

February 1, 2019

The Honorable James R. Flaiz
Geauga County Prosecuting Attorney
Court House Annex
231 Main Street
Chardon, Ohio 44024-1235

SYLLABUS:

2019-003

1. A county is not required to institute a civil action seeking reimbursement of motor vehicle fuel excise tax revenues received by the county pursuant to R.C. Chapter 5735 and erroneously distributed to municipal corporations within the county. Although a county has a cognizable cause of action to seek reimbursement of such revenues under an unjust enrichment theory, the county may decline to initiate a cause of action.
2. A county engineer, county auditor, and board of county commissioners each has the authority to direct the county prosecuting attorney to initiate a cause of action under an unjust enrichment theory against a municipal corporation that was the recipient of erroneously distributed motor vehicle fuel excise tax revenues owed to the county engineer. If the Auditor of State issues a certified report concluding that fuel tax revenues were illegally expended, the county prosecuting attorney may initiate a cause of action pursuant to R.C. 117.28. Regardless of any action taken by the county engineer, county auditor, or board of county commissioners, or the issuance of a certified report by the Auditor of State, the county prosecuting attorney has independent discretion to initiate a cause of action pursuant to R.C. 309.12 to recoup the erroneously distributed fuel tax revenues if he is satisfied that moneys of the county, or public moneys belonging to the county, have been misapplied.
3. A county's claim for unjust enrichment against a political subdivision that was the recipient of erroneously distributed motor vehicle fuel excise tax revenues is subject to the six-year statute of limitations for quasi-contractual claims under R.C. 2305.07, as are actions initiated by a county prosecuting attorney pursuant to R.C. 117.28 or R.C. 309.12.



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OPINION NO. 2019-003

The Honorable James R. Flaiz
Geauga County Prosecuting Attorney
Court House Annex
231 Main Street
Chardon, Ohio 44024-1235

Dear Prosecutor Flaiz:

You have requested an opinion regarding several questions that have arisen as a result of the erroneous distribution of motor vehicle fuel excise tax revenues in Geauga County. You explain that, from 1981 until 2018, the office of the county auditor erroneously distributed revenues from the motor vehicle fuel excise tax established by the General Assembly pursuant to R.C. Chapter 5735. You write that, after distributing a certain percentage of the revenues to the townships within Geauga County, the remaining revenues should have been distributed to the county engineer. Instead, the remaining revenues were erroneously distributed to six municipal corporations within Geauga County.¹ You indicate that, as a result, since 1981, the county engineer has not received approximately \$3 million in motor vehicle fuel excise tax revenues that the engineer should have received pursuant to R.C. Chapter 5735.

You ask the following questions related to these circumstances:

1. Does the County (*i.e.*, the board of county commissioners) have a duty to collect the moneys incorrectly distributed to the six municipal corporations?
2. Does the County have the power to waive collection or relinquish its right to the improperly disbursed fuel tax moneys?

¹ The six municipal corporations are the Villages of Aquilla, Burton, Hunting Valley, Middlefield, and South Russell, as well as the City of Chardon.

3. If there is a right to waive collection of the improperly disbursed moneys, which office or entity – the county engineer, the county auditor, or the board of county commissioners – has the authority to make the decision to waive collection?²
4. Is there a statute of limitations or other bar on claims to seek collection of erroneously distributed moneys against a municipal corporation?

Before turning to your questions, we will first provide an overview of the Ohio motor vehicle fuel excise tax established pursuant to R.C. Chapter 5735.

R.C. Chapter 5735: Ohio Motor Vehicle Fuel Excise Tax

The General Assembly has enacted a comprehensive motor vehicle fuel excise tax and revenue distribution scheme in R.C. Chapter 5735. The motor vehicle fuel excise tax is levied “on each motor fuel dealer, measured by gross gallons, upon the receipt of motor fuel within [Ohio].” R.C. 5735.05(A). The Treasurer of State, after depositing certain fuel excise tax revenues in the grade crossing protection fund, deposits the remaining revenues into the gasoline excise tax fund in the state treasury. R.C. 5735.051(A)(2); 2018 Op. Att’y Gen. No. 2018-010, at 2-90. A portion of those revenues are then distributed to municipal corporations, counties, and townships, R.C. 5735.051(A)(2)(a)(iii)(I)-(III); R.C. 5735.051(A)(2)(b); R.C. 4735.051(C)(3); 2018 Op. Att’y Gen. No. 2018-010, at 2-90. The motor vehicle fuel excise tax scheme established by the General Assembly in R.C. Chapter 5735 is “‘statewide’ in application.” *Austintown Twp. Bd. of Trustees v. Tracy*, 76 Ohio St. 3d 353, 357, 667 N.E.2d 1174 (1996). Regardless of the geographical part of the state in which a political subdivision is located, “every municipality, every county, and every township in ... Ohio receives gasoline tax funds according to the formulas established in R.C. Chapter 5735.” *Id.* Fuel tax revenues may be used for road and street maintenance and repair. *See* R.C. 5735.27(A)(1)-(3).

Municipal corporations and counties receive fuel tax revenues directly from the state, while townships receive a disbursement of revenues from the county treasurer. R.C. 5735.27(A)(2)-(3). Therefore, although the county treasurer is directed to distribute fuel tax revenues to the townships within the county, municipal corporations receive their revenue distributions directly from the

² We understand “collection” to refer to the authority of the county to initiate a civil lawsuit in a court of competent jurisdiction against the municipal corporations that erroneously received motor vehicle fuel excise tax revenues to recoup the erroneously distributed revenues. As a corollary to the authority to initiate such a lawsuit, we understand “waive collection” to refer to the authority of the board of county commissioners or relevant county officer to decline to initiate a lawsuit to recoup the erroneously distributed revenues. *Accord* 2018 Op. Att’y Gen. No. 2018-011, at 2-101 (“[t]he power to settle is inherent in the power to sue and be sued”).

gasoline excise tax fund in the state treasury.³ See R.C. 5735.27(A)(1). This revenue distribution scheme differs from the motor vehicle license tax revenue distribution scheme. Under R.C. 4501.04(A), revenues from the motor vehicle license tax levied under R.C. 4503.02 are first received by the county auditor and a portion of such revenues is then distributed to municipal corporations within the county. See also R.C. 4501.03 (establishing the auto registration distribution fund in the state treasury from which motor vehicle license tax revenues are distributed to county treasuries). Thus, unlike motor vehicle license tax revenues, counties are not responsible for disbursing fuel tax revenues to municipal corporations.

The General Assembly intends that a portion of the motor vehicle fuel excise tax revenues that a county receives from the state gasoline excise tax fund be directed to the county engineer's office. R.C. 315.12(A) states as follows:

Two thirds of the cost of operation of the office of county engineer, including the salaries of all of the employees and the cost of the maintenance of such office as provided by the annual appropriation made by the board of county commissioners for such purpose, shall be paid out of the county's share of the fund derived from the receipts from motor vehicle licenses, as distributed under [R.C. 4501.04], and from the county's share of the fund derived from the motor vehicle fuel tax as distributed under [R.C. 5735.27]. (Emphasis added.)

See also *Bd. of Cnty. Comm'rs of Scioto Cnty. v. Scioto Cnty. Budget Comm.*, 17 Ohio St. 2d 39, 43, 244 N.E.2d 888 (1969) (“[R.C. 309.12] means that at least two-thirds of the cost of the office of the county engineer must be paid from motor vehicle license and fuel tax revenues”); 1994 Op. Att’y Gen. No. 94-031, at 2-141.

³ A county auditor issues warrants to the county treasurer for payments to be disbursed from the county treasury. R.C. 319.16 provides that “[t]he county auditor shall issue warrants ... on the county treasurer for all moneys payable from the county treasury, upon presentation of the proper order or voucher and evidentiary matter for the moneys, and keep a record of all such warrants showing the number, date of issue, amount for which drawn, in whose favor, for what purpose, and on what fund.” R.C. 321.15 similarly states that “[n]o money shall be paid from the county treasury, or transferred to any person for disbursement, except on the warrant of the county auditor ... for payment of county obligations.” As such, the county treasurer, rather than the county auditor, is the public official responsible for the physical disbursement of county moneys to external recipients of those moneys such as townships and municipal corporations. You have stated that the office of the county auditor, for 37 years, erroneously distributed fuel tax revenues received by the county to municipal corporations within the county. Accordingly, we infer from your letter that the county auditor's office erroneously issued warrants to the county treasurer directing the treasurer to make disbursements of fuel tax revenues to the municipal corporations within the county, rather than the auditor's office transferring those moneys to the county engineer's operating fund. See R.C. 315.12(A).

Recovering the Erroneously Distributed Motor Vehicle Fuel Excise Tax Revenues

You ask whether Geauga County has a duty to recover motor vehicle fuel excise tax moneys that were erroneously distributed to municipal corporations within the county, or whether the county may decline to initiate an action to collect the improperly distributed moneys. Your questions presume a legal right on the part of the county to collect the improperly distributed motor fuel excise tax revenues. As such, we will first consider whether the county has a cognizable cause of action to collect the improperly distributed revenues before reaching your question regarding the duty of the county to collect those revenues.

The Ohio Supreme Court has determined that a political subdivision has a cognizable cause of action against another political subdivision if tax revenues collected pursuant to a statewide tax were wrongly distributed to the second subdivision. For example, the Supreme Court has held that a municipal corporation has a cause of action against another municipal corporation under an unjust enrichment theory when the county in which the two municipalities were located erroneously distributed revenues from a personal property tax levied by the General Assembly to one of the municipalities, Cincinnati, when the revenues should have been distributed to the other municipality, Indian Hill. *See Vill. of Indian Hill v. Atkins*, 153 Ohio St. 562, 93 N.E.2d 22 (1950) (syllabus, paragraph 3) (“[w]here the proceeds of intangible personal property taxes collected from a taxpayer who resided in and was domiciled in one municipality are distributed to another municipality because of a mistaken belief that such taxpayer was a resident of the latter municipality, a cause of action *may exist* in favor of the first municipality against the second municipality for recovery of the proceeds so distributed”) (emphasis in original). Accordingly, if a tax is levied by the General Assembly and the revenues from such tax are erroneously distributed, a political subdivision to which the revenues were owed has a cognizable cause of action against a political subdivision to which the revenues were erroneously distributed. 2011 Op. Att’y Gen. No. 2011-009, at 2-77 (“in determining whether a subdivision can assert a cause of action against another subdivision, the salient distinction is between an error in the assessment and levying of a tax and an error in the distribution of tax proceeds”). In this instance, the motor vehicle fuel excise tax is levied by the General Assembly in accordance with the statewide scheme established under R.C. Chapter 5735. *See Austintown Twp. Bd. of Trustees v. Tracy*, 76 Ohio St. 3d 353, 357, 667 N.E.2d 1174 (1996) (the fuel tax distribution scheme of R.C. Chapter 5735 is “statewide in application”). You have explained that the county auditor’s office has erroneously distributed motor vehicle fuel excise tax revenues to six municipal corporations in Geauga County when those revenues should have been distributed to the county engineer. Therefore, under the foregoing precedents, the county has a cognizable cause of action for unjust enrichment against the municipal corporations that erroneously received the fuel tax revenues.⁴

⁴ Certain authorities state, in broad terms, that a municipal corporation may not be sued for reimbursement of moneys under an unjust enrichment theory. *See, e.g., G.R. Osterland Co. v. City of Cleveland*, 140 Ohio App. 3d 574, 577, 748 N.E.2d 576 (Cuyahoga County 2000) (“the doctrine of unjust enrichment does not apply to a municipal corporation”); *see also Magnum Towing & Recovery, LLC v. City of Toledo*, 430 F. Supp. 2d 689, 701 (N.D. Ohio 2006)

Given the county's ability to initiate a cause of action against the six municipal corporations to which motor vehicle fuel excise tax revenues were erroneously distributed, you ask whether the county has a duty to institute such an action. We are aware of no law that requires a county to seek recovery of erroneously distributed fuel tax revenues. As discussed more fully below, the county and certain county officeholders have the discretion to initiate a civil cause of action seeking recovery of erroneously distributed fuel tax revenues. Accordingly, we are of the opinion that a county and its officeholders have no duty to seek collection of motor vehicle fuel excise tax revenues that were distributed to municipal corporations when those revenues should have been distributed to the county engineer. *Accord* 2013 Op. Att'y Gen. No. 2013-026 (syllabus) (a township may seek reimbursement from township employees for deductions that were improperly submitted to a pension fund and paid by the township, but the township is not required to seek such reimbursement).

(“[u]nder Ohio law, a municipality is not liable for unjust enrichment (quantum meruit) or quasi- and implied contracts”); *Wright v. City of Dayton*, 158 Ohio App. 3d 152, 2004-Ohio-3770, 814 N.E.2d 514, at ¶¶ 40, 45 (Montgomery County). We decline to assign weight to these authorities in the context of a political subdivision's unjust enrichment claim against a municipal corporation, particularly in light of the Ohio Supreme Court's express recognition that a political subdivision has a cognizable cause of action against another political subdivision when the latter political subdivision has been the recipient of erroneously distributed tax revenues collected under a statewide tax scheme. *See Vill. of Indian Hill v. Atkins*, 153 Ohio St. 562, 93 N.E.2d 22 (1950) (syllabus, paragraph 3); *see also Thompson v. City of Oakwood*, 307 F. Supp. 3d 761, 779-80 (S.D. Ohio 2018) (plaintiffs were entitled to summary judgment on their unjust enrichment/restitution claim against defendant, an Ohio municipal corporation, because it would be inequitable to allow the defendant to retain money that was collected pursuant to an unconstitutionally coercive property inspection fee ordinance).

We also note that, although we conclude that a county has a cognizable cause of action against a municipal corporation to seek collection of erroneously distributed fuel tax revenues under an unjust enrichment theory, “it is beyond the scope of the opinion process to make findings of fact or to determine the rights of particular parties.” 2011 Op. Att'y Gen. No. 2011-009, at 2-78. “Ultimately, either the parties involved or the judiciary will need to make this determination.” *Id.*; *see also Vill. of Indian Hill v. Atkins*, 153 Ohio St. 562, 574, 93 N.E.2d 22 (1950) (although a municipal corporation has a cognizable cause of action against another municipal corporation to recover erroneously distributed tax revenues, that cause of action is subject to any equitable and other defenses that the defendant municipality might raise).

A County Engineer, County Auditor, Board of County Commissioners, and County Prosecuting Attorney each Enjoys the Discretion to Determine Whether to Seek Collection of Erroneously Distributed Motor Vehicle Fuel Excise Tax Revenues

Your third question asks, if a county may decline to seek recovery of erroneously distributed fuel tax revenues, who has the authority to decide whether the county should decline to seek such recovery: the county engineer, county auditor, or board of county commissioners.

County Engineer

A county engineer is an elected county officer entitled to legal representation relating to the engineer's official duties by the county prosecuting attorney. *See* R.C. 309.09(A); R.C. 315.01. We have previously concluded that, under R.C. 309.09,⁵ a county prosecuting attorney has "a duty to prosecute and defend all suits and actions which any county officer directs or to which it is a party." 1962 Op. Att'y Gen. No. 2919, p. 238, at 242. Specifically, we concluded that the county prosecuting attorney was required to initiate a suit to collect fees and costs that were owed to the county engineer pursuant to R.C. 325.27 when the county engineer directed that a suit be brought to collect such costs. *Id.* In this instance, a county engineer is entitled to have two thirds of the operations of his office funded by motor vehicle license and fuel excise tax revenues. *See* R.C. 315.12(A); *Madden v. Bower*, 20 Ohio St. 2d 135, 139, 254 N.E.2d 357 (1969) (two thirds of the operation of a county engineer's office shall be funded as directed by R.C. 315.12; neither the board of county commissioners nor the county auditor has the discretion to decide otherwise). The county engineer has an interest in ensuring that his office is funded properly and at adequate levels. Therefore, we are of the opinion that the same logic that led to the conclusion that a county prosecuting attorney shall initiate an action when directed by the county engineer for the recovery of fees and costs owing to the engineer's office pursuant to R.C. 325.27 also compels the conclusion that a county prosecuting attorney shall initiate an action to recover erroneously distributed motor vehicle fuel excise tax revenues when directed by the county engineer.

Accordingly, it is our opinion that a county engineer may direct the county prosecuting attorney to initiate a civil action to recover erroneously distributed fuel tax revenues that should have been distributed to the engineer's office. Conversely, the county engineer may decline to direct the

⁵ R.C. 309.09(A) provides:

The prosecuting attorney shall be the legal adviser of the board of county commissioners, board of elections, all other county officers and boards, and all tax-supported public libraries, and any of them may require written opinions or instructions from the prosecuting attorney in matters connected with their official duties. *The prosecuting attorney shall prosecute and defend all suits and actions that any such officer, board, or tax-supported public library directs or to which it is a party, and no county officer may employ any other counsel or attorney at the expense of the county, except as provided in [R.C. 305.14].* (Emphasis added.)

county prosecuting attorney to institute such an action. The county engineer enjoys the discretion to make either decision.

County Auditor

Like a county engineer, a county auditor is an elected county officer entitled to legal representation relating to the auditor's official duties by the county prosecuting attorney. *See* R.C. 309.09(A); R.C. 319.01. Consequently, a county auditor generally may direct the county prosecuting attorney to initiate an action on behalf of the auditor, a direction the prosecuting attorney is obliged to follow within the bounds of his ethical responsibilities as an attorney. *See* R.C. 309.09(A); 1962 Op. Att'y Gen. No. 2919, p. 238, at 242; *see also* Ohio Prof. Cond. R. 3.1 (“[a] lawyer shall not bring or defend a proceeding ... unless there is a basis in law and fact for doing so that is not frivolous”). We note, however, under the circumstances you have described, a court may conclude that the county auditor lacks standing to seek recovery of the erroneously distributed motor vehicle fuel excise tax revenues.

To establish standing, a party must show that the party has “suffered (1) an injury that is (2) fairly traceable to the defendant’s allegedly unlawful conduct, and (3) likely to be redressed by the requested relief.” *Moore v. City of Middletown*, 133 Ohio St. 3d 55, 2012-Ohio-3897, 975 N.E.2d 977, at ¶ 22. In most cases, “the question of standing depends upon whether the party has alleged such a personal stake in the outcome of the controversy, as to ensure that the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.” *State ex rel. Dallman v. Court of Common Pleas of Franklin Cnty.*, 35 Ohio St. 2d 176, 178-179, 298 N.E.2d 515 (1973). “A person has standing to sue only if he or she can demonstrate injury in fact, which requires showing that he or she has suffered or will suffer a specific, judicially redressible injury as a result of the challenged action.” *State ex rel. N. Ohio Chapter of Associated Builders & Contractors, Inc. v. Barborton City Sch. Dist. Bd. of Edn.*, 188 Ohio App. 3d 395, 2010-Ohio-1826, 935 N.E.2d 861, at ¶ 10 (Summit County) (citation omitted).

In addition, for a party to establish standing, “it is fundamental that he who comes into equity must come with clean hands.” *State ex rel. Mallory v. Pub. Employees Ret. Bd.*, 82 Ohio St. 3d 235, 244, 694 N.E.2d 1356 (1998). “Restitution is available as an equitable remedy ‘where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant’s possession.’” *Santos v. Ohio Bureau of Workers’ Comp.*, 101 Ohio St. 3d 74, 2004-Ohio-28, 801 N.E.2d 441, at ¶ 13 (quoting *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 214, 122 S. Ct. 708 (2002)) (emphasis omitted). “‘Thus, for restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant’s possession.’” *Id.* (quoting *Great-West Life*, at 214). Thus, when a plaintiff petitions a court for restitution in equity, the plaintiff must come to the court with clean hands or the court may declare the plaintiff lacks standing to bring the action. *Mallory, supra*, at 244 (plaintiffs “lack standing to raise the equitable, affirmative defense of laches because they have unclean hands”).

Here, a court may conclude the county auditor's office has unclean hands because, as you explain, the auditor's office erroneously distributed fuel tax revenues to municipal corporations in the county. As discussed above, R.C. Chapter 5735 mandates that revenues from the state motor vehicle fuel excise tax be distributed to municipal corporations, counties, and townships. *See* R.C. 5735.27(A)(1)-(3). Municipal corporations receive distributions of fuel tax revenues directly from the state, while the county treasurer, on warrant of the county auditor, distributes fuel tax revenues to townships within the county. *See* R.C. 5735.27(A)(2)-(3); *see also supra*, note 3. In this instance, it appears the county auditor issued a warrant to the county treasurer to disburse the county engineer's portion of the motor vehicle fuel excise tax revenues to six municipal corporations within the county, rather than transferring the moneys owed to the county engineer to the engineer's operating fund. *See supra*, note 3; R.C. 315.12(A). In other words, the county auditor failed to perform a ministerial duty to transfer the appropriate fuel tax revenues to the county engineer's operating fund. *See State ex rel. City of Lorain v. Stewart*, 119 Ohio St. 3d 222, 2008-Ohio-4062, 893 N.E.2d 184, at ¶¶ 43-45 (a county auditor is "not empowered to refuse to perform his ministerial statutory duty of placing on the exempt list the properties certified by the housing officer as meeting [Community Reinvestment Area] exemption requirements based on a belief that the properties are not exempt"). Under the circumstances you have described, if the county auditor's office were to institute an action for recovery of the erroneously distributed fuel tax revenues, a court may conclude that the office of the county auditor approaches the court with unclean hands and thus lacks standing to seek recovery of the fuel tax revenues.

Accordingly, although the county auditor may direct the county prosecuting attorney to institute various civil actions on behalf of the auditor's office pursuant to R.C. 309.09, a court may conclude that the county auditor lacks standing in an action for unjust enrichment against municipal corporations that erroneously received motor vehicle fuel excise tax revenues.

Board of County Commissioners

Under R.C. 305.12, a board of county commissioners "may sue and be sued ... in any court." Although R.C. 305.12 goes on to enumerate specific actions a board of county commissioners may initiate, the statute "does not restrict the commissioners to those causes of action listed." *Portage Cnty. Bd. of Comm'rs v. City of Akron*, 156 Ohio App. 3d 657, 2004-Ohio-1665, 808 N.E.2d 444, at ¶ 159 (Portage County). "If that were true, the ability of county commissioners to protect the interests of those people living in the county would be severely curtailed." *Id.*; *accord Scioto Cnty. Bd. of Comm'rs / Revolving Loan Fund Bd. v. McDermott Indus., L.L.C.*, 4th Dist. No. 12CA3504, 2014-Ohio-240, 2014 Ohio App. LEXIS 219, at ¶¶ 1-2, 19 (a board of county commissioners that was the holder of a promissory note had standing to sue and was the real party in interest in a suit against a defendant corporation that defaulted on the note).

Moreover, the board of county commissioners, as the legislative authority for the county, has an interest in safeguarding the tax dollars of the county. Although two thirds of a county engineer's budget is composed of motor vehicle license and fuel excise tax revenues, *see* R.C. 315.12, the source of the remaining one third of the engineer's budget revenues is determined by the board of county commissioners. *Madden v. Bower*, 20 Ohio St. 2d 135, 139-140, 254 N.E.2d 357 (1969) (whether one

third of the total cost of operation of the county engineer's office is to be paid from motor vehicle fuel and license tax revenues, from special road levy revenues, or from the county general fund, within the limits prescribed by law, is a decision that the board of county commissioners, and not the county auditor, is entitled to make); *see also* R.C. 5705.38(A), (C) (a board of county commissioners, as the taxing authority for the county, shall adopt an annual appropriation measure, which "shall be classified so as to set forth separately the amounts appropriated for each office, department, and division, and within each, the amount appropriated for personal services").

Consequently, it is our opinion that the board of county commissioners may direct the county prosecuting attorney to institute a civil action against those municipal corporations that erroneously received fuel tax revenues to seek recovery of those revenues. *See* R.C. 309.09(A). Conversely, the board of county commissioners may decline to direct the county prosecuting attorney to institute such an action. The board of county commissioners has the discretion to make either decision.

County Prosecuting Attorney

Notwithstanding direction from the county engineer, county auditor, or board of county commissioners to institute a civil action to recover erroneously distributed motor vehicle fuel excise tax revenues, a county prosecuting attorney has independent discretion to initiate civil actions for the recovery of misapplied public moneys. R.C. 309.12 provides as follows:

Upon being satisfied that funds of the county, or public moneys in the hands of the county treasurer or belonging to the county, are about to be or have been misapplied, or that any such public moneys have been illegally drawn or withheld from the county treasury, or that a contract, in contravention of law, has been executed or is about to be entered into, or that such a contract was procured by fraud or corruption, or that any property, real or personal, belonging to the county is being illegally used or occupied, or that such property is being used or occupied in violation of contract, or that the terms of a contract made by or on behalf of the county are being or have been violated, or that money is due the county, the prosecuting attorney may, by civil action in the name of the state, apply to a court of competent jurisdiction, to restrain such contemplated misapplication of funds, or the completion of such illegal contract, or to recover, for the use of the county, all public moneys so misapplied or illegally drawn or withheld from the county treasury, or to recover damages, for the benefit of the county, resulting from the execution of such illegal contract, or to recover, for the benefit of the county, such real or personal property so used or occupied, or to recover for the benefit of the county, damages resulting from the nonperformance of the terms of such contract, or to otherwise enforce it, or to recover such money as is due the county. (Emphasis added.)

The Ohio Supreme Court has concluded that R.C. 309.12 authorizes a county prosecuting attorney to institute a civil action against the wrongful recipient of county moneys. *State v. McKelvey*, 12 Ohio St. 2d 92, 232 N.E.2d 391 (1967) (syllabus, paragraph 4) ("[R.C. 309.12], which authorizes civil suit

by the prosecuting attorney to recover misapplied county funds, is to be construed to permit suit against the ultimate wrongful recipient of the funds”). As the prosecuting attorney for Geauga County, therefore, you have the discretion, pursuant to R.C. 309.12, to initiate a civil action against the six municipal corporations that erroneously received motor vehicle fuel excise tax revenues.⁶

Finally, a county prosecuting attorney may institute an action pursuant to R.C. 117.28 upon receipt of a certified audit report from the Auditor of State, also known as a “finding for recovery,” which concludes that public money has been illegally expended. R.C. 117.28 provides as follows:

Where an audit report sets forth that any public money has been illegally expended, or that any public money collected has not been accounted for, or that any public money due has not been collected, or that any public property has been converted or misappropriated, the officer receiving the certified copy of the report pursuant to [R.C. 117.27] may, within one hundred twenty days after receiving the report, institute civil action in the proper court in the name of the public office to which the public money is due or the public property belongs for the recovery of the money or property and prosecute the action to final determination.

A certified report of the Auditor of State is to be filed with the clerk of the legislative authority for the audited public office as well as with the legal counsel for the audited public office. R.C. 117.26; R.C. 117.27. If legal counsel receiving the report does not file an action to recover the moneys within one hundred twenty days, the Attorney General may file such an action. R.C. 117.28; R.C. 117.30. Therefore, in addition to the authority of a county prosecuting attorney to bring an action under R.C. 309.12, a prosecuting attorney may also bring an action for the

⁶ If a county prosecuting attorney declines to bring an action pursuant to R.C. 309.12 upon written request of a taxpayer of the county, the taxpayer may institute such an action in the name of the state:

If the prosecuting attorney fails, upon the written request of a taxpayer of the county, to make the application or institute the civil action contemplated in [R.C. 309.12], the taxpayer may make such application or institute such civil action in the name of the state, or, in any case wherein the prosecuting attorney is authorized to make such application, such taxpayer may bring any suit or institute any such proceedings against any county officer or person who holds or has held a county office, for misconduct in office or neglect of his duty, to recover money illegally drawn or illegally withheld from the county treasury, and to recover damages resulting from the execution of such illegal contract.

R.C. 309.13.

recovery of public moneys pursuant to R.C. 117.28 upon receipt of a certified report of the Auditor of State that concludes public moneys have been illegally expended.

Although the six municipal corporations that erroneously received motor vehicle fuel excise tax revenues may be liable for reimbursement of the erroneously distributed moneys, ultimately “[q]uestions of liability are resolved by the courts and cannot be determined by means of an opinion of the Attorney General.” 2000 Op. Att’y Gen. No. 2000-021, at 2-136; *see also* 2012 Op. Att’y Gen. No. 2012-023, at 2-197 (“whether members of a county board of elections may in a particular case be held personally liable for encumbering money that has not been appropriated to the board cannot be determined by means of an Attorney General opinion”); 2003 Op. Att’y Gen. No. 2003-037, at 2-311 (“[q]uestions of liability are decided by the courts, in particular contexts and with consideration of specific facts.”). For these reasons, the decision to initiate a civil action to seek recovery of erroneously distributed fuel tax revenues is left to the sound discretion of the county engineer, county auditor, board of county commissioners, and/or county prosecuting attorney, ideally working in conjunction with one another to decide whether initiating such an action is in the best interest of the county.

Statute of Limitations

You also ask whether there is any statute of limitations or other bar upon an action to recover erroneously distributed motor vehicle fuel excise tax revenues. Courts have concluded that a claim for unjust enrichment is a “claim in quasi-contract” subject to the six-year statute of limitations established under R.C. 2305.07.⁷ *State ex rel. Cnty. of Cuyahoga v. Jones Lang Lasalle Great Lakes Co.*, 8th Dist. No. 104157, 2017-Ohio-7727, 2017 Ohio App. LEXIS 4129, at ¶ 118 (footnote in original). “An action for unjust enrichment arises when a party retains money or benefits which, in justice and equity, belongs to another.” *Patel v. Krisjal, L.L.C.*, 10th Dist. No. 12AP-16, 2013-Ohio-1202, 2013 Ohio App. LEXIS 1086, at ¶ 29. In *Patel*, the 10th District Court of Appeals explained that “[a] claim for unjust enrichment accrues on the date which the money is wrongly retained,” and, therefore, “[t]he statute of limitations for an unjust enrichment claim is not subject to equitable tolling or a discovery rule.” *See id.* at ¶¶ 29-30. Other courts that have considered the equitable tolling question have generally agreed that unjust enrichment claims are not subject to a discovery rule. *See Grilli v. Smith*, 5th Dist. No. 2012-CA-12, 2012-Ohio-6146, 2012 Ohio App. LEXIS 5312, at ¶ 59; *Ignash v. First Serv. Fed. Credit Union*, 10th Dist. No. 01AP-1326, 2002-Ohio-4395, 2002 Ohio App. LEXIS 4481, at ¶ 20; *Binsack v. Hipp*, No. H-97-029, 1998 Ohio App. LEXIS 2370, at *17 (Huron County June 5, 1998) (“[a]n action for unjust enrichment must be brought within six years of the alleged unjust enrichment [T]here is no exception to measure the statute of limitations from the time the alleged unjust enrichment was discovered as there is for fraud”); *Palm Beach Co. v. Dun &*

⁷ R.C. 2305.07 provides, “[e]xcept as provided in [R.C. 126.301] and [R.C. 1302.98], an action upon a contract not in writing, express or implied, or upon a liability created by statute other than a forfeiture or penalty, shall be brought within six years after the cause thereof accrued.”

Bradstreet, Inc., 106 Ohio App. 3d 167, 175, 665 N.E.2d 718 (Hamilton County 1995).⁸ Accordingly, we conclude that a claim for unjust enrichment is subject to the six-year statute of limitations for quasi-contractual claims under R.C. 2305.07. In light of this six-year statute of limitations, a county may seek recovery of erroneously distributed fuel tax revenues going back six years based on the date of an alleged erroneous distribution. Although Geauga County only recently discovered the erroneous distributions of fuel tax revenues, the lack of a discovery rule tolling the statute of limitations for unjust enrichment claims restricts the county to pursue collection of improper distributions made within the last six years.

Courts have found that the six-year statute of limitations under R.C. 2305.07 also applies to actions initiated by a county prosecuting attorney pursuant to R.C. 117.28. *State ex rel. Holcomb v. Walton*, 66 Ohio App. 3d 751, 756, 586 N.E.2d 176 (Butler County 1990); *Portage Lakes Joint Vocational Sch. Dist. Bd. v. Bowman*, 14 Ohio App. 3d 132, 133, 470 N.E.2d 233 (Summit County 1984) (“[t]he law is established that an action brought pursuant to R.C. 117.10 [a predecessor of R.C. 117.28] may be brought within six years from the date of the filing of the report with the prosecuting attorney”); *Rhea Acad. Cmty. Sch. v. Rhea*, C.P. Franklin County No. 11-CV-14860, 2013 Ohio Misc. LEXIS 3207, at *5-6; *see also* 1995 Op. Att’y Gen. No. 95-035, at 2-190 n.3. Therefore, we conclude that a six-year statute of limitations applies to actions brought pursuant to R.C. 117.28.

Finally, we must determine whether a six year statute of limitations applies to actions initiated by a county prosecuting attorney pursuant to R.C. 309.12. The purpose underlying both R.C. 117.28 and R.C. 309.12 is the protection of public moneys from misapplication or illegal expenditure. In light of this shared statutory purpose, we have previously concluded that the rationales for interpreting R.C. 117.28 in one fashion apply equally to interpretations of R.C. 309.12. In 2012, we concluded that although prior Attorney General opinions evaluating the personal liability of public officers “specifically addressed civil actions brought under R.C. 117.28, the same rationale and conclusions equally apply to R.C. 309.12.” *See* 2012 Op. Att’y Gen. No. 2012-010, at 2-78 to 2-79. Therefore, although no court of which we are aware has considered the statute of limitations applicable to actions brought under R.C. 309.12, we conclude that the same six-year statute of limitations applicable to unjust enrichment actions brought under R.C. 2305.07 and to actions brought pursuant to R.C. 117.28 also applies to actions initiated by a county prosecuting attorney pursuant to R.C. 309.12.

⁸ Compare *N. Olmsted City Sch. Dist. Bd. of Edn. v. Cleveland Municipal Sch. Dist. Bd. of Edn.*, 108 Ohio St. 3d 479, 2006-Ohio-1504, 844 N.E.2d 832, at ¶ 42 (the six-year statute of limitations under R.C. 2305.07 does not apply to a situation in which a school district seeks recovery of tax revenues that were distributed to another school district as the result of improperly levied local property taxes because recovery of revenues is impossible under an unjust enrichment theory in such circumstances); *Desai v. Franklin*, 177 Ohio App. 3d 679, 2008-Ohio-3957, 895 N.E.2d 875, at ¶¶ 14-23 (Summit County) (reviewing the statute of limitations for unjust enrichment claims but declining to decide whether the discovery rule applies to an unjust enrichment claim because the plaintiff “brought his claim within the six year statute of limitations period under R.C. 2305.07 once his claim accrued”).

Therefore, we conclude that a county's claim for unjust enrichment against a political subdivision that was the recipient of erroneously distributed motor vehicle fuel excise tax revenues is subject to the six-year statute of limitations for quasi-contractual claims under R.C. 2305.07, as are actions initiated by a county prosecuting attorney pursuant to R.C. 117.28 or R.C. 309.12.

Conclusions

Based on the foregoing, it is my opinion, and you are hereby advised as follows:

1. A county is not required to institute a civil action seeking reimbursement of motor vehicle fuel excise tax revenues received by the county pursuant to R.C. Chapter 5735 and erroneously distributed to municipal corporations within the county. Although a county has a cognizable cause of action to seek reimbursement of such revenues under an unjust enrichment theory, the county may decline to initiate a cause of action.
2. A county engineer, county auditor, and board of county commissioners each has the authority to direct the county prosecuting attorney to initiate a cause of action under an unjust enrichment theory against a municipal corporation that was the recipient of erroneously distributed motor vehicle fuel excise tax revenues owed to the county engineer. If the Auditor of State issues a certified report concluding that fuel tax revenues were illegally expended, the county prosecuting attorney may initiate a cause of action pursuant to R.C. 117.28. Regardless of any action taken by the county engineer, county auditor, or board of county commissioners, or the issuance of a certified report by the Auditor of State, the county prosecuting attorney has independent discretion to initiate a cause of action pursuant to R.C. 309.12 to recoup the erroneously distributed fuel tax revenues if he is satisfied that moneys of the county, or public moneys belonging to the county, have been misapplied.

3. A county's claim for unjust enrichment against a political subdivision that was the recipient of erroneously distributed motor vehicle fuel excise tax revenues is subject to the six-year statute of limitations for quasi-contractual claims under R.C. 2305.07, as are actions initiated by a county prosecuting attorney pursuant to R.C. 117.28 or R.C. 309.12.

Respectfully,

A handwritten signature in blue ink that reads "Dave Yost". The signature is written in a cursive, flowing style.

DAVE YOST
Ohio Attorney General