
IN THE
SUPREME COURT OF ILLINOIS

COUNTY OF COOK, ex rel.,)	
ROBERT F. RIFKIN, RAYMOND G.)	
SCACHITTI, and PATRICK J. HOULIHAN,)	
on behalf of itself and all other municipal and)	
governmental entities similarly situated,)	Circuit Court No. 01 CH 4822
)	
Plaintiffs-Appellants,)	
)	
v.)	Hon. Stephen A. Schiller,
)	Judge, Presiding
BEAR STEARNS & CO., INC., PUBLIC)	
SECTOR GROUP, INC., SEAWAY)	
NATIONAL BANK OF CHICAGO, and)	
ERNST & YOUNG LLP,)	
)	
Defendants-Appellees.)	

BRIEF OF DEFENDANT-APPELLEE
ERNST & YOUNG LLP

July 23, 2004

ORAL ARGUMENT REQUESTED

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INTRODUCTION

The three plaintiffs in this case, purportedly Cook County taxpayers, are attempting to assert claims on behalf of the County to recover for alleged overcharges by Bear Stearns & Co. (“Bear Stearns”) in connection with the County’s 1992 refinancing of certain municipal bonds. The County hired Ernst & Young (“E&Y”) to perform specified mathematical calculations in the transaction.

The claims against E&Y are flawed for several independent reasons:

First, this Court has never permitted common law taxpayer actions to proceed without an allegation that a breach of duty by a public official resulted in the purported damages. Here, the plaintiffs admitted in their complaint that there was no breach of duty by a public official.

Second, the plaintiffs cannot sue on the County’s behalf in any event because, as this Court held in *Ashton v. Cook County*, 384 Ill. 287 (1943), the Counties Code prohibits private attorneys from litigating claims on behalf of a county. The Counties Code requires that any suits on behalf of a county may be litigated only by the State’s Attorney, acting under the general direction of the County Board (unless a court has appointed a Special State’s Attorney for reasons specified by statute, which has not occurred here).

Third, the trial court did not manifestly abuse its discretion in denying plaintiffs’ motion to amend their complaint and add a statutory fraud claim against E&Y under 735 ILCS 5/20-102 (Article XX). Plaintiffs sought leave to amend four years after they first sued E&Y, and they have never denied that they could have asserted their statutory claim from the

outset, nor have they ever offered any explanation for their long delay. Moreover, the proposed amendment as to E&Y is legally deficient because it completely fails to plead fraud with the specificity required by Illinois law. In addition, it is undisputed that plaintiffs never served a statutorily required pre-suit demand on the President of the Cook County Board. Even if they had, Article XX is unconstitutional under this Court's decision in *Lyons v. Ryan*, 201 Ill. 2d 529 (2002), and *People ex rel. Kunstman v. Nagano*, 389 Ill. 231 (1945), because it allows private parties to exercise powers that the Illinois Constitution places exclusively in the hands of the State's Attorney.

For all of these reasons, explained in detail below, the trial court properly dismissed the claims against E&Y. This Court should affirm that ruling.

ISSUES PRESENTED

1. Whether plaintiffs have appealed the dismissal of the common law claims against E&Y when their notice of appeal does not refer to the trial court's order dismissing those claims.

2. Whether taxpayers may assert common law claims on behalf of a county when this Court has never permitted a taxpayer action to proceed without an alleged breach of duty by a public official and plaintiffs admitted in their complaint that there was no such breach here.

3. Whether taxpayers may assert common law claims on behalf of a county when the Counties Code provides that the State's Attorney is responsible for litigating all suits brought by a county, under the general direction of the county board.

4. Whether the trial court committed a manifest abuse of discretion in denying plaintiffs' May 2003 motion for leave to amend to add a statutory fraud claim under Article XX when

- (a) plaintiffs first sued E&Y in 1999,
- (b) plaintiffs have never disputed that they could have alleged a statutory fraud claim in 1999, and
- (c) the new proposed claim was deficient because
 - (i) plaintiffs failed to served the statutorily required pre-suit demand on the President of the Cook County Board,
 - (ii) Article XX is unconstitutional to the extent that it permits an individual taxpayer to litigate claims on behalf of a county, and
 - (iii) the fraud allegations in the proposed amendment are entirely conclusory.

JURISDICTION

The complaint alleges three common law claims against E&Y. Record Vol. 1, C 32-33, 35-37. The circuit court dismissed those claims on June 19, 2003. Pl. App. A1-2. In the same order, the court also denied plaintiffs' motion for leave to amend their complaint to add a statutory fraud claim against E&Y under Article XX of the Code of Civil Procedure. Pl. App. A1; Vol. 3, C 638-40, 667. The court did not make a finding under S. Ct. Rule 304(a), and the entire case was not dismissed until the court's August 20, 2003 order dismissing the claims against Bear Stearns. Pl. App. A3.

The plaintiffs' notice of appeal, filed on September 18, 2003, states that the plaintiffs "hereby appeal" two orders: "(a) the final judgment order * * *, entered on August 20, 2003,

which dismissed all counts of this case with prejudice in favor of the Defendant, and (b) the court's June 19, 2003 order denying Plaintiffs leave to amend their complaint, made appealable by the dismissal on August 20th." Pl. App. A44. After discussing the denial of plaintiffs' request for leave to amend, the notice of appeal summarizes the reasons why the circuit court "dismissed the common law counts against Bear Stearns," and the prayer for relief asks this Court, *inter alia*, to reverse the circuit court's holding that "common law taxpayer standing" is limited only to suits against public officials and that "the Counties Code precludes common law taxpayer suits." Pl. App. A45. The notice of appeal does not refer at all to the common law claims against E&Y. Pl. App. A44-45.

Under these circumstances, this Court lacks jurisdiction to the extent that plaintiffs' brief attempts to argue that dismissal of the common law claims against E&Y should be reversed. Rule 303(b)(2) mandates that the notice of appeal "shall specify the judgment or part thereof or other orders appealed from." The notice of appeal here does not indicate, let alone "specify" as required, that plaintiffs are appealing the dismissal of their common law claims against E&Y.

Significantly, although the notice of appeal states explicitly that plaintiffs are appealing "the court's June 19, 2003 order denying Plaintiffs leave to amend their complaint" (Pl. App. A44), it makes no mention of the other part of the June 19 order dealing with E&Y: dismissal of the common law claims against E&Y. Plaintiffs' failure to refer to that part of the order in their notice of appeal means that plaintiffs have not appealed the ruling on the common law claims against E&Y. See *Alpha Gamma Rho Alumni v. People ex rel. Boylan*,

322 Ill. App. 3d 310, 313 (4th Dist. 2001) (“When an appeal is taken from a part of a specified judgment, the appellate court acquires no jurisdiction to review other judgments or parts thereof not so specified or not fairly inferred from the notice as intended to be presented for review”); *Sterne v. Forrest*, 145 Ill. App. 3d 268, 279 (2d Dist. 1986) (a notice of appeal stating that the defendant was appealing from specified rulings made in a particular order did not confer appellate jurisdiction over another order entered the same day). The conclusion that the plaintiffs have not appealed the court’s ruling on the common law claims against E&Y is reinforced by the fact that the notice of appeal specifically refers to “the common law counts against Bear Stearns.” Pl. App. A45. An analogous reference to the common law counts against E&Y is conspicuously absent.

This Court faced a similar situation in *Ferguson v. Riverside Medical Center*, 111 Ill. 2d 436 (1985). There were four defendants in that case. One defendant was never served with a summons, and another defendant received summary judgment early in the litigation because the individual defendants were not its employees. *Id.* at 438-39. The last two defendants then filed separate motions to dismiss; each motion made the same limitations argument. *Id.* at 439. The motion to dismiss filed by one of those defendants (Parkhurst) was granted several weeks before the court granted the motion to dismiss filed by the remaining defendant (Ehrlich). The ensuing notice of appeal referred only to Ehrlich and the order granting his motion, although the notice also asked the appellate court to “remand[] this cause for Trial.” *Id.* at 440. This Court held that “[i]t is clear that the plaintiff perfected an appeal only of the order granting defendant Ehrlich’s dismissal motion.” *Id.* The notice of

appeal “did not bring up for review the separate, earlier ruling on defendant Parkhurst’s dismissal motion” because the notice “purported to appeal only the order granting defendant Ehrlich’s dismissal motion and requested relief only with respect to that ruling.” *Id.* at 442.

Other decisions are to the same effect. In *Illinois Central Gulf R.R. v. Sankey Bros.*, 78 Ill. 2d 56 (1979), this Court held that there was no appellate jurisdiction with respect to an order dismissing the defendant’s counterclaim. The Court explained that the notice of appeal “seeks review only of the summary judgment order * * * and makes no mention of the earlier order * * *, which dismissed the counterclaim.” *Id.* at 61. See also, *e.g.*, *Atkinson v. Atkinson*, 87 Ill. 2d 174, 177-78 (1981) (no appellate jurisdiction to review an earlier custody order where the notice of appeal was “expressly limited” to two separate matters in a later order and “failed to specify that [the appellant] was appealing the award of custody”); *Ibe v. Lee*, 264 Ill. App. 3d 800, 806 (1st Dist. 1993) (“By failing to specify the March mistrial order in the notice of appeal, defendant did not appeal the order,” even though the mistrial resulted in a sanctions order that was appealed); *Long v. Soderquist*, 126 Ill. App. 3d 1059, 1062 (2d Dist. 1984) (no appellate jurisdiction over order dismissing two counts of the complaint because that order “was not included” in the notice of appeal; plaintiffs appealed only from a summary judgment order disposing of their other claims).

It is obvious that the notice of appeal here does not purport to appeal the circuit court’s dismissal of the common law claims against E&Y. Accordingly, this Court does not have jurisdiction to review that decision, and it cannot review the circuit court’s decision that the plaintiffs lacked standing to sue E&Y. As to E&Y, the Court has jurisdiction only to

review the trial court's discretionary decision to deny plaintiffs' motion for leave to amend their complaint.

STATEMENT OF FACTS

A. Plaintiffs' Allegations. The three plaintiffs in this case are taxpayers attempting to sue on behalf of Cook County to pursue an alleged "yield burning" claim. Vol. 1, C 6 ¶¶ 7-9. The case has its genesis in the County's 1992 decision to refinance, at lower interest rates, certain municipal bonds that the County had issued in previous years. Vol. 1, C 19 ¶ 63. In brief, plaintiffs contend that Bear Stearns, the lead underwriter for the County's issuance of new bonds (called "advance refunding bonds"), charged an above-market rate for U.S. Treasury bonds sold to the County as part of the transaction. Vol. 1, C 19, 22 ¶¶ 63, 79. The plaintiffs claim that E&Y, hired by the County as an "escrow verifier," improperly failed to disclose to the County that Bear Stearns was charging an excessive price for the Treasury bonds; failed to include Bear Stearns's markup in calculating the Treasury bonds' yield; and as a result, improperly certified the yield figure. Vol. 1, C 4, 16-17, 21, 26 ¶¶ 2, 56, 74, 96. (For a further description of the factual background for this case, see *Rifkin v. Bear Stearns & Co.*, 248 F.3d 628, 630-31 (7th Cir. 2001), an earlier decision in this litigation.)

E&Y's report, which is attached as an exhibit to the complaint, states that E&Y had performed "a verification of the mathematical accuracy of the computations contained in the schedules" prepared by Bear Stearns for Cook County, and that E&Y had calculated "the computations of 'yield' contained in the schedules." Vol. 1, C 44. E&Y further stated that

“the computations contained in the schedules provided to us by Bear, Stearns & Co. * * * are mathematically correct,” and that it had “verif[ied] the mathematical accuracy of the computations.” Vol. 1, C 45.

The plaintiffs do not allege that any public official or employee knew about or participated in the alleged markup by Bear Stearns. Rather, plaintiffs allege that “the County did not know” about the purported markup. Vol. 1, C 22 ¶ 82. In addition, plaintiffs admit that if the alleged markup is recovered on behalf of the County, the County must “turn[] the markup over to the [U.S.] Treasury to avoid having the Cook Refunding Bonds loose [sic] their tax exempt status.” Vol. 1, C 23 ¶ 82.

B. Relevant Procedural History. In March 1999, attorney Clinton Krislov notified Cook County State’s Attorney Richard Devine, purportedly pursuant to 735 ILCS 5/20-104(b), of his intention to file suit to recover the alleged overcharge for the U.S. Treasury bonds. Vol. 1, C 39. The letter did not identify the taxpayers represented by Krislov. *Id.* It is undisputed that no similar letter was ever sent to Cook County Board President John Stroger.

Plaintiffs initially filed suit against E&Y and others in federal court in May 1999. Vol. 3, C 691. Judge Norgle dismissed the case for lack of standing (Vol. 1, C 125-34), and the Seventh Circuit affirmed (*Rifkin*, 248 F.3d at 631-34). The Seventh Circuit held that the plaintiffs lack Article III standing to challenge the yield burning claims made in this case because they did not have any concrete interest in the recovery, if any, obtained on behalf of

Cook County. Rather, the plaintiffs “assert only a generalized injury shared by all taxpayers of Cook County,” which is legally insufficient to establish standing. *Rifkin*, 248 F.3d at 632.

Plaintiffs filed the instant state court suit in March 2001. Vol. 1, C 4. They alleged three common law claims against E&Y: breach of fiduciary duty, breach of contract, and accountant malpractice. Vol. 1, C 32-33, 35-37 ¶¶ 128-132, 141-153. E&Y moved to dismiss, as did Cook County, Bear Stearns, and the other defendants. Vol. 1, C 54, 179, 193, 196; Vol. 2, C 471. After receiving several extensions of time, plaintiffs finally responded to E&Y’s motion on May 13, 2003. Vol. 3, C 592, 612-14. The next day—some four years after plaintiffs first sued E&Y—plaintiffs moved to amend their complaint, in order to add a statutory claim against E&Y under Article XX. Vol. 3, C 638-40, 667. The plaintiffs had alleged Article XX claims against Bear Stearns since 1999. Vol. 1, C 29-30, 128. The proposed new claim alleged that E&Y “knowingly aid[ed] Bear Stearns in its fraudulent receipt” of money to which it was not entitled. Vol. 3, C 667 ¶ 116.

C. The Circuit Court’s Decision. In June 2003, the circuit court, “[i]n the exercise of [its] discretion,” denied plaintiff’s motion to amend their complaint. Pl. App. A1. The court explained that “the matters asserted in the Amended Complaint were known to the Plaintiffs when the original complaint was filed in this Court and no sufficient excuse was offered to explain the initial failure to include Article XX claims in the original complaint.” *Id.* Moreover, the court noted, “there would be prejudice to * * * Ernst & Young LLP from amendment at this time.” *Id.*

The court then dismissed the common law claims against E&Y for lack of standing. The court held that the First District’s recent ruling in *City of Chicago ex rel. Scachitti v. Prudential Securities*, 332 Ill. App. 3d 353 (1st Dist. 2002), was controlling and compelled dismissal of the common law claims. *Id.*

Two months later, the court granted Bear Stearns’s motion to dismiss and dismissed the entire case. Pl. App. A3, 39-42. Plaintiffs then appealed to this Court. Pl. App. A44.

STANDARD OF REVIEW

If the plaintiffs have appealed the trial court’s dismissal of their common law claims against E&Y—which they have not, for reasons explained earlier—that decision is reviewed *de novo*. *Lyons v. Ryan*, 201 Ill. 2d 529, 534 (2002). The trial court’s denial of plaintiffs’ motion for leave to amend their complaint may be reversed only if the trial court committed a “manifest abuse” of its “broad discretion” to decide whether to permit amendment of a pleading. *Loyola Academy v. S&S Roof Maintenance*, 146 Ill. 2d 263, 273-74 (1992) (citing numerous cases).

ARGUMENT

I. The Trial Court Properly Dismissed The Common Law Claims Alleged Against Ernst & Young.

There are two independent reasons for dismissal of the common law claims asserted against E&Y. *First*, it is clear under this Court’s decisions that common law taxpayer actions are not permitted unless the plaintiffs establish that there was a breach of duty by a public officer; we are not aware of any case in which this Court has allowed a taxpayer action to proceed without such a breach of duty. Certainly the plaintiffs cite no such case. And the

plaintiffs have conceded that there was no breach of duty by a public official here: they admitted in their complaint that “the County did not know” about the alleged markup by Bear Stearns. Vol. 1, C 22 ¶ 82. *Second*, even if a public official had breached a duty here, the Counties Code precludes all taxpayer actions on behalf of a county. By statute, the County Board has the sole authority to bring suits on behalf of a county, and all such suits must be litigated by the State’s Attorney. Here, Cook County, the allegedly defrauded party, has opposed this litigation from the outset. The County’s position is perfectly understandable: by plaintiffs’ own admissions, the County cannot possibly benefit from successful prosecution of this suit; if anything, the case puts the County at risk.

The second ground summarized above was raised in the trial court; E&Y argued below that the Counties Code required dismissal of this suit. Vol. I, C 187. Plaintiffs contend (without citation) that arguments that “were not the grounds for dismissal” below are “not relevant” in this Court. Pl. Br. 12 n.4. That is plainly wrong. It has long been settled Illinois law that “[a] trial court may be affirmed on any basis that appears in the record without regard to whether the trial court relied upon such ground or whether the trial court’s rationale was correct.” *Gunthorp v. Golan*, 184 Ill. 2d 432, 438 (1998). Indeed, “[a]n appellee may raise any argument or basis supported by the record to show the correctness of the judgment, even though he had not previously advanced such an argument.” *People v. P.H.*, 145 Ill. 2d 209, 220 (1991).

A. Plaintiffs Lack Standing Because This Case Does Not Involve A Breach Of Duty By A Public Officer.

The federal courts have already held that this lawsuit is not the kind of taxpayer derivative action that is permissible under federal law. This Court should not reach a contrary decision under state law when the taxpayers have no cognizable interest in any recovery and the plaintiffs have admitted that there has been no violation of a duty by a public official. Indeed, reversing the circuit court's decision would require this Court to overturn 100 years of Illinois law, which has consistently permitted common law taxpayer actions *only* when there has been a breach of duty by a public officer.

The circuit court held (Pl. App. A1) that dismissal of plaintiffs' claims is compelled by *City of Chicago ex rel. Scachitti v. Prudential Securities*, 332 Ill. App. 3d 353 (1st Dist. 2002), which in turn relied on several of this Court's decisions. *Scachitti* was much like this case: a taxpayer suit, purportedly filed on behalf of the City of Chicago, to recover from private defendants for alleged yield burning. Citing *Reid v. Smith*, 375 Ill. 147 (1940), and *People ex rel. Daley v. Warren Motors, Inc.*, 114 Ill. 2d 305 (1986), the Appellate Court held in *Scachitti* that taxpayers may sue to recover money on behalf of a public body only when the plaintiffs allege a "breach of duty *by a public officer*." 332 Ill. App. 3d at 369-70. The *Scachitti* complaint did not allege any breach of duty by a public officer, and therefore the court affirmed dismissal of the complaint.

Scachitti correctly held that a breach of duty by a public official is a prerequisite to any common law taxpayer suit. Indeed, in this Court, the plaintiffs themselves concede that taxpayer suits are generally permitted "only if they are designed to (a) enjoin unlawful

expenditures; (b) bring about an accounting of public funds wrongfully withheld or retained by public officials; (c) enjoin levying of illegal taxes; or (d) enjoin the issuance [or] payment of general revenue bonds.” Pl. Br. 15 (quoting *Booth v. Metropolitan Sanitary Dist.*, 79 Ill. App. 2d 310, 318 (1st Dist. 1967)) (other citations omitted).

The first problem with plaintiffs’ argument is that this lawsuit does not fit into *any* of the four categories of permissible taxpayer suits identified in plaintiffs’ own brief. Under their own standards, the common law claims against E&Y must be dismissed.

Moreover, each of the four situations identified in plaintiffs’ brief necessarily involves a breach of duty by a public official. That much is obvious by the plain language of (a)-(c), and it is true for (d) as well; the only case that *Booth* cited for this proposition, *Wright v. Bishop*, 88 Ill. 302, 303 (1878), was a suit by a taxpayer “to enjoin the municipality from incurring an illegal debt.”

To our knowledge, this Court has never permitted a common law taxpayer suit to proceed absent some breach of duty by a public official—and the plaintiffs cite *no* such case. For example, in *Reid v. Smith*, 375 Ill. at 149, the Court held that “a taxpayer may maintain a suit in equity to enjoin the misappropriation or waste of public money”; by definition, this must be the result of misconduct by public officials (in *Reid*, the State Treasurer, Director of Public Works, and Auditor of Public Accounts). Likewise, *Jones v. O’Connell*, 266 Ill. 443, 447-48 (1914) (cited Pl. Br. 15), recognized that taxpayers possessed an “equitable right to restrain the illegal use or misappropriation of public funds” through an injunction against a public official who had “unlawfully retained” public funds. *Fergus v. Russel*, 270 Ill. 304,

315 (1915) (cited Pl. Br. 16), was a suit against the State Treasurer to “enjoin an invalid appropriation of the public funds from the State treasury.” Among other things, the *Fergus* Court invalidated a statute that would have permitted a lawyer other than the Attorney General to represent a state agency. *Id.* at 341-42. In *McCord v. Pike*, 121 Ill. 288, 290 (1887) (cited Pl. Br. 16), the Court permitted a taxpayer suit to enjoin public officials from “illegal[ly]” disposing of public property. In a more recent decision, *City of Chicago ex rel. Konstantelos v. Duncan Traffic Equipment Co.*, 95 Ill. 2d 344, 348 (1983) (cited Pl. Br. 16), the plaintiffs alleged that the deputy commissioner of Chicago’s Department of Streets and Sanitation had “conspir[ed]” with others to pay bills for inspecting city parking meters even though the inspection work was not performed. And although the *Daley* case cited by the *Scachitti* court was not a taxpayer suit, it involved the imposition of a constructive trust on private defendants who participated with public officials in “a fraudulent scheme involving personnel of the board of appeals of Cook County.” 114 Ill. 2d at 308-09. The common thread in all of these cases is that each involved public officials who had allegedly acted improperly or unlawfully.^{1/}

^{1/} The other cases that plaintiffs cite also involve alleged breaches of duty by public officials. See *Knopf v. First Nat’l Bank*, 173 Ill. 331, 332 (1898) (cited Pl. Br. 15) (suit to enjoin public officials from collecting an allegedly “illegal tax”); *Colton v. Hanchett*, 13 Ill. 615, 617 (1852) (cited Pl. Br. 15) (ordering an injunction against a county board of supervisors because the board “had no authority to appropriate the county funds to aid a private individual in the construction of a toll bridge”); *Booth*, 79 Ill. App. 2d at 313 (suit alleging that there was a “fraudulent conspiracy” involving the Metropolitan Sanitary District and “certain of its officials” to lease land for inadequate sums; the court affirmed dismissal for lack of standing). The only case cited by plaintiffs that does not concern a breach of duty by a public official, *City of Chicago ex rel. Thrasher v. Commonwealth Edison*, 159 Ill. App. (continued...)

The requirement that common law taxpayer actions are permitted only when there has been a breach of duty by a public official makes sense. When a public officer has committed a breach of duty, it is unlikely that the public body involved will be able to make an objective, dispassionate decision about whether to bring suit; the public official whose conduct is at issue may be able to prevent the appropriate public agency from filing suit. In this circumstance, a taxpayer suit may provide the only means of remedying official misconduct. But a taxpayer suit is unnecessary when, as here, there has not been any breach of duty by a public officer. In these situations, the appropriate public officials can reasonably be counted on to arrive at an objective decision about whether the case should be pursued, taking into consideration the pertinent factors that must be weighed in determining where the public interest lies. As this Court has noted, there is a “presumption that public officers, in the absence of any showing to the contrary, are ready and willing to perform their duties.” *Konstantelos*, 95 Ill. 2d at 353-54. Accord, e.g., *Lyons*, 201 Ill. 2d at 539 (“it is presumed that a public official performs the functions of his office according to law and that he does his duty”) (citations omitted); *People ex rel. Kunstman v. Nagano*, 389 Ill. 231, 252 (1945) (“It is presumed that [the State’s Attorney] will act under such a heavy sense of public duty and obligation for enforcement of all our laws that he will commit no wrongful act”).

^{1/2}(...continued)

3d 1076 (1st Dist. 1987) (cited Pl. Br. 16-17), is inapposite: the Appellate Court there affirmed dismissal of the complaint because the claim that was alleged, an overcharge for electricity service, was within the exclusive jurisdiction of the Illinois Commerce Commission. *Id.* at 1079-80. The court explicitly declined to reach, or even discuss, whether the plaintiff had standing to bring the action. *Id.*

Accordingly, this Court has eschewed standing rules that would permit taxpayers with too-ready access to courts, which would “frustrate the orderly administration of governmental responsibilities.” *Konstantelos*, 95 Ill. 2d at 354. The Court has declined to adopt a test for standing that would encourage citizens “to substitute their discretion for that of those to whom the law has confided that discretion.” *Id.* As this Court stated in *Nagano*, when it struck down as unconstitutional a state statute that permitted citizens to bring suit when the State’s Attorney did not act, if the State’s Attorney acts improperly, “the remedy must be by other well known means,” not by authorizing private citizens to override the State’s Attorney’s judgment on whether to file suit. 389 Ill. at 252. “Disagreement” with a decision whether to sue “in any given case does not justify granting standing to anyone who desires to bring an action on behalf of [a governmental body].” *Lyons*, 201 Ill. 2d at 539.

A bright-line test barring common law taxpayer suits when there is no allegation of a breach of duty by a public official is fully consistent with these principles and with this Court’s longstanding precedent. And because the plaintiffs have admitted that no public officer breached a duty here, the trial court properly dismissed the common law claims against E&Y.

B. Plaintiffs Lack Standing Because Common Law Claims Cannot Be Brought By Taxpayers On Behalf Of A County.

There is a second reason why the claims against E&Y must be dismissed. The Counties Code provides that:

*It shall be the duty of the county boards of each of the counties of this State to take and order suitable and proper measures for the prosecuting and defending of all suits to be brought by or against their respective counties * * *.*

55 ILCS 5/1-6003 (emphasis added). Similarly, one of the duties of the State’s Attorney “shall be” to “commence and prosecute *all* actions, suits, indictments and prosecutions, civil and criminal, in the circuit court for his county, in which the people of the State or county may be concerned.” 55 ILCS 5/3-9005(a)(1) (emphasis added).

This Court applied earlier but substantively identical versions of these two statutes in *Ashton v. Cook County*, 384 Ill. 287, 296-97 (1943), an action by private counsel attempting to enforce contingent fee contracts to pay them for legal services they performed for Cook County. The Court held that the Cook County Board had no authority to enter into the contracts and that the contracts, therefore, were void. The Court explained that section 5 of the State’s Attorneys Act (now section 9005(a)(1) of the Counties Code) “expressly imposed on the State’s Attorney” the “duty to prosecute all actions and proceedings for the recovery of revenues and penalties,” while under section 33 of the Counties Act (now section 6003 of the Counties Code) “the duty is imposed upon the county board to take and order suitable and proper measures for the prosecution of all suits.” 384 Ill. at 297. By law, the State’s Attorney “is the attorney and legal adviser of the county officials in all matters pertaining to the official business of the county,” and section 33 “contains no express authorization empowering [the county] to employ private attorneys to institute such proceedings.” *Id.* at 297-98. Nor is there any such power by implication:

County boards can exercise only such powers as are expressly given by law or such as arise by necessary implication from the powers granted or are indispensable to carry into effect the object and purpose of their creation. No provision is made in the law which authorizes a board to employ private counsel in collection of delinquent taxes * * *, even though the State’s Attorney approves the contracts as to form and gives his silent acquiescence

to the procedure adopted. His consent cannot operate to supply the board with a power which the legislature has seen fit to withhold.

Id. at 299 (citations omitted). The Court concluded:

The law is well settled that when the constitution or the laws of the State create an office, prescribe the duties of its incumbent and fix his compensation, no other person or board, except by action of the legislature, has the authority to contract with private individuals to expend public funds for the purpose of performing the duties which were imposed upon such officer.

Id. at 300 (citing *Fergus v. Russel*, 270 Ill. 304 (1915), and other cases). As a result, the contracts for legal services that the plaintiffs and the county board entered into were “wholly void.” *Id.* at 301. See also 1997 Ill. Atty. Gen. Op. 1, 1997 WL 8820, at *2 (Jan. 9, 1997) (“In addition to *Ashton v. County of Cook*, there are numerous reported cases holding that a county has no authority to employ an attorney to perform duties which the State’s Attorney is obligated to perform. Opinions of the Attorney General have reached the same conclusion”) (citations omitted).^{2/}

The Court’s reasoning in *Ashton* applies squarely to suits purportedly brought by citizens on behalf of a governmental unit. That is what this Court held in *Nagano*, 389 Ill. at 247-52, when it ruled that a statute permitting citizens to sue on the State’s behalf if the

^{2/} The “only exception” to the rule stated in the text is when a Special State’s Attorney is appointed by a court pursuant to 55 ILCS 5/3-9008, which has not occurred here. 1997 Ill. Atty. Gen. Op. 1, 1997 WL 8820, at *2. That statute permits a court to appoint a Special State’s Attorney in limited circumstances: when the State’s Attorney “is sick or absent, or unable to attend, or is interested in any cause or proceeding,” or there is a “vacancy of more than one year” in the office of State’s Attorney. 55 ILCS 5/3-9008. A State’s Attorney is “interested” in a case within the meaning of the statute only when he or she is “interested as a private individual” or is “an actual party to the action.” *EPA v. Pollution Control Bd.*, 69 Ill. 2d 394, 400-01 (1977).

State’s Attorney did not file suit within a specified time was unconstitutional under *Ashton* and *Fergus*. Similarly, the Appellate Court followed *Ashton* in *McKay v. Kusper*, 252 Ill. App. 3d 450 (1st Dist. 1993), holding that taxpayers lacked standing to sue on behalf of Cook County. The court reasoned that section 6003 of the Counties Code “places the sole authority in the County Board to bring suits on behalf of the County” and that, under *Ashton*, the county board had no authority to “employ private counsel” to act for the county.^{3/} 252 Ill. App. 3d at 456-57.

The *McKay* court was correct: this Court’s decision in *Ashton* governs taxpayer cases. To be sure, this case does not involve, as *Ashton* did, an express contract between the County Board and private counsel. But the plaintiffs’ attorneys here are asserting an ability to conduct litigation on behalf of Cook County, just as the attorneys in *Ashton* were. As in *Ashton*, the attorneys here are attempting to prosecute claims for the county from which they will recover their fees. That was true in *Nagano* as well; the plaintiff was purporting to sue on the State’s behalf under a statute (which this Court held unconstitutional) providing for the payment of fees to the citizen plaintiff. If anything, *Ashton* presented a stronger case for permitting the private attorneys to act for the county—the Cook County Board, after all, had approved the contracts at issue there. Here, in contrast, the Cook County Board has *not*

^{3/} The *McKay* court further noted that cases involving taxpayer suits brought on behalf of municipalities were inapposite because the Municipal Code “explicitly authorize[s]” municipal taxpayer suits. 252 Ill. App. 3d at 457-58. A county is not a municipality. Ill. Const. art. VII, § 1 (“‘Municipalities’ means cities, villages and incorporated towns. ‘Units of local government’ means counties * * *”).

approved this litigation, and Cook County has consistently argued for dismissal of this suit. *E.g.*, Vol. 1, C 54.

Thus, counties have no power “to employ private attorneys,” *Ashton*, 384 Ill. at 298, either directly as in *Ashton* or indirectly through citizen suits as in *Nagano*, 389 Ill. at 251-52. Pursuant to 55 ILCS 5/1-6003 and 3-9005(a)(1), the County, acting through the State’s Attorney, has complete discretion to decide whether to pursue litigation on the County’s behalf.

This case illustrates the General Assembly’s wisdom in leaving decisions about whether to pursue litigation entirely with the County, not with private attorneys in search of a fee award. The plaintiffs admit in their complaint that even if the alleged Bear Stearns markup is recovered, Cook County would have to “turn[] the markup over to the [U.S.] Treasury to avoid having the Cook Refunding Bonds loose [sic] their tax exempt status.” Vol. 1, C 23 ¶ 82. In other words, the County cannot possibly achieve *any* benefit from this lawsuit. If anything, the litigation creates a risk that the tax exempt status of County-issued bonds will be jeopardized. It would be irrational for the County to pursue this lawsuit, which no doubt is one reason why the State’s Attorney has argued from the beginning that the case should be dismissed. It would make no sense to permit private attorneys to pursue litigation that the County, for eminently sensible reasons, has refused to bring.^{4/}

^{4/} In corporate derivative actions, a stockholder cannot pursue litigation on behalf of a corporation unless the board of directors “abused its discretion, was grossly negligent, or acted in bad faith or fraudulently” in deciding “not to proceed with litigation.” *Goldberg v. Michael*, 328 Ill. App. 3d 593, 599 (2d Dist. 2002). Counties have more discretion than that
(continued...)

* * *

We have shown above that there are many reasons why the trial court properly dismissed the claims that plaintiffs are attempting to assert against E&Y on Cook County's behalf. The law on standing is clear, and there is no reason to overturn that law in this case. If the plaintiffs have appealed the dismissal of their claims against E&Y, the trial court's decision should be affirmed.

II. The Trial Court Did Not Abuse Its Discretion In Denying Plaintiffs' Motion To Amend Their Complaint.

Plaintiffs first sued E&Y in May 1999 in federal court, and after the federal courts ruled that plaintiffs lacked standing to sue, they decided to try their luck in state court, filing there in March 2001. Vol. 1, C 4, 125-34; Vol. 3, C 691. As noted earlier, plaintiffs alleged three common law claims against E&Y arising out of Cook County's 1992 refinancing transaction: breach of fiduciary duty, breach of contract, and accountant malpractice. Vol. 1, C32-33, 35-37. In May 2003—eleven years after the events at issue, four years after plaintiffs first sued E&Y in federal court, and more than two years after plaintiffs sued E&Y in state court—plaintiffs moved to amend to add a statutory fraud claim against E&Y under Article XX of the Code of Civil Procedure. Vol. 3, C 638-40, 667. That statute permits suit against someone who “knowingly aided” another person in receiving money from a

^{4/}(...continued)

in making decisions about litigation—by statute, a county has unfettered discretion to make judgments about litigation—but the plaintiffs here cannot meet even the more liberal standards that apply to corporate derivative actions. As explained in the text, Cook County has made a perfectly rational decision in opposing this lawsuit.

governmental unit “by means of a false or fraudulent record, statement, or claim or other willful misrepresentation.” 735 ILCS 5/20-102. The proposed amendment alleged that E&Y “knowingly aid[ed] Bear Stearns in its fraudulent receipt” of money. Vol. 3, C 667 ¶ 116. The trial court denied leave to amend because “the matters asserted in the Amended Complaint were known to the Plaintiffs when the original complaint was filed,” plaintiffs offered “no sufficient excuse” for failing to allege Article XX claims earlier, and E&Y “would be prejudice[d]” if the amendment were permitted. Pl. App. A1. As will be seen, the court’s decision was hardly “arbitrar[y],” as plaintiffs contend. Pl. Br. 30.

Because trial courts have ““broad discretion”” to decide whether to permit amendment of a pleading, a decision denying leave to amend will be reversed only if the trial court committed a “manifest abuse of such discretion.” *Loyola Academy*, 146 Ill. 2d at 273-74. “There is no absolute right to amend pleadings,” *Hall v. Northwestern Univ. Medical Clinics*, 152 Ill. App. 3d 716, 722 (1st Dist. 1987), and four factors are considered in determining whether the trial court acted “within [its] sound discretion,” *People ex rel. Hartigan v. E&E Hauling*, 153 Ill. 2d 473, 505 (1992), in ruling on a motion to amend:

- (1) whether the proposed amendment would cure the defects in the original pleading;
- (2) whether the amendment would prejudice or surprise other parties;
- (3) whether the proposed amendment is timely; and
- (4) whether previous opportunities to amend the pleading can be identified.

Id. “Ordinarily, however, amendment should not be allowed where the matters asserted were known to the party requesting amendment when the original pleading was drafted, and for which no excuse is offered to explain the initial failure.” *Hall*, 152 Ill. App. 3d at 723. Accord, e.g., *TWA v. Martin Automatic, Inc.*, 215 Ill. App. 3d 622, 628 (2d Dist. 1991). As

discussed below, it is clear from a review of the relevant considerations that the trial court did not commit a manifest abuse of discretion in denying plaintiffs' motion for leave to amend to assert an Article XX fraud claim against E&Y.

To begin with, plaintiffs have never disputed that they could have asserted an Article XX claim against E&Y when they first brought suit in May 1999—indeed, the plaintiffs alleged Article XX claims against Bear Stearns from the outset. See Vol. 1, C 29-30, 128. Plaintiffs also have *never* offered *any* explanation—either in the trial court or in this Court—why they did not move to add an Article XX claim against E&Y until May 2003, four years later. For example, they have not claimed (and cannot claim) that they learned anything in discovery that spurred them to add a fraud claim. The plaintiffs' complete failure to provide any explanation for their long delay is sufficient by itself to affirm the trial court's ruling. *Hall*, 152 Ill. App. 3d at 723 (“Since the matters alleged in the amended complaint were clearly within plaintiff's knowledge when the original complaint was filed, we cannot find any abuse in the circuit court's refusal to permit this eleventh hour amendment”). Consideration of the four other factors mentioned earlier provides further confirmation that the trial court did not manifestly abuse its discretion.

1. Whether the proposed amendment would cure the defects in the original pleading.

Plaintiffs have not met this factor. The addition of a proposed fraud claim “does not cure an existing defect” in pleadings alleging breach of contract and negligence because a fraud

claim “relies on mental states never before pled.” *W.E. Erickson Constr. v. Chicago Title Ins. Co.*, 266 Ill. App. 3d 905, 912 (1st Dist. 1994).^{5/}

Wholly apart from this, the proposed amendment against E&Y is deficient because it is entirely conclusory. The new cause of action alleges only that “Ernst & Young * * * knowingly aid[ed] Bear Stearns in its fraudulent receipt” of money. Vol. 3, C 667 ¶ 116. (This count also realleges the first 108 paragraphs of the proposed amended complaint, *id.* ¶ 113, but the earlier paragraphs referring to E&Y do not plead any specific facts concerning E&Y’s supposed knowledge of the alleged fraud. See Vol. 3, C 653-55, 658-59, 662-63, 665 ¶¶ 56-62, 74-77, 94-97, 104-06.) As a result, the proposed amendment does not state a claim for fraud under Illinois law. This Court has long made clear that a plaintiff has an “obligation to plead facts and not conclusions.” *Knox College v. Celotex Corp.*, 88 Ill. 2d 407, 426 (1981). “[U]nsupported conclusions are not enough” to state a claim. *Buckner v. Atlantic Plant Maintenance*, 182 Ill. 2d 12, 24 (1998). In particular, to survive a motion to dismiss, common law fraud and statutory fraud claims alike must “allege, with specificity and particularity, facts from which fraud is the necessary or probable inference.” *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 496-97 (1996); see also *id.* at 501. Thus, a claim “sounding in fraud is required to allege the ultimate facts showing a false representation

^{5/} *In re Estate of Hoover*, 155 Ill. 2d 402 (1993) (cited Pl. Br. 31), is inapposite because, as the Court observed there, “plaintiffs will rely on the *same* allegations in their undue influence count as in their fraud in the inducement theory.” 155 Ill. 2d at 417 (emphasis added). In contrast, the new statutory fraud claim that plaintiffs attempted to add against E&Y would have required proof of E&Y’s state of mind that was not even relevant to the claims previously alleged against E&Y.

knowingly made.” *Hardy v. Bankers Life & Cas. Co.*, 19 Ill. App. 2d 75, 81 (1st Dist. 1958). “Merely characterizing acts as having been done fraudulently is insufficient.” *Boatwright v. Delott*, 267 Ill. App. 3d 916, 919 (1st Dist. 1994) (citing *Browning v. Heritage Ins. Co.*, 33 Ill. App. 3d 943, 948 (2d Dist. 1975)). See also *Small v. Sussman*, 306 Ill. App. 3d 639, 646 (1st Dist. 1999) (“generalized pleadings” alleging, *inter alia*, that defendants “made false statements of material fact” are “defective as a matter of law” because they “fail[] to allege fraud with particularity”). The proposed amended complaint here violates these settled principles; it does not allege *any* specific facts to support the conclusion that E&Y knowingly aided a fraud, and thus it does not come close to meeting “Illinois’ stringent pleading requirements for fraud.” *Boatwright*, 267 Ill. App. 3d at 919.

Nor could the plaintiffs allege any such specific facts about E&Y. After all, E&Y’s report stated only that “the computations contained in the schedules provided to us by Bear, Stearns & Co. * * * are mathematically correct.” Vol. 1, C 45. E&Y simply “verif[ied] the mathematical accuracy of the computations.” *Id.* Plaintiffs do not allege that these mathematical calculations were incorrect, and accurately performing mathematical computations cannot constitute knowing participation in a fraud. See *Bane v. Sigmundr Exploration Corp.*, 848 F.2d 579, 582 (5th Cir. 1988) (“routine or typical banking practices” are legally insufficient to constitute aiding and abetting securities fraud).

Because the proffered amended complaint does not allege any specific facts to support the conclusion that E&Y knowingly joined in a fraud, the trial court did not abuse its discretion in denying leave to amend. See *Swaw v. Ortell*, 137 Ill. App. 3d 60, 74 (1st Dist.

1984) (no abuse of discretion in denying leave to amend where fraud allegations were “conclusory” instead of “contain[ing] specific allegations of facts from which fraud is the necessary or probable inference”); *Boatwright*, 267 Ill. App. 3d at 919 (“A complaint must clearly and explicitly allege sufficient facts to support a conclusion of fraud”) (affirming dismissal of fraud claim). A court does not abuse its discretion in denying leave to amend when, as here, the “[new] allegations failed to cure the defective pleading.” *Board of Directors of Bloomfield Club Recreation Ass’n v. Hoffman Group*, 186 Ill. 2d 419, 432 (1999). See also *Terry v. Metropolitan Pier & Exposition Auth.*, 271 Ill. App. 3d 446, 456 (1st Dist. 1995) (“a court may deny a plaintiff’s request to amend if it is apparent that even after amendment, no cause of action can be stated”).

In addition, the plaintiffs could not assert the proposed Article XX claim against E&Y for reasons explained in detail by Bear Stearns in its brief, which we adopt and incorporate by reference. In particular:

- Article XX requires the plaintiff, before filing suit, to serve a demand on “the chief executive officer” of a “local government unit” other than a municipality. 735 ILCS 5/20-104(b). The Illinois Constitution provides that the “President of the Cook County Board * * * shall be the chief executive officer of the County.” Ill. Const. art. VII, § 4(b). Plaintiffs served their demand letter on the State’s Attorney, not the President of the Cook County Board. Vol. 1, C 39.
- To the extent that Article XX permits taxpayers to litigate claims on a county’s behalf, it is unconstitutional under *Lyons v. Ryan*, 201 Ill. 2d 529 (2002), and *Nagano*, 389 Ill. at 247-51.

2. *Whether the amendment would prejudice or surprise other parties.* E&Y explained in the trial court that it would be prejudiced by plaintiffs’ sudden shift, after four years of

litigation, from what amounted to a breach of contract claim to a fraud claim because “many of the pertinent witnesses are no longer in [E&Y’s] employ,” which would make it considerably more difficult to prepare a defense responding to an entirely new theory of the case. Vol. 3, C 695 n.2. Plaintiffs did not dispute this contention below. As a result, the trial court did not manifestly abuse its discretion in finding that E&Y would have been prejudiced if an amended pleading had been permitted. Pl. App. A1. See *W.E. Erickson Constr.*, 266 Ill. App. 3d at 912 (“Chicago Title would be prejudiced if the amendment were allowed” because “the Chicago Title employee who issued the commitment no longer works for Chicago Title and has yet to be located,” and “[n]ew allegations of mental states” in a new fraud claim “require a substantially different defense” than non-fraud claims and thus “require[] separate investigation”).

Because plaintiffs did not dispute in the trial court that E&Y would be prejudiced by the proposed amendment, they have waived their argument about prejudice in this Court. See Pl. Br. 31; *Employers Ins. v. Ehlco Liquidating Trust*, 186 Ill. 2d 127, 161 (1999) (“Issues raised for the first time on appeal are waived”). In any event, plaintiffs’ reliance on generalities about prejudice cannot overcome E&Y’s specific prejudice argument, which plaintiffs still refuse to address. See Pl. Br. 31.

3. *Whether the proposed amendment is timely.* Although “amendments may be allowed at any time before the entry of a final judgment,” *Lee v. Chicago Transit Auth.*, 152 Ill. 2d 432, 468 (1992), courts retain the discretion to deny leave to amend before that time. For example, in *Starnes v. International Harvester Co.*, 184 Ill. App. 3d 199, 205-06 (4th

Dist. 1989), the court held that the trial judge did not abuse his discretion in denying leave to amend where “the proposed amendments were requested some five years after the litigation began.”

Here, although the plaintiffs moved to amend before judgment had been entered, the motion was untimely given the circumstances of this case. The proposed amendment—asserting a new claim arising out of events that occurred in 1992—was not offered until 2003, four years after the plaintiffs first sued E&Y; it is undisputed that plaintiffs could have alleged an Article XX claim in their initial complaint; and plaintiffs have never even tried to explain why they waited four years after first suing to assert that claim.^{6/} See *TWA*, 215 Ill. App. 3d at 628 (the trial court did not abuse its discretion in denying leave to amend where the new claim “was available to Martin since the inception of this case” and “Martin has not offered, and cannot offer, any excuse for waiting six years to make this allegation”). See also, *e.g.*, *In re Southmark Corp.*, 88 F.3d 311, 316 (5th Cir. 1996) (no abuse of discretion in denying leave to amend filed 38 months after the transaction at issue and 13 months after the original complaint was filed where the new cause of action was “based on the identical, known facts that underlie [the] original complaint” and the plaintiff “offer[ed] no reasonable explanation for its delay”); *Turner v. Mitchell Pontiac, Inc.*, 771 F. Supp. 530, 535 (D. Conn. 1991) (denying motion to amend filed eight months after the complaint was

^{6/} Indeed, plaintiffs did not respond to E&Y’s motion to dismiss for months, long after the initial deadline set by the court. See Vol. 1, C 192; Vol. 3, C 583-87, 591-92.

filed where the “new claims are based on the same facts” as the initial claim and “the plaintiff should indeed have known about them when the original complaint was filed”).

4. *Whether previous opportunities to amend the pleading can be identified.* Plaintiffs had many prior opportunities, including in their original complaint, to allege an Article XX claim against E&Y. The plaintiffs could have moved to add an Article XX claim against E&Y at any time during the four years that litigation was pending before they sought leave to amend.

* * *

The trial court in this case considered all of the relevant factors, and in denying leave to amend focused specifically on the plaintiffs’ delay, the absence of any explanation why matters known to them from the outset were omitted from the original complaint, and the prejudice to E&Y. That decision was well within the court’s broad discretion, particularly when E&Y was not the party that allegedly received funds improperly, but at most, even under plaintiffs’ theory, aided an alleged fraud supposedly committed by someone else. See generally *Bloomfield Club Recreation Ass’n*, 186 Ill. 2d at 432-33 (affirming denial of motion to amend); *Mundt v. Ragnar Benson, Inc.*, 61 Ill. 2d 151, 160-61 (1975) (same); *Killion v. Meeks*, 333 Ill. App. 3d 1188, 1195 (5th Dist. 2002) (the trial court did not abuse its discretion in denying leave to amend where proposed amendment did not satisfy any of the four factors). E&Y simply “verif[ied] the mathematical accuracy of the computations” prepared by others (Vol. 1, C 45)—mathematical calculations that were indisputably accurate based on the information provided to E&Y. For all of the reasons we have explained, the

trial court did not manifestly abuse its discretion in denying leave to add another claim against E&Y so long after the events in question occurred.

CONCLUSION

The trial court's judgment should be affirmed.

July 23, 2004

Respectfully submitted,

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CERTIFICATE OF SERVICE

James C. Schroeder, an attorney, hereby certifies that on July 23, 2004 he caused three copies of the foregoing Brief of Defendant-Appellee Ernst & Young LLP to be delivered via messenger to

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