Clients&FriendsMemo

# Illinois Supreme Court Holds Challenge To GO Bonds Is Barred By *Laches*, But Avoids Underlying Constitutional Issues

**May 26, 2021**

On May 20, 2021, the Illinois Supreme Court finally put to rest a long-simmering challenge to the validity of around $14 billion of Illinois general obligation bonds.[1] The Supreme Court unanimously affirmed, albeit on different grounds, a trial court's August 2019 order[2] denying a petition by a prominent political activist to file a lawsuit challenging those bonds. In affirming the trial court's decision, the Supreme Court also reversed an intermediate appellate court's August 2020 decision[3] permitting the challenge to go forward.

The original 2019 trial court decision had ruled on the underlying issue of whether the challenged bonds violated a provision of the Illinois Constitution requiring long-term debt to be issued only for a "specific purpose." However, the Supreme Court intentionally avoided that constitutional issue, instead holding that the activist's petition was barred by the equitable doctrine of *laches*, which prevents the filing of lawsuits where unreasonable delay and a lack of due diligence has resulted in prejudice to another party. The Supreme Court found that the activist's delay of 2 to 16 years in challenging the relevant bonds constituted a lack of due diligence, and found that the State of Illinois would be prejudiced by this delay if the activist's suit were permitted to go forward, particularly if the suit resulted in damage to the State's credit rating. The Supreme Court also clarified the standard for denying a petition to bring a taxpayer action under Illinois law, holding that such a petition may be denied not only where it is "frivolous" or "malicious," but also where it is "otherwise unjustified" for any reason, including because the State has a viable affirmative defense, such as *laches*.

The Supreme Court's decision is broadly consistent with the traditional view that government debt generally cannot be retroactively invalidated once issued, at least where there has been a significant lapse of time since the issuance of the debt. The decision also suggests that protecting

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1 *Tillman v. Pritzker*, 2021 IL 126387 (Ill. May 20, 2021). Of the approximately $16 billion of original issuance amount of the challenged bonds, approximately $14 billion remains outstanding.

2 *See Tillman v. Pritzker*, Case No. 2019-CH-000235 (Cir. Ct. Sangamon Cnty., Ill. Aug. 29, 2019).

3 *See Tillman v. Pritzker,* Case No. 4-19-0611 (Ill. App. Ct. 4th Dist. Aug. 6, 2020).

a state's credit rating is likely to be an overriding consideration for many state supreme courts, meaning that legal challenges that would result in defaults or downgrades seem unlikely to succeed if they reach the highest state courts, whatever legal rationale those courts may devise for defeating such challenges.

However, by avoiding the underlying issue of whether the challenged bonds were valid under the "specific purposes" clause of the Illinois Constitution, the Supreme Court left municipal bond markets without any clear guidance as to the meaning of that clause, or the meaning of similar clauses limiting the issuance of long-term debt in other state constitutions. The decision therefore leaves open the possibility that future litigants could make renewed, more timely attempts to challenge bonds under that or similar constitutional provisions.

In addition, because the meaning of the "specific purposes" clause remains unresolved, the meaning of that provision could potentially reemerge as a key issue in any future restructuring of Illinois's debt.

**Background**

Under Illinois law, private citizens have standing to bring actions in their capacity as taxpayers to enjoin the disbursement of public funds for improper purposes. *See* 735 ILCS 5/11-303. Before bringing such an action, however, a private citizen must first file a petition seeking leave from a court. *Id.* The court may grant such a petition if the court "is satisfied that there is reasonable ground for the filing of [the taxpayer] action." *Id.*

On July 1, 2019, a prominent political activist, John Tillman (***"Tillman"***), filed such a petition in his capacity as an Illinois taxpayer. The proposed complaint attached to the petition also identified hedge fund Warlander Asset Management, L.P. (***"Warlander"***) as a plaintiff in the proposed action. The complaint primarily alleged that Illinois's 2003 and 2017 general obligation (or "GO") bond issuances violated a provision of the Illinois Constitution that requires long-term debt to be for a "specific purpose" (Ill. Const. art. IX, § 9), arguing that "specific purposes" include only "specific projects in the nature of capital improvements, including roads, buildings, and bridges." Specifically, the complaint alleged that Illinois's 2003 issuance of "Pension Funding Bonds" failed to satisfy this "specific purposes" requirement, because it allocated bond proceeds to be used to reimburse the State's General Fund for past contributions to the State's retirement systems. The complaint similarly alleged that Illinois's 2017 issuance of "Income Tax Proceed Bonds" failed to satisfy this "specific purposes" requirement, because it allocated bond proceeds to be used to pay past due bills related to general operating expenses.

The Illinois Attorney General opposed the petition on behalf of the government officer defendants, which included the Governor, Treasurer, and State Comptroller. These defendants argued that Tillman failed to establish reasonable grounds for filing his taxpayer complaint because his constitutional claims lacked merit. Alternatively, they contended that Tillman's complaint was barred by *laches* because he waited to file his action until years after the statutes authorizing the bonds were enacted and the bonds were issued.

In addition, two holders of challenged bonds, Nuveen Asset Management, LLC and AllianceBernstein, L.P., filed an *amicus* brief in which they alleged that Warlander had an "ulterior purpose" for joining the litigation because it had purchased credit default swaps that would pay off if the litigation caused Illinois to default on its debt.

***Trial Court Decision***

In August 2019, Sangamon County trial court Judge Jack D. Davis, II, denied Tillman's petition by ruling on the underlying merits of Tillman's proposed complaint, holding that the challenged bonds satisfied the "specific purposes" requirement in the Illinois Constitution because the legislation authorizing the bonds "stated with reasonable detail the specific purposes for the issuance of the bonds." Judge Davis therefore treated the "specific purposes" provision as merely requiring that the legislature identify the purposes for which bond proceeds would be used, rather than requiring that the intended purposes themselves be "specific" (such as capital improvements) as opposed to "general" (such as general operating expenses).

Judge Davis also held broadly that allowing Tillman to file the complaint "would result in an unjustified interference with the application of public funds." He stated that Tillman was asking the Court "to address a non-justiciable political question and substitute its judgment for the Illinois Legislature some two decades after it occurred," thereby violating "the separation of powers." His decision therefore suggested that the validity of the debt might be effectively immune from legal challenge.

Judge Davis did not address the defendants' *laches* argument or their other affirmative defenses.

***Appellate Court Decision***

Tillman appealed to the Illinois Fourth District Appellate Court, which reversed Judge Davis's order, holding that the trial court erred by denying Tillman's petition.[4]

Citing the Illinois Supreme Court's "seminal case" of *Strat-O-Seal Manufacturing Co. v. Scott*, 190 N.E.2d 312 (1963), the appellate court explained that the purpose of requiring a petition for leave prior to the commencement of a taxpayer action was to "provide a check upon the indiscriminate filing of such suits." Absent such a check, taxpayers could bring such suits for "an ulterior or malicious purpose" and thereby "seriously embarrass the proper administration of public affairs." The appellate court concluded that under *Strat-O-Seal*, the relevant standard for granting leave is

[4] Warlander did not participate in the appeal.

simply "whether the facts alleged in the petition and proposed complaint, taken as true, disclose a reasonable ground for the filing of a suit."

Applying this standard to Tillman's petition, the appellate court concluded that "nothing in the record indicates that the proposed complaint was frivolous, filed for a malicious purpose, or is otherwise unjustified." Specifically, the court concluded that "Tillman's complaint sets forth a colorable reading of the Illinois Constitution that does not appear to be frivolous on its face."

While the appellate court framed its decision as a straightforward application of the *Strat-O-Seal* standard, its application of that standard arguably lowered the bar for granting leave to file taxpayer actions, as the appellate court focused specifically on whether the proposed complaint was "frivolous" or "malicious" and on whether the petitioner's claims were merely "colorable," rather than placing the burden squarely on the petitioner to establish that reasonable grounds existed for filing the suit.

Unlike the trial court, the appellate court expressed "no opinion on the ultimate merits of Tillman's claims," but "concluded that the petition and complaint state reasonable grounds for filing suit." The appellate court also declined to opine on the strength of the defendants' affirmative defenses, including *laches*.

**Supreme Court Decision**

The State Attorney General appealed the appellate court's decision to the Illinois Supreme Court, which reversed the appellate court's decision and affirmed Judge Davis's original trial court order denying Tillman's petition, albeit based on a finding of *laches* rather than on Judge Davis's original assessment of the merits of Tillman's complaint. In the process, the Supreme Court also clarified the standard for denying petitions to bring a taxpayer action under Illinois law.

***Standard for Denying Petition for Leave to File a Taxpayer Action***

The Supreme Court began by addressing the standard for denying a petition to file a taxpayer action, concluding that "the appellate court's holding that the trial court is limited to addressing whether a proposed complaint is frivolous or malicious when deciding whether to allow a . . . petition [is] incorrect." Instead, the Supreme Court concluded that a petition could also be denied when it was "otherwise unjustified," including because a valid affirmative defense existed to the underlying complaint.

To reach this conclusion, the Supreme Court initially focused on the meaning of the phrase "reasonable ground" in the governing statute, which provides that a court may grant a petition to file a taxpayer action if the court "is satisfied that there is reasonable ground for the filing of [the taxpayer] action." 735 ILCS 5/11-303. The appellate court's overly narrow interpretation of the phrase "reasonable ground" stemmed, in the Supreme Court's view, from a misreading of the seminal *Strat-O-Seal* case. In that case, the Illinois Supreme Court permitted a taxpayer action to go forward after stating that "[w]e find nothing in the present record to indicate that the purpose is frivolous or malicious, or that a filing of the complaint is **otherwise unjustified.**"

Based on the *Strat-O-Seal* court's consideration not only of whether the petition in that case was frivolous or malicious, but also of whether it was "*otherwise unjustified*," the Supreme Court concluded that a petition to file a taxpayer action could be denied for reasons other than that it is frivolous or malicious. In particular, the Supreme Court concluded that "the statute does not expressly preclude the reviewing court from examining the legal merits of the complaint or addressing what are ordinarily considered to be affirmative defenses."

***The Doctrine of Laches***

The Supreme Court's conclusion that the standard for denial of a petition to file a taxpayer action can include consideration of affirmative defenses set the stage for the remainder of its opinion, in which it proceeded to affirm the denial of Tillman's petition based on just such an affirmative defense, namely the equitable doctrine of *laches*. As the Supreme Court explained, *laches* is an equitable defense asserted against a party "who has knowingly slept upon his rights" and shown a lack of "due diligence" by "failing to institute proceedings before he did." *Laches* is therefore somewhat similar to a statute of limitations in that it penalizes a party for delay in bringing an action. Whereas a statute of limitations "forecloses an action based on a simple lapse of time," however, *laches* is based on the idea that it would be inequitable to allow a party to bring an action after there has been "some change in the condition or relation of the property and parties." As the Supreme Court further explained, the doctrine is based on the notion that courts should not "come to the aid of a party who has knowingly slept on his rights to the detriment of the opposing party."

The State Attorney General had asserted *laches* as a defense as early as the trial court briefing, but neither the trial court nor the intermediate appellate court had engaged with or relied on this defense in their respective opinions. The Supreme Court nonetheless emphasized that it was free to "sustain the [trial] court's judgment on any ground supported by the record, even a ground not relied on by that court." The Supreme Court also indicated that it was choosing to focus on *laches* specifically in order to *avoid* engaging with the larger constitutional issues raised by the case, citing the so-called canon of constitutional avoidance, which holds that "cases should be decided on nonconstitutional grounds whenever possible, reaching constitutional issues only as a last resort."

The Supreme Court identified two "fundamental elements" of *laches*, namely (1) "lack of due diligence by the party asserting the claim" and (2) "prejudice to the opposing party." It analyzed each of these elements in turn.

***Lack of Due Diligence***

With respect to the "lack of due diligence" element of *laches*, the Supreme Court found it relevant that Tillman had delayed for years in filing his petition despite having notice of the relevant bond issuances. Specifically, Tillman filed his petition around 16 years after the 2003 "Pension Funding Bonds" had been issued, and around 2 years after the 2017 "Income Tax Proceed Bonds" had been issued. The Supreme Court found this delay to be unreasonable, citing prior Illinois precedents where taxpayer petitions had been denied under the doctrine of *laches* based on delays ranging from 1 to 4 years. The Court also presumed that Tillman had had sufficient notice to file his petition earlier, because the statutes authorizing the bond issuances were matters of public record.

***Prejudice to the State***

With respect to the "prejudice" element of *laches*, the Supreme Court cited to Illinois precedents establishing that the prejudice element is satisfied where the plaintiff waits to file suit until after the defendant has (i) expended large sums of money or (ii) made irrevocable transactions rendering it impossible to return to the status quo. The Supreme Court found both forms of prejudice to be present in Tillman's case, because Illinois had issued the challenged bonds, applied the bond proceeds as specified in the applicable statutes, and made payments on the bonds for years before Tillman filed his petition. Perhaps getting to the heart of what the Court viewed as the main prejudice to the State, the Supreme Court also specifically noted that "granting relief to petitioner would amount to a *de facto* default on outstanding bonds that are backed by the full faith and credit of the State," and would therefore "have a detrimental effect on the State's credit rating."[5]

Based on its conclusion that both of the necessary elements of *laches* had been satisfied, the Supreme Court reversed the judgment of the intermediate appellate court and affirmed Judge Davis's original trial court order denying Tillman's petition to file a taxpayer action.

**Conclusion**

As noted in prior updates on the *Tillman* case,[6] the dominant view in modern public finance is that government debt generally cannot be invalidated retroactively once issued. This view makes sense from a policy perspective, because the threat of retroactive invalidation could destabilize the bond

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[5] The Supreme Court also rejected an argument by Tillman that the State would not suffer any prejudice from his delay because he did not seek to undo past payments already made on the bonds and instead sought only to enjoin future payments. In rejecting this argument, the Supreme Court cited past Illinois precedents where *laches* was found to bar taxpayer actions that sought to enjoin even future bond issuances or payments.

[6] *See* "Illinois Judge Holds That Courts Cannot Rule Retroactively on Validity of State Debt," September 5, 2019, *available at* https://www.cadwalader.com/resources/clients-friends-memos/illinois-judge-holds-that-courts-cannot-rule-retroactively-on-validity-of-state-debt; "Illinois Appeals Court Reignites GO Bond Challenge," August 11, 2020, *available at* https://www.cadwalader.com/resources/clients-friends-memos/illinois-appeals-court-reignites-go-bond-challenge.

markets, increase borrowing costs for government issuers, or even make it impossible for states and municipalities to borrow at all.

The Illinois Supreme Court's ruling in *Tillman* is generally consistent with this traditional view. By basing its decision on a fact-specific analysis of *laches* rather than on a *per se* rule that debt cannot be retroactively invalidated, however, the Supreme Court did leave some room for future litigants to attempt to challenge public debt under circumstances that are less likely to give rise to a finding of *laches*, such as by bringing a challenge immediately following the issuance of new bonds, or even in the period between the time bonds are authorized and the time they are issued.

Another often-articulated principle of public finance is that long-term debt should generally be issued only to fund capital improvements rather than annual operating expenses. By consciously choosing to avoid interpreting the "specific purposes" clause in the Illinois Constitution, however, the Supreme Court left unresolved the question of whether this traditional limitation on the use of long-term debt is actually legally enforceable in Illinois or in other states with similar provisions in their state constitutions. The Supreme Court's decision to avoid this substantive issue again leaves the door open for future litigants to try their hand at enforcing the "specific purposes" clause of the Illinois Constitution or similar restrictions in other state constitutions, either because they are ideologically opposed to government borrowing, as appears to have been the case with Tillman, or because they are pursuing a particular investment strategy, as appears to have been the case with Warlander.

In addition, the Supreme Court's decision leaves the $14 billion of GO bonds challenged by Tillman in place as one component of Illinois's substantial debt burden, which has given Illinois one of the lowest credit ratings among the states. In the event Illinois were at some point to pursue a restructuring of its debt load, the Supreme Court's decision not to address the "specific purposes" question could allow the "specific purposes" issue to reemerge as one potential basis for negotiating or litigating the treatment of particular bond issuances based on how susceptible such issuances are to a "specific purposes" challenge. As such, the *Tillman* case may have provided more a preview—than a resolution—of some of the key issues that may come into play in any future negotiations or litigations over Illinois's debt.

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