

Nos. A10-1244 and A10-1331

State of Minnesota
In Court of Appeals

City of Minneapolis, a municipal corporation,
Respondent,

vs.

Minneapolis Police Relief Association and
Minneapolis Firefighters Relief Association,
Appellants.

**BRIEF AND ADDENDUM OF AMICI CURIAE
ALLEN BERRYMAN AND RONALD KASTNER**

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LEGAL ISSUES

I. Whether Respondent is Judicially Estopped from Seeking Recoupment

Authorities: *State v. Pendleton*, 706 N.W.2d 500 (Minn. 2005); *State v. Profit*, 591 N.W.2d 451 (Minn. 1999); *Modrow v. JP Foodservice, Inc.*, 656 N.W.2d 389 (Minn. 2003); *Vaske v. Lonneman*, 2000 WL 760438; *Brach v. Moen*, 35 F.2d 475 (8th Cir. 1929)

II. Whether Constitutional and Minnesota Statutory Law Preclude Recoupment

Authorities: Minn. Stat. §555.11; *Yanke v. City of Delano*, 393 F. Supp. 2d 874 (D. Minn. 2005); *McCullum v. State*, 640 N.W.2d 610 (Minn. 2002); *Women of State of Minnesota by Doe v. Gomez*, 542 N.W.2d 17 (Minn. 1995); *Official Committee of Unsecured Creditors of LTV Aerospace & Defense Co. v. Official Committee of Unsecured Creditors of LTV Steel Co.*, 988 F.2d 322 (2d Cir. 1993); *In re Chateaugay Corp.*, 988 F.2d 322 (2d Cir. 1993); *In re Pan Am Corp.*, 1995 WL 366356 (S.D.N.Y. 1995); *Frisk v. Board of Educat. Of City of Duluth*, 246 Minn. 266, 75 N.W.2d 504 (1956); *Cincinnati Inc. Co. v. Franck*, 621 N.W.2d 270 (Minn. Ct. App. 2001); *Hunter v. Zenith Dredge Co.*, 202 Minn. 318, 19 N.W.2d 795 (Minn. 1945)

III. Whether the Plan Documents or Enabling Legislation Preclude Recoupment

Authorities: Minn. Stat. § 354A.12, subd. 7 (2004); Minn. Stat. Ch. 423D and 432C; Minn. Stat. § 69.77, subd. 8; *Wells v. U.S. Steel & Carnegie Pension Fund, Inc.*, 950 F.2d 1244 (6th Cir. 1991); *Nesom v. Brown and Root, USA, Inc.*, 987 F.2d 1188 (5th Cir. 1993); *Fisher v. Metropolitan Life Ins. Co.*, 895 F.2d 1073 (5th Cir. 1990); *Calloway v. Pacific Gas & Electric Co.*, 800 F.Supp. 1444 (E.D.Tex. 1992); *Palmer v. Johnson & Johnson Pension Plan, et al.*, 2009 WL 3029794 (D.N.J. 2009); *D.H. Johnson v. Retirement Program Plan*, 2007 WL 649280 (E.D. Tenn. 2007).

IV. Whether Equitable Factors Stemming from the Law of Trusts Preclude Recoupment

Authorities: *Restatement (Second) of Trusts § 254 (comments d and e)*; *D.H. Johnson v. Retirement Program*, 2007 WL 649280 (E.D.Tenn. 2007); *Wells v. U.S. Steel & Carnegie Pension Fund, Inc.*, 950 F.2d 1244 (6th Cir. 1991); *Porter v. Hartford Life & Accident Insurance Co.*, 609 F. Supp. 2d 817, 826-27 (E.D. Ark. 2009); *Thesenvitz v. Kaiser Engineers*, 796 F. Supp. 447 (E.D. Wash. 1992); *Phillips v. Brink's Company*, 632 F. Supp.2d 563 (W.D. Va. 2009); *Phillips v. Maritime Association-I.L.A. Local Pension Plan*, 194 F.Supp.2d 549 (E.D.Tex. 2001); *Gallagher v. Park West Bank & Trust Co.*, 11

F.Supp.2d 136, 140 (D. Mass. 1998); *Butler v. Aetna US Healthcare, Inc.* 109 F. Supp. 2d 856, 862-63 (S.D. Ohio 2000)

INTRODUCTION AND STATEMENT OF THE CASE

The beneficiaries of the Minnesota Police Relief Association (“MPRA”) Pension had no role in determining the amount of their monthly pension checks and each rely on this check to meet their daily living expenses. As a result of the erroneous orders below, each of these beneficiaries have had their monthly pension check reduced substantially and now face the prospect of further substantial reductions as a result of the district court’s May 17, 2010, order requiring Appellants to “recoup” past overpayments directly from the beneficiaries.

The errors below are numerous, but Amici Allen Berryman and Ronald Kastner focus on this order as it imposes a grave and unwarranted hardship on the retired police officers, firefighters, and their surviving spouses who comprise the beneficiaries directly affected by this erroneous and unsupportable order.¹ This order violates fundamental

¹ Retired Minneapolis police officers Allen Berryman and Ronald Kastner are the named amicus in this Brief. Their legal counsel authored this Brief in its entirety. Legal counsel for Appellants did not author any of this Brief, although they have reviewed its content and made minor editorial suggestions before filing. Pursuant to Rule 129.03 of the Minnesota Rules of Civil Appellate Procedure, the following 85 individuals, all of whom are beneficiaries of the Minnesota Police Relief Association Pension Fund, made a monetary contribution to the preparation and submission of this Brief: John Arens, Phyllis Berg, Sharon Bergquist, Bonita Berry, Frances Blomberg, Eldora Boldt, Mary Bouchard, Wayne Brademan, Jerry Bridgeman, Leo Buchan, Joyce Burchett, Betty Claussen, Ronald Cole, Alice Cromstrom, Russell Dee, Robert Denman, Delphine Dick, Shirley Dooher, Dayton Dunn, Dee Emrick, John Frazer, Donald Fuerstenberg, Richard Gardner, Judith Gilchrist, Gary Godfrey, Lyle Goodspeed, Mary Goodspeed, Patricia Hanson, Francis Haukom, Don Heitland, John Hennessey, Jim Hessing, Ralph Hitchens, Randi Holtz, James Hovda, Janice Ingeman, John Jensen, Beverly Johnson, Kenneth Johnson, Rita Johnson, Lorraine Knickerbocker, Kenneth Kubera, Glen Lang, Jerry

procedural and substantive rights of Appellants *and* these beneficiaries and thus cannot stand.²

Procedurally, the order must be reversed for two reasons. First, Respondent is estopped from seeking this remedy, based on unambiguous statements about the relief sought made from the commencement of the action below and through the conclusion of trial. Second, the actual beneficiaries directly affected by recoupment, because of these statements, were denied party status in the action below and are still not parties to this appeal. Therefore, due process as well as the plain language of Minn. Stat. § 555.11 *preclude* the issuance of an order from this litigation directly affecting their monthly pension checks.

Larson, Richard Levens, Bruce Lindberg, Art Lindfors, John Locke, Douglas Madsen, Betty Madson, Charles Manly, Loretta Morse, Doris Mruz-Partyka, Lorin Myring, Richard Nelson, Calvin Nelson, Bob Nelson, Hugh Norrbom, John O'Keefe, Jim and Joan O'Meara, Sherman Otto, James Palmborg, Roger Pence, Helen Petersen, Timothy Prill, Annette Rifley, Theresa Ross, Carol Sandvig-Olish, Ronald Seliski, Leonard Skogland, Lucile Slattery, John Soltis, Lilliam Stenbakken, Renee Tessier, James Thomas, Robert Thompson, Jerry Torrey, James Violette, Patricia Voltin, Pearl Waller, Alice Wepplo, Rebecca Whaley, Charles Wodash, and Betsy Zentzis. Furthermore, while not a named amicus, Loretta Morse is a surviving spouse and has provided additional valuable input as a representative of the interests of this significant group of beneficiaries. This Amicus Curiae Brief sets forth the legal arguments endorsed by this large group of beneficiaries in relation to the recoupment remedy alone, obviously without prejudice to the right to challenge recoupment on any and all grounds in the unlikely event that this remedy survives this appeal.

² These beneficiaries, and their two amicus representatives, focus solely on the May 17, 2010 Order erroneously requiring recoupment and subsequent orders seeking to implement this remedy. They side entirely with Appellants, however, on the other arguments raised in attacking all of the erroneous orders at issue below, and the resolution of these arguments may moot the need to address recoupment. This Brief is therefore only relevant if the Court reaches the recoupment issue.

Substantively, the order fails because the claimed authority permitting this remedy – Appellants’ fiduciary obligation to seek recoupment directly from beneficiaries in the event of past benefit overpayments – *cannot* support this remedy here, for two reasons. First, for the right of recoupment to arise, it must be rooted in language in the operative plan documents or enabling legislation. No such language exists here. Second, recoupment is a remedy which sounds in the law of trusts, and when the fiduciary obligation to recoup arises it is circumscribed by a host of equitable considerations, *every one of which preclude recoupment here.*

Finally, the inequity of this remedy here, and the degree to which the District Court misunderstood the basic fiduciary duty allowing it, is best illustrated by the language in the May 17, 2010 Order requiring Appellants to “oppose any and all challenges to the recoupment”. (Appellant’s Addendum, (“AA”) at ADD. 47, ¶ 3). When the recoupment remedy can be considered by a plan fiduciary, it is *discretionary* and must be carefully calibrated to the circumstances of past overpayment(s), the past use of the mistakenly paid funds, and the beneficiaries’ ability to repay the amounts sought -- precisely the circumstances Appellants here not only must ignore, but must “oppose” when objections based on these circumstances arise. The district court’s order is thus fundamentally at odds with even the basic fiduciary duty it purports to rely upon when mandating recoupment. The recoupment remedy as ordered therefore cannot stand.

STATEMENT OF FACTS

Allen Berryman and Ronald Kastner are retired Minneapolis Police Officers whose monthly pension checks have been directly affected by the recoupment order

below. (See 7/30/2010 Affidavit of Douglas L. Micko in Support of Brief in Support of Motion to Intervene, at ¶¶ 2-3 (hereafter cited as “Micko Aff.”)). They sought to join this litigation as parties once recoupment was ordered, but were denied this voice, and instead this Court ordered that they be permitted to participate as Amicus Curiae. (See 8/17/2010 Order). While this participation is not the avenue they sought to make their voices heard, it is nonetheless one they accept, and appear before this Court on the issue of recoupment speaking on behalf of all of the beneficiaries of the MPRA Pension Fund, 85 of whom have provided direct financial support for this Brief. Recoupment here is a remedy which imposes a severe hardship on entirely innocent, non-party beneficiaries who have relied for years on pension checks which were the product of a process which the Respondent participated in fully, and in which these beneficiaries had no role whatsoever.

The facts relevant to the recoupment order are undisputed. To the extent these facts are not contained in Appellants’ Brief, they are briefly summarized as follows.

A. Respondent Never Sought Recoupment Directly from Beneficiaries until after Trial

Appellants have aptly and succinctly described how Respondent below maintained from the commencement of this litigation through trial that it was not seeking recoupment directly from any plan beneficiary. (See Appellants’ Brief and Addendum (“AB”) at 43). This position was relied upon by this Court when denying Appellants’ prior appeal of the ruling that these beneficiaries were indispensable parties who must be joined as defendants. See *City of Minneapolis v. Minneapolis Police Relief Ass’n., et al.*,

2008 WL 1747923 at *4 (Minn. Ct. App. April 15, 2008) (unpublished). The district court's Findings of Fact and Conclusions of Law following trial made clear that the City had no right to seek recoupment directly from plan beneficiaries. (*See* ADD. 33 (11/20/09 Order at p. 8, ¶ 9)).

The City then changed its position *post-trial* and sought to have the court order recoupment, based largely on an out-of-context supposed admission by Appellants' actuarial expert Mark Meyer when he speculated at trial that a plan administrator could have a fiduciary obligation to recoup in the event of past overpayments. (ADD. 44-45 (5/17/10 Order at pp. 8-9, ¶¶ 10-13)). Based upon this slender reed, the district court, over Appellants' vigorous objections and directly contrary to its post-trial order, ruled that Appellants' fiduciary duty *required* the Associations to seek recoupment of all past overpayments to beneficiaries³, to "oppose any and all challenges to the recoupment", and to submit a detailed recoupment plan by June 4 and commence recoupment by no later than July 1, 2010. (ADD. 44, 46-47 (5/17/10 Order at ¶ 10, pp. 11-12, ¶¶ 3-5)).

³ The District Court estimated these past overpayments to amount to approximately \$52.6 million dollars, ADD. 41 at ¶¶ 27, 31, and its initial order requires that this entire amount be recouped from the plan beneficiaries. While the court's subsequent order could be interpreted to reduce the amount to be sought in recoupment, the district court below has mandated recoupment which would be unprecedented in American jurisprudence, in terms of the amount sought to be recovered. Amici here have conducted a thorough review of the published case law addressing this remedy, and have not found a single reported decision where the dollar amount of an attempted recoupment even rose to a significant fraction of the aggregate level ordered in this action. *See Texas Medical Association, et al., v. Bowen, et al.*, 1988 WL 235555 at *1 (W.D. Tex., January 11, 1988) (analyzing recoupment request to recover \$13.3 million from "approximately 5,000 physicians [and] 15,000 beneficiaries").

B. Appellants Have Been Forced to Take Actions Pre-Appeal Which Constitute Recoupment

Based on the district court's prior orders and directives, Appellants agreed to "freeze" MPRA pension benefits at the May 28, 2010 level and "withhold payment of any future PRB payments and unit value increases pending the outcome of the appeal process," as set forth in a Stipulated Order entered by the Court on May 28, 2010. (5/28/10 Order at p. 1, ¶ 4). The freezing of benefit-based unit value calculations at May 28, 2010 salary levels withholds from MPRA beneficiaries an August 1, 2010 unit-value increase to which they are otherwise entitled under state law. These Amici made unsuccessful attempts to have the MPRA reconsider this benefit freeze at a July 16, 2010 Board meeting. (Micko Aff., Ex. 6). The beneficiaries' pension checks have therefore reflected this shortfall beginning in August, 2010.⁴

Pursuant to further directive of the district court, on July 12, 2010, Appellants submitted proposed plans to recoup alleged overpayments directly from plan beneficiaries.⁵ (Micko Aff., Ex. 7.) For each MPRA and MFRA beneficiary, the recoupment plans calculate an overpayment of several thousand dollars, and propose a method of repayment directly from plan beneficiaries for a period of several years. *Id.*

⁴ These beneficiaries, however, have been forced to accept significant reductions to their monthly pension checks beginning in November 2009. See AB at 38 (citing AA. 236 at ¶ 7).

⁵ Defendants submitted a prior recoupment plan on June 4, 2010, which in essence suggested withholding consideration of a detailed recoupment plan until the conclusion of appellate proceedings. (Micko Aff., Ex. 15.) The district court rejected this submission.

These Amicis' subsequent attempt to intervene in these proceedings before the district court and this Court were denied.⁶

ARGUMENT

A. Respondent is Judicially Estopped from Seeking Recoupment

Judicial estoppel precludes a party from taking one position in litigation, and then taking a contrary position after the parties or courts have relied on the earlier position. *See State v. Pendleton*, 706 N.W.2d 500, 507 (Minn. 2005) (citing *State v. Larson*, 605 N.W.2d 706, 711, n.11 (Minn. 2000)); *see also State v. Profit*, 591 N.W.2d 451, 462 (Minn. 1999). The doctrine “is not reducible to a pat formula” but “is intended to protect the courts from being manipulated by chameleonic litigants who seek to prevail, twice, on opposite theories.” *Id.* (citing *Levinson v. United States*, 969 F.2d 260, 264 (7th Cir. 1992)). Judicial estoppel applies when three conditions are met. First, the party presenting the allegedly inconsistent theories must have prevailed in its original position. *Id.* (“a litigant is not forever bound to a losing position.”). Second, there must be a clear inconsistency between the original and subsequent position of the party. *Id.* Finally, there must be no distinct or different issues of fact in the proceedings. *Id.* Whether to apply judicial estoppel is a question of law, reviewed de novo. *See Modrow v. JP Foodservice, Inc.*, 656 N.W.2d 389, 393 (Minn. 2003).

⁶ On July 28, 2010, Proposed Interveners (the Amici here) served all parties with a Notice of Intervention with a Statement of Issues for, and Claim for Entitlement to, Intervention. (Micko Aff., Exs. 9-10.) As set forth in these documents, Appellants provided written consent to intervene. (Micko Aff., Ex. 11.) Respondent refused to

Respondent's conduct below establishes it as a "chameleonic litigant" against whom this doctrine must be enforced. At every instance through the conclusion of trial, Respondent asserted that it was not seeking *any* relief from individual pension beneficiaries. *See* AB at 43. This Court relied on this position when denying the appeal of the joinder decision, *supra*, and the district court specifically cited it when issuing its post-trial Findings of Fact and Conclusions of Law: "The City's action is against Defendants [the MPRA and MFRA]...*not against the individual members of the relief associations for a reduction in their benefits.*" (ADD. 33 (11/20/09 Order at p. 8, ¶ 9) emphasis added). Respondent here thus successfully excluded the plan beneficiaries from participating as parties in this dispute from the outset because it claimed no remedy relating to their benefits. It maintained this position at trial, and only after securing a favorable ruling did it change this position. The district court's post-trial ruling cannot under any circumstance be considered "a distinct or different issue of fact" precluding the application of judicial estoppel, as this was precisely the finding of fact, conclusion of law and remedy Respondent sought at trial. There is no basis to conclude that Respondent is not judicially estopped from seeking recoupment.⁷

consent to intervention. (Micko Aff., Exs. 12-14.) This Court then denied intervention, but gave the proposed interveners the right to proceed as amici. (*See* 8/17/10 Order).

⁷ This result is especially appropriate here given the prior determination by this Court, based on Respondent's representations, that the individual beneficiaries are not indispensable parties to this litigation and their joinder is not therefore warranted. *See City of Minneapolis v. Minneapolis Police Relief Ass'n, et al.*, 2008 WL 1747923 at *4 (Minn. Ct. App. April 15, 2008) (unpublished). This prior ruling is the law of the case, and this doctrine provides further support for barring *any* recovery against these beneficiaries in this case. *See Vaske v. Lonneman*, 2000 WL 760438 at *1 (Minn. Ct.

B. A Recoupment Order Cannot Issue Against the Non-Party Plan Beneficiaries From This Action

Constitutional and Minnesota Statutory law preclude any court from ordering a remedy against a non-party. This is based on the bedrock federal and state constitutional principle that no one can be deprived of property without the due process of law, and the parallel requirement codified in the Minnesota Declaratory Judgment Act that no order can prejudice the rights of a non-party. *See* Minn. Stat. § 555.11; *see also* AB at 45 (*citing* U.S. Const. amends. V, XIV; Minn. Const. at I, § 7); *Yanke v. City of Delano*, 393 F. Supp. 2d 874, 879-880 (D. Minn. 2005), *aff'd* 171 Fed. Appx. 532 (due process protection provided under Minnesota Constitution is identical to the due process guaranteed under the United States Constitution); *McCollum v. State*, 640 N.W.2d 610, 617-618 (Minn. 2002) (same); *Cf. Women of State of Minnesota by Doe v. Gomez*, 542 N.W.2d 17, 30 (Minn. 1995) (Minnesota Constitution may be interpreted to offer greater due process, protections than United States Constitution). Based on these same bedrock principles, several courts in disputes similar to this have refused to order recoupment when the affected beneficiaries were not parties to the action. *See Official Committee of Unsecured Creditors of LTV Aerospace & Defense Co. v. Official Committee of Unsecured Creditors of LTV Steel Co.*, 988 F.2d 322, 325 (2d Cir. 1993) (“The Plan’s numerous participants have presumably used the benefits they have received to meet their living expenses. The recoupment of these funds from them, in addition to being

App. 6/13/2000) (prior order regarding who constitutes indispensable parties for purpose of joinder is law of the case and cannot be altered); *Brach v. Moen*, 35 F.2d 475, 483 (8th Cir. 1929) (same).

impracticable, would impose an unfair hardship on faultless beneficiaries who are not parties to this appeal.”); *In re Chateaugay Corp.*, 988 F.2d 322, 326 (2nd Cir. 1993); *In re Pan Am Corp.*, 1995 WL 366356, *4 (S.D.N.Y. 1995).

Respondent will undoubtedly attempt to evade the consequences of this clear constitutional and statutory language by arguing that the district court’s recoupment order is addressed solely to Appellants, and the individual beneficiaries from whom recoupment must be sought will be provided due process in connection with the execution of this order because they are free to raise any and all challenges to recoupment efforts when these efforts commence. This argument fails for two reasons.

First, the non-party beneficiaries here have already had their monthly pension checks substantially reduced as a result of this litigation, beginning in November 2009, in a direct violation of their due process rights and the plain terms of Minn. Stat. § 555.11. *See also Frisk v. Board of Education Of City of Duluth*, 246 Minn. 266, 75 N.W.2d 504, 514 (1956) (when organization administering teachers’ retirement was not made party to action, court lacks jurisdiction to determine any matter affecting teachers’ retirement rights); *Cincinnati Inc. Co. v. Franck*, 621 N.W.2d 270, 275 (Minn. Ct. App. 2001) (Declaratory judgment cannot bind absent parties; failure to join necessary parties leaves their rights undetermined). Their due process rights have therefore repeatedly been violated in this action for almost a year, and these violations must now be corrected. The only constitutionally permissible manner to *reduce* these beneficiaries’ monthly pension checks is through litigation in which each affected beneficiary is a party.

Second, this argument is sophistry, especially considering that Appellants are required, under the penalty of contempt, to “oppose any and all challenges to recoupment.” (ADD. 44). Under the current Order, therefore, these individual beneficiaries against whom recoupment *must* be sought are forced to litigate any claimed objections to recoupment against a party bound by this same Order to oppose “any and all objections”. Appellants therefore are required to abandon their fiduciary obligations toward these same beneficiaries, and arbitrarily oppose any objection to recoupment. This deprives these very beneficiaries of the fiduciary protections mandated by statute placing them in a situation where they are required to litigate against the very party who has a statutorily-imposed fiduciary obligation to protect their interests. Each beneficiary, therefore, is faced with having to spend potentially tens of thousands of dollars on legal fees, individually, to protect his or her prior receipt of pension benefit overpayments which may barely exceed or even be less than this mandatory transactional cost. Due process rights become meaningless if such a scenario were found to be constitutionally acceptable. *See Hunter v. Zenith Dredge Co.*, 202 Minn. 318, 19 N.W.2d 795 (Minn. 1945) (due process when applied to judicial proceeding means a course of legal conduct consonant with rules and principles established in our system of jurisprudence for the protection and enforcement of private rights).

C. The Plan Documents and The Enabling Legislation Do Not Authorize Recoupment

Courts generally allow recoupment only where the plan documents or the enabling legislation specifically or implicitly allow for the recoupment of overpayments. *See*

Wells v. U.S. Steel & Carnegie Pension Fund, Inc., 950 F.2d 1244, 1251 (6th Cir. 1991); *Nesom v. Brown and Root, USA., Inc.*, 987 F.2d 1188, 1193-1194 (5th Cir. 1993); *Fisher v. Metropolitan Life Ins. Co.*, 895 F.2d 1073, 1078, n.2 (5th Cir.1990); *Calloway v. Pacific Gas & Electric Co.*, 800 F.Supp. 1444 (E.D.Tex. 1992); *Palmer v. Johnson & Johnson Pension Plan, et al.*, 2009 WL 3029794 at (D.N.J. 2009); *D.H. Johnson v. Retirement Program Plan*, 2007 WL 649280 at **5-6 (E.D. Tenn. 2007). Here there is no language in the plan documents themselves, or the enabling legislation creating these plans, that even implicitly might allow for recoupment of past overpayments directly from the plan beneficiaries. See AB at 47. In contrast, recoupment is permitted in the administration of certain teacher pension funds under Minn. Stat. § 354A.12, subd. 7 (2004), which demonstrates that the Minnesota legislature understands how to authorize recoupment and its failure to do so under chapters 423D and 432C and Minn. Stat. § 69.77 precludes this remedy. Recoupment therefore is simply not an available remedy here *regardless* of the circumstances of the prior miscalculations.

This conclusion becomes even more inescapable when considering the sole remedy available under the statutory provision Respondent relied upon below in challenging the alleged past miscalculations and resulting overpayments. As Appellants argue persuasively in their Brief at pages 32-33, under Minn. Stat. § 69.77, *the only statutory basis under which Respondent sought relief below*, the sole remedy for any payments above the minimum obligation is to “amortize any unfunded actuarial accrued liabilities of the relief association.” *Id.* at Subd. 8. Incredibly, the district court found that “[t]estimony was elicited at trial indicating Plaintiff’s unfunded actuarial liability,”

(ADD. 45 (5/17/10 Order at p. 9, ¶15)), yet then ignored this finding and the adequate remedy at law imposed by § 69.77, subd. 8, and instead ordered recoupment. There is no basis to allow any other remedy apart from amortization to proceed from this litigation.

D. The Circumstances of the Past Miscalculations and the Beneficiaries Ability to Repay Preclude Recoupment

In the ERISA⁸ context, when a Plan does not either explicitly provide for or prohibit recoupment, courts must weigh the equities to determine if recoupment is proper in the given context. See *D.H. Johnson v. Retirement Program Plan for Employees of Certain Employers at the U.S. Dep. of Energy Facilities at Oak Ridge, Tennessee and BWXT Y-12, LLC*, 2007 WL 649280, *5 (E.D.Tenn. 2007). Furthermore, even in cases where the plan language itself permits recoupment, courts are “concerned with the possible inequitable impact recoupment may have on the individual retirees.” *Wells v. U.S. Steel & Carnegie Pension Fund, Inc.*, 950 F.2d 1244, 1251 (6th Cir. 1991); see also *Porter v. Hartford Life & Accident Insurance Co.*, 609 F. Supp. 2d 817, 826-27 (E.D. Ark. 2009). Thus, certain factors must guide a plan fiduciary to “consider whether, under principles of equity or trust law, relief [i.e. recoupment] is unwarranted.” *Wells* at 1251 (citing *Thorn v. United States Steel & Carnegie Steel Pension Fund*, CV-P-1829-S (M.D.Ala. 1983)).

[U]nder trust law recovery of an overpayment by a trustee will not be allowed where the beneficiary, in reliance on the correctness of the amount

⁸ While ERISA does not apply to the plans at issue, the body of case law interpreting this statute as it relates to the recoupment remedy, and the law of trusts in which the reasoning of these cases are rooted, demonstrates that recoupment cannot be an available remedy even if the plans here or enabling legislating could be interpreted to allow it.

of benefits, changes his position so that it would be inequitable to compel him to make restitution. Restatement (Second) of Trusts § 254, Comment e.

Whether repayment would be inequitable depends on the beneficiary's disposition of the money which he was overpaid, the amount of the overpayment, the nature of the mistake made by the administrator, the amount of time which has passed since the overpayment was made, and the beneficiary's total amount of income and the effect recoupment would have on that income.

Id. at 1251. Thus, recoupment of erroneous payments made to the beneficiaries "is unwarranted under the principles of equity or trust law if it resulted in hardship to the individuals from whom recoupment was sought." *Johnson*, 2007 WL 649280 at *5 (citing *Wells*, 950 F.2d at 1251); *see also Thesenvitz v. Kaiser Engineers*, 796 F. Supp. 447, 453 (E.D. Wash. 1992) (applying Restatement 2d of Trusts § 254 (1959) in denying recoupment because "the Plaintiffs made substantial changes in their lives as a result of the miscalculations of their retirement benefits. Requiring the Plaintiffs to repay benefits on which they relied to their detriment would be unjust and inequitable.") *Porter*, 609 F. Supp. 2d at 826-28 (mistakenly paid benefits cannot be recouped from faultless beneficiary).

The Court's analysis in *Phillips v. Brink's Company*, 632 F. Supp.2d 563 (W.D. Va. 2009), is similarly instructive and its application precludes recoupment here. In *Phillips*, the plaintiff had for almost seven years received monthly disability benefits which had failed to properly deduct the value of the monthly union pension payments he was also receiving (which were required to be offset). *Id.* at 573. The plan administrator detected this error after years of miscalculated payments and then sought to recoup these

past overpayments. In denying recoupment, the Court relied on the Restatement of (Second) Trusts, § 254, comment d:

If the trustee by mistake or otherwise makes an overpayment to the beneficiary, he cannot recover the amount of the overpayment from the beneficiary personally or out of the beneficiary's interest in the trust estate, if the beneficiary had no notice that he was overpaid and has so changed his position that under all the circumstances it is inequitable to the beneficiary to permit such recovery. Among the circumstances which may be of importance in determining whether it is inequitable to allow the trustee indemnity are the following: (1) what disposition has been made by the beneficiary; (2) the amount of the overpayment; (3) the nature of the mistake made by the trustee, whether he was negligent or not; (4) the time which has elapsed since the overpayment was made.

Id., 632 F.Supp.2d at 573-74. In *Phillips*, a Committee of the plan administrator had essentially “rubber stamped” the erroneous calculations, due to no fault of the beneficiary, and the beneficiary “had rationally planned his life based on the amount stated in his benefit letter and in the amounts received each month from the plan for almost seven years” and used this monthly amount to pay his “routine expenses”. *Id.* These facts, all of which are present here, precluded recoupment. *Id.* This determination was made despite the proposed monthly recoupment amount of \$163.29, which the Court characterized as relatively “small”, but nonetheless a hardship because the beneficiary “lived on a fixed income.” *Id.* at 574. Proper application of these same factors would preclude recoupment here, but the Order as drafted does not even allow for these factors to be considered. (ADD. 47 at ¶ 3 (“Defendant’s shall oppose any and all challenges to the recoupment.”))

Similarly, in *Phillips v. Maritime Association-I.L.A. Local Pension Plan*, 194 F.Supp.2d 549, 555 (E.D.Tex. 2001), the court applied these same equitable factors in

denying recoupment. The *Phillips* court explained that “[w]hen applying an equitable doctrine for the purposes of recoupment, it is critical to consider the circumstances surrounding the overpayments.” *Id.* The court held that due to the “breach of fiduciary duty by [the Plan administrator], the [beneficiaries’] resulting change of position, the balance of equities, and the principles of restitution,” the Plan was not entitled to recover overpayments through recoupment.” *Id.* The equities the Court relied upon in precluding recoupment were: (1) Plaintiff’s lack of fault in the erroneous calculations resulting in the previously paid benefits; (2) the length of time it took to detect the overpayments and plaintiffs’ reliance on these payments without knowing they were erroneously calculated; (3) the plan administrator’s culpability in making the proper miscalculations. *Id.* at 555. Again, application of these same factors would preclude recoupment here. *See also Gallagher v. Park West Bank & Trust Co.*, 11 F.Supp.2d 136, 140 (D. Mass. 1998) (recoupment denied when overpayment is a result of breach of fiduciary duty by Plan Administrator); *Butler v. Aetna US Healthcare, Inc.* 109 F. Supp. 2d 856, 862-63 (S.D. Ohio 2000) (recoupment must allow for equitable considerations to be permissible).

The undisputed facts here are at least as compelling as any published decision precluding recoupment. Specifically, the miscalculations producing the past overpayments, if upheld on appeal, occurred through no fault of the beneficiaries. The overpayments occurred for several years, and in each year the Respondent and Appellants both implicitly and explicitly approved of the amount the beneficiaries were to receive. The beneficiaries here are living on fixed incomes and planned their lives according to the amounts paid, using these amounts to meet their daily living expenses, not to accrue

any financial windfall at Respondent's expense. Finally, it took Respondent several years to discover the alleged overpayments, despite the fact that it is required to review and approve the amounts paid each year. There is simply no basis, even if recoupment were permitted under the Plan documents or enabling legislation (which it is not), to allow it to proceed here.

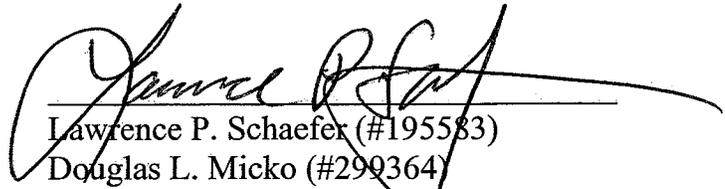
This is particularly true when considering the legal and factual implications of the Court-imposed duty to "oppose any and all challenges to recoupment." By attempting to impose this obligation, the district court has precluded any consideration of the *parallel and equally important* fiduciary duty to the beneficiaries themselves by compelling opposition to the very objections which *must* guide the process of recoupment in the very limited circumstances where it is permitted. This clear distortion of fiduciary duty cannot stand. Appellants here cannot be compelled to take any affirmative steps to affect recoupment, and the Order below must be reversed.

CONCLUSION

These plan beneficiaries have for years received monthly pension checks which were determined through a process in which these beneficiaries had no voice, but on which each relied upon to produce accurate calculations. If this process produced mistaken calculations, the only possible remedy from this litigation is to prospectively correct these mistakes. Recoupment is not an available remedy under any possible circumstance stemming from the record below.

Dated: November 1, 2010

SCHAEFER LAW FIRM, LLC

A handwritten signature in black ink, appearing to read "Lawrence P. Schaefer", is written over a horizontal line. The signature is stylized and extends to the right of the line.

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**STATE OF MINNESOTA
IN COURT OF APPEALS**

City of Minneapolis, a municipal
corporation,

Respondent,

vs.

**CERTIFICATION OF BRIEF
LENGTH**

Minneapolis Police Relief Association and
Minneapolis Firefighters Relief
Association,

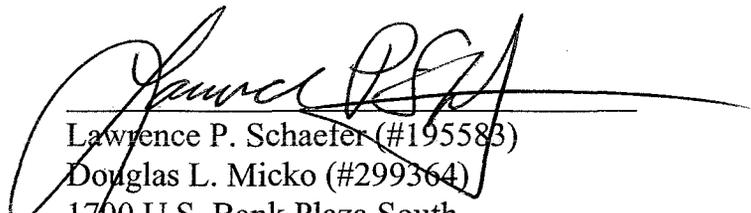
Appellants.

APPELLATE COURT CASE NOS. –
CONSOLIDATED:
A10-1244
A10-1331

I hereby certify that this brief conforms to the requirement of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with a proportional 13-point font. The length of this brief is 5,386 words. This brief was prepared using Microsoft Office Word 2002.

Dated: November 1, 2010

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