UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

RONALD D. MELL, SR., et al,	:	**Case No. 1:08-cv-00715**
Plaintiffs,	:	**Judge Spiegel**
v.	:	
CITY OF CINCINNATI., et al.,	:	**CITY DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**
Defendants.	:	

The City of Cincinnati and the individually named City officials ("the City") move for summary judgment under Rule 56. The grounds for this motion are set forth in the attached memorandum. In addition, this motion is supported by the pleadings, depositions, and accompanying exhibits. The depositions referenced are filed in the Plaintiffs' Appendix and the Wellpoint Appendix, or are attached to this Motion.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. Introduction

This is a case originally filed in the Hamilton County Court of Common Pleas. The case arises out of the demutualization of the Anthem Insurance Company, the insurance carrier for the City of Cincinnati. In the fall of 2001, the Indiana Insurance Commissioner approved the demutualization of Anthem. In early 2002, the City received its membership distribution of approximately 870,000 shares of the new stock insurance company. The City promptly disposed of its shares on the public market. The total amount the City received was approximately $55 million. Over the next seven years, the City used the Anthem funds on various City projects.

Now, plaintiffs in this case propose to undo the $55 million dollar fund seven years after the City has spent it. As set forth in this memorandum, the City is immune for any tort claim asserted regarding the funds. As discovery has made clear, plaintiffs believe the City was directed by City Council to wrongfully detain the funds from the plaintiffs. Under Ohio law, tort claims against the City (and its officials) are barred after two years (R.C. 2744.04). If this court determines that Ohio's political subdivision tort immunity provisions do not apply, then the claims are barred by the four- year statute of limitations in R.C. 2305.09. Finally, under Indiana and Ohio insurance and contract law, plaintiffs' substantive insurance claims fail as a matter of law.

In addition to this memorandum, the motion is supported by the filed depositions of the Plaintiffs and City Risk Manager Charles Haas, City Finance Director William Moeller, and City Manager Timothy Riordan.[1]

Based on the undisputed facts and application of Indiana and Ohio law, the City is entitled to summary judgment.

II. Facts

Plaintiffs are two former city employees and the estate of a spouse of a deceased city employee. Plaintiffs claim entitlement to the $55 million dollar Anthem proceeds. Plaintiffs seek to represent a class consisting of "individuals who were named as insured persons covered under the Group Policy, or who were members of a named group of insured persons covered under the Group Policy during the relevant period of time."[2]

The Plaintiff's basic theory of the case is that the employees and retirees are the "named insureds" entitled to the fund created when Anthem Insurance converted from a mutual insurance company to a stock insurance company.[3] This court should conclude that the City was the policyholder entitled to its membership share when Anthem converted from an Indiana mutual insurance company to an Indiana stock insurance company under Indiana law. The undisputed factual record adopted by both the Indiana and Ohio insurance regulators supports this conclusion.

[1] Depositions other than the plaintiffs in this case were taken in the previous Ohio state court case, Case No. A0611097 filed in the Hamilton County Court of Common Pleas. Referenced Exhibits are included in Attachment 1. The Deposition of Charles Haas was filed by the Plaintiffs. William Moeller's deposition is Attachment 2. Excerpts from Timothy Riordan are in Attachment 3.
[2] Complaint at ¶2.
[3] *Id.* at ¶21-24.

A brief history of the City's insurance experience is outlined in the deposition of the City's risk manager, Charles Haas. Mr. Haas testified that the City was (and is) primarily self-insured.[4] The City did have fully insured products from Anthem, including an HMP plan, a dental plan, and a human organ transplant (HOT) coverage provided to eligible city employees and retirees. The total amount of premium paid by employees for fully insured products amounted to less than 5% of the total paid to Anthem by the City between 1990-2000.[5] In fact, for many of the years covered by the Anthem demutualization, the City employees paid no premium or fee for the health benefits purchased by the City.[6] In this case, it is uncertain whether the putative class representatives paid any premium at all, yet they claim entitlement to the entire amount received by the City.

The City was advised that Anthem was converting to a stock company in late 2001.[7] The City administration, including the acting city manager (Tim Riordan), the finance director (William Moeller) and its risk manager (Chuck Haas) were involved when the City was first informed of the demutualization. The City quickly retained outside counsel to review the process and determine how the City could use the funds.[8] The City relied on the legal opinion provided by outside counsel.[9]

Based on the Indiana Insurance Commissioner's Order, the independent legal opinion, and its contracts with Anthem,[10] the City concluded it was entitled to its

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[4] Haas Deposition at p. 56-58. Plaintiff's Appendix, Attachment 3.
[5] Haas Deposition, Exhibit 74.
[6] Id. at p. 239.
[7] Deposition of Timothy Riordan, p. 33-34.
[8] Id. at p. 51.
[9] Deposition of Charles Hass, p. 221-222.
[10] Id. at p. 67-68.

membership share. The City administration recommended that the proceeds be used for health care costs.[11] City Council, acting as the legislative body for the City, decided to invest the proceeds in neighborhood projects.[12] The decision was made final by a City Council motion passed on March 6, 2002.[13]

The entire process was reported in the Cincinnati media.[14] City Council spent the funds on a variety of neighborhood projects throughout the City.[15] For example, instead of shutting down firehouses in the 2004, the City used Anthem funds to keep its neighborhood firehouses open.[16]

III. Law and Argument

A. The tort claims against the City are barred by sovereign immunity.

1. The City of Cincinnati is immune from tort liability under R.C. 2744

The plaintiffs have asserted four tort claims against the City: 1) conversion[17], 2) breach of fiduciary duty, [18] 3) breach of agency duties[19] and 4) fraud.[20] In this case, the City, its mayor, and its City Council members were engaged in a legislative act when they decided to use the Anthem funds as reflected in the legislative record.[21] A

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[11] Id. at p. 125. Deposition of William Moeller at p. 68.
[12] Id. at p. 126.
[13] Deposition of William Moeller, at p. 97-98. Exhibit 86.
[14] Complaint at ¶168.
[15] Deposition of William Moeller, p. 83-89, Exhibit 83-84.
[16] Id. at p. 84, 85.
[17] Complaint at ¶265-267.
[18] Id. at ¶209-218; 275-286.
[19] Id at ¶302-307.
[20] Id. at ¶308-316.
[21] Deposition of Timothy Riordan, p. 60-62, Exhibit 59. Deposition of William Moeller, p. 97. Exhibit 86.

comprehensive list of how the Anthem fund were spent is set forth in William Moeller's deposition, Exhibit 84.[22]

Chapter 2744 of the Ohio Revised Code creates a three-tiered analysis to determine whether a political subdivision is subject to tort liability.[23] First, a political subdivision is generally immune from liability when performing a governmental or proprietary function.[24] This grant of immunity, while broad, is not absolute. The second tier in the immunity analysis is to determine whether any of the five exceptions described in R.C. 2744.02(B) apply. The five exceptions are: (1) negligent operation of a motor vehicle when the employee is in the scope of employment, (2) negligent performance of proprietary functions, (3) negligent failure to keep roads in good repair, (4) negligence in allowing physical defects to exist on buildings used in connection with governmental functions, and (5) when liability is expressly imposed upon the political subdivision by statute.[25] If an exception to immunity applies, then R.C. 2744.03 must be analyzed to determine if there are applicable defenses that will reinstate immunity to the political subdivision.[26]

The Complaint names the City's mayor and City Council members in their role as legislators who determined the use of the Anthem funds.[27] The plaintiffs cannot articulate a reason why these City leaders are named. Plaintiffs presumably disagree with the legislative decision to use the money on City improvements instead of

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[22] Id. Exhibit 84.
[23] *Colbert v. City of Cleveland*, 99 Ohio St.3d 215, 216, 790 N.E.2d 781, 783 (2003).
[24] R.C. 2744.02(A)(1); *Colbert*, 99 Ohio St.3d at 216, 790 N.E.2d at 783.
[25] R.C. 2744.02(B)(1) – (5).
[26] *Colbert*, 99 Ohio St.3d at 216, 790 N.E.2d at 783.
[27] Complaint at ¶ 14, 15, 166-170.

distributing it to the employees whose health insurance was purchased by City taxpayers.

Revised Code Chapter 2744 designates certain activities of political subdivisions and its employees as "governmental functions." The actions of the City, its mayor, and council members are governmental functions specified in R.C. 2744.01(C)(2)(f) & (i). Specifically, the Revised Code provides immunity for "Judicial, quasi-judicial, prosecutorial, legislative, and quasi-legislative functions"[28] and "the enforcement or non-performance of any law."[29] More broadly, the Code defines a "governmental function" as "a function that is imposed upon the state as an obligation of sovereignty and that is performed a political subdivision voluntarily or pursuant to legislative requirement."

Here, the allegation against the City and its officials is that the City failed to perform a law or laws, specifically, R.C. 3913.20(B), 3913.22(A) and 3913.22(C).[30] This alleged failure to follow Ohio insurance law forms the basis of all claims against the City.[31] This failure to comply with state law is the basis of the tort claims that are barred by Ohio's sovereign immunity provisions. The decision to invest the money in neighborhood funds (as opposed to employee benefits) was a City Council decision.

In order to prove a conversion claim, a plaintiff must prove the following three elements: 1) plaintiff's actual or constructive possession or immediate right to possession of the property; 2) defendant's wrongful interference with plaintiff's rights;

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[28] R.C. 2744.01(C)(2)(f).
[29] R.C. 2744.01(C)(2)(i).
[30] Complaint at ¶105.
[31] Id. at ¶26-33.

and 3) damages.[32] Ohio courts have observed that conversion is an intentional tort.[33] Plaintiffs' conversion claim depends on plaintiffs' interpretation of Ohio's demutualization law. Even if their interpretation is correct (it is not), the conversion count is barred by the immunity afforded by R.C. 2744.

The Hamilton County Court of Appeals has concluded that intentional torts are covered by the immunity protections extended to political subdivisions. In *Engleman v. Cincinnati Board of Education*[34] the court stated: "if an employee acts under the authority of law or exercises an essential function of the political subdivision, but acts so as to commit an intentional tort, the subdivision is immune from liability. . ." Importantly, the case involved a claim by an employee for an alleged intentional tort. The First District specifically rejected the contention that 2744.09 removed the protections against civil liability in cases involving employees alleging an intentional tort.[35]

The claim for breach of fiduciary duty against the City and its officials fails for the same reasons. As the Seventh District Court of appeals has observed: "An action for a breach of fiduciary duties is a civil action for damages caused by an act or omission of the political subdivision."[36] Because such a claim is a tort claim, any such claim is

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[32] *Allied Erecting & Dismantling Co., Inc. v. Youngstown,* 151 Ohio App.3d 16, 2002-Ohio-5179, ¶ 76.
[33] *Geiger v. King,* 158 Ohio App.3d 288, 2004-Ohio-4227, at ¶ 8; *Schafer v. RMS Realty* (2000), 138 Ohio App.3d 244, 301-302;
[34] 2001 WL 705575 (Ohio App. 1 Dist.).
[35] Id. at *5.
[36] *Walker v. Jefferson County* (Ohio App. 7 dist.) 2003-Ohio-3490.

barred by Chapter 2744. The same immunity provisions that apply to the intentional tort of conversion bar the tort of breach of fiduciary duty.[37]

The claim of an agency relationship likewise must fail because of immunity. Plaintiffs generally allege that the City breached its duties as an "agent" for the members of the class. The source of the agency appears to be the same alleged duty set forth in the fiduciary duty count.[38]

An agent is one who acts for or in the place of another by authority from the other. An agent stands in the shoes of the principal.[39] An "agency relationship" is a consensual fiduciary relationship between two persons where the agent has the power to bind the principal by his or her actions, and the principal has the right to control the actions of the agent.[40] "Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other to so act." Restatement of Law 2d, Agency (1958). The agency claim for relief is nothing more than a recasting of the claimed breach of fiduciary duty count. That is, the claim appears to be that the City was acting as the insurance agent for its employees. First, there was no such relationship. The employees had no control over who or how the City purchased health insurance. Second, any claim for a breach of an agent's duty is a tort claim. As such, the breach of agency agreement claim is also barred by the immunity protections of R.C. 2744.

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[37] Id. at ¶46.
[38] Complaint at ¶303-307.
[39] *American Financial Corp. v. Fireman's Fund Ins. Co.,* 15 Ohio St.2d 171, 44 Ohio Op.2d 147, 239 N.E.2d 33 (1968).
[40] *Evans v. Ohio State Univ.,* 112 Ohio App.3d 724, 680 N.E.2d 161, (10th Dist. Franklin County 1996), *appeal not allowed,* 77 Ohio St.3d 1494, 673 N.E.2d 149 (1996).

Ohio cases have determined that the employer's agency is limited to an express written agreement or upon the intention of the parties as indicated by their conduct.[41] The plaintiffs in this case can't point to any contract which specifies that the City is the employees' agent for the purpose of demutualization proceeds. Nor did any of the plaintiffs conduct themselves in such a way that they had any expectation whatsoever of receiving the proceeds.[42]

The final count against the City (Count 17) is for fraud or concealment. The plaintiffs do not contend the City made a false statement, but rather that the City relied on materially false factual representations by the Anthem defendants to the City.[43] The claim against the City is that somehow the City concealed from the putative class the alleged entitlement to the insurance proceeds.[44]

In Ohio, to demonstrate a fraud claim, the plaintiff must show:

> a) a representation or, where there is a duty to disclose, a concealment of fact, (b) which is material to the transaction at hand, (c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (d) with the intent of misleading another into relying upon it, (e) justifiable reliance upon the representation or concealment, and (f) an injury proximately caused by the reliance.[45]

It is hard to imagine a more public process than the one the City engaged in when it received the Anthem proceeds. The entire process of receipt of the proceeds and the use of the money for City projects was publicized not just in City Council hearings,

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[41] *See, e.g. Spuhler v. Industrial Rayon Corp*. 10 Ohio Supp. 51 (Ohio Com. Pl. 1939).
[42] See Depositions of Cluadette Schenck, p. 87; Robert Espel, p. 73-75; and James Matacia at p. 73-75.
[43] Complaint at ¶310-313.
[44] Id. at ¶309.
[45] *Graham v. American Cyanamid Co.*, 350 F.3d 496, 507 (6th Cir. 2003).

budgets, and debates, but also widely reported in the press.[46] The proceeds were publicly allocated by March of 2002.[47] The City was not concealing anything. Based on the demutualization plan and its approval by the Indiana insurance department, the City received its shares of the proceeds. This was all publicly done with an extensive administrative process in Indiana. The City relied on the administrative determination and properly received the funds. Moreover, the City investigated the use of the funds, and obtained a legal opinion regarding how to use the funds. All of this was disclosed publicly, including in City Council proceedings. Of course, the plaintiffs themselves concede that they weren't even paying attention at the time,[48] so they could not have been relying on anything the City stated or allegedly concealed.

2. The mayor and city council members have legislative immunity.

R.C. 2744 provides immunity from tort liability to employees of a political subdivision unless the acts or omissions were committed with malicious purpose, in bad faith, or in a wanton or reckless manner.[49] As to all legislative duties, the Revised Code codifies long-standing Ohio law regarding legislative immunity for city council members. Legislative immunity is a common law immunity and is not constrained by the codified version of immunity in Chapter 2744.

In *Hicksville v. Blakeslee*[50] the Ohio Supreme Court observed: "That legislative officers are not liable personally for their legislative acts is so elementary, so fundamentally sound, and has been so universally accepted, that but few cases can be

[46] See, Complaint at ¶166-176. Deposition of Tim Riordan, p. 55-60.
[47] Id.
[48] See Depositions of Schenck,p. 87 Espel, p.73-75 and Matacia at p. 73-75.
[49] R.C. 2744.03(A)(6)(b).
[50] (1921), 103 Ohio St. 508, 517-518.

found where the doctrine has been questioned and judicially declared." The syllabus in *Hicksville* provides: "The members of a municipal council, when acting in good faith, are exempt from individual liability for the exercise of their legislative discretion in voting, as such members of council, for or against any proposed legislation before them for consideration."[51] Moreover, this legislative immunity is a common law immunity[52] that provides a defense to the City not limited by Chapter 2744.[53] To the extent the plaintiff's theory relies on the allegation that the City council members acted tortiously,[54] Plaintiff's tort claims against the City and its officials are barred by legislative immunity.

B. Plaintiff's tort claims against the City are time barred under both R.C. 2744.04 and R.C. 2305.09.

Tort claims against Ohio political subdivisions such as the City are governed by the two-year statute of limitations found in R.C. 2744.04. The statute is a special statute of limitations that prevails over the general statute (R.C. 2305.09) that would otherwise apply to the tort claims.[55] In this case, the City received the stock in late 2001 and disposed of it in early 2002. All of the operative facts and law have remained unchanged since 2002.

Under 2744.04, the Plaintiffs, or some other similarly situated individual, should have brought this action by March 2004, at the latest. Even applying the four-year statute in R.C. 2305.09, the action should have been filed by March 2006. Plaintiff's

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[51] Id. at Syllabus.
[52] *Bigelow v. Brumley* (1941) 138 Ohio St. 574, 37 N.E.2d 584
[53] R.C. 2744.03(A)(7).
[54] See, Complaint at ¶14 & 15.
[55] *See, e.g. Fifth Third Bank v. Cope* (Ohio App. 12 Dist. 2005) 162 Ohio App. 3d. 838, 851.

Complaint was filed in this Court on October 15, 2008. Pursuant to either statute, the plaintiffs' tort claims, and that of the entire class, are time barred.

C. Plaintiffs Contract Claims Against the City Fail as a Matter of both Indiana and Ohio law

The City hereby incorporates those portions of the Wellpoint defendants Motion for Summary Judgment directed at the substantive insurance law claims in this case. The City adds the following to supplement the arguments presented by the Anthem defendants.

1. The Plaintiffs Third Party Beneficiary Claim Against the City fails because the City was the member of CMIC and Anthem under its Group Policy and the Guaranty Policy issued to the City.

Plaintiffs' contract claims against the City rely on two documents: 1) The City's Group Policy with Anthem or its predecessor; and 2) The Guarantee policy issued to the City.[56]

All of plaintiffs' contract and third beneficiary allegations rely on the false assumption that the City employee or retiree was the owner or member, not the City. But, the documents are to the contrary.

To prevail on a third party beneficiary claim, the third party must be entitled to the benefit claimed. Ohio law dictates that a third party to a contract can only enforce a promise made in the contract.[57] Ohio courts have applied the rule to limit a third party's rights to those set forth in the contract.[58] Ohio case law also dictates that a contract be read to achieve its intended purpose. In construing contract language, the principal goal

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[56] Chuck Haas Deposition, p. 178-182; Exhibit 24. Guarantee Policy attached to Complaint as Exhibit S.
[57] *Union Savings & Loan Co. v. Cook* (1933) 127 Ohio St. 26, 186 N.E. 728 at Syllabus.
[58] *Ohio Savings Bank v. H.L. Vokes Company* (Ohio App. 8 Dist. 1989) 54 Ohio App.3d 68, 71 560 N.E.2d 1328, 1331.

is to give effect to the intent of the parties.[59] The parties' intent is presumed to reside in the language they have employed in the written agreement.[60]

The "Group Guaranty Health Policy" plaintiffs rely on specifically designates who the member is for purposes of a conversion under Indiana law. The guarantee policy provides:

> As long as this Policy is in effect, the Associated Member shall be entitled to all of the rights of membership in Associated accorded to members of a mutual insurance company under Indiana law, including . . . equity rights in the event of liquidation, merger, consolidation, or demutualization as provided in Associated's Articles of Incorporation from time to time in effect. Such equity rights . . . shall accrue solely to the Associated Member. ***No enrollee or dependent of an enrollee shall receive any equity rights by virtue of being an enrollee or dependent of an enrollee***.[61]

The contract the plaintiffs rely on specifically designates the "Associated Member" and not "enrollees" as the member designated to receive equity rights in the event of demutualization. This is the clearest expression of the parties' intent and specifically excludes the benefit the plaintiffs claim: equity rights in a demutualization. The employees and their dependents are specifically defined as enrollees in the guaranty contract.[62] Only members had equity rights in a demutualization. The City received its equity rights as a member and owner of the contract. The plaintiffs did not.

It is a fundamental rule of contract construction that specific terms prevail over general terms in a contract. Here, the plaintiffs claim a third party beneficiary status to

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[59] See *Skivolocki v. East Ohio Gas Co.* (1974), 38 Ohio St.2d 244, 313 N.E.2d 374, syllabus

[60] *Kelly v. Medical Life Ins. Co.* (1987), 31 Ohio St.3d 130, 509 N.E.2d 411, paragraph one of syllabus

[61] Wellpoint Appx. Tab 1, (Umstead Decl.), Ex.B. Deposition of Charles Haas, p. 178-182, Exhibit 24.

[62] Id.

a contract. But, the contract specifically denies the benefit they seek. As such, plaintiff's claim as a third party beneficiary fails because of the plain language of the contract.

2. Any contract theory against the City must fail because the City was the member when Anthem converted.

The plaintiffs various contract theories against both the City and Wellpoint depends on a collateral attack on the entire Indiana Insurance Commission proceeding. The facts and law regarding the status of the City as member and the demutualization approval are set forth in the Wellpoint brief.

Ohio law provides for specific adoption of a statute of limitations from another state.[63] As an initial matter, this case is time barred under both Ohio and Indiana law. And, the plaintiffs failed to exhaust their administrative remedy in Indiana.[64] The entire Indiana proceeding was reviewed and approved by the Ohio department of Insurance.[65] Plaintiffs' complaint is thus barred by both the statute of limitations and the doctrine of exhaustion of administrative remedies.

Indiana law controlled the demutualization proceeding in Indiana. The City of Cincinnati was an eligible statutory member under Indiana law and received compensation in the demutualization. As detailed in the Wellpoint brief, the City was the member of Anthem in Indiana by virtue of its original membership in CMIC, which membership was continued in the merged Associated mutual insurance company.[66]

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[63] R.C. 2305.03(B). Indiana's statute of Limitations for a challenge to and administrative determination is 30 days (Indiana Code 27-15-15-1 and 27-15-15-2).
[64] See, e.g. *Advantage Home Health Care, Inc. v. Indiana State Dep't of Health,* 829 N.E.2d 499, 503 (Ind. 2005).
[65] *See,* Wellpoint Motion for Summary Judgment, p. 6-7.
[66] See, Wellpoint Defendants' Motion for Summary Judgment, "Undisputed Facts."

The Indiana Insurance Commissioner determined *"[i]ndividual certificate holders under group Policies issued to groups by Anthem Insurance's Kentucky, Ohio and Connecticut subsidiaries prior to its mergers with those former mutual companies are not Statutory Members (the group policyholders are Statutory Members)."* (Demutualization Order, Findings of Fact, ¶ 26, p. 7).[67] Plaintiffs had an administrative appeal in Indiana that they failed to exhaust. Plaintiffs'case is a belated collateral attack on the Indiana administrative proceeding, which this court should not allow.

3. Under Ohio law, the City is the "owner" of the policy, and the Plaintiffs are not entitled to any shares under Ohio law.

Even if Ohio law somehow applies, the plaintiffs are not the owners of the group policy. The City was the owner paying premium to insure its risk. The Plaintiffs rely on the Ohio Revised Code, specifically, R.C. 3913. 20(B) and R.C. 3913.22(A) and (C). The Plaintiffs seek to rely on the Ohio Revised Code provisions, despite their inapplicability to an Indiana proceeding. But, even if the company had converted in Ohio, the result would have been the same: the City as the owner of the policy would have received the stock, not the retirees.

The Ohio Revised Code creates a comprehensive administrative process for demutualization in Ohio. As in Indiana, the process results in a final appealable administrative determination.[68] Again, the plaintiffs did not exhaust the available administrative remedy in Indiana, which mirrors Ohio's. But, even in Ohio, the City would have received the stock as the owner of the policy. Because this is true under Ohio law, plaintiffs' substantive claims fail as a matter of law.

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[67] Wellpoint Appx. Tab 5, Ex. C.
[68] R.C. 3913.21(F), R.C. 33913.23.

Ohio Revised Code 3913.22(C) provides:

> Shares shall be issued to the owner or owners of a mutual policy in force on the date of the examination conducted pursuant to division (C) of section 3913.21 of the Revised Code, as such owner or owners appear on the face of the policy. If ownership of a policy has been assigned by a writing absolute on its face to an assignee other than the mutual company, and such assignment is in effect and on file at the principal office of the new corporation on the date shares are issued the assignee shall be deemed the owner of the policy.[69]

Assuming, as Plaintiffs do in their Complaint, that R.C. 3913 applies to the Indiana demutualization process through the Ohio group policy, the "owner" entitled to a share distribution is the City. If there had been a distribution under the Ohio procedure the only entitlement to a *pro rata* share of converted stock is based on the amount of premium paid by the policyholder. In this case, the City was the premium payer. The plaintiffs do not allege they were responsible for the payment of any premium. Nor can the plaintiffs show any contract or policy that identifies the retiree as the "owner" as it appears "on the face of the policy."[70]

The only reported Ohio cases that deal with this topic support this plain application of the Ohio demutualization statute. The courts in both *Greathouse v. E.Liverpool*[71] and *State of Ohio ex rel. Teamsters Local Union No. 637 v. City of Marietta*[72] conclude that the City that bought the Anthem policy is the entity that qualifies as the owner for the distribution of the stock. The Plaintiffs cannot prevail on their interpretation of Ohio law to escape the plain language of the statute.

The plain language of the statute confers converted stock on the owner of the policy. R.C. 3913.22(C) provides that the owner receives the stock shares. This court

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[69] R.C. 3913.22(C)
[70] *Id.*
[71] 159 Ohio App.3d 251, 823 N.E.2d 539
[72] 2005-Ohio-7108, 2005 WL 3642030

does not need to resort to statutory interpretation to reach a contrary result. In Ohio, "[w]here the language of a statute is plain and unambiguous and conveys a clear and definite meaning there is no occasion for resorting to rules of statutory interpretation. An unambiguous statute is to be applied, not interpreted."[73] There is no ambiguity in R.C. 3913.22(C).

Discovery in the Ohio state case demonstrates that the employees and retirees typically had no obligation to pay any premium.[74] At the most, they paid a tiny portion of the cost that was otherwise paid by City taxpayers. Now, they seek a judgment to be paid by the very taxpayers who continue to provide an excellent and nearly free menu of health benefits to its workers and retirees. As a matter of logic, the employees and retirees should not be able to reap the benefit of the return to the taxpayers of the money paid by the taxpayers to provide health benefits to municipal workers.

Moreover, as to each of the plaintiffs' claims, the defense of laches applies. In this case the plaintiffs could have enjoined the City by participating in the original taxpayer action[75] or by filing a claim as taxpayers themselves. Under the Revised Code, an action to enjoin a municipal contract must be filed within one year.[76] In this case, any claim for relief is barred by laches, especially given the one-year statute to enjoin the distribution to the City under the Anthem contract and demutualization.

The City has now spent the entire amount of the Anthem proceeds in the seven years since the demutualization. The prejudice to the City in today's economy is self-evident. The Plaintiffs expect to collect over $55 million from the City while the City is

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[73] *Sears v. Weimer* (1944), 143 Ohio St. 312, paragraph five of the syllabus.
[74] Deposition of Charles Haas, p. 239, Exhibit 74.
[75] Complaint at ¶173-176. Case No. C030749, 2004-Ohio-3501
[76] R.C. 733.60.

in the process of the most challenging budget in memory. To do so would be to cause many of the problems the Anthem funds were used for: to cure housing deficiencies, prevent closure of firehouses, build recreations center, etc.

IV. Conclusion

Plaintiffs' tort claims against the City and its officials are barred by Chapter 2744 of the Ohio Revised Code. Legislative Immunity bars all claims against the City officials including the Mayor and the council members. There is simply no basis for the City Officials to be included as defendants in this case. Each of the Plaintiffs' tort claims are barred by the applicable statute of limitations.

Substantive Ohio and Indiana contract and insurance law bar the plaintiffs claim to entitlement of the $55 million Anthem proceeds. The City was the eligible statutory member entitled to receive the proceeds of the Anthem demutualization. There is no contract to the contrary nor is there any contract requiring the City to distribute the proceeds to the plaintiffs. The City respectfully requests the Court issue an order granting summary judgment to the City dismissing all of the claims against the City.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 29th Day of September, 2009, a copy of the foregoing was filed in the Court's CM/ECF system, which will serve notification on all counsel of record.

/s/ Terrance A. Nestor__
Terrance A. Nestor