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' Opening Brief
Merits Issues and Emergency (Action Required by December 1, 2016)
Interlocutory Appeal Re: Denial of Renewed Emergency Motion For Preliminary Injunction Preserving the Status Quo, To Enjoin City from Eliminating The City of Chicago Annuitant Medical Benefits Plan, During the Litigation

Oral Argument Requested

Clinton A. Krislov
Kenneth T. Goldstein
KRISLOV & ASSOCIATES, LTD.
20 North Wacker Drive, Suite 1300
Chicago, Illinois 60606
Tel.: 312-606-0500 Fax: 312-739-1098
Clint@krislovlaw.com; Ken@krislovlaw.com

Points and Authorities

Introductory Statement

These appeals are brought to determine participants' rights and prevent the City's termination of *protected* and *promised* lifetime healthcare coverage for the last group of City employees whose City employment did not qualify them for coverage under the federal Medicare program.

The appeals arise from the Circuit Court's partial grant and denial of the City and Funds' motions to dismiss, the Circuit Court's (1) upholding but restrictively defining, the claims asserted under the Illinois Constitution's Pension Protection Clause, dismissing Counts asserting rights under (2) Contract, (3) Estoppel, (5) Impairment of Contract, (6) Equal Protection (basing rights on retirement date rather than participation/hire date), and (7) Special Legislation (named municipality). The Circuit Court entered Rule 304(a) findings for all counts. Plaintiffs also appeal under Rule 307 the Court's denial of a preliminary injunction against the City's termination of retiree healthcare benefits on December 31, 2016.

The appeals stem from a single litigation initiated *October 19, 1987, by the City*, (*City v. Korshak*) as a "game plan"[1] retaliation to offset the City's liability in a separate case[2] for converting the tax levies belonging to the even-then underfunded retirement systems. There, the Circuit Court dismissed the City's claims, and *upheld* counterclaims by the Funds and Participants for participants' continued retiree healthcare coverage under the fixed-rate subsidized "*City of Chicago Annuitant Medical Benefits Plan*" (the "Plan"); the case was tried in June 1988 but "settled", over the participants' opposition, by an interim ten-year Agreement between the City and the Funds' trustees, committing

[1] Testimony of City Comptroller Ronald Picur, June 22,1988 at 143-4 (Third Amended Complaint ("Comp."), Ex. 9, Supplemental Record C 394 ("S.R. C_").
[2] *Ryan v. City of Chicago*, 148 Ill.App.3d 638 (1986)

the City to pay at least 55% of healthcare costs, with Pension Code amendments providing increased Fund subsidies for the interim period, and (notably for this case now) *with the explicit reservation for the participants*, "if no permanent resolution was achieved by the end of 1997", *to restore the litigation* to its original October 19, 1987 filing date status.[3]

Participants' subsequent efforts to revive and pursue their claims to their promised lifetime coverage under the *Plan* have been repeatedly resisted by the City and the Funds' trustees, but restored by the appellate court, then subsequently settled for another interim period again with-right-to-restore, *again* resisted by the City; declaring instead at the June 30, 2013 end of the last interim settlement, that, rather than negotiate another settlement, interim or permanent, it would unilaterally extend the Settlement's benefits to the end of 2013, then "phase out" and end all retiree healthcare benefits on December 31, 2016, for all annuitants, excepting only those who had retired 24 years before, by August 23, 1989.[4] [5]

The City's elimination is grossly unfair. The core participants in this case are the last group of people whose work for the City *did not* qualify them for Medicare coverage; leaving them uniquely harmed, permanently, by this City administration's determination to renege on its contract and estoppel promises to its employees. The most significant protection for them is their Constitutional protection; which *intends to* protect them from these types of policy switches, when they are retired, outside any bargaining unit, and

[3] Comp., Ex. 10, S.R. C 399 (*Korshak* 12/15/1989 Settlement) and Ex. 13, S.R. C 439 (*Korshak* 2003 Settlement).
[4] The date of passage of P.A. 86-273, the legislation amending the Pension Code for the first Korshak settlement.
[5] *See* City's May 15, 2013 letter announcing the phase-out and cut off (Supplemental Appendix 1 ("S.A._"), S.R. C 847), and October 1, 2016 letters to participants again notifying them of the termination of their coverage on December 31, 2016 (S.A. 160).

without protection except by the courts. No one disputes that these retirees were led to believe that their work for the City earned them permanent healthcare benefits and they relied on it. The dispute is whether the City and Funds can evade those promises.

Despite participants' repeated efforts since mid-2013, at the end of the last settlement, the Circuit Court has indulged the City's efforts to delay, deflect, and divide the litigation, frustrating participants' ever obtaining resolution of their claims, such that time will run out if this Court does not act to either (i) quickly resolve the purely legal issues, or (ii) grant an injunction, *pendent lite*, to preserve the 2013 or current status quo pending resolution. There is simply no time left for them to obtain a final and fair adjudication on the merits before the City terminates their coverage at year end, forcing them to find coverage elsewhere, some at truly unconscionable rates above their entire annuity, with minimal provider networks and bankrupting out-of-pocket costs.

Over decades, the City induced its employees to understand their entitlement to lifetime healthcare coverage, and obtained the benefit of their service over their lifetimes; now, in their retirement is dumping them, especially unfair to pre-4/1/86 hires, whose City work did not qualify them for coverage under the federal Medicare program.

Issues Presented for Review

I. The Merits Issues Present Clear Issues of Law On Which This Court's Review is De Novo[6].

1. Constitution: Whether, under *Kanerva v. Weems*, the City's providing the fixed-rate subsidized *City of Chicago Annuitant Medical Benefit Plan,* a benefit which is "limited to, conditioned on, and flows directly from" membership in an Illinois public

[6] *Jones v. MEABF*, 2016 IL 119618 ¶25; and *Gurba v. Community High School District No. 155*, 2015 IL 118332 ¶10.

retirement system, is protected for life, or that the Constitution's Art. XIII, Section 5 protects only those obligations explicitly required by state statutes.

2. Contract, Statute of Frauds: Whether the City's Plan Handbooks, the City's explicit appropriation for annuitant health claims, the City's Pre-Retirement Seminar communications, and other writings alleged and identified in the Complaint are sufficient writings to support annuitants' complaint to proceed under contract;

3. Estoppel: Whether the City's conducting dozens of pre-retirement seminars, and assuring employees over decades of employment that they would have permanent healthcare coverage in retirement, constitute sufficient actions by the City to support annuitants' claims under estoppel, especially for the core group of retirees whose City employment did not qualify them for coverage under the federal Medicare program. (Judge Green upheld these claims, Judge Cohen dismissed them).

4. Invalidity of Amendments to Pension Code provisions: Whether the 1989 and Subsequent Pension Code Healthcare Amendments are Invalid, Unconstitutional Provisions for one or more of the following reasons:

(i) Non-Protected Pension Benefits. Whether a statute's labelling the retiree healthcare benefits as *not* protected benefits violates the Constitution's Article XIII, Section 5 Pension Protection clause. (Judge Cohen ruled that the "not a protected benefit" clause is "unenforceable")

(ii) Special Legislation. Whether explicitly conditioning the benefit, on employment by a named city, violates Article IV, §13's prohibition on Special Legislation.

(iii) Time-Limited Pension Code benefits. Whether time-limited Pension Code amendments are, Constitutionally, invalid diminutions, or should be considered as a floor for subsequent benefits; i.e., that participants who participate or retire during those periods are protected against their termination at the end of the stated period.

And, if they are so invalid, the declaration of each participant group's enforceable rights.

5. Equal Protection: Whether, because Art. XIII §5's protected benefits are based on one's "participation" (i.e., hire date)[7], the City's discrimination among pre-8/23/89 hires, based on their retirement dates (i.e., continuing coverage only for those who retired by that date) violates Equal Protection.

6. Measuring Diminution of Benefits: In evaluating whether an Article XIII, §5 diminution of benefits has occurred, choosing the appropriate comparison between (i) what the City currently provides versus the Funds' 1983 subsidy or (ii) comparison of the benefit Participants received in 1989 (a fixed-rate fully subsidized coverage) compared with the current benefit (i.e. zero) from the City and Funds.

II. Preliminary Injunction: Whether, having upheld the participants' complaint on the Constitutional protection, the Circuit Court abused its discretion in not enjoining the City and Funds from terminating retiree healthcare benefits while the case proceeds; especially in light of the Funds' refusal to fulfill the Court's ruling that they are obligated to provide healthcare coverage to their participant annuitants.

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[7] From *Matthews v. CTA*, 2016 IL 117638 at ¶108: "we held that pension benefits provided to state employees are covered by the so-called pension protection clause when those employees first begin employment, and those benefits cannot be later unilaterally diminished or eliminated by legislative fiat. *In re Pension Reform Litigation*, 2015 IL 118585 ¶ 46 n.12.

III. Class Certification: Whether the Court erred in deferring class certification "until I have to" but proceeding to declare rights of each on a class basis.

Appellate Jurisdiction

Both appeals in this consolidated case arise from the Circuit Court's August 31, 2016 rulings:

(i) upholding (in part) the Constitutional count and dismissing the remaining counts of Petitioners-Plaintiffs-Participants' Third Amended Complaint with Rule 304(a) findings for appellate review on all claims, and staying the case pending appellate review. Appendix 7 ("A_"), No. 16-2356, R. C917, No. 16-2357, R C7 ("R_") – Appeal No. 16-2357.

(ii) under Rule 307(a)(1), from the Circuit Court's August 31, 2016 denying an injunction to preserve the current, or 2013, status quo and enjoin the City's "phase out" and termination of retiree healthcare at the end of 2016, either permanently or while the case is pending. A. 1, R. C, 902, 917, 925. Appeal No 16-2356

Petitioners filed a Notice of Appeal and Notice of Interlocutory Appeal in both cases on September 1, 2016, and an Amended Notice of Appeal in 16-2357 on September 2, 2016. A. 1, A. 7, No. 16-2356 R. C 925, and No. 16-2357 R C7. This Court consolidated the two appeals by Order entered on November 3, 2016.

Constitution and Statutes Involved

1970 Illinois Constitution:

Article XIII, Section 5-Pension Protection: "Membership in any pension or retirement system of the State, any unit of local government . . . or any agency or instrumentality thereof, shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired."

Article IV, Section 13 prohibits special or local legislation: Section 13. Special Legislation. 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.

Article I, Section 2: Due Process and Equal Protection: No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws.

Statutes

Illinois Pension Code Provisions for applicable periods are provided in S.A. 249- 294; S.R. C 349-390.

Federal Combined Omnibus Budget Reconciliation Act of 1985 ("Cobra") PL 99- 272, §13205(a). (Excluding pre-4/1/86 hires from qualification for Medicare) S.A. 295-300 (Regarding Medicare Qualifying Quarters).

Statement of Facts

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 Benefits Plan since the 1960s, 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 "Complaint" at ¶ 2.[8] (S.A. 197, R. C 3)

[8] 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), and by Officer Herbert Kordeck, who was the actual speaker at 55 to 60 of these seminars (S.R. C 678, C 719). *See* testimony at 46:5-47:20, S.R. C 725-726.

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.[9] This had a unique importance to these participants because local government employees who began their service prior to April 1, 1986 do not earn qualifying quarters for coverage under the federal Medicare program.[10]

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

Anticipating future increases in healthcare costs, the City in 1983, entered into an agreement with the Police and Firemen's' Funds to provide a subsidy to the City's funding of the healthcare benefit, under which the Funds would adopt a retiree healthcare plan for their participants, the City as the insurer would provide the health care coverage, charge $55 or $21 per month (depending on the person's Medicare qualifying status), and the Funds (authorized by the 1983 Pension Code amendments) would "subsidize" the City by paying that amount (itself funded by a City tax), 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.[11] [12] Over

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[9] 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.

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

[11] 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.

[12] As will be repeated throughout, 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.

the years, the City issued Plan Books to participants, and at least one of the 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."[13] 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 dispute that City employees came to rely on the assurance of these lifetime benefits (the Funds themselves asserting they were 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,[14] the Washington administration concocted a "game plan"[15] 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.

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[13] Police Fund Plan Handbook, Comp. Ex. 7, p.10 S.R. C 333, 342

[14] *Ryan v City of Chicago*, 148 Ill.App.3d 638 (1986).

[15] Testimony June 22, 1988 by then-City Comptroller Picur (Comp., Ex.9), S.R. C 394, C 397-398.)

When the Fund trustees refused the City's backdoor offer/request to waive the City's *Ryan* liability[16], 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,[17] asserting (what Retirees claim now) that the lifetime annuitant healthcare benefit was an enforceable contract term of employees' employment. Participants intervened, seeking enforcement of their lifetime fixed-rate, subsidized-by-their- respective- Fund, benefit.[18]

The Circuit Court (Hon. Albert Green) dismissed the City's claim, but upheld the counterclaims against the City, asserting participants' rights to permanent coverage.[19] The upheld participants' counterclaims were tried[20] 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,

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[16] Police Fund Minutes May 11, 1987 (Comp., Ex.1), S.R. C 53.
[17] Funds' Counterclaims to City (Comp. Ex. 3), S.R. C 64-180.
[18] Participants' original Korshak Counterclaims (Comp., Ex. 4) S.R. C 206.
[19] *City v Korshak*, May 16, 1988 transcript ruling by Circuit Judge Green (Comp. Ex. 5, pg. 66), S.R. C 218, C 286.
[20] 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.

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.[21] The accompanying Pension Code codifying amendments were not enacted until August 23, 1989[22], 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[23], 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).[24, 25] No resolution was reached before June 30, 2013.

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[21] Korshak Settlement, Comp. Ex. 10 at ¶ J, S.R. C 399:

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 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)

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

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

[24] 2003 Settlement ¶J (Comp., Ex. 13), S.R. C 429.

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

Nearing the 2003 Settlement's June, 30 2013 end, the City rejected participants' requests to negotiate another (permanent) resolution. The current City administration, which 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.[26]

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[27], 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[28], 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 entertained virtually every time-delaying and dividing tactic by the City, until now we are at the very end of time to challenge the City's declared termination of coverage at the end of this year.

G. The Third Amended Complaint

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[25] 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 1st152183-U, reversing Judge Cohen's dismissal of participants' motions to audit the charges in the period unilaterally extended by the City.

[26] May 15, 2013 letter (Comp. Ex. 21), S.A. 1, S.R. C 847. 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.

[27] A. 31, Judge Cohen's dismissal of *City v. Korshak* Motion to Revive and File an Amended Complaint.

[28] *Underwood v. City of Chicago*, 779 F.3d 461 (7th Cir. Ill. 2015)

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) 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[29]; 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.[30]

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

[29] Supra., Section 2. Due Process and Equal Protection, Constitution and Statutes Involved, p. 8.

[30] Supra., Section 13. Special Legislation, Constitution and Statutes Involved, p. 8.

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 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 Court issued five rulings which the City and the Funds view as freeing them 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 is pending as No. 121498.

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;
- Dismisses 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; 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.

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

H. Repeal of the ACA/Obamacare

The Court can take Judicial Notice of Donald J. Trump's November 8, 2016 election to President of the United States, his campaign's promise to repeal ACA "Obamacare," coupled with November 9, 2016, Senate Majority Leader McConnell's declaration "the Senate would move swiftly to repeal Obamacare now that the GOP Congress will have a Republican president" S.A. 301, all combine to eviscerate the City's assertion here that the retirees who are not eligible for Medicare and without City coverage would move to the market place and/or an ACA/Obamacare policy.[31] On. In short they are being dropped without out any safety net.

Argument

I. The Important Difference Between This Appeal and the Court's September 21, 2016 Decision

In contrast with the panel's September 21, 2016 Opinion, 2016 IL App (1st) 153613, A. 73 ("Opinion"), affirming denial of an injunction against the 2016 *rate increase*, this appeal deals with the City and Funds' absolute termination of retiree healthcare coverage at the end of this year.

There are also a number of errors in the Court's September 21, 2016 Opinion (issued without the benefit of oral argument) which should be considered and change the result here. The core paragraphs of that Opinion at ¶¶ 27- 29, totally ignore the Settlement Agreements' explicit restoration-to-October-1987 rights, and ignore *Kanerva*'s declaration that the Constitution's Article XIII, Section 5, protects benefits, including retiree healthcare, that are "limited to, conditioned on, and flow[s] directly from membership" in the retirement systems. *Kanerva v. Weems*, 2014 IL 115811 at ¶40.

[31] The City has continued with this argument as recently as October 25, 2015, when the City argued to the Illinois Supreme Court in response-opposition to our Motion for Rule 302(b) Direct Appeal in No. 121468 at page 13-14.

Limiting the Constitution's protection to the minimum Pension Code requirements, it ignored, as well, *Kanerva*'s far broader umbrella:

> 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. *Id.* at ¶41.

The Panel's Contract count treatment (Opinion at ¶28), of the "*City of Chicago Annuitant Medical Benefits Plan*" handbook, wrongly viewing it as necessary that a handbook of an Annuitant plan must explicitly use the term "lifetime", and in nonspecifically "refer[ing] several times to the idea that the plan will some time terminate" ignores that there was simply no explicit reservation to the City to amend or terminate this plan.

The panel's dealing with the Estoppel Claim, Count 3, ignored that 1) the City's acting as insurer (not mere "subsidizer") is an act by the City, qua-City, as is its conducting literally dozens of City-sponsored "Pre-Retirement Seminars" explicitly informing employees of this lifetime benefit, with evidence from the people who actually spoke at the Seminars[32]; 2) no one disputes that City employees were routinely told and relied on the assurance of permanent health coverage in retirement, and 3) it is patently unjust for the City to simply disavow further coverage, after decades of assuring its employees of this fixed-rate fully subsidized coverage; especially so, for people whose City work would never qualify them for Medicare coverage. The Panel's assertion that

[32] Korshak Declaration and Testimony by Officer Herbert Kordeck (Comp. Ex. 19 at 62-65, S.R. C 678 and Ex.19A, S.R. C 830) and Sgt. James McDonough (Comp. Ex. 18, S.R. C 528).

Plaintiffs had not produced "evidence from a witness who might have heard these promises" ignores both the City and Funds never disputing that City personnel routinely made such assurances[33] (there were hundreds of such statements here and in the *Korshak* Settlement proceedings, supra. Fn. 9, S.A. 302-416), as well as the testimony from the City employees (Kordeck and McDonough) who actually spoke for the City at the City-sponsored Pre-Retirement information seminars.

The fact that it was not personally made by the Mayor and a majority of the City council together at each program does not make it less an actual act of the City, sufficient to find it unjust for the City to simply now end the benefits on its whim. It was entirely this basis upon which the Third District Appellate Court enjoined the City of Streator, as equitably estopped from refusing lifetime life and health insurance benefits to qualified nonunion retirees to whom it had promised such benefits during their employment. *Dell v. City of Streator*, 193 Ill.App.3d 810 (3d Dist. 1990).

Regardless of our disagreement with most of this Court's September 21, 2016 ruling, or its ¶25 view that there is no diminution because the City's 2016 plan provides more than what retirees received under the 1983 and 1985 amendments (ignoring the Funds' *Korshak* assertion that the City had enforceably agreed to price the premiums at the Police and Fire Fund subsidy amounts), it simply cannot be disputed that, the City's and Funds' declared termination of retiree benefits altogether at year end, indisputably constitutes a diminution, and one that should not be permitted unless and until the participants have had their full and fair adjudication guaranteed in the Settlement Agreements.

[33] In response to the Court's view, we received statements from literally hundreds of retirees, attesting to both their being assured that they would have such coverage for life, and their need for healthcare coverage. S.A. 302-816

II. On the Merits of Their Claims, Participants' Claims for Permanent Protection of their Annuitant Healthcare Plan Benefits Should be Permitted to Proceed Under Constitution, Contract, and Estoppel.

Standard of Review. Interpretation of the Constitution and Statutes' validity are subject to *de novo* review with no deference to the decisions of the court below. *Jones v. Municipal Ann. & Ben. Fund of Chicago*, 2016 IL 119618 ¶26; *McElwain v. Office of the Ill. Sec. of State*, 2015 IL 117170.

A. Constitutional Protection. The Circuit Court's ruling that the Constitution's Pension Protection Clause protects only what is explicitly required by the Pension Code provisions, conflicts with *Kanerva's* declared protection of all benefits provided by a public employer that are conditioned on, limited to, and flow directly from one's status as a participant in an Illinois Public Retirement System.

Illinois law is clear:

1. **Benefits are to be determined with a presumption in favor of "pensioners";**
2. **All benefits that are provided by a public employer that are based on participation in the City's retirement systems (i.e. provided, limited to, conditioned on, and flowing from participation in an Illinois retirement system) are protected benefits of participation; not just obligations required by the Pension Code; and**
3. **Retiree Healthcare Benefits are protected benefits under the Constitution's Art. XIII, §5; thus cannot be legally diminished, reduced or impaired.**

Participants are entitled to Article XIII Section 5's protections. The protected benefits are interpreted liberally with a presumption in favor of the pensioners, not limited to the Pension Code's explicit obligations, but as the benefits the City employer provided its annuitants.

1. *Kanerva v. Weems* directs that Pension Rights under the Constitution are to be determined with a presumption in favor of "pensioners" and Benefits, that a public employer provides that are conditioned on, and flowing from, participation in an Illinois retirement system, are protected for life.

Since *Kanerva v. Weems*, 2014 IL 115811, ¶35, Illinois law has been absolutely clear that "the pension protection clause applies to an Illinois public employer's obligation to

contribute to the cost of health care benefits for employees covered by one of the state retirement systems", and precludes the employer from reducing the subsidized healthcare benefits provided to its annuitants.

Indeed, the protected benefit there provided 100% full-paid health insurance to its "former employees" (rather than "annuitants") and was not a Pension Code provision.

> **¶1** At issue in this appeal is the validity of Public Act 97-695 (eff. July 1, 2012), which amended section 10 of the State Employees Group Insurance Act of 1971 (Group Insurance Act) (5 ILCS 375/10 (West 2012)) by eliminating the statutory standards for the State's contributions to health insurance premiums for members of three of the State's retirement systems.

They were simply benefits legally provided to the State's former employees.

Consequently the "Pension Protection Clause" protects benefits beyond annuities, not just benefits required by the Pension Code; protects, and prohibits the reduction of, all benefits that a person receives that are "conditioned on, and flowing directly from a person's being a participant in an Illinois governmental retirement system", *Id.* at ¶40.[34]

The court's obligation is to construe these questions with a presumption liberally in favor of the annuitants.

Kanerva also set the framework of interpreting by directing the court to interpret pension rights *liberally* in favor of the *annuitants*:

> **¶36** Our objective when construing a constitutional provision is to determine and effectuate the common understanding of the citizens who adopted it …, and courts will look to the natural and popular meaning of the language used as it was understood when the constitution was adopted …. Where the language of a constitutional provision is unambiguous, it will be given effect without resort to other aids for construction. …. "*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.*"
> ...

[34] Per the Illinois Supreme Court's recent *Matthews v. CTA* decision (2016 IL 117638) these rights and protections thus cannot be modified except by agreement of the participant or their lawfully authorized bargaining agent (neither of which occurred here).

> ¶55 …*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*.

Kanerva, at ¶¶ 36 and 55; citations omitted, emphasis added.

2. Participants' protected benefits are thus not limited to just what the Illinois Pension Code requires. Rather, the protection against diminution applies to all benefits whose eligibility is conditioned on, and flows from, a person's being an annuitant, participant in the City's retirement systems.

Kanerva explicitly rejects the State's assertion that the Constitution's Pension Protection clause should only apply to Pension Code provisions:

> Defendants respond by asserting that State contributions to retiree health insurance premiums, which are not codified in the Pension Code and are not paid from the assets of the retirement funds established in the Pension Code, are fundamentally different from pension annuities and, therefore, are not included within the protections afforded by *article XIII, section 5*. *Kanerva*, at ¶ 37.

The Court declared the rule that Article XIII §5 protects *all benefits provided by a public employer to participants in an Illinois public pension or retirement system*, deriving from their status as retirement system participants:

> **¶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.*
>
> …
>
> ¶*41 No principle of statutory construction supports a contrary view.* Defendants contend that the reach of *article XIII, section 5*, is confined to the retirement annuity payments authorized by the Pension Code, but there is nothing in the text of the Constitution that warrants such a limitation. ….. 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.
>
> …
>
> **¶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*.

Thus, if a public employer provides a benefit for which eligibility is a person's annuitant status, that benefit is protected permanently for that participant, by the Illinois Constitution's Article XIII §5.

3. The Benefit to be protected here is the *City of Chicago Annuitant Medical Benefits Plan*, whose eligibility is conditioned on, limited to, and flows directly from one's being an annuitant of the City's four retirement funds.

The benefits we seek to enforce are the healthcare benefit plan legally provided by the City to its retiree participants in the four annuity and benefit plans; not just the

limited wording of the Pension Code provisions that the City finance the Funds' subsidies.

Per the terms of the *City of Chicago Annuitant Medical Benefits Plan*, as set out in the Plan Handbook (Comp. Ex. 6, S.R. C 292), eligibility is "limited to, conditioned on, and flows directly from membership in" one of the City's annuity and benefit funds:

> **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 you are receiving spousal annuity payments, or
> - A dependent of a deceased Annuitant if you are receiving annuity payments. (C 757, p. 2, Plan Handbook at 2).

Accordingly, the *City of Chicago Annuitant Medical Benefits Plan* has been, at all relevant times, a benefit of participants' participation in their respective Funds, which the 1970 Illinois Constitution, Article XIII §5 prohibits from being diminished or impaired. Nor was there any reservation of right by the City to amend or terminate the plan.

4. The importance of the City's role as the "provider", not merely a "subsidizer".

While the City repeatedly relabels its actions as merely "subsidizing" retiree healthcare (as if that would diminish Article XII Section 5's force against it), the City does not merely "subsidize" retiree healthcare provided by a third party health insurer. Here the city explicitly took the role of self-insured actual *provider* of the benefit. (December 23, 2015, Tr. 36:6-8; 77-79) S.A. 2, 11-21, 3613 S.R. C 4. This was thus, an action by the City, as City.

Alternatively, we show, as also asserted by the Funds in their original *Korshak* counterclaims upheld against the City, the "contract" is that the Funds fulfilled their obligations to obtain coverage for their participants by contracting with the City-*qua provider* for a fixed rate, paid for either (a) fully by the Police and Fire Funds, or (b) mostly by the Municipal and Laborers funds.[35]

5. The court's rulings below were based on its fundamentally wrong view that the Constitution's Pension Protection Clause protects only what the Pension Code explicitly requires, rather than *Kanerva*'s declared protection of the benefits a public employer provides that "flow from, are conditioned on, and limited to" a person being an annuitant of one of its Retirement Funds.

While the court below paid lip service to Constitutional interpretation, it ignored the Supreme Court's admonition that the courts are required to construe pension benefits liberally in favor of the pensioners:

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23 **THE COURT: …**

216

But I'll tell you, it's just ordinary rules of statutory construction. You look at the four corners of the statute and the contract. You look at the four corners of the contract, and you are limited by those terms as to what was given. That's just the ordinary rules of construction, whether it's a constitutional amendment provision, statutory provision or a contract.

(December 23, 2015 Tr. 215-216; S.A. 2, 56, 3613 S.R. C 4)

And squarely held that participants' protected benefits are only the provisions that the Pension Code explicitly requires, rather than the healthcare benefit provided annuitants by the City:

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[35] The City's contract with Blue Cross (Exhibit 54 in the *Korshak* trial) would be yet another writing satisfying the statute of frauds.

You're asking me to read into that that which is not there. You're asking me to do it because of Kanerva, and I understand that.

But Kanerva didn't just give carte blanche. It doesn't say that which has been given with limitations is, carte blanche, given for life. It just said that which is given is guaranteed. It's not guaranteed for life. It's guaranteed within the ambit in which it was given, and that's up to the legislature. It's not up to you, and it's not up to me. I wish it were up to me; then we'd have a real nice, platonic republic, and lots of things would be changing. But we don't have that, and I'm somewhat limited by that which is the -- by the separation of powers in that regard.

MR. KRISLOV: ….

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….

Our view of Kanerva is that Kanerva says where a public employer has granted a benefit that is conditioned on --

THE COURT: Participation.

MR. KRISLOV: -- participation in one of the retirement systems, it is a protected benefit for life. And giving it --

THE COURT: **What if the nature of that which has been given is limited? I'm giving you $5 every week for the rest of your life. Somehow, because you need more money, or because things change -- and I'm not trying to insult anybody here, believe me, I'm not -- are you trying to tell me that it should be $10 or $20 because the value of the dollar has gone down? Does it ipso facto mean that I have to give you $100 a week? Isn't it limited to that which I give?**

MR. KRISLOV: **If I'm a public employ[er], and I say here is a benefit that I will give to people who are participants in the retirement system, I will provide your healthcare -- I will provide the following benefit. I will provide, the City of Chicago --**

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THE COURT: I will give you $55 a month.

MR. KRISLOV: But that's not what I'm seeking to enforce.

THE COURT: I know. But that's what it says. I understand you're trying to go beyond that.

MR. KRISLOV: That's what the Pension Code wording says. …

What I'm saying is that by providing -- …. **the City of Chicago annuitant healthcare plan ….to people based solely on their being annuitants or participants in the plan, you're stuck with it for life. Yes.**

…..

THE COURT: Providing the tax levy is what the City did per the statute, '83 and '85.

MR. KRISLOV: Per the Pension Code statute.

THE COURT: Yeah, well, isn't that what I'm stuck with?

Id.

And, the court declaring that the City's providing annuitant healthcare benefits to annuitants does not "willy nilly" or "magically" make those benefits permanent:

225

……

And Mr. Krislov's argument notwithstanding, the Constitution protects that which was granted. It doesn't add to it. It doesn't magically create a right that was not given. The problem therein lies with the legislature if you have a beef, not with anybody else. And that was a long time ago.

So, clearly, as to the -- it seems to me, as to the post-August 23rd, 1989 group, the fourth subclass, they do not have an ascertainable claim for relief, and I need go no further.

[Regarding the *pre*-8/23/1989 hiree subclass:]

With regard to the prior groups, the 1983 and '85 [Pension Code] amendments were in effect when the Korshak subclass and the Windows subclass and subclass 3 entered into the Funds' retirement systems, as I stated.

Although Mr. Krislov and I argued about the issue, I do find, of course, that those who were participants prior to August 23rd, 1989, do have an ascertainable claim for relief. And that's what I said earlier in my December 3rd opinion.

What that claim for relief is, as I mentioned earlier, and Mr. Krislov mentioned, is going to be subject to further discussion between the parties, arguments, etcetera. **But as I have alluded to, I use rules of statutory construction, and I cannot write into a statute that which is not there, even if I want to.**

And I look at the 1983 and the 1985 [Pension Code] statutes, and much as Mr. Prendergast has as argued, they are limited. They are limited by their terms. And the ascertainable claim for relief for those three subclasses is, thus, limited thereby.

Therefore, they do have an ascertainable claim for relief, but I have to go on to see their likelihood of success on the merits as to that which is being asked of me today and is being asked of me in the complaint. That's the second element, as you may recall I said to you.

Much as Mr. Prendergast has argued, and I accept his argument, those retirees are subject to the limitations of the statute that gave them the benefit, the '83 and the '85 statute, which is clearly less than that which is being given by the 2016 enactment, or appropriation.

Therefore, I do not find that there would be a likelihood of success on the merits with regard to that which is before me today.

Id. Read fairly, the transcript demonstrates the Circuit Court's wrong interpretation as limited to what the Pension Code requires.

III. Based on the Undisputed Facts, Plaintiffs and the Classes are also Entitled to Permanent Enforcement of the *City of Chicago Annuitant Medical Benefits Plan*, Enforceable for Life also by Contract and Estoppel.

The contract and estoppel theories of Counts 2 and 3 (respectively, that the Funds complied with their Pension Code obligations by contracting with the City agreeing to

provide the coverage, and that the City had repeatedly represented that permanent coverage under the *City of Chicago Annuitant Medical Benefits Plan* was a term of one's employment) as previously asserted by the Funds themselves, recognized and upheld by Judge Green's May 1988 decision, and the repeated communications of permanent coverage to active employees, and in pre-retirement seminars, also need to be equitably enforceable without proof of each communication being from a person with authority to bind the City.[36]

A. Contract: Statute of Frauds. There are sufficient writings to support annuitants' claims under contract, and sufficient actions by the City to support annuitants' claims under estoppel. (Judge Green upheld these claims, Judge Cohen dismissed them.)

To satisfy the Frauds Act, there need only be a writing that is signed by the party to be bound by the contract. *Prodromos v. Howard Savings Bank,* 295 Ill.App.3d 470, (1st Dist. 1998). No particular form of writing is necessary. *Hartke v. Conn,* 102 Ill.App.3d 96 (3d Dist. 1981). Any kind of writing is sufficient, including notes and memoranda. *Id.* The writing may consist of several documents. *Podromos, supra; Bower v. Jones,* 978 F.2d 1004 (7th Cir. 1992). A writing may satisfy the Frauds Act even though it is not the contract itself. *Yorkville National Bank v. Schaefer,* 71 Ill.App.3d 137 (2d Dist. 1979). Letters to a third party, stating and affirming a contract, may be used against the writer as a memorandum of the contract. *Trustmark Insurance Co. v. General & Cologne Life Re of America,* 424 F.3d 542 (7th Cir. 2005).[37]

Here, 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

[36] Such an obstacle to enforcement would similarly require each City employee, police, fire, municipal or laborer, to question each directive received from a superior or dispatcher to verify the authority of each direction.
[37] IICLE, Contract Law 2016, Ch.3 Statute of Frauds, [3.2]

argument) an annuitant needed only to look at the *City of Chicago Annuitant Medical Benefits Plan* Handbook to conclude that he or she had lifetime healthcare coverage. From the City-issued handbook ("*Your City of Chicago Annuitant Medical Benefits Plan*", Comp. Ex. 6, S.R. C 292); 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 any explicit[38] 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.[39]

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[38] Such a reservation would have to be explicit and construed strictly against the City, who drafted the Handbook provisions, and chose not to insert an explicit right to terminate the Plan, nor the terms under which it could elect to terminate the Plan. *See, e.g., Linker v. Allstate Ins. Co.*, 342 Ill.App.3d 764, 779 (1st Dist. 2003). *See also, Bland v. FiatAllis N. Am. Inc.*, 401 F.3d 779 (7th Cir. 2005) and *In re Unisys Corp. Retiree Medical Benefit ERISA Lit.* 58 F.3d 896 (3d Cir. 1995).

[39] 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. These Participants need permanent coverage because their City employment does not qualify them for Medicare coverage. The overwhelming number of *pre*-August 23, 1989 hires need the City's

And, there are additional substantial writings to document the terms of the contract and its permanence: e.g., the Benefits Plan Book issued by the Mayor's office[40], coupled with explicit appropriations for annuitant healthcare by the Chicago City Council[41], plus the Pre-Retirement Seminars conducted by the City[42], 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. (Comp., Ex. 5, Korshak May 16, 1988 Transcript, S.R. C 218).

B. Estoppel: Having for decades assured employees that they were earning lifetime healthcare coverage and receiving the benefit of their lifetime work, the City cannot avoid its commitment by claiming that the City authorized speakers could not themselves legally bind the City.

While a single hearsay or rumor might not be enforceable, here there is both the allegation and evidence of repeated City-issued benefits handbooks and City-sponsored "pre-retirement seminars" conducted over a number of years, which certainly constitutes sufficient "apparent authority" to bind the City contractually or estop the City from denying the enforceability of the benefits. *See, e.g., Dell v. City of Streator,* 193 Ill.App.3d 810 (3d Dist. 1990), enforcing those promised benefits over that city's arguments that providing lifetime coverage for annuitants was either beyond its authority, or fell short of some contract requirement or formality:

---

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 age or length of service*.

[40] "*Your City of Chicago Annuitant Medical Benefits Plan*", Comp. Ex. 6, S.R. C 292.

[41] Comp. Ex. 16, S.R. C 513.

[42] Comp. Ex. 15, Pre-Retirement Seminar Agenda Samples, S.R. C 502.

The principle which controls the instant case is not the statutory provision asserted by defendant City, but rather is the doctrine of equitable estoppel: Where a contract is within the general power of a corporation but a portion of the contract exceeds the corporate powers and where the City receives a benefit, it is equitably estopped from refusing payment. The Illinois Supreme Court has stated:

> "[Municipal] corporations, as well as private corporations and natural persons, are bound by principles of common honesty and fair dealing." *McGovern v. City of Chicago* (1917), 281 Ill. 264, 284, 118 N.E. 3.

The case of *McGovern v. City of Chicago,* though more than 70 years old, is instructive of the principle. There the City of Chicago had awarded a 13 month contract to McGovern to make needed repairs to city streets, as directed by the Superintendent of Streets, and to be paid at a particular rate based on area and kind of repairs. The City Council did not make an appropriation for the full amount, and at the conclusion of the contract term, the City refused to pay for some $ 117,394 of work performed on the ground that the contract was void for want of an appropriation and for extending beyond one fiscal year. The Supreme Court of Illinois ruled that the City had the power to contract to repair its streets, that McGovern had performed in good faith, and that the City was estopped to refuse payment on the ground that it had exercised its power improperly when it had received and accepted the benefit of the contract.

Illinois courts do recognize that those contracts expressly prohibited by law are *ultra vires* and thus unenforceable. (*E.g., DeKam v. City of Streator* (1925), 316 Ill. 123, 146 N.E. 550.) However, as we have previously held, a municipality has the power to enter into employment contracts with its employees, and the irregular exercise of that power does not entitle the City to accept its employees labor without giving them the full compensation promised. *Eertmoed v. City of Pekin* (3d Dist.1980), 83 Ill.App.3d 362, 39 Ill.Dec. 351, 404 N.E.2d 942.

We also observe that rights to lifetime life and medical insurance benefits have, in effect, "vested" for those retired employees who are union members as well as for plaintiffs. To deny plaintiffs their vested rights while paying benefits to union members would be discriminatory and might raise a constitutional question concerning impairment of contract rights.

The City also argues that any agreement with non-union employees was void because there was no formal, recorded action by the City Council but rather some sort of "secret" action. Plainly it was a matter of public record that the City Council appropriated the money to

> pay insurance benefits for these plaintiffs, after their retirement and until November of 1987. That was hardly "secret" action. Also, the union collective bargaining agreement expressly provided for such lifetime retirement benefits, and it was no "secret" that non-union employees had been promised the same benefits as union employees. The record does not support the City's contention, and the trial court's finding that the City had agreed to provide non-union employees with the same benefits as union employees was not contrary to the manifest weight of the evidence. Furthermore, the evidence is more than sufficient to establish that these lifetime benefits were a part of the compensation for the work performed by these plaintiffs. The 1987 ordinance of the City Council purporting to change the benefits for retired persons will apply only to those non-union employees retiring after the effective date of that ordinance. The City was properly held estopped to refuse to pay the agreed benefits to plaintiffs. The order of the circuit court of LaSalle County is affirmed.

Dell v. City of Streator, 193 Ill.App.3d at 254. Similarly here, the City cannot, in good faith, induce its employees to understand their entitlement to lifetime healthcare coverage, accept the benefit of their service over their lifetimes, then dump them during retirement, especially for pre-4/1/86 hires, whose City work did not qualify then for Medicare. In this situation, it would indeed be unjust to permit the City to simply walk away from its promised protection for this vulnerable group.

C. Nor does *Matthews v. CTA*, 2016 IL 117638 rule out contract or estoppel enforcement here. *Matthews* simply held that where the rights arise from a Collective Bargaining Agreement, (a) the lawful bargaining agent can waive or modify them for employees still in the bargaining unit (the "Class II-Matthews" employees) (*Id*. at ¶¶ 38-44), but (b) that the union lost that authority to negotiate for people who had, by retiring, left the bargaining unit, thus vesting their rights as they existed at their retirements, holding that participants who retired during the contract period were entitled to lifetime enforcement of the benefit under those terms. (*Id*. at ¶76-89).

Applying that here would vest the terms of the benefit at one's retirement, and block the City from reducing the benefit for those who retired during the settlement periods, or the level during the City's voluntary extension of the 2003 Settlement terms through the end of 2013. Enforcing their benefit at that level (for those retirees who retired during the Settlement periods or the City's extension; i.e., retired from 8/23/1989 through December 31, 2016, with the City paying at least 55% of audited and reconciled health costs) would be enforceable for life, at reasonable rates.

Nor did *Matthews* rule out any estoppel-based enforcement, where, as here, there has been actual institutional approval by the City as such*:*

> **[*P95]** To establish a claim based on promissory estoppel, the plaintiff must allege and prove that (1) defendant made an unambiguous promise to plaintiff, (2) plaintiff relied on such promise, (3) plaintiff's reliance was expected and foreseeable by defendant, and (4) plaintiff relied on the promise to its detriment. *Newton Tractor Sales, Inc.*, 233 Ill. 2d at 51; *Quake Construction, Inc. v. American Airlines, Inc.*, 141 Ill. 2d 281, 309-10 (1990).

Different from the *Matthews* generalized assertions (essentially, little more than the fact that the benefits were provided and continued[43]), or terms different from their Agreement, [44] here even the Funds asserted that they had entered into an agreement for

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[43] *Matthews* at **¶97:** In support of his promissory estoppel claim, Williams does not point to any specific statement—either written or verbal—in which the CTA promised to continue to provide health care benefits to retirees. Rather, the factual support for Williams's claim is premised on the assertion that "the CTA began providing fully-paid retiree health care benefits in 1980, and continued to provide those benefits until 2009." Williams also alleged that "[f]rom 1980 to July 2009, the CTA acted consistent with the well-established understanding that it had an obligation under the collective bargaining agreements to pay for and provide retiree health care benefits." These allegations are insufficient, as a matter of law, to support a claim for promissory estoppel against the CTA.

[44] The Class I Matthews CTA employees Williams represented (challenging the union's authority to compromise claims for people still within the bargaining unit) were also, different from the situation here, arguing for a benefit that was different from what their

the City to provide health insurance to retirees, via written contracts with Blue Cross/HCSC, and the City's repeated assurances of lifetime coverage in literally dozens of pre-retirement and information sessions and seminars conducted by the Benefits Department over decades, in which employees were repeatedly assured that they had lifetime coverage with the City,[45] plus the fact that these are the last group of City employees whose City employment did not qualify them for coverage under the federal Medicare program – altogether justify holding the City and Funds to their promises to these retirees.

This is indeed a situation where estoppel enforcement is necessary to prevent injustice and fraud upon innocent employees, who were repeatedly assured by authorized City employees that they would have lifetime coverage, and actually do need it, because

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authorized representative had agreed to. [*Matthews*, at ¶101] In essence, Williams's promissory estoppel claim seeks to enforce a contractual obligation (implied in fact) that goes beyond the terms of the 2004 CBA. Because the CTA engaged in collective bargaining over retiree health care benefits, it is precluded under Illinois law from making "outside" promises of benefits that exceed those set forth in the relevant CBAs. … Therefore, any "promises" allegedly made to Williams and the Class I plaintiffs before the 2004 CBA expired would have constituted direct dealing in violation of the Illinois Public Labor Relations Act (5 ILCS 315/6, 7, 10(a)(4) (West 2002)).

[45] S.A. 302-816, 3613 S.R. C 329-839, is just a sampling of the overwhelming statements received from participants that they were assured of retiree healthcare coverage for life, and depended on that. For many of them, who over the decades of City employment accrued no Medicare qualifying quarters, and suffer from serious medical conditions, some life threatening, such that the City's casting them out for its convenience is inhumane.

A sample of people who are over 63, but have insufficient quarters for Medicare coverage: Donald G. Anderson-Police-Age 75, Tab 8; Albert Aguilar-Laborers-Age 65, Tab 3; Tijwana Baugh-Municipal-Age 71, Tab 14; John R. Bobko-Police-Age 66, Tab 20; Janice Byrne-Municipal-Age 67, Tab 29; Stephan Combes-Police-Age 74, Tab 41; Ethel Dockery-Municipal-Age 69, Tab 53; Alex Kasper-Municipal-Age 84, Tab 103; Randall Konop-Firemen's-Age 66, Tab 110; Geraldine Krupa-Municipal-Age 79, Tab 112; Carol J. Majeske-Police-Age 71, Tab 120; Terry L. Maderak-Police-Age 66, Tab 119; Warren Seyferlich-Police-Age 70, Tab 185; Gerald A. Weyer-Police-Age 72, Tab 209; James Zurawik,-Police,-Age 63, Tab 213; Frank Zurawski-Laborers-Age 63, 214.

they lack the federal Medicare safety net that all subsequent City workers and all private-sector workers enjoy.[46]

Thus, whether enforced under the Constitution or principles of contract or estoppel, the Circuit Court's interpretation of the protected benefits as limited, and strictly so, to the obligations contained in the Pension Code's 1983 and 1985 provisions, which explicitly impose only duties on the Funds is wrong. The City's obligation, once it provided benefits to its retiree participants, continues[47]. That is *Kanerva*. Similar to

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[46] Some participants' direct request to pay into Medicare were rejected by the City, to avoid having to incur an employers' contribution and because their lifetime City healthcare coverage meant it should not be necessary to resort to Medicare (*See*, Participant Statements at S.A. 302-816, 3613 S.R. C 329-839.

People who explicitly asked to pay into Medicare but were refused: Tab 6, Tamja Ancrum, Municipal, age 62; Tab 148, Elizabeth Olsen, Police, age 64; Tab 30, Donna Canchola, Municipal; Tab 66, Michael Engle, Municipal, age 64; Tab 165, Ralph Rhoden, Police, age 62; Tab 192, Bob Soprych, Municipal; Tab 13, Irene Battistella, Firemen's, age 62 "I do not have enough quarters. That is because I was paying into a City pension plan, instead…"; Tab 30, Donna Canchola, Municipal, Tab 39; Mary Coglianese, Laborers, "My Dad did not work enough quarters to earn Medicare but he never worried he had a pension and he would always have health care"; Tab 66, Michael Engle, Municipal; Tab 89, Juana Harper, Police, Tab 110; Randall Konop, Firemen's

Many, who were not allowed to pay into Medicare believed as these:

Tab 29: Janice Byrne, Municipal: "I believe I was promised lifetime coverage by City healthcare in my retirement… I heard it at different meetings with City reps held while on the job. I remember asking why no FICA was taken from my checks? I remember being told pension and healthcare wasn't from SS/Medicare for government workers but from the City/pension fund."

Tab 103: Alex Kasper: "When we were hired, we were told that we had defined pension and health care plans and therefore did not need SSI or Medicare. …We are now both retired and it seems like all we have been doing is fighting for something that we were promised."

Tab 8: Donald Anderson, Police, Age 75: "In our final retirement seminar by the Chicago Police Department we were all assured our healthcare would be in place and remain for our lifetime. I believe that we were assured by the Illinois State Constitution of 1970 that benefits would not be reduced or eliminated. ...Why did the city NOT withdraw funds from my pay check to complete enough quarters to cover people like me for Medicare?"

[47] There was also no reservation of right to the City to terminate or amend the plan. The Plan's language is that coverage terminates if the plan terminates (Plan Handbook at C 632), it does not mention what rights the City had to terminate the Plan (if indeed, Post-

the State's establishing its healthcare obligations by the legislature's enacting a law; the City did the same by its ordinances establishing the Plan, under which it was the insurer, providing the benefit of coverage at the rate of the Police and Fire subsidies. That is precisely what James McDonough testified to in *Korshak.*

As well, the City did, by its May 2013 declaration, voluntarily subject itself to the obligation of providing annuitant healthcare which it may not thereafter diminish for participants on that date.

D. Invalidity of Amendments to Pension Code Provisions: Whether the 1989 and subsequent Pension Code Healthcare Amendments are invalid, unconstitutional provisions for one or more of the following reasons (Leaving the 1983 and possibly 1985 Amendments as the still applicable provisions):

The 1989 and subsequent versions of the healthcare statutes all share three unconstitutional aspects.

1. Labelling Annuitant Benefits as Not Protected.

First, as actually recognized by Judge Cohen, the language in the 1985, 1989 and subsequent amendments, all purporting to create benefits that are not protected by

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Kanerva, such a right could be effective). Nonetheless, the ERISA decisions make clear that such a reservation would have to be clear and unequivocal:

2005, American Bar Association The Brief, *The Employer Giveth And Taketh Away, Retiree Health Benefits Under Erisa-Governed Health Plans*, By Helen M. Kemp, the following are examples of typical unambiguous reservation of rights provisions that courts have held negate any inference that the employer intended for *benefits* to vest:

1. "This plan can be amended at any time, without consent of the insured employees or any other person having a beneficial interest in it."
2. "The coverage described here may be amended, revoked or suspended at the Company's discretion at any time, even after your retirement."
3. "The Plan Sponsor and your employer intend to continue the Plan indefinitely. Since future changes and conditions cannot be foreseen, we do reserve the right to suspend, terminate or modify the Plan at any time when deemed to be in the best interest of the participating member firms."

The City Plan contains no such language.

the Constitution, are "unenforceable" because, per *Kanerva*, the limitation is unconstitutional. A. 2, S.R. C 831, December 3, 2015 Order at 9:

> The 1985, 1989, 1997 and 2003 amendments to the Pension Code all contained language providing that the healthcare plans were not to be construed as retirement benefits under the Pension Clause. Our supreme court has now unequivocally held that healthcare is a benefit of membership in a pension or retirement system and is protected by the Pension Clause.
>
> Defendants do not cite to any authority holding that the General. Assembly may avoid the application of the Illinois Constitution by inserting exemption language within a statute.
>
> Under Kanerva, healthcare benefits are covered by the Pension Clause. The amendments' language to the contrary is not enforceable. The General Assembly cannot erase the constitutional rights of the annuitants by statute.

2. Invalid "Special Legislation".

Second, they are all invalid "special legislation" (*Infra*. at p. 8) because, different from all the rest of the provisions in each Fund's Pension Code Articles 5, 6, 8 and 11 (which create Funds in "Cities with populations above 500,000"), the amendatory provisions provide healthcare only to annuitants "by reason of employment by" a named City: "the City of Chicago".

As applied, Article VI §13 invalidates laws whose terms explicitly limit their application to an identified locality or date[48]. Accordingly, Illinois laws (including these

[48] *People ex rel. East Side Levee and Sanitary Dist. v. Madison County Levee and Sanitary Dist.*, 54 Ill.2d 442, 447 (1973) (invalidating legislation applicable only to sanitary district meeting stated criteria on December 22, 1972); *Lee v. City of Chicago*, 31 Ill.2d 252, 255 (1964) (invalidating statute conferring a benefit upon policemen listed on a particular date's pledgibility roster). Contrast with *Lee v. Retirement Bd. of the Policemen's Assn. and Benefit Fund*, 22 Ill.App.3d 600, 606-7 (1st Dist. 1974) (upholding constitutionality of statute computing benefits for employees of cities with a population in excess of 500,000); *Gaca v. City of Chicago*, 411 Ill. 146 (1952) (obligation of City of Chicago to indemnify police, application to municipalities greater than 50,000); *Matthews v. City of Chicago*, 342 Ill. 120, 132 (1930) (population classification valid if it

four Annuity and Benefit Funds) are customarily crafted as applying to public entities, determined by defined population numbers; such as, above 500,000, or some other figure. While the conditions of applicability may exist currently only in Chicago, nonetheless the law is valid if it operates "uniformly throughout the state in all localities and on all persons in like circumstances and conditions." *Rincon v. License Appeal Comm.*, 62 Ill.App.3d 600, 605 (1st Dist. 1978) (upholding dramshop provisions applicable only in municipalities with over 500,000 population); quoting from *People ex rel. Vermilion County Cons. Dist. v. Lenover*, 413 Ill.2d 209, 217 (1969).

In contrast, P.A. 86-273 and its successor statutes (*see* S.A. 249-294, S.R. C 348-393), invalidly provide for group health benefits only for persons receiving an annuity "by reason of previous employment by the City of Chicago".[49] This is all rather strikingly highlighted by the fact that the provisions all appear within Illinois Pension Code Articles otherwise validly applicable only "in each city of more than 500,000 inhabitants." Pension Code §5-101, 6-101, 8-101 and 11-101.

3. Time-limited Pension Benefits.

Third, it has never been determined whether the creation of a time-limited retirement benefit (e.g., P.A.86-273's application through 1997) can trump the Pension Clause and end the benefit at that date, or rather, we think, serves as a floor which cannot

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applies to all that are now or may hereafter come within its terms, whether the condition currently exists in one place or many.); *Devine v. Commrs. of Cook County*, 84 Ill. 590 (1877); *Pettibone v. West Chicago Park Commrs.*, 215 Ill. 304 (1905)(invalidating law applicable only to any town "now" falling within applicable definition). With that preface, the statutes' providing group health benefits only for persons receiving an annuity "by reason of previous employment by the City of Chicago" are unquestionably invalid.

[49] New Pension Code §§5-167.5, 6-164.2, 8-164.1 and 11-160.1, all as amended by P.A. 86-273

be validly diminished or terminated, for those who were participants during its applicable period.

E. Equal Protection: Nor Can the City Legally Discriminate Among "Participants" Based on When They Retired.

Nor can the City's declared policy of providing lifetime healthcare "confined to the *Korshak* and *Window* sub-classes" [i.e., pre-8/23/89 *retirees* only], while terminating coverage for others 8/23/1989 participants who had not retired by that date, be legal either.

Under our Constitution, Participants' interests vest with their *participation* in a Fund, not just at their retirement. An employee's contractual right in his pension plan vests at the time he becomes a member of the system. *Kraus v. Board of Trustees*, 72 Ill.App.3d 833 (1979). The terms of this contractual relationship are governed by the version of the Pension Code in effect at the time the employee became a member of the system (*Di Falco v. Board of Trustees of the Firemen's Pension Fund*, 122 Ill.2d 22 (1988)), including improvements during his employment, and may not be thereafter reduced for that employee. *Buddell v. Bd. Of Trustees, SURS*, 118 Ill.2d 99, 106 (1987) (invalidating Pension Code amendment retroactively abolishing entitlement to service credit previously available, if not yet elected on enactment date.).

The City declaring its commitment to provide arguably unchanged healthcare, to those who could claim under the statutes in effect on 8/23/1989 (i.e., "not because of the 1983 or 1985 amendment, but because in 2013, the City voluntarily committed to do so for these older retirees") should actually seal its fate. Since it is "participants", not just "retirees", who are protected by the Constitutional protection of the benefits as they exist during one's participation, the City cannot pick only some subgroups of participants to

bestow benefits. In obligating itself to *any* "participants" on that date, it necessarily obligated itself to *all* participants on that date, whether active or already retired.

IV. Participants Amply Satisfy the Criteria Necessary for Preliminary Injunction to Preserve the Status Quo.

Standard of Review. Although the standard for review of an order denying interlocutory injunctive relief is usually abuse of discretion, *Mohanty v. St. John Heart Clinic, S.C.*, 225 Ill.2d 52, 62-63 (2006); and *Desnick v. Dept. of Professional Regulation* 171 Ill.2d 510, 516 (2006); where, as here, the issue is a question of law (i.e., the legal entitlement of retirees to protection of their annuitant healthcare benefits under the Constitution's Article XIII, Section 5, the "Pension Protection" clause), the standard of review is *de novo*. *Mohanty*, supra.; *Price v. Philip Morris, Inc.*, 219 Ill.2d 182, at 236 (2005) *Steinbrecher v. Steinbrecher*, 197 Ill. 2d 514, 523 (2001) (the question on appeal is limited to application of the law to undisputed facts, the standard of review is *de novo*).

The Circuit Court's denial of the requested preliminary injunction, primarily rested on its wrong view that the Constitution's Pension Protection Clause protects only what is explicitly required by the Pension Code, that the Pension Code imposes no obligations on the City or Funds, and its acceptance of the City's assertion that the mere temporary loss of one's medical coverage is not an irreparable injury, compel this Court's reversal and direction to enjoin the City from terminating coverage at the end of the year.

The most common basis for a preliminary injunction is to preserve the status quo until the merits can be decided. IICLE, Chancery and Special Remedies 2013, Chapter 4 Injunctions; hereinafter "IICLE", *citing, People ex rel. Klaeren v. Village of Lisle*, 202 Ill.2d 164 (2002) (additional citation omitted). "Status quo" is defined as the "last, actual, peaceable, uncontested status which preceded the pending controversy." IICLE,

citing Postma v. Jack Brown Buick, Inc., 157 Ill.2d 391 (1993). IICLE states, "Another expressed purpose of an interlocutory injunction is the prevention of a threatened wrong or further perpetration of injury until the merits of the case can be decided." IICLE, *citing, People v. Kerr-McGee Chemical Corp.*, 142 Ill.App.3d 1104 (2d Dist. 1986).

A. The criteria for a preliminary injunction are straightforward and are satisfied here.

The statutory provision governing preliminary injunctions is 735 ILCS 5/11-102, and the criteria for granting it are well-established. Four factors must be satisfied to issue an interlocutory injunction: (a) the plaintiff possesses a clearly ascertainable right in need of protection, (b) there is a likelihood that the plaintiff will succeed on the merits, (c) the plaintiff will suffer irreparable harm if an injunction does not issue, and (d) the plaintiff has no adequate remedy at law. IICLE, Chancery and Special Remedies 2013, Chapter Injunctions, at §4.14 *citing, Mohanty v. St. John Heart Clinic, S.C.*, 225 Ill.2d 52 (2006) (additional citations omitted).

Plaintiffs satisfy the criteria, and the additional considerations of the balance of hardships and consideration of the public interest.

Numerous courts have issued preliminary injunctions against reduction of retiree healthcare benefits during litigation, amply finding all the appropriate criteria well met.[50]

1. The participants' claim to lifetime coverage under the fixed-rate subsidized plan presents a clearly ascertainable right in need of protection.

[50] *See e.g., Green v. UPS Health and Welfare Package for Retired Employees*, 746 F.Supp.2d 921(N.D. Ill. 2009); *affirmed* 595 F.3d 734 (7th Cir. 2010); *Temme v Bemis Co.*, 2011 WL 1498584 (E.D. Wis. 2011); *Schalk v. Teledyne, Inc.*, 751 F.Supp. 1261 (W.D. Mich. 1990); *Senn v. AMCA Intern.*, 1990 WL 292476 (E.D. Wis. 1990) (Hon. Terence Evans, then-USDJ); *Cole v. ArvinMeritor, Inc.*, 516 F.Supp.2d 850 (E.D. Mich. 2005); *Golden v. Kelsey-Hayes Co.*, 845 F. Supp. 410 (E.D. Mich. 1994); *Winnett v. Caterpillar, Inc.*, 579 F.Supp.2d 1008 (M.D. Tenn. 2008); *Jansen v. Greyhound Corp.*, 692 F.Supp. 1029 (N.D. Iowa 1987).

As shown in this brief, the participants' claimed right to continued healthcare coverage for life, at fixed rates, subsidized either fully or at set dollar amounts, is a clearly ascertainable[51] right, needing protection against the City's announced increased rates, and phase-out.

Irreparable Harm/Inadequate Remedy at Law. Being forced off one's healthcare coverage and provider networks constitutes the epitome of irreparable harm for which eventual money damages are an inadequate remedy.

Plaintiffs are clearly suffering an Irreparable Harm. The Court below based its denial almost exclusively on its disagreement with Plaintiffs that participants had an enforceable right to continued coverage from the City. Neither the City, the Funds, nor the Court ever disputed that retirees are being irreparably harmed. To be sure there is no misunderstanding, S.A. 302 and 417 are spreadsheets listing the statements by hundreds of retirees, swearing to their induced reliance on explicit City assurances of lifetime healthcare coverage, their acute health conditions, and for many, their lack of qualifying quarters for Medicare coverage despite decades working for the City. *See also* 3613 S.R. 329.

The plaintiffs can show an Inadequate Remedy at Law. "The harm that the plaintiff seeks to enjoin must be expected with reasonable certainty and not merely possible." IICLE, *citing*, *Callis, Papa, Jackstadt & Halloran, P.C. v. Norfolk & Western Ry.*, 195 Ill.2d 356 (2001). "Irreparable harm" does not necessarily mean injury that is

[51] The plaintiff need only raise a fair question as to the existence of an ascertainable claim for relief. *Ford Motor Credit Co. v. Cornfield,* 395 Ill.App.3d 896 (2d Dist. 2009), *appeal denied,* 236 Ill.2d 503 (2010).

beyond repair. Sometimes "irreparable harm" means harm of a continuing nature. *Id.*, *citing, Lucas v. Peters,* 318 Ill.App.3d 1 (1st Dist. 2000) (additional citations omitted).

The assertion that a retiree's loss of healthcare coverage or benefit, even temporarily, is not irreparable harm is wrong. Losing, or having to drop one's healthcare coverage or existing provider networks constitutes irreparable harm, as the City recognized by, just before the hearing, seeking to offset that by arguably modifying its prohibition on taking back participants in the future; i.e., for a very limited time and only under very limited circumstances, and of course without having any assurance that people who sign up for coverage for the coming year with a third party would be able to simply drop it without penalty and come back. Having to forego one's health insurance coverage or provider networks, is not just about lower premiums, different deductibles and out of pocket expenditures, but also in no longer having your historic healthcare providers, doctors and hospitals (e.g., the City offered alternative and ACA Exchange choices have severely restricted networks, and exclude most of the pre-eminent Chicago-area hospital systems).

The City's arrogance on this is deplorable; asserting that it is entitled to unilaterally convert their Constitutionally protected benefits into a "means tested" welfare program, or that retirees who have not applied for means-tested capped premiums "strongly suggests that they have income above and beyond their pension annuity" is just the type of non-evidentiary cynicism that this court should reject. The City's determination to dump the retirees onto the ACA healthcare exchanges, focusing only on premium rates, while ignoring the recent revelations that individual PPO plans have been discontinued by all major carriers, leaving individual exchange purchasers dumped into

plans whose networks (i.e. the list of usable doctors and hospitals) are extremely limited, and with "out of pocket" limits of $6,000 per person, $12,000 per couple; essentially converting them into mere catastrophic policies that more resemble Medicaid than normal coverage.[52]

Compounded by the Presidential election, after which President-Elect Trump and Senate President McConnell, declared their "first priority" intention to repeal the Affordable Care Act/Obamacare[53], the City's terminating coverage at year-end, means that the retirees are being dumped into an abyss of totally unknown depth[54].

Fundamentally, retiree healthcare is not just a question of money that can be adequately compensated by a later money judgment. As important as food and shelter, healthcare coverage ensures one's ability to function and live. While the increases already some 300% over three years, had already brought a number of annuitants to the point where some annuitants already exceeds the amount of the person's monthly annuity payment! Having to forego healthcare treatment is simply not compensated by the potential for money damages down the road.

Moreover (in contrast with the City's acknowledged measure of a reasonable healthcare portion, set by the City in P.A. 82-30 at no more than 10% of one's annuity), the healthcare premiums being imposed by the Blue Cross program the City recently

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[52] http://www.nytimes.com/2016/08/20/upshot/think-your-obamacare-plan-will-be-like-employer-coverage-think-again.html?_r=0

[53] McConnell says GOP will quickly repeal Obamacare; Politico, 11/9 16, S.A. 301.

[54] This is particularly horrible for retirees who do not qualify for Medicare, because they will be forced into Medicaid or senior "risk pools" underwritten and priced for their age and health components, which by natural attrition and health deterioration, rate-spiral upward very quickly beyond anyone's affordability. See, https://en.wikipedia.org/wiki/Death_spiral_(insurance) and Forbes, John Goodman, 6/23/15 "Are-the-obamacare-exchanges-headed-toward-a-death-spiral"

obtained, but does not sponsor (S.A. 152, Prendergast Sep. 23, 2106 Letter), impose rates of $1500 to $3600 per month (dwarfing some annuitants monthly annuity) for those not qualified for Medicare coverage.

Regardless, what the City is doing now is ending coverage - period. And the Funds are not providing any coverage, or subsidy, despite even Judge Cohen's view that they are so obligated to provide coverage for their members.

Based on all the annuitant statements - the participants amply satisfy the necessary showing of irreparable harm/inadequate remedy at law. S.A. 302-816, 3613 S.R. 329-839.

2. Participants' claims to Lifetime healthcare coverage are not only likely to succeed, the court is to interpret the law presuming in their favor.

Participants' claims go well beyond their burden to raise a "fair question"[55] of their likelihood of success on the merits. While the court may conclude that different categories of participants may be entitled to different terms of coverage based on the four to six categories of hire and retirement dates, Illinois law is clear that Retiree Healthcare Benefits provided to participants in Illinois State and Local government retirement systems are constitutionally protected for life.

3. The Balance of Hardships weighs in favor of the annuitants.

The balance of equities favors annuitants, because losing their coverage and having to seek out other coverage is a horrendous harm, compared with the City's minimal cash cost (less than 1% of the City's $3 billion corporate fund budget) to delay the "phase out"/termination of the provided benefit for only the period of their promised

[55] It is only necessary that the plaintiff raise a "fair question as to" the likelihood of success on the merits. *Buzz Barton & Associates, Inc. v. Giannone,*108 Ill.2d 373 (1985), quoting *Nestor Johnson Mfg. Co. v. Goldblatt,* 371 Ill. 570 (1939).

fair and full adjudication of their claims.

Balancing the "hardships" between the City's being prevented for a few months from cutting its 2013 expenditure of $100 million and the Participants' having to find new coverage, with different doctors and sharply reduced provider networks, or to forego coverage altogether—the balance is strongly in favor of the requested injunction.

There is no unreasonable hardship to the City by having to continue providing coverage at 2013 or current levels until the matter is resolved. The City has provided this coverage continuously since long before it began this litigation in 1987. While there is certainly a cost, it is a cost the city cannot assert is unreasonable; especially since it would only be required to maintain the appropriation at the levels when this recent restoration of the litigation began.

4. The Huge Flaw in the City's RHBC Projections on which its argument is based.

Perhaps the most graphic display of the City's lack of financial hardship lies in comparing (a) the $103 million that the City has stripped to zero, from its 2013 annual retiree healthcare appropriation, to (b) the City's 1987 appropriation of $107 million for retiree healthcare (*see* Comp. ¶98, S.A. 197, 226-227; S.R. C 1A, C 30-31). In short, the City's healthcare cost has not actually increased at all since 1987[56], and will substantially

[56] That's right. No growth in that cost over 25 years. Actually, declining as a percentage of the City's budget. And, the RHBC Report (at 12-15), done without any public or retiree input, ignores that while the number of retirees in any year remains stable at about 22,000 people, the percentage who do not qualify for Medicare primary coverage (costing $750 per month) are replaced by Medicare qualified post-4/1/1986 hires (costing $270 per month). Properly analyzed, the City's Retiree Health Benefits Commission's report and conclusions are as lacking in credibility as its Chairman, former Comptroller Amer Ahmad, who currently resides in federal prison.

decrease over the projection period as non-Medicare retirees are replaced by Medicare qualified retirees at a 75% cost reduction.

In contrast, retirees, already subjected to back-breaking increases totaling 300% over a mere three years, and between 30% and 100% of their fixed annuity checks, are now being dumped off entirely. The attached participant submissions, particularly those who are not Medicare-qualified, show a level of financial and health hardships that are compelling. S.A. 302-816; 3613 S.R. C 329-839.

5. The Public Interest favors retirees.

The public interest favors an injunction; whether it is represented by the over-20,000 participants in the City's retiree healthcare program, the public's interest in having City employees know of the security of their benefits, and the importance of public bodies fulfilling their promises.

Conclusion

Accordingly, this court should reverse the decisions below and order the Circuit court to issue a preliminary injunction, enjoin the City from its "phasing out" its 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 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 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 22, 2016

By: /s/Clinton A. Krislov
Attorney for Plaintiffs,
Participants-Appellants

Clinton A. Krislov, Esq.
(clint@krislovlaw.com)
Kenneth T. Goldstein, Esq.
(ken@krislovlaw.com)
KRISLOV &ASSOCIATES, LTD.
Civic Opera Building
20 North Wacker Drive, Suite 1300
Chicago, Illinois 60606 (312) 606-0500

Certificate of Service

I, Kenneth T. Goldstein, an attorney, on oath state that on November 22, 2016, I caused three copies the foregoing **Appellate Brief** to be served on Defendant and upon the Illinois Appellate Court, at the addresses below on by with proper postage/delivery fees paid, deposited from the Civic Opera House, 20. N. Wacker Drive, properly addressed.

s/Kenneth T. Goldstein

Attorney for Plaintiffs
Clinton A. Krislov
Kenneth T. Goldstein
KRISLOV & ASSOCIATES, LTD.
20 Wacker Drive, Suite 1300
Chicago, IL 60606
(312) 606-0500

SERVICE LIST

Richard J. Prendergast
Michael T. Layden
111 W. Washington St., Suite 1100
Chicago, Illinois 60602
312-641-0881
rprendergast@rjpltd.com
mlayden@rjpltd.com

Benna Ruth Solomon
Deputy Corporation Counsel City of Chicago Department of Law, Appeals
30 N. LaSalle Street, Suite 800
Chicago, IL 60602
Phone: 312-744- 7764
benna.solomon@cityofchicago.org

Jennifer Naber
Joseph Gagliardo
Laner, Muchin
515 N. State Street, 28th Floor
Chicago, Illinois 60610
Phone: 312-494-5359
Fax: 312-467-9479
jnaber@lanermuchin.com
jgagliardo@lanermuchin.com
Counsel for The City of Chicago

Edward J. Burke
Mary Patricia Burns
Sarah A. Boeckman
Burke, Burns & Pinelli Ltd.
Three First National Plaza, Suite 4300
Chicago, IL 60602
Phone: 312-541-8600
Fax: 312-541-8603
eburke@bbp-chicago.com
mburns@bbp-chicago.com
sboeckman@bbp-chicago.com
Counsel for The Firemen's Annuity and Benefit Fund of Chicago and The Municipal Employees' and Benefit Fund of Chicago

David R. Kugler
Policemen's Annuity and Benefit Fund
221 North LaSalle Street
Suite 1626
Chicago, Illinois 60601-1203
davidkugler@comcast.net
Counsel for the Policemen's Annuity and Benefit Fund of Chicago

Cary Donham
John Kennedy
Taft Law
111 E. Wacker Drive, Suite 2800
Chicago, Illinois 60601
Phone: 312-527-4000
Fax: 312-527-4011
cdonham@taftlaw.com
jkennedy@taftlaw.com
Counsel for The Laborers' & Retirement Board Employees 'Annuity and Benefit Fund of Chicago

Certification of Compliance

I certify that this brief conforms to the requirements of Rule 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of point and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 50 pages.

s/Kenneth T. Goldstein

Clinton A. Krislov
Kenneth T. Goldstein
KRISLOV & ASSOCIATES, LTD.
20 Wacker Drive, Suite 1300
Chicago, IL 60606
(312) 606-0500