

1.-16. [reallegations]

17. Since the mid-1960's the City has paid the full cost of medical insurance coverage for the active employees of the City's Police Department. Since 1971, the City has paid the full cost of medical benefits for the active employees of the City's Police Department and for their spouses and dependents.

18. For the past ten years it has been common knowledge among the active City of Chicago policemen that the annuitants participate in the City's Annuitant Medical Benefits Plan and that the City pays a substantial portion of the cost of its annuitants' medical care benefits.

19. The active City of Chicago policemen, for the past ten years, relied upon this retirement benefit in continuing their employment with the City.

20. The City's inclusion of the annuitants in its medical benefits program and its payment of a substantial portion of the cost of its annuitants' medical care benefits thus became a term and condition of employment for active employees of the Police Department of the City.

21. The City's announced intention to terminate medical care benefits for the Fund's annuitants as of December 31, 1987, is a breach of those terms and conditions of these employment contracts with the City.

22. It would be inequitable and unjust to permit the City to breach these established terms and conditions of employment.

23. The Fund and its annuitants will suffer substantial and irreparable harm if the City is not enjoined from terminating the medical care benefits it has provided to them for the past 20 years. The annuitants will be exposed to the risk of financial catastrophe if the City is permitted to terminate their medical benefits coverage on December 31, 1987.

24. Plaintiffs have no adequate remedy at law.

COUNT II - IMPLIED CONTRACT

1.-16. [reallegations]

17. The City's actions described above gave rise to an implied contract between the Fund, the annuitants and the City under which the City agreed to include the annuitants in the Plan's coverage and to pay the cost of the annuitants' medical benefits coverage to the extent that it exceeds the rates established for the medical benefits coverage effective April 1, 1982. [emphasis added]

18. The City's letter to the Fund dated October 19, 1987 and its filing of the complaint described in paragraphs 15 and 16 above, constitute a breach of that implied contract.

Thus, the Funds, having successfully asserted[22] that retiree healthcare was provided by a three-party contract that existed and was enforceable beyond the requirements of the Pension Code statutes, the Funds are simply precluded from asserting that no contract existed that was enforceable against them. *Smeilis v. Lipkis*, 2012 IL App (1st) 103385 (Ill. App. 1st Dist. 2012) and *Bidani v. Lewis*, 285 Ill. App. 3d 545(Ill. App. Ct. 1st Dist. 1996) (disavowal of interest in entity in first litigation, precluded him from pursuing damage claim for entity in subsequent litigation).

V. The Pension Code Statutes that we do seek to enforce are:

A. For pre-8/23/89 hire-date participants: at least those that were in effect on 8/22/1989, which were not time-delimited.

All defendants argue that their Pension Code statute-based obligations were all time-delimited and now expired. (City Memo at 15-17, Fire/Municipal Memo at 11-12 , Laborers Memo at 7, presumably adopted by Police fund Memo's general adoption of the other Funds'

22 Recalling that was one of the bases that Judge Green relied on in dismissing the City's motion to dismiss.

positions, at 3). That is not true. For the Korshak (retired by 12/31/1987) and Window (post-1987 retired before 8/23/1989), the statutes then in force had no time limit. (See pre-8/23/89 version of 5-167, 6-164.2, 8-164.1, and 11-160.1). Whatever those funds were then legally providing (having contracted for City coverage under the City's fixed-rate plan, and subsidizing the annuitant's premium, either in full for police and fire, or at $25/month for Municipal and Laborers) were and remain protected against being diminished or impaired. *Kanerva v. Weems*, op cit. at ¶ 40, 41, 54-57.

B. For post-8/22/89 hire-date participants:

As to the periods thereafter, there also remains the argument that for the two Settlement period rates, that those cannot be diminished or impaired. As well, the post-6/30/2013 period, the amounts of both healthcare provided by the City, under agreement with the Funds, as well as the Funds' subsidies, may well be protected for life, at their best amounts.

Moreover, the City's assertion that the settlement statutes were constitutionally valid in either time-delimiting their benefits (See City Brief at 6), or in declaring "that the healthcare plans should not be construed to be pension or retirement benefits within the meaning of the Pension Clause" (see City Brief at 6 n.2), is refuted by *Heaton*'s declaration that the Constitution defines what the legislature can and cannot do (*Heaton* , at ¶¶ 79-80; "the legislature cannot enact legislation in contravention of those rights and restrictions" set by the Constitution) precludes the legislature from creating a nonprotected or time limited retirement benefit of participation.

Summary and Conclusion

In a three-way agreement, the City exercised its home-rule powers and provided fixed-rate health insurance coverage, paid for or subsidized by the Pension Funds, that was, and is, a benefit

provided to participants in the City's four annuity & benefit retirement systems.

As such, it is a benefit protected by the Illinois Constitution, and without having to explicitly label the benefit as a "lifetime" benefit.

The complaint's counts under principles of contract, estoppel, or term of employment, should also be upheld as this court did some twenty-seven years ago, because there are ample writings, actions and other inducements done and issued by the City, presenting these benefits as "lifetime" benefits, upon which the City induced Participants' reasonable reliance, received their life work, and cannot justifiably permit the City to now evade its promises.

But, by this submission, we have shown not only enough to survive the City and Funds' motions to dismiss, and be permitted to proceed ahead.

We have provided a sufficient evidentiary basis to entitle the Participants, all of them, to partial summary judgment, that their entitlement to retiree healthcare under the City/Funds subsidized plan is an enforceable lifetime benefit.

The court should then proceed to certify the participant class, and determine the benefits terms to each of the retiree subclasses, defined as

1. Korshak and Window retirees on or before August 23, 1989
2. Other participants whose hire date precedes August 23, 1989
3. Participants with post 8/22/1989 hire dates.
4. Participants with hire dates July 1, 2013 or later.

Dated: September 9, 2015

Respectfully Submitted,

/s/ Clinton A. Krislov
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List of Exhibits

Under penalty of perjury, Plaintiffs' attorney certifies that the following are true and correct copies of the documents they purport to be:

Exhibit 1.....Police Fund Minutes of Special Meeting May 11, 1987 – Documenting City retaliation on healthcare after found liable for converting pension assets

Exhibit 2.....*City v. Korshak*, No. 87 CH 10134, City's original complaint

Exhibit 3.....*City v. Korshak* Counter-complaints by Funds

Exhibit 4.....*City v. Korshak* Counterclaim by Intervenors/Participants

Exhibit 5.....May 16, 1988 Transcript and Ruling, Honorable Albert Green (Dismissing City Complaint, upholding Funds' and Participants' Counter-complaints)

Exhibit 6.....“Your City of Chicago Annuitant Medical Benefits Plan”

Exhibit 7.....Police Fund Pamphlet: Your Service Retirement Benefits, effective January 1, 1986 (“The Fund pays annuitant's premium”)

Exhibit 8.....Relevant Illinois Pension Code provisions as of 8/22/1989

Exhibit 9:.....Comptroller Picur testimony

Exhibit 10.....December 15, 1989 Korshak City/Funds Settlement with Court Order approving Settlement

Exhibit 11.....*City v. Korshak*, December 12, 1989 Memorandum of Judge Green Approving City/Funds Settlement over objections of Participant classes

Exhibit 12.....June 15, 2000 Illinois Appellate Court Order restoring case to active Calendar

Exhibit 13.....August 17, 2003 Korshak 2003 Settlement and Approval Order

Exhibit 14.....City v. Korshak, Audit & Reconciliation Agreement

Exhibit 15.....Pre-Retirement Seminar Agenda Samples

Exhibit 16.....City Appropriation for Healthcare for Annuitants

Exhibit 17.....Barbara Malloy Testimony