

USE OF TORT IMMUNITY FUND

In August of 2005, a Weekly Message included a detailed summary of a circuit court case in Stephenson County, *In Re: Objections to Tax Levies of Freeport School District No. 145, Freeport Park District, Pearl City School District No. 200, and Highland Community College District 519 for the Year 2000*, Case No. 01-TX-29 (15th Cir. Ill., Aug. 15, 2005). In March of 2007, the Appellate Court for the Second District issued a decision in the same case, *In Re: Objections to Tax Levies of Freeport School District No. 145, Freeport Park District, Pearl City School District No. 200, and Highland Community College District No. 519 for the Year 2000*, 372 Ill. App. 3d 562, 865 N.E.2d 361, 310 Ill. Dec. 37 (2nd Dist. 2007).

The Appellate Court for the Second District largely agreed with the Circuit Court's analysis and held that:

1. Risk management does not include ordinary safety duties performed by regular staff;
2. A portion of the superintendent's salary could be funded if he was performing duties under a valid risk management plan;
3. Other employee salaries could not be funded where the activities were not part of the risk management plan;
4. OSHA and ergonomic training were permissible uses as "educational, inspectional, or supervisory services directly related to loss prevention and reduction;"
5. A community college's campus security software was not a permissible use because it was a good not a service; and,
6. An equity program intended to close the achievement gap also was not a permissible use, despite the fact that the program was implemented to settle the threat of a class action litigation on behalf of minority students, because the district did not pay any compensatory damages to the entities threatening suit and costs of complying with injunctive relief may not be paid from tort.

"Risk management" was again defined as a process that consists of identifying and analyzing loss exposures, selecting a technique or combination thereof to be used to handle each exposure, implementing the chosen techniques, and monitoring the decision made and implementing appropriate changes. It does not include safety practices of employees as part of their normal duties and arising out of their own common sense.

The facts surrounding the Freeport School District's development of an equity program might be of interest to other districts. The program was created pursuant to a memorandum of understanding with a community group that had threatened class action litigation. The District investigated the charges, determined that its practices were a substantial cause of conditions that disparately impacted minority students, and the community group agreed to forgo litigation to determine whether the program would cure the civil rights violations. Also, the United States Education Department's Office for Civil Rights was conducting a compliance review, and the District entered a settlement agreement to provide improved conditions if OCR suspended its investigation. The

District believed that the threatened lawsuit could have resulted in liability for compensatory damages and attorney fees. It further believed that funding the equity program was a permissible use of tort funds if it constituted settlement of a tort claim. However, the Appellate Court found that the remedies to which the District agreed did not constitute compensatory damages. In addition, the Appellate Court relied on the Illinois Supreme Court's reasoning in the "People Who Care" case in Rockford, which found that costs of complying with injunctive (i.e., remedial) relief could not be paid from tort. *See In Re: Consolidated Objections to Tax Levies of School Dist. No. 205*, 193 Ill.2d 490, 739 N.E.2d 508, 250 Ill.Dec. 745 (2000).

We now have another circuit court ruling regarding the same issue and very similar facts, *In Re: Objection to Tax Levy of Quincy School District No. 172 for the Year 2003*, Case No. 04-TX-41 (8th Cir. Ill., July 6, 2007). As with the *Freeport* case, an action was brought on behalf of taxpayers, claiming that the public body illegally levied and expended tort funds. The parties disagreed about whether the Second District case (discussed above) was binding on a circuit court in the Fourth District, and the Circuit Court concluded that it was indeed binding. Therefore, the Circuit Court adopted the standards and definitions developed by the Second District in *Freeport* with respect to statutory construction, legislative history, a four-prong process of developing a risk management plan, a definition of "risk management," a definition of "services," and the time frame in which a plan must be in place.

The Circuit Court denied Quincy School District No. 172's motion for summary judgment (allowing the case to move forward to trial) and found that:

1. Quincy's risk management plan designed around an examination of the pre-existing responsibilities of employees was not valid and could not be properly funded by the tort fund;
2. While Quincy's plan was written, it still was not valid because the process used to create it was invalid;
3. A taxing body may properly use a tort immunity levy to partially fund employee compensation under a valid risk management plan; however, that statement was inapplicable as Quincy did not have a valid plan;
4. "Services" as used in the phrase, "Educational, inspectional, and supervisory services directly relating to loss prevention and loss reduction," means the performance of duties or work by other than in-house personnel;
5. Even if Quincy had used a valid process to create its plan, the tort levy was still improper for the year in question because the plan was not in place before the levy was made; and,
6. Both the levy and its expenditure were improper.

School districts should consult with their attorneys and auditors to determine how to address expenditures from the tort immunity fund in light of these recent rulings.