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

TOWNSHIP TRUSTEES OF SCHOOLS TOWNSHIP 38 NORTH, RANGE 12 EAST,	)	
Plaintiff and Counter-Defendant,	)	No. 13 CH 23386
v.	)	Hon. Sophia H. Hall
LYONS TOWNSHIP H.S. DISTRICT 204,	)	Calendar 14
Defendant and Counter-Plaintiff.	)	

DEFENDANT LT'S MOTION FOR PARTIAL SUMMARY JUDGMENT:
THE TTO'S CLAIMS ARE SUBJECT TO A 5-YEAR LIMITATIONS PERIOD

I. INTRODUCTION

Defendant Lyons Township High School District 204 ("LT" or "District 204"), pursuant to 735 ILCS 5/2-1005(d), respectfully asks this Court to decide, as a matter of law, a major issue in our case: that the five-year, catch-all statute of limitations set forth in 735 ILCS 5/13-205 applies to all of the claims of Plaintiff Township Trustees Of Schools ("the TTO").

The TTO's case involves three distinct claims. First, the TTO alleges that from 1993-2012, the TTO paid an accounting firm for the annual audit expenses of LT. The TTO now claims these payments were improper and should be repaid from LT's account. The TTO makes this claim even though the TTO made these payments deliberately, with the knowledge and approval of its Treasurer and Board of Trustees, and there was no legal bar to the TTO paying these invoices.

Second, the TTO claims that from 1994-2012, the TTO made erroneous allocations of investment income to LT based on the TTO's own internal calculations and determinations. The TTO demands repayment of the alleged net overallocation. The TTO does not explain how or why it overallocated income to LT in some years, and underpaid LT in other years. Nor does the TTO have sufficient records to show how much income the TTO actually earned for the districts in each

year from the various financial institutions. The TTO's claim is based solely on a deeply flawed analysis of inconsistent and incomplete internal records.

Third, the TTO claims that from 2000-12, LT improperly applied to the TTO's annual invoices for the TTO's expenses an offset for the costs of LT's business functions. The TTO makes this claim despite record evidence demonstrating that LT performed its own accounting work at its own expense, unlike the other districts; that in 1999-2000, the parties negotiated extensively, in writing and in person, to reach an agreement that addressed this inequity; that in 2000, both parties' governing boards voted unanimously to accept this agreement; and in each subsequent year until 2012, both parties reaffirmed and honored this agreement.

Of course, LT acknowledges that the merits of the TTO's claims involve many disputed issues of material fact that cannot be resolved through summary judgment. The jury will have to hear from the available witnesses, and review the record evidence, in order to make a decision on the merits of the TTO's claims. However, now that discovery is complete, the applicability of the statute of limitations to the TTO's claims is a legal issue that can and should be resolved on summary judgment. It is the role of the Court, and not the jury, to determine what statute of limitations period, if any, applies to the TTO's claims.[1]

As LT will discuss in this motion, the law in Illinois is that claims of governmental entities are subject to limitations periods unless the claim involves the rights of the general public, such as rights that directly involve public health or safety issues. Governmental entities are not exempt from the statute of limitations when they sue another governmental body or company for recovery of disputed payments, like a private company might, or even when there is an inter-governmental quarrel over public money. Thus, the mere status of a government entity, and its use of public tax

[1] In 2014, the parties briefed this limitations issue on LT's motion to dismiss. The Court decided not to resolve the limitations issue prior to the discovery process. (SJ Ex. 1, p. 17-21 (9/22/14 Trans.); SJ Ex. 2 (9/22/14 Order))

revenues, does not necessarily mean that the dispute involves "public rights" of the type that is exempt from statutes of limitation. In addition, courts have not hesitated to enforce statutes of limitations against claims involving township treasurers and school districts that are comparable to the TTO's claims here.

Whatever the ultimate merits of the TTO's claims, the record evidence that is relevant to the statute of limitations analysis is undisputed and compelling. There can be no genuine dispute that the TTO's claims do not involve "public rights" such as health and safety issues. Instead, the TTO's claims involve "private rights" that concern disputes over payment of money between two governmental entities, and which arose out of expense and payment issues that private companies could just as easily be contesting.

Accordingly, Illinois law requires that a five-year statute of limitations applies to the TTO's claims. The justness of this outcome is supported by the seriously incomplete nature of the TTO's own records, as well as the unavailability of key witnesses – the inevitable results of literally decades having passed since the TTO's claims first arose.

II. THE FACTUAL BACKGROUND

A. The Relationship Between the TTO and LT

The township trustees of schools system in Illinois has a long and checkered past. A century ago, money management and accounting were difficult tasks beyond the capability of many school districts. The State set up a political subdivision in each township called the township trustees of schools. The trustees were elected officials who appointed a treasurer. Together, they collected property tax revenues earmarked for school districts within the township, managed the investment of the schools' funds, and performed accounting functions for the schools like accounts payable and payroll. (SJ Ex. 3 (Chi. Trib. 11/5/95))

More than 50 years ago, the State realized that money management and accounting systems had evolved, and that as a result, school districts could handle their own money. But, there were political considerations involved in Springfield's decision. "In 1962, state lawmakers, thinking the township school positions were outmoded, abolished the offices throughout Illinois – except in suburban Cook County, where politics played a role in their preservation." (*Id.* (emphasis added)) LT and the TTO, of course, are located in suburban Cook County.

For years, the township treasurer system has come under fire as an unnecessary and costly layer of government, as well as a source of public corruption as treasurers operating with no real oversight stole from the school district funds they were supposed to safeguard. (*Id.*; SJ Ex. 4 (Chi. Trib. 9/13/13)) As of May 2016, a third of the school districts in suburban Cook County were able to free themselves from the archaic township treasurer system, and the significant expenses that go with it, through legislative action. (SJ Ex. 5 (Ill. St. Bd. Of Ed. Rpt.))

During the entire period relevant to this case, the TTO's Treasurer was Robert Healy ("Healy"). The absence of checks and balances and meaningful oversight at the TTO allowed Healy to steal millions of dollars from LT and the other districts he supposedly served. Healy currently is serving a 20-year prison sentence. (SJ Ex. 6 (Ill., Dept. Corrections Rpt.))

LT is one of two high schools within the TTO's jurisdiction. LT has owned about 25 percent of the commingled investment pool that the TTO manages, and therefore pays the same proportionate share of the TTO's expenses. (SJ Ex. 7, p. 26 (TTO Dep.)) For instance, in 2013, LT's share of the TTO's expenses was $253,900 (SJ Ex. 17), but those expenses have ballooned over the past several years. The TTO's bill to LT for the last fiscal year was for $322,352. (SJ Ex. 8 (5/10/17 Inv.)) LT receives these invoices even though it performs its own business

functions, like vendor payments and payroll, with its own staff – unlike the other districts, which use the TTO's much less reliable services. (SJ Ex. 9 ¶ 3-6 (TTO Reply to Aff. Def.))

LT tried several times to leave the township treasurer system through legislative action, but the TTO's political supporters blocked these bills. (SJ Ex. 10, Chi. Trib. 4/15/15)) As the Chicago Tribune noted in 2013, "One of the maddening things is that the students, parents and taxpayers in those school districts didn't need Robert Healy and don't need the township school trustees. The office is an anachronism." (SJ Ex. 4)

The Filing of this Case

On October 16, 2013, the TTO filed this case against LT. The TTO's Amended Complaint ("the Complaint") has one count for declaratory judgment. (SJ Ex. 11 (LT Ans. to Am. Cpl.)) The TTO's legal theory consists of citations to several provisions in the Illinois School Code. (*Id.*) The TTO's declaratory judgment count contains three distinct factual claims relating to audit payments, interest allocations, and pro rata expenses.

B. The Audit Payments Claim

With respect to the audit payment claim, the TTO alleges that from 1993-2012, the TTO improperly paid $511,068.60 to the accounting firm Baker Tilly and its predecessors ("Baker Tilly") for annual audits performed for LT. (*Id.* ¶ 54). The TTO admits that these payments "were knowing and intentional, i.e., payment was not accidentally made." (SJ Ex. 9, ¶ 33)

Michael Thiessen is the President of the TTO's Board of Trustees, as well as a business consultant and investment banker. (SJ Ex. 12, p. 5-6 (Thiessen Dep.)) Thiessen explained how the TTO made the disputed payments to Baker Tilly:

> Q. The TTO has claimed in this case that it paid the annual audit costs of LT but not for the other districts, correct?
> **A. Correct.**
> Q. And how do you know that's true?

A. Because as we went back and looked within the books and our records, we can see that we paid the audit costs related to 204 out of our operational budget, which is not typically how bills are paid within our system. So it came out of the TTO's bank account versus 204's bank account.

Q. And what was the situation with respect to the other districts that you found?

A. Well, we processed their checks, and the money comes out of their bank accounts.

(*Id.* p. 29-30) Thus, the TTO's own internal records list these payments to Baker Tilly as vendor expenses of the TTO. (SJ Ex. 13-14 (TTO Dep. Ex. 12, 14))

Thiessen also explained that the TTO's own account contains operational funds that the TTO receives from the member districts, and that Healy stole from this account. (SJ Ex. 12, p. 9) Because the TTO has no independent source of funding (*id.* p. 8), the TTO's operational account contains money that the TTO holds in trust for LT and the other districts. According to Thiessen, the TTO account is distinct from the accounts of LT and the other districts, which are "agency funds which we manage on their behalf." (*Id.* p. 7-8)

The application of the five-year statute of limitations will reduce the TTO's audit payments claim from $511,068.60 to $164,435.35. (SJ Ex. 13)

C. The Interest Allocations Claim

As its second claim, the TTO alleges that "from "1995 through 2012, the Treasurer erroneously allocated $1,574,636.77 in interest on investments to District 204." (SJ Ex. 11, ¶ 44) The TTO later reduced that claim to $1,427,442.04. (SJ Ex. 15 (Martin Ex. 7)) The TTO, through its current Treasurer and designated representative deponent Dr. Susan Birkenmaier ("Birkenmaier"), testified that the TTO does not "have any understanding as to how or why the treasurer erroneously allocated" this money to LT. (SJ Ex. 7, p. 172)

Thiessen testified that the disputed interest income was money that the TTO "over-allocated or contributed to LT's fund that they were not entitled to." (SJ Ex. 12, p. 39) In order to determine the amounts of interest that the TTO allegedly allocated to LT over the years, the TTO

examined the entries posted to the general ledger that the TTO maintains for LT's account, as well as LT's account balance. (*Id.* p. 100) The TTO then compared those ledger entries to the cryptic handwritten notes of Healy (SJ Ex. 15), who is now in prison. Notably, the TTO did not compare those ledger entries to the actual interest earnings for the relevant time period, as the TTO's records are largely missing. (SJ Ex. 20, p. 13-16)

The application of the five-year statute of limitations will reduce the interest allocation claim from $1,427,442.04 to zero, as the TTO's analysis claims that LT actually was under-allocated interest in the five years before this case was filed. (SJ Ex. 15)

D. The Pro Rata Expenses Claim

As its third claim, the TTO alleges that from 2000-12, LT failed to pay the total amounts of the annual invoices that the TTO issued to LT. These invoices were for LT's pro rata share of the TTO's operating expenses. (SJ Ex. 11, ¶ 32-34)

This dispute really concerns the TTO's refusal to acknowledge the legitimacy of the agreement between the parties throughout this period, and the parties' consistent course of dealing, concerning offsets to the expense invoices. Under this agreement, which both governing boards approved through formal action, LT applied the costs of performing its own business functions as a setoff against the TTO's expenses. (SJ Ex. 9, ¶ 3-31) Essentially, the TTO outsourced LT's accounting work to LT instead of paying for additional staff at the TTO to do this work.

However, the only facts related to the pro rata expense claim that are relevant to this summary judgment motion concern the specific nature of the financial transactions involved. These facts are undisputed. The record shows that any net payments that LT made to the TTO – that is, a payment on the invoice, less the agreed offset – were made from checks drawn on LT's account, entitled "Lyons Township High School District 204," and made payable to the "Township

School Treasurer." (SJ Ex. 16, p. 6 (TTO Dep. Ex. 16); SJ Ex. 12, p. 22-23) Thus, the payments came – or, did not come – from LT's account.

The application of the five-year statute of limitations will reduce the TTO's pro rata expense claim from $2,628,807 to $1,080,160. (SJ Ex. 17 (TTO Dep. Ex. 17))

III. THE SUMMARY JUDGMENT STANDARD

LT respectfully requests the entry of partial summary judgment. Pursuant to 735 ILCS 5/2-1005(d), a Court may determine that "there is no genuine issue of material fact as to one or more of the major issues in the case." When granting a motion for partial summary judgment, "the court shall thereupon draw an order specifying the major issue or issues that appear without substantial controversy, and directing such further proceedings upon the remaining undetermined issues as are just." *Id.*

Whether the statute of limitations applies to the TTO's claims is a legal question that can and should be resolved by this Court before the jury trial. "The applicability of a statute of limitations to a cause of action presents a legal question ...." *Travelers Cas. & Sur. Co. v. Bowman*, 229 Ill.2d 461, 466 (2008). "It is the duty of the trial court to decide the legal issues; while the role of the jury is to decide factual issues." *Todd W. Musburger, Ltd. v. Meier*, 394 Ill.App.3d 781, 800 (1st Dist. 2009).

IV. THE 5-YEAR STATUTE OF LIMITATIONS APPLIES TO THE TTO'S CLAIMS

A. The Importance of Limitations Periods

The U.S. Supreme Court has long emphasized the vital role that statutes of limitation play in ensuring fairness in our civil legal system. "Statutes of limitations, which 'are found and approved in all systems of enlightened jurisprudence,' *Wood v. Carpenter*, 101 U.S. 135, 139 (1879), represent a pervasive legislative judgment that it is unjust to fail to put the adversary on

notice to defend within a specified period of time and that 'the right to be free of stale claims in time comes to prevail over the right to prosecute them.' *Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 349 (1944). These enactments are statutes of repose; and although affording plaintiffs what the legislature deems a reasonable time to present their claims, they protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise." *U.S. v. Kubrick*, 444 U.S. 111, 117 (1979).

The Supreme Court of Illinois, as well, has repeatedly emphasized that statutes of limitations are needed to prevent injustices to parties like LT that are asked to defend long-delayed claims. "A statute of limitations is by definition an arbitrary period after which all claims will be cut off. However, the need to encourage claimants to investigate and pursue causes of action in order to discourage delay, in time, outweighs the right to litigate a claim." *Langendorf v. City of Urbana*, 197 Ill.2d 100, 110 (2001). "Delayed claims will almost certainly prejudice defendants, who must defend against claims arising out of traumatic events long after witnesses' memories have faded and evidence has become unavailable for testing and inspection." *Golla v. Gen. Motors Corp.*, 167 Ill.2d 353, 370 (1995).

These fairness considerations are particularly important in our case, where the TTO waited up to 19 years to assert a legal claim against LT.

B. The Five-Year Limitations Period

The limitations period applicable to the Amended Complaint is five years. As the legal basis for its declaratory judgment count, the TTO cites to several sections of the Illinois School Code, 105 ILCS 5/1 *et seq.* The School Code does not include a specific statute of limitations. Also, the Code of Civil Procedure ("the Code") does not contain a limitations period specific to

claims under the School Code. Where the Code does not list a limitations period for a particular type of claim, a five-year catch-all limitations period applies. 734 ILCS 5/13-205 (five-year limitations period applies to "all civil actions not otherwise provided for" in the Code).

C. No Exemption For the TTO's Claims, Which Involve Only Private Rights

Given the important role that statutes of limitation play in our legal system, Illinois courts have strictly limited the types of cases that are exempt from these time restrictions. The TTO's claims in the present case purport to reach back as far as 1993. However, Illinois law does not exempt the TTO's claims from the applicable five-year statute of limitations.

1. Development of the "Public Rights" Versus "Private Rights" Standard

For over a century, when considering claims of governmental bodies, Illinois courts have distinguished cases involving "public rights" (which are exempt from limitations periods) from those involving "private rights" (not exempt). Even though governmental bodies use public funds, that does not mean that all of their claims involve public rights. Rather, the question that Illinois Courts must answer is (a) does the claim involve a critical right that belongs to the public at large, and not some distinct subset of the public, such as issues with a direct effect on public health or safety; or (b) does the claim involve private rights, where there is a dispute over payments or services that is more like a private business transaction, or that is an inter-governmental quarrel over the potential shifting of public money.

The Illinois Supreme Court's decision in *People v. Oran*, 121 Ill. 650 (1887), demonstrates that the distinction between public rights and private rights with respect to governmental claims is so old that it predates the zipper's invention. While modern cases have introduced a three-factor test, as discussed below, the *Oran* decision is both instructive and controlling in our case.

In *Oran*, the town of Oran waited 10 years to sue the town of Atlanta for money due on a land transfer. The Court decided that the five-year statute of limitations barred the claim. *Id.* at 652-54. The Court held, "No public rights are involved in this case. The controversy relates solely to two townships.... We fail to see how the public can be interested in this transaction to any greater extent than they would be in an action which one citizen might bring against another to secure money claimed to be due on a contract. The public will neither lose nor gain if the town of Atlanta is required to pay all of its indebtedness; nor will it affect the public if the town of Oran is required to contribute." *Id.* at 655-56 (emphasis added).

Another older case involving the public versus private rights standard is *People v. Knox*, 157 Ill.App. 438 (2nd Dist. 1910) (pre-1935, persuasive but not binding authority). In *Knox*, a county sought to recover allegedly excessive and wrongful funds paid to the county sheriff. *Id.* at 438-39. The Court decided that the statute of limitations applied, and held that claims made by municipalities are exempt from statutes of limitation only where the claims involve "governmental affairs affecting the general public." *Id.* at 439. The Court concluded that the alleged overpayments to the sheriff concerned "only private rights" because the general public "are not interested in the amount allowed for these county expenses." *Id.* at 440.

2. The Three-Factor Test: The A, C & S, Shelbyville, and King Cases

The most current decision that governs the public versus private rights standard is *Champaign Cty. Forest Preserve Dist. v. King*, 291 Ill.App.3d 197 (4th Dist. 1997). In *King*, a forest preserve district claimed it was overcharged for liability insurance purchased more than six years earlier. *Id.* at 199. The defendant raised the five-year catch-all limitations period. *Id.*

The *King* Court recognized that there is a three-factor test in order to determine if a claim of a governmental body involves "public" or "private" rights for limitations purposes: (1) the

effect of the interest on the public, (2) the obligation of the governmental unit to act on behalf of the public, and (3) the extent to which the expenditure of public revenues is necessitated." *Id.* at 200, *citing Board of Education v. A, C & S, Inc.*, 131 Ill.2d 428, 476 (1989) ("*A,C&S*"); *City of Shelbyville v. Shelbyville Restorium, Inc.*, 96 Ill.2d 457, 464-65 (1983) ("*Shelbyville*").

To assess the first factor of public interest, the *King* Court reviewed the Supreme Court decisions in the *A,C&S* and *Shelbyville* cases. In the *A,C&S* case, which involved school buildings constructed with hazardous asbestos, "there was an effect on the general public because the school districts were addressing a significant health concern to children and adults using the buildings." *King*, 291 Ill.App.3d at 201. The *A,C&S* case involved 34 school districts that sued 78 defendants involved in the manufacturing and distribution of asbestos-containing material. 131 Ill.2d at 436.

Likewise, in the *Shelbyville* case, in which a builder failed to construct or defectively constructed numerous public roads some years earlier, "construction and maintenance of city streets directly affected the safety of the general public ...." *King*, 291 Ill.App.3d at 201. The roads at issue in *Shelbyville* involved an entire subdivision of housing. 96 Ill.2d at 458.

The *King* Court distinguished the liability insurance involved in *King* from the asbestos-containing school buildings and the unbuilt or defective roads in the other cases as follows: "Unlike the governmental activities in *Shelbyville* and *A,C&S*, plaintiff's purchase of liability insurance in this case had no effect on the public at large. It did not make the public safer, nor did it reduce the likelihood of injury on plaintiff's property." *King*, 291 Ill.App.3d at 201.

As for the second factor, the obligation of the governmental unit to act, the *King* Court determined that "although plaintiff was authorized to purchase insurance, it was not required to do so." *Id.* (emphasis added).

For the third factor, the necessity of spending public money, the *King* Court noted that "the fact that public funds were used to purchase insurance does not necessarily render it a public act. Otherwise, any use of public funds would always be considered a public act." *Id.* at 202. The Court noted that there was no record evidence concerning the burden on the public treasury caused by the alleged insurance overpayments. *Id.*

Based on this analysis of the three-factor test, The *King* Court concluded that the district's purchase of insurance was "a corporate or business undertaking for its own benefit, rather than for the benefit of the general public. Therefore, it would be considered a private act...." *Id.*

Accordingly, the critical legal distinction in this case is between matters that meaningfully and directly impact the lives of the general public, like safe roads and healthy schools, and matters that simply involve shifting of funds from, or among, governmental entities, as with disputed financial or commercial transactions. *Id.*; *see also Village of DePue v. Viacom Int'l, Inc.*, 713 F.Supp.2d 774, 778-85 (N.D. Ill. 2010) (District Court applied reasoning of *A, C & S*, *Shelbyville*, and *King* cases to determine that Village's claims for trespass and nuisance for flow of contaminants onto public land were not brought for the general public, and therefore were time-barred under 5-year limitations period).

3. Application of the Three-Factor Test to the TTO's Claims

Application of this three-factor test to the undisputed facts of our case shows that the TTO's claims involve only "private" rights. For the first factor of the test, concerning public interest, the general public in Illinois does not have a direct or meaningful interest in which governmental body paid Baker Tilly's vendor bills; whether the TTO's investment income allocations to LT recorded in its general ledger were too much or too little in certain years; or whether LT properly offset the

TTO's expense bills with its in-house costs. It is not an overstatement to say that most members of the Illinois public are not even aware of the existence of the TTO, or the functions it performs.

At most, our case would involve shifting some money from one governmental body, LT, to another, the TTO. This makes our situation directly comparable to the insurance premium payments in *King*, the sheriff's expense payments in *Knox*, and the land transfer payment in *Oran*. There simply are no compelling issues of public health or safety involved in our case, as there were in the very different factual situations presented in the *A,C&S* and *Shelbyville* cases.

With respect to the second factor, the obligation of the governmental unit to act, the TTO cannot demonstrate that it was obligated to act on behalf of the public by filing this case. Thus, our case is distinguishable from the *Shelbyville* case, where the missing and defective roads had to be built and repaired, and in fact they were. 96 Ill.2d at 458-59. Our case also is distinguishable from the *A,C&S* case, where the schools had to remove the asbestos from the affected school buildings pursuant to the requirements of the Illinois Asbestos Abatement Act. 131 Ill.2d at 474.

In this case, the TTO admitted that it made audit payments, allocated investment interest, and accepted setoffs against its expenses knowingly and intentionally. The TTO never alleged that LT either concealed facts from the TTO, or otherwise defrauded or coerced the TTO into taking these actions. The TTO's lawsuit is not mandated by any statute, and it is just as discretionary as the forest preserve district seeking repayment of insurance premiums in *King*, the county seeking repayment of expense money in *Knox*, and the town demanding a land transfer payment in *Oran*. In keeping with the holding of the *King* Court, even if the TTO was authorized to file this case, it was not required to do so – and thus it cannot satisfy this second factor.

Indeed, while the TTO claims that it is acting in this case on behalf of the other school districts, there is no documentary evidence of the other districts authorizing this action, or the

TTO's spending of well over a million dollars of the member districts' funds on legal fees for this case. Indeed, 7 of the 13 school districts and cooperatives under the TTO's jurisdiction, including LT, are seeking to get out of the TTO under legislation re-introduced in Springfield on May 10, 2017. (SJ Ex. 26 (Chi. Trib. 5/26/17)) The TTO's real motive seems to be preventing LT from leaving the TTO's control through legislative action by tying LT up in years of litigation. (*Id.* (pendency of this case expressly used to block prior bills seeking LT's withdrawal))

As for the third factor, the necessity of spending public money, the TTO cannot present any evidence that the TTO will have to expend any public funds in connection with the disputes here. In the *A,C&S* case, the Court found that the school had to remove asbestos from dozens of public buildings, and "the cost of these abatement projects will run into the millions. This cost will be shouldered by the [34] local school districts, appropriations from the State, Federal funds, or this litigation." 131 Ill.2d at 476. Likewise, in *Shelbyville*, city actually built and repaired the missing and defective roads in the subdivision "at great expense to itself." 96 Ill.2d at 458-59.

In contrast, here the TTO has failed to present any evidence that its payment of audit expenses and interest income, and its alleged non-receipt of pro rata expenses, will cause it to spend public revenues in the future. In other words, the money at issue in this case already has been spent. Like the governmental bodies in the *King*, *Knox*, and *Oran* cases, the TTO simply is looking to recover money that will improve its bottom line, just like a private company suing for on a financial or commercial transaction.

D. No Exemption From Limitations Periods for Township School Trustees

The decisions discussed above are consistent with Illinois cases that specifically involve township school trustees, township school treasurers, and school districts. These cases show that entities like the TTO are not exempt from statutes of limitation.

An Illinois federal court applied a five-year limitation period in the context of funds transferred from a township school treasurer to certain school districts. In *Rusch v. Baer*, 18 F.Supp. 732 (N.D. Ill. 1937), a bank's receiver sued to recover allegedly preferential payments made to the township treasurer, which he distributed to the school districts. The Court determined that the bank could sue the districts for return of the disputed funds, and held that Illinois' "five-year statute of limitations on an open account would be applicable." *Id.* at 734. The *Rusch* decision is not binding, but its fact pattern and holding are directly applicable to our case.

Another case that specifically involves a township trustees of schools is *Trustees of Schools v. School Directors of Union Dist.*, 88 Ill. 100 (1878). There, a school district sued the trustees of schools to contest the validity of the trustees' action to move territory from one district to another. The Supreme Court ruled that the school district waited too long to contest the transaction. *Id.* at 2. The Court observed that in the intervening years, public funds were collected and apportioned, and debts possibly incurred, in accordance with the trustees' action. *Id.* Similarly, in this case, public funds were collected and apportioned within budgets that LT's Board of Education passed from 1993-2012, and the TTO has waited too long to now contest its agreement with LT and its own alleged misapplications of funds.

In a holding that just as easily could have been written for our case, the *Trustees of Schools* Court determined that it was better to leave the dated action in place, rather "than to open up an indefinite field of strife and litigation by now nullifying the action of the trustees, and thereby declaring everything done pursuant thereto illegal." *Id.; see also School Directors of District No. 5 v. School Directors of District No. 1*, 105 Ill. 653 (1883) ("The Trustee in this case was the township treasurer, and as long as he held the money it was a trust fund in his hands, but when he

paid it out to [the school district], or on its orders, it was not a trust fund in appellee's hands which would exclude the operation of the Statute of Limitations....").

As in the *Rusch* and *School Directors* decisions, the TTO's status as a township trustee of schools does not exempt it from Illinois' statutes of limitation.

V. MISSING TTO RECORDS AND UNAVAILABLE WITNESSES

Illinois case law and statutes impose limitations periods on legal claims in order require plaintiffs to file legal claims promptly – and to avoid the unfairness to defendants resulting from the inevitable losses of documentary evidence and witnesses with each passing year. Here, controlling Illinois case law requires the application of the statute of limitations to the TTO's claims. The justness of this result is fully supported by the real and severe problems with missing records at the TTO, and the unavailability of key witnesses on both sides. This showing is not required under the applicable legal standard, but it is important to consider in a court of equity.

First, on the TTO's audit payments claim, there can be no dispute that the TTO records that are critical to this claim – which spans 19 years and arose 24 years ago – are seriously incomplete:

- The TTO is missing, for multiple years, many of the actual Baker Tilly invoices that the TTO claims were for LT's audit expenses. (SJ Ex. 18, p. 31 (Bradshaw Dep.); SJ Ex. 19 (TTO Dep. Ex. 11); SJ Ex. 13)

- In 2013, the TTO tried to obtain the missing invoices from Baker Tilly, but this effort failed because Baker Tilly's records only went back to 2006 or so. (SJ Ex. 18, p. 32-33)

- When TTO's audit costs claim is unsupported by missing invoices, the claim is based solely on a one or two-word description of an expense entered on the TTO's general ledger. (SJ Ex. 13-14)

- Many of the general ledger entries that lack supporting invoices are vague and unreliable, either because they either do not reference LT, or because they refer to services that are unrelated to annual audits. (*Id.*)

- The TTO, through Birkenmaier, could not explain any of the unsupported general ledger entries, and admitted she would need to see "source documents" (which the TTO does not have). (SJ Ex. 7, p. 104-15)

Second, on the TTO's investment income claim, there can be no dispute that records that are critical to this claim – which spans 18 years and arose 23 years ago – are seriously incomplete:

- The TTO's accounting expert James Martin ("Martin") tried to determine the amount of investment income that the districts actually earned from 1994-2012, but this analysis failed because the TTO's records from financial institutions that held investment funds are so incomplete. (SJ Ex. 20, p. 15-16)

- In particular, Martin testified that in the early years, the TTO's records from financial institutions were at least 50 percent incomplete; while even in recent years, the TTO's records were at least 10 percent incomplete. (*Id.* p. 13-14)

- The TTO's interest income claim is based on accountant Kelly Bradshaw's ("Bradshaw") review of Healy's handwritten interest income sheets, but those records are missing for some quarters. (SJ Ex. 18, p. 86; SJ Ex. 20, p. 114)

- The TTO, through Birkenmaier, testified that Bradshaw "encountered periods of time for which there was missing data," but could not explain why the data was missing. (SJ Ex. 7, p. 231-32)

- The TTO's recordkeeping practices were so poor that in 2013, the TTO informed the districts that it had a pool of undistributed investment income, left over from prior years, that belonged to the districts. (SJ Ex. 21 (Thiessen Dep. Ex. 9))

- However, the TTO did not inform the districts of the amount of the funds discovered in 2013, (*id.*), and the TTO still does not know the amount – but thinks it might have been $1.2-1.3 million. Incredibly, the TTO still has not fully disbursed these funds back to the member districts. (SJ Ex. 7, p. 41-43, 48)

Third, the TTO is missing critical documents to support its claim that LT did not pay pro rata expense invoices from 2000-12 (and that there were no agreed offsets, despite the explicit acceptance of LT's setoff proposal by the TTO's Board of Trustees):

- The TTO cannot find the pro rata expense invoice for $200,680 that it claims it sent to LT for fiscal year 2006. (SJ Ex. 17; SJ Ex. 7, p. 161)

- The TTO's records are missing dozens of monthly fund balance reports (SJ Ex. 22 (TTO Dep. Ex. 2)), the absence of which the TTO cannot explain. (SJ Ex. 7 at 17-20)

- The TTO's expert parliamentarian, who relied on a review of meeting minutes of the TTO's Board of Trustees from 1993-2010 to form certain opinions, testified that numerous sets of meeting minutes were missing. (SJ Ex. 23, p. 20-21 (Sylvester Dep.))

- The TTO's recordkeeping practices were so bad that after Healy left, the TTO had no clear documentation of the more than $100 million in district funds the TTO was charged with managing. The TTO had to telephone banks, and wait for bank statements to arrive in the mail, to try to account for these funds. (SJ Ex. 18, p. 20-24)

Fourth, several of the key witnesses on both sides who could have testified about relevant transactions and communications, spanning more than two decades, either died or moved away:

- Joseph Nekola, former President of the TTO's Board of Trustees during the relevant period, is deceased. (SJ Ex. 24, p. 20-21 (Hartigan Dep.))

- Donna Milich, another former TTO Trustee during the relevant period, retired to Arizona (*id.* p. 17-18), and the TTO has made no effort to contact her. (SJ Ex. 7, p. 65)

- Leon Eich, LT's former Business Manager during the relevant period, is deceased. (SJ Ex. 25, p. 67 (Kelly Dep.))

Fifth, Birkenmaier testified that the TTO is missing unknown volumes of records due to alleged flood during the Healy era. She was unaware of the extent of the records the TTO lost. Remarkably, she was uninterested in the details and did not view the loss of records as a problem:

Q: Do you know why the TTO appears to be missing records from its files?
A: No.
Q: Are you aware of a flood that occurred or that Bob Healy claimed occurred at the TTO's offices?
A: I have heard that, but I don't know anything about it.
Q: What have you heard about it?
A: I heard that there was a flood that damaged records.
Q: When was that?
A: I don't know.
Q: Who told you that?
A: Lauralee [Conway, a TTO employee].
Q: When did she tell you that?
A: When I first started.
Q: And what did she say – What records were lost as a result of the flood?
A: We didn't have a detailed conversation about that....
Q: Didn't you think it was important to know what documents were missing from the TTO's files?
A: No.
Q: Why didn't you think it was important?
A: Historical documents didn't have relevance to the current operation.
Q: Well, they do have relevance to this lawsuit, don't they?

A: Understood.
Q: And you're seeking $4.6 million from District 204 based on things that happened in the past, some as far back as 20 years ago, aren't you?
A: Yes.
Q: And so isn't it important to have an understanding as to what documents the TTO does and doesn't have from that relevant time period?
A: I understand that when there was a flood that they salvaged as much of the documentation as they could by drying it out. If the documents don't exist, I don't know why. And I don't question why they were lost or what was lost because they're historical documents, and they were not relevant to the operations when I was there.

(SJ Ex. 7, p. 101-04)

The seriously incomplete nature of the TTO's files, the unavailability of key witnesses, and the alleged flood at the TTO are undisputed facts that underscore why Courts impose limitations periods on plaintiffs – even governmental bodies like the TTO.

VI. CONCLUSION

For all of the reasons in this motion, LT respectfully asks this Court to grant this motion and decide, as a matter of law, that (a) the five-year catch-all limitations period in 735 ILCS 5/13-205 applies to the TTO's claims in the Amended Complaint, and (b) the TTO's claims, to the extent they are based on events or transactions that occurred before October 17, 2008, are time-barred.

Respectfully submitted,

LYONS TOWNSHIP HIGH SCHOOL DISTRICT 204

By s/Jay R. Hoffman
Its Attorney

Jay R. Hoffman
Hoffman Legal
20 N. Clark St., Suite 2500
Chicago, IL 60602
(312) 899-0899
jay@hoffmanlegal.com
Attorney No. 34710

CERTIFICATE OF SERVICE

Jay R. Hoffman, an attorney, certifies that on May 31, 2017, he caused the foregoing pleading to be served by email on the following attorneys:

Gerald E. Kubasiak
kubasiak@millercanfield.com
Barry P. Kaltenbach
kaltenbach@millercanfield.com
Gretchen M. Kubasiak
kubasiakg@millercanfield.com
Miller, Canfield, Paddock and Stone, P.L.C.
Suite 2600
225 W. Washington St.
Chicago, IL 60606

s/Jay R. Hoffman