In the Commonwealth Court of Pennsylvania

Nos. 103 & 128 CD 2012

DALLAS SCHOOL DISTRICT, as Fiduciary and Trustee of Its Employees Who are Members of the Class, FRANK GALICKI, On His Own Behalf and On Behalf Of All Other Persons Similarly Situated Within The Dallas School District, PITTSTON AREA SCHOOL DISTRICT, as Fiduciary and Trustee Of Its Employees Who Are Members of the Class, GEORGE COSGROVE, On His Own Behalf Of All Other Persons Similarly Situated Within The Pittston Area School District,
Plaintiffs/Appellees/Cross–Appellants,

v.

NORTHEAST PENNSYLVANIA SCHOOL DISTRICTS (HEALTH) TRUST,
Defendant/Appellant/Cross–Appellee.

BRIEF FOR APPELLANT

On Appeal from the Judgment of the Court of Common Pleas of Luzerne County, Pennsylvania, Civil Division, No. 1404–08, entered January 18, 2012

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I. STATEMENT OF JURISDICTION

The trial court entered final judgment in this case on January 18, 2012. R.8a, 7085a. Defendant/appellant Northeast Pennsylvania School Districts (Health) Trust filed its timely notice of appeal on January 25, 2012. R.8a, 7095a. Plaintiffs/cross–appellants Dallas School District and Pittston Area School District filed their notice of cross–appeal on February 1, 2012. R.8a, 7143a. Appellate jurisdiction exists pursuant to Pennsylvania Rule of Appellate Procedure 341(a).

On June 5, 2012, this Court *sua sponte* issued an order directing that "the parties shall in their principal briefs on the merits address the Court's jurisdiction under 42 Pa. C.S. §762(a)(4)." The Trust appealed to this Court, rather than to the Superior Court, pursuant to 42 Pa. Cons. Stat. Ann. §762(a)(5)(ii), which gives this Court jurisdiction over "[c]ertain private corporation matters," including:

> All actions or proceedings otherwise involving the corporate affairs of any corporation not–for–profit subject to Title 15 or the affairs of the members, security holders, directors, officers, or employees or agents thereof, as such.

Id.

As explained below, the Trust is a non–profit organization, and this case involves the corporate affairs of the Trust. Thus, jurisdiction is proper in this Court pursuant to 42 Pa. Cons. Stat. Ann. §762(a)(5)(ii). *See Medical Shoppe, Ltd.* v. *Wayne Memorial Hosp.*, 866 A.2d 455, 460 (Pa. Commw. Ct. 2005) (citing 42 Pa. Cons. Stat. Ann. §762(a)(5)(ii)); *Gelman* v. *Philadelphia Port Corp.*, 546 A.2d 723, 724 n.1 (Pa. Commw. Ct. 1988) (recognizing that this Court has "appellate

jurisdiction in all actions or proceedings involving the corporate affairs of non–profit corporations").

In addition, appellees Dallas and Pittston Area School Districts themselves filed a notice of cross–appeal to this Court (R.7143a), and they have not raised any timely objection to this Court's consideration and resolution of these appeals. Under these circumstances, Pennsylvania Rule of Appellate Procedure 741(a) provides:

> The failure of an appellee to file an objection to the jurisdiction of an appellate court on or prior to the last day under these rules for the filing of the record shall, unless the appellate court shall otherwise order, operate to perfect the appellate jurisdiction of such appellate court, notwithstanding any provision of law vesting jurisdiction of such appeal in another appellate court.

Pa. R. App. P. 741(a). This Court has relied on Rule 741(a) to decide appeals over which the Superior Court should have exercised jurisdiction where neither party objected to this Court's resolution of the case. *See Peacock ex rel. Peacock* v. *Commonwealth, Dep't of Transp.*, 610 A.2d 1092, 1094 n.6 (Pa. Commw. Ct. 1992).

As this brief demonstrates, this appeal directly concerns the operation and financial well–being of local governmental agencies over which this Court routinely exercises jurisdiction. Moreover, none of the parties would benefit from having to operate under an extended period of uncertainty that would likely follow in the months that it took for judges serving on the Superior Court of Pennsylvania to reach the point of readiness to decide this case that the judges of this Court will possess when this case is called for oral argument. Accordingly, the Trust respectfully urges this Court to proceed to decision pursuant to the jurisdiction conferred under 42 Pa. Cons. Stat. Ann. §762(a)(5)(ii) and Pa. R. App. P. 741(a).

II. STATEMENT OF THE SCOPE AND STANDARDS OF REVIEW

The Supreme Court of Pennsylvania has held that where the language of a trust agreement is clear and unambiguous, the determination of the trust agreement's meaning presents a question of law as to which an appellate court exercises *de novo* review. *See Scalfaro* v. *Rudloff*, 594 Pa. 210, 215 n.2, 217, 934 A.2d 1254, 1257 n.2, 1258 (2007). Similarly, in *McMullen* v. *Kutz*, 603 Pa. 602, 609, 985 A.2d 769, 773 (2009), Pennsylvania's highest court recognized that "the interpretation of the terms of a contract is a question of law for which our standard of review is *de novo*, and our scope of review is plenary."

With regard to questions of law, this Court's scope of review is plenary, and the standard of review is *de novo. See Castellani* v. *Scranton Times, L.P.*, 598 Pa. 283, 293, 956 A.2d 937, 943 (2008). With regard to findings of fact, this Court has explained that where a trial court's "factual findings are supported by substantial evidence they will not be disturbed on appeal." *Tobin* v. *Centre Township*, 954 A.2d 741, 746 n.8 (Pa. Commw. Ct. 2008).

III. TEXT OF THE ORDER IN QUESTION

The trial court's order dated November 28, 2011 states, in pertinent part:

> AND NOW, this 28th day of November, 2011, following the trial in the above case, the Court enters the following Order:
>
> 1. The surplus funds attributable to Dallas School District as of June 30, 2007, in the amount of $2,873,419.00, are hereby subject to a constructive trust and shall be used for the sole and exclusive purpose of paying healthcare costs for the employees of Dallas School District and their beneficiaries.

> 2. The surplus funds attributable to Pittston Area School District as of June 30, 2007, in the amount of $2,329,529.00 are hereby subject to a constructive trust and shall be used for the sole and exclusive purpose of paying healthcare costs for the employees of Pittston Area School District and their beneficiaries.
>
> * * *
>
> 10. A hearing on the amount of attorney's fees to be awarded to Plaintiffs shall be held before this Court * * * .

Attachment B at 1–2.

An order that the trial court issued on December 27, 2011 states, in pertinent part:

> AND NOW, this 27[th] day of December, 2011, with this Court's Order and Opinion of November 28, 2011, and for the reasons set forth therein, the Court Orders as follows:
>
> 1. The pending Post–Trial motions of the Defendant are hereby DENIED; and
>
> 2. The pending Post–Trial Motions of the Plaintiff[s] are hereby DENIED.

Attachment C.

IV. STATEMENT OF THE QUESTIONS PRESENTED

1. Did the trial court err as a matter of law and rule contrary to the great weight and sufficiency of the evidence in concluding that defendant Heath Trust is not a pooled trust, notwithstanding the language of the Trust Agreement creating a pooled trust, the Health Trust's course–of–performance in operating as a pooled trust, and the uncontradicted testimony of the Health Trust's founders that they knowingly and intentionally created a pooled trust?

2. Did the trial court err as a matter of law in holding that operating the Health Trust as a pooled trust would violate public policy, where: (i) plaintiffs never advanced any such claim or argument; (ii) the trial court never identified any public policy that pooled trusts in general or this specific pooled trust violates; and (iii) multiemployer pooled trusts are expressly recognized as valid under both federal and state law?

3. Did the trial court err in failing to hold that the Health Trust's affirmative defenses of consent, estoppel, waiver, laches, and statute of limitations precluded or significantly limited plaintiffs' claims?

4. Did the trial court err in holding that plaintiffs were entitled to recover their attorneys' fees from the Health Trust, when neither the Trust Agreement itself nor any statute or court rule authorizes such an award of counsel fees to plaintiffs, even if plaintiffs remain prevailing parties in this case?

V. STATEMENT OF THE CASE

A. Relevant Factual History

Defendant/appellant Northeast Pennsylvania School Districts (Health) Trust came into existence when thirteen public school entities (school districts, vo–tech schools and an intermediate unit) and their respective labor organizations, through the process of collective bargaining, signed an Agreement and Declaration of Trust ("Trust Agreement"). R.3001a–36a. Although the Trust Agreement was signed in August 1999, the Trust did not begin formal operations until after tax exempt status was granted by the Internal Revenue Service in March of 2000.

The Trust is a multi–employer trust administered by an equal number of Trustees appointed by management (the school districts and other public school entities) and the labor organizations. R.3013a (Trust Agreement §4.2). Before the Trust was formed, the public school entities that ultimately formed the Trust were experiencing substantial double–digit increases in health insurance premiums that they were being charged for individual, fully–insured insurance plans provided separately to them by Blue Cross. R.1189a–91a. The Trust was formed in order to provide health care benefits to the eligible employees and their eligible dependents of the member public school entities in a manner that reduced the costs and risk exposure of the participating public school entities. R.1192a. The principal goals of the school entities that decided to join the Trust were cost savings, rate stability, and rate certainty. *Id.*

The Trust has operated as a "pooled" multi–employer trust during the last 11 years by pooling the premium contributions of the member public school entities to obtain reduced rates for health care by negotiating as a much larger entity and by spreading the risk of high health care claims and the expenses of running the Trust among all of the member school entities. A brief explanation about the manner in which employers may provide health care benefits to their employees and their dependents is essential to an understanding of the Trust's operation.

An employer may choose to purchase what is known as "fully insured" health care coverage for an employee. In that scenario, the employer pays a premium, in exchange for which the health insurer agrees to offer (and pay for) the coverage being provided. In the "fully insured" scenario, the risk of unusually expensive claims is transferred to the health insurer, as is the potential benefit that the insured will have lower than expected claims.

Another health insurance alternative that an employer or group of employers may select — which is in fact the alternative that the Trust has itself selected — involves what can best be described as self–insurance. R.1190a. Instead of transferring the risk of high claims or the benefit of lower than expected claims to a health insurer under a "fully insured" policy, the employer or employers can pool their resources into a fund from which the health care claims of employees and their dependents will be paid. *Id.*

The Trust uses Blue Cross as its third–party administrator (commonly known as a TPA) for its medical programs, and thus after the employees of the

covered school districts obtain health care services, the Trust receives a bill from Blue Cross that the Trust then pays out of the pooled Trust fund. The Trust has not transferred the risk of higher–than–expected health care claims to an insurer, nor has the Trust given up the potential benefit of lower–than–expected claims. In this self–insured scenario that the Trust operates under, the pool of money that the school entities have contributed represents the "insurance" from which the health care claims of the school employees and their dependents are paid.

As reflected in the Trust Agreement, the Trustees are responsible for the operation of the Trust and have sole responsibility for determining the existence, non–existence, nature, and amount of the rights and interests of all parties in the Trust Fund. R.3010a (Trust Agreement §2.1). The Trust Fund consists of the assets held by the Trustees in accordance with the Trust Agreement and is made up of the contributions received from the member school districts. R.3008a–09a (Trust Agreement §1.1(b), (c)).

As explained below, the Trust has always operated as a pooled, irrevocable Trust in which: (1) the premium contributions of all of the member public school entities are irrevocable and pooled together to obtain lower health care rates; (2) the health care claims paid out by the Trust are paid out of the pooled pot of money, thereby spreading the risk of high health care claims across the entire Trust membership; and (3) the expenses of Trust operation and administration are shared among all member public school entities.

The irrevocable and pooled nature of the Trust fund is established by various sections of the Trust Agreement that all member schools and labor organizations have signed.

Section 6.6 of the Trust Agreement, titled "Irrevocability of Trust," provides as follows:

> All contributions made by public school entities to the Trust Fund shall be irrevocable, and no part of the corpus of the Trust Fund nor any income therefrom shall revert to any public school entity or be used for or diverted to purposes other than for the exclusive benefit of the Participants and their Beneficiaries, except as provided by law, or as provided in the Plan or this Agreement and Declaration of Trust.

R.3032a (Trust Agreement §6.6).

Section 5.1(b) of the Trust Agreement addresses amendments to the Trust and provides as follows:

> No amendment to this Agreement shall be effective if it authorizes or permits any part of the Trust Fund (other than such part as is required to pay taxes and administration expenses) to be used for or diverted to any purpose other than for the exclusive benefit of the Participants and/or their Beneficiaries or estates; nor shall any amendment be effective if such amendment authorizes or permits or causes any portion of the Trust Fund to revert to or become property of any public school entity.

R.3025a (Trust Agreement §5.1(b)).

In the year 2000, the Trust's board of trustees authorized the trust's attorney to apply to the Internal Revenue Service as a tax exempt entity pursuant to 29 U.S.C. §501(c)(9). R.3037a (Def. Exh. 8). Consistent with the irrevocability of the monies in the Trust fund, in its application to the IRS for tax–exempt status, the Trust affirmatively represented that there would be no distribution of its property

or surplus to shareholders or members and obtained Section 501(c)(9) tax exempt status based on that representation. R.3046a, 3058a (Def. Exh. 4); R.3212a–14a (Def. Exh. 5); R.1283a–84a (testimony of Ralph Scoda). The application to the IRS is signed by Dr. Frank Serino, the founding Trustee appointed by the Pittston Area School District, who also served as the Trust's management co–chair from 1999 to 2002. R.3056a.

In the IRS application, the Trust stated that "[t]he organization is a Trust created to pool the resources of 13 school districts to provide health insurance coverage at reduced rates to employees of those districts by leveraging their buying power as a very large purchaser of benefits." R.3057a. Asked in the Application whether the organization had made or planned to make any distribution of its property or surplus funds to shareholders or members, the Trust responded "no." R.3060a. Dr. Serino understood, when he signed the Application, that the Trust would not be distributing property or surplus funds to the members of the Trust. R.6102a. The Trust's Application to the IRS confirms the intent of the Trustees that this Trust be operated as a pooled Trust in which contributions by the member public school entities, once paid in, would be irrevocable and not subject to refund or return.

In the period immediately before the Trust's formation, the public school entities that ultimately formed the Trust hired Plan3 Incorporated. R.810a. During this transition period, Plan3 administered the separate contracts of insurance that each public school entity had at the time with Blue Cross. R.3539a–92a (Def. Exh.

55). Each of these public school entities then formed and joined the Trust, with the exception of the Crestwood School District, which, as explained below, did not become a member of the Trust and never became subject to the Trust Agreement.

For the initial years of the Trust's existence, Plan3 administered the Trust's Plan of Benefits. From the Trust's formation to the Plan year ending June 30, 2002, the Trust experienced an increasing Trust–wide deficit. R.1277a. The Trust became dissatisfied with Plan3 and terminated its relationship with Plan3 in 2001. R.1114a. In 2002, the Trust hired an actuarial firm, Conrad M. Siegel, Inc. ("CSA"), to provide actuarial and administrative services to the Trust. R.1115a. During the period June 2002 to October 16, 2002, CSA, in its capacity as actuary to the Trust, developed a methodology to determine premium contribution rates for the public school entities participating in the Trust. R.3216a–18a (Def. Exh. 6).

The rating methodology developed by CSA is a pooled rating methodology. As explained by Robert Glus, the Trust's actuary with CSA, the rating methodology is a pooled rating methodology primarily because the premium/contribution rates for the member school districts are set on a prospective basis and are fixed, in advance, for the Plan year, and there is then no retrospective settlement process for each member school district. R.1428a, 1434a–35a, 1444a–45a. That is, each member school entity is not responsible for its own specific claims and expenses that occur throughout the Plan year; rather, each member school entity pays the fixed contribution rate for the Plan year, regardless of whether the actual health care

claims and expenses for a particular member district are less than or greater than the premium contributions made to the Trust by that district for that Plan year. *Id.*

The Trust implements a self–insured Plan of Benefits through agreements between the Trust and the various service providers, including Blue Cross. The Trust's Plan of Benefits includes three medical programs administered by Blue Cross (as TPA) pursuant to these agreements (R.900a), along with a prescription drug program and a vision and dental program administered by other service providers. Which program or programs a member school district utilizes is determined by collective bargaining with the district's union(s). The rating methodology developed by CSA establishes how a base premium contribution rate is determined for each of these programs to come up with an amount that represents what a member school district must pay for each employee–participant in that program (depending on whether the employee seeks insurance only for himself or herself or also for other family members.)

For the Access Care II program (the PPO) and the First Priority Health program (the HMO), the rating methodology provides for an equalized claim rate to be developed based on the claims experience of the entire Health Trust, and there is no consideration of the claims experience of the Trust's member school districts as individual entities. R.905a–06a. This type of rating methodology also applies to the prescription drug program that is included as part of the Trust's Plan of Benefits. R.1420a.

For the Traditional medical program, the rating methodology is likewise based on the claims experience of the entire Trust, but it also takes into account as a much smaller factor the claims experience of the individual member district. R.901a–02a. Under the pooled rating methodology, differences in rates among member school districts for the Traditional program are limited to a differential of plus or minus 5% of the average rate of the whole Trust. R.903a. This limitation reflects the intent of the Trustees that the Trust be operated as a pooled Trust whereby the risk of high claims is spread across the entire Trust membership, and the goal is rate stability versus volatility. R.903a–04a. As part of the rating process, CSA factors into each member school district's rate any co–pays, deductibles, or co–insurance negotiated between that school district and its unions. R.1422a–23a. As a result, each member school district receives the benefit of these negotiated items in the form of a lower premium/contribution rate. *Id.* This accounts for the differences in premium/contribution rates among the districts that sometimes exist for the same program.

At a Board of Trustees meeting held on October 16, 2002, the Trustees voted for and adopted the pooled rating methodology developed by CSA. R.3216a–20a (Def. Exhs. 6, 7). As recorded in the minutes of the October 16, 2002 meeting of the Board of Trustees, both the Trustee appointed by the Dallas School District, Ernest Ashbridge, and the Trustee appointed by the Dallas Educational Association, William Wagner, voted to adopt the pooled rating methodology developed by CSA. R.3219a–20a (Def. Exh. 7). Similarly, the Trustee appointed by the Pittston Area

Federation of Teachers, Arthur Clark, voted to adopt the pooled rating methodology developed by CSA, while Pittston Area's management Trustee was not present. *Id.* CSA has used this pooled rating methodology to develop the contribution rates for the member school districts for each Plan year since the July 2003 to June 2004 Plan year. R.907a–08a, 1423a–24a.

Defendant's evidence at trial further established that, in December of 2002, the Board of Trustees voted on a Resolution for the "allocation of deficits (Reduction in Net Assets) and/or surpluses (Addition to Net Assets)" that sets out how the Health Trust would handle Trust–wide deficits and/or surpluses. R.3221a–22a. This Resolution was introduced into evidence at trial as defendant's exhibit 8 and was proposed by Ralph Scoda, the management Trustee for the Wilkes–Barre Area School District. It is undisputed that the Board of Trustees collectively voted on and approved the Scoda Resolution at its regular monthly meeting on December 18, 2002. R.3223a (Def. Exh. 9).

As reflected in the Scoda Resolution, when a Trust–wide deficit exists, participating member school districts are responsible for payment to the Trust for an amount based on the member's contributions to the Trust as compared to the total contributions of all of the members of the Trust. R.3221a. Importantly, this liability is not based on the member's contributions paid in versus its actual claims and expenses paid out.

The Scoda Resolution also addresses the possibility of a Trust–wide surplus and restricts the allowable uses of that surplus consistent with Sections 6.6 and 5.1

of the Trust Agreement. R.322a. Specifically, the Scoda Resolution provides in point 6 as follows:

> In the event that the Trust realizes Unrestricted Net Assets — Surplus, said surplus shall, at the discretion of the Trust, be used for any of the purposes listed below:
>
> (1) Reserved to fund future unanticipated deficits.
>
> (2) Stabilize future member contributions.
>
> (3) Added to required reserve deposits either held by underwriters/carriers or in an escrow investment account held by the Trust solely for this purpose.
>
> (4) Any combination of the above.

R.3222a (Def. Exh. 6).

As recorded in the minutes of the December 18, 2002 meeting of the Board of Trustees, both the Trustee appointed by the Dallas School District, Ernest Ashbridge, and the Trustee appointed by the Dallas Educational Association, William Wagner, voted to adopt the Scoda Resolution. R.3223a (Def. Exh. 9). Similarly, the Trustee appointed by the Pittston Area Federation of Teachers, Arthur Clark, voted to adopt the Scoda Resolution, while the management Trustee for Pittston Area was not present for the vote. *Id.*

In voting for the December 2002 Scoda Resolution, the Trustees rejected the opposing, alternate approach of Robert Eyet, the Trustee appointed by the Northwest Area School District. R.1289a. Mr. Eyet had proposed an alternative approach to the allocation of the then accumulated Trust–wide deficit that required the calculation of individual school district surpluses or deficits based on the

district's individual claims experience and its size as compared to the size of the other members of the Trust. R.4790a (Def. Exh. 107). The evidence establishes, without dispute, that the Trustees voted against Mr. Eyet's "each member pays for its own employees' claims" approach in December of 2002, instead passing the Scoda Resolution. R.1301a, 3223a.

Consistent with the Scoda Resolution, in years when there has been a Trust–wide surplus, the Trustees have decided, by collective vote, to what extent those monies will be relied on to stabilize contribution rates in the future. The trial evidence establishes that the Trustees have stabilized future rates in two ways — by using a portion of the surplus to avoid any increase in rates or to fund a lower percent increase in the members' annual contribution rates, or to fund a waiver of one month or a half month's contribution amount for all members. R.1316a, 2161a, 968a–69a.

Dallas School District founding Trustee Ernest Ashbridge testified at trial that Item 6 of the Scoda Resolution, which did not provide for any payment of surplus back to a member school district, was consistent with his understanding of the Trust's intended operation as a pooled trust. R.6038a.

Since being retained by the Trust in 2002, CSA has provided the Trustees with recommendations on the budget and contribution rates for the coming Plan year, and the Trustees have voted on the budget and the contribution rates for the upcoming Plan year. The evidence at trial was undisputed that the Trustees voted on and approved the budget and the contribution rates for the member school

districts in advance of every Plan year. Plaintiffs have admitted, in their Reply to Defendant's New Matter, that for each Plan year, beginning with the 2002–2003 Plan year through the 2006–2007 Plan year, the management Trustee appointed by the Dallas School District to the Defendant Trust and the management Trustee appointed by the Pittston Area School District to the Defendant Trust voted in favor of the budget and the contribution rates developed by CSA. R.200a–08a (Par's 132, 134, 138–143, 146–151, 153, 155–159, 162–164 of Trust's Answer and New Matter); R.325a–28a (Plaintiffs' Reply to New Matter). CSA's Rob Glus testified that he applied the pooled rating methodology of defendant's exhibit 6 in proposing the contribution rates for the Plan years starting in July 2003 that have ultimately been approved by the Trustees. R.907a–08a, 1423a–24a.

These contribution rates are intended to fund all benefits to be afforded to all eligible employees and beneficiaries under the Trust's Plan of Benefits, as well as all projected expenses of the Trust for the future Plan year. R.3020a (Trust Agreement §4.4(u)); R.1194a–95a (Lane testimony). The trial testimony established, without contradiction, that since inception of the Trust, once the contribution rates are set for the upcoming Plan year, each member public school entity pays no more than that rate for that Plan year, regardless of whether the cost of health care claims and share of expenses for that school exceeds the amount of money it paid into the Trust based on its contribution rate. R.1338a (Kyle testimony), R.1194a–95a (Lane testimony), R.1441a (Glus testimony). Moreover, to the extent that the Trust needed more funding to operate during the initial years when there was an

overall Trust deficit, the Trust simply required the member school districts to make either an extra monthly payment or an advance payment — based on their existing premium contribution rate, and not based in any way on what their employees' actual claims were or had been to that point. R.3221a.

As confirmed by Danielle Savitsky, the Trust Office Manager and Accountant, the Trust has never performed a retrospective settlement or reconciliation of amounts paid in by a member school entity versus amounts paid out for that member in claims and expenses. R.982a. According to Ms. Savitsky, the Trust has never gone to a member school entity after a Plan year and asked the member for more money for that Plan year because the member's cost of claims and share of expenses exceeded what that member paid in contributions. *Id.* Nor has the Trust ever paid money back to a member public school entity because the member's cost of claims and share of expenses was less than what that member paid in contributions. *Id.*

Rather, the Trust pools the contributions from and the liabilities (claims and expenses) of the participating public school entities so that these entities are not at risk for their own claims experience beyond the contribution rate approved in advance and paid by that entity. Operating in this way, the member school districts are able to know, in advance of each Plan year, the maximum amount that they will have to pay for health care, and are thereby able to properly plan and budget for these benefits for their respective school districts.

Moreover, the evidence at trial established that the Trust's financial accounting has always been performed on a pooled, trust–wide basis, without segregation by member school district. The Trust Agreement, at Sections 4.7 and 4.8 sets forth the financial auditing requirements for this Trust and provides only for Trust–wide accounting. R.3021a–22a (Trust Agreement §§4.7, 4.8). Early on, the Trustees retained an independent auditing firm to audit the Trust's financial records on an annual basis. For every Plan year, starting with the 7/1/99 to 6/30/00 Plan year, that firm, Bonita & Rainey, has conducted an audit of the Trust's financial documents and prepared an audited financial report for the Trust. Those reports were presented to the trial court as defendant's exhibit 56. R.3593a–705a.

Thomas Rainey of Bonita & Rainey testified at trial that his firm has always reported the Trust's finances on a Trust–wide basis and has never included a breakdown of Trust finances by member public school entity. R.1374a–75a. He testified that his firm came to a Board of Trustees meeting every year and presented their final audited financial report for that Plan year to the Trustees. R.1373a. The Trustees then voted on and approved the report. These reports establish that there has never been any auditing or accounting performed suggesting that any member public school entity in the Trust has an ongoing separate or individual "balance" in the Trust Fund. Mr. Rainey confirmed at trial that that was the case and further confirmed that no Trustee or member school district has ever asked him to perform segregated accounting or auditing by member school district. R.1373a–74a. Mr. Palfey of Dallas admitted at trial that he

never objected to the Trust–wide presentation of the Trust's Audited Financial Statements. R.754a–55a.

Trust office manager Danielle Savitsky testified as follows at trial:

> —Each member public school entity makes contribution payments to the Trust monthly and those payments are deposited into a single bank account. No separate accounts are maintained for each school district or other public school entity. R.978a–80a.
>
> —The Trust pays the bills from the vendors that provide the health care services (as submitted by Blue Cross, United Concordia for dental, Express Scripts for prescription drugs), from the same single account. R.978a–79a.
>
> —She has never tracked or analyzed the cash receipts received by the Trust from a member school entity as compared to the health care claims and expenses paid by the Trust for that entity. R.977a–78a.
>
> —She has never made any analysis as to whether a member school entity has paid into the Trust enough money to cover the health care claims and share of expenses of that entity. R.978a–80a.
>
> —There has never been a circumstance where the Trust has required a particular school entity to pay more money beyond its contribution rate because its claims and share of expenses exceeded what it paid in to the Trust. R.982a.
>
> —The Trustees never asked Ms. Savitsky to perform an analysis or reconciliation of the difference between what a member school entity paid to the Trust in contributions versus the dollar amount of the claims paid and share of expenses paid by the Trust on behalf of that entity. R.979a.

According to the testimony at trial of Albert Melone, Jr. of the ABM Co.:

> —He works as a partner of the Albert B. Melone Company ("ABM Co."). R.990a.
>
> —For a four–year period, from late 2000 to April 2004, the ABM Co. was retained by the Trust and ABM Co.'s duties, at least since September 2001, included preparing the monthly revenue and expense

statements and balance sheets for the Trust. R.1007a–08a, 4752a–53a, 4780a–85a.

—For the period that ABM Co. performed accounting functions for the Trust, the contribution payments of the member school entities were paid into a single account. R.1053a.

—For the period that the ABM Co. performed accounting functions for the Trust, Mr. Melone never asked Ms. Savitsky, either as an employee of ABM Co. or on behalf of any school district that he represented, to maintain a separate account for each member school entity. R.1053a–54a.

—For the period that the ABM Co. performed accounting functions for the Trust, the ABM Co. did not correlate, track or compare what the member school entities were paying into the Trust in contributions for comparison with what the Trust was paying out for that entity in claims and share of expenses. R.1054a.

The evidence introduced at trial established that the manner in which the Trust has actually operated was consistent with the manner in which the Trust's founding trustees intended for the Trust to operate. At trial, the Trust presented testimony from many of its founding Trustees. This testimony established overwhelmingly that the originating Trustees of the Trust intended a pooled Trust, in which the members would and did pool their resources to obtain lower health care rates and shared the liabilities, including the risk of high health care claims, to stabilize those rates. The founding Trustees of the Trust include Ernest Ashbridge, Jr., the founding management Trustee for Dallas, and Frank Serino, the founding management Trustee for Pittston. R.3043a–35a. Other founding Trustees include Dr. Sandra Vidlicka (now Lane), the founding management Trustee for Tunkhannock Area School District; Joseph Kochuba, the founding management Trustee for Hanover Area School District, Andrew Marko, the founding

management Trustee for Wyoming Valley West School District, and Joseph Casarella, the founding management Trustee for Wyoming Area School District. R.3034a–36a. All of these individuals signed the Trust Agreement. *Id.* In contrast, it is undisputed that neither Grant Palfey, who testified for plaintiffs, nor Al Melone, who testified for plaintiffs, signed the Trust Agreement. *Id.* In fact, Mr. Palfey had no involvement in this Trust until sometime in 2004. R.661a, 669a.

Defendant's witnesses established that in the period before the formation of the Trust, the public school entities that ultimately formed the Trust were experiencing substantial double–digit increases in the health insurance premiums that each was being charged for individual, fully–insured plans of insurance provided separately to each of them by Blue Cross. R.1189a–91 (Lane testimony). The intent of the founding Trustees, in establishing the Health Trust, was to avoid the dramatic increases in premiums which they were being charged for fully–insured, individual plans of insurance. The founding Trustees were also concerned that a bad claim year for their school district could wipe them out financially. The founding Trustees addressed these concerns by establishing a pooled, self–funded health care plan which stabilized health care costs, pooled their resources, and spread each member public school entity's risk of adverse claims experience over the entire Trust membership. R.1192a (Lane testimony); R.1122a–23a (Marko testimony).

According to the testimony at trial, the Trustees who founded the Trust understood and intended that their premium contributions paid into the Trust

would be pooled and also that their risk of adverse claims experience would be pooled and shared by the entire Trust membership. Witness after witness testified at trial that for every Plan year, the contribution rates for the member were set in advance and that that rate was all that that school district paid for the health and welfare benefits for that Plan year — and furthermore, that there was no comparison or reconciliation done, either by the Trust or anyone else, of a member school district's contributions paid in to the Trust versus the claims and expenses paid out on its behalf. This testimony came from Dallas School District Trustee Ernest Ashbridge (a founding Trustee) (R.6031a), Dallas School District Trustee Karen Kyle (R.1338a–40a), Pittston Area School District Trustee Frank Serino (R.6106a), as well as Trustees Andrew Marko (R.1122a–24a), Ralph Scoda (R.1275a–76a), Joseph Kochuba (R.1309a), Sandra Lane (R.1204a–05a), Trust actuary Rob Glus (R.898a), and the Trust office manager Danielle Savitsky (R.977a–82a). Not a single witness testified otherwise.

These Trustee witnesses further testified that once their school district paid its premium contributions to the Trust, that was all they would pay for that Plan year, regardless of what their school district's employees and their beneficiaries actually incurred in claims, and that this is what they intended. All of the trial evidence confirmed that the Trust never asked a member public school entity for more money because that entity's actual claims were too high and never issued a credit or a refund to an entity because its actual claims were too low. This evidence was also undisputed at trial.

The founding Trustees also understood and intended that the monthly premium contributions paid by the member entities were irrevocable and that if a member school entity decided to leave the Trust, that entity would receive no money upon withdrawal. Specifically, Dallas School District founding Trustee Ernest Ashbridge testified (by videotape deposition) that he understood that Dallas' contributions to the Trust were irrevocable and that the Trust Agreement would not permit an amendment that would allow money to be returned to a district. R.6033a. Mr. Ashbridge further testified that he was not aware of anything in the Trust Agreement that entitled a district to money back. *Id.* Mr. Ashbridge stated that he understood that there was no effort or attempt by the Trust to determine whose money was being used to pay what bills and that he never asked that there be any kind of reconciliation or comparison made for Dallas School District. R.6038a. He recalled that the Trust financial audits were only Trust–wide, and that there were no separate accounts by member school district. R.6037a. Other Trustees confirmed this testimony.

Indeed, every Trustee who testified acknowledged that all contribution payments by member public school entities were deposited into a single bank account and that the Trust did not maintain separate accounts for each individual school district. This evidence was thus also undisputed at trial.

The Health Trust read into the record the following Stipulation in lieu of Testimony from Joseph Casarella, Arthur Clark, Alan Yendrzeiwski and Joseph Yozviak:

> If called to testify, Joseph Casarella, Arthur Clark, Alan Yendrzeiwski and Joseph Yozviak would testify that they were the former Superintendent of Schools of the Wyoming Area School District, a former teacher in the Pittston Area School District, the former Business Manager of the Wyoming Valley West School District and a former teacher within the Wilkes–Barre Area School District, respectively. If called to testify, these individuals would also testify that they were founding Trustees of the Defendant Trust and that they participated in the meetings and discussions that predated the Trust Agreement. All but Alan Yendrzeiwski will testify that they signed the Trust Agreement. They would all testify that it was their intent to create a self–insured multi–employer trust that would pool member districts' contributions and spread the risk of claims over the entire Trust in order to address their desire to stabilize rates and reduce rate fluctuations. They would also testify that it was their understanding that once contributions were paid by a district into the Trust, the district would not get money back. Finally, they would testify that it is their belief that these principles were included in the Trust Agreement and that this is the manner in which they believe the Trust operated while they were Trustees.

R.1412a–13a.

The trial evidence further established without dispute that, from 1999 to the time in 2007 when the plaintiff schools sought this type of information because they knew that they were leaving the Trust, the Trustees of the Trust never requested or directed that the Trust office staff correlate or track or compare the payment of each member school district's claims and share of Trust expenses with the money that that member school district paid into the Trust in contributions. Multiple witnesses, including the Trust's independent auditor, Thomas Rainey, testified that the Trustees — who, under the Trust Agreement, controlled the operations of the Trust — never asked that that kind of reconciliation or breakdown by member school district be done. R.1206a (Lane testimony); R.1370a, 1378a (Rainey testimony).

In recent years, the Trust has experienced positive net assets, or a reserve. Plaintiffs refer to this reserve as the surplus. According to Glus, the Trust actuary, the increase in net assets has been due to the Trust's having far better actual claims experience than was expected for recent Plan years. R.1424a. The Trust's auditor, Thomas Rainey, confirmed this by demonstrating that the Trust's Audited Financial Report for the 2006–2007 Plan year reflects a total cost of claims for all Trust participants and beneficiaries approximately $8.65 million below what was projected in the budget for that Plan year. R.1388a–90a. To the extent that the Trust has experienced positive net assets in a given year, the Trustees decide collectively, and in accordance with the Scoda Resolution, to what extent those monies will be relied upon to reduce or stabilize rates in the future.

In November of 2006, Glus presented the Board of Trustees with various scenarios/options for purposes of deciding the rates for the 7/1/07–6/30/08 Plan year. R.3299a (Def. Exh. 32). The Board of Trustees then voted to have a maximum 3% cap on rate increases for future Plan years despite higher than 3% projected increases in claims expenses for those years. R.3308a–14a (Def. Exhs. 35–37). The actual contribution rates for the 2007–2008 Plan year ranged from a –4.5 to +2.1 percent increase for the member districts, at a time when health care cost increases were trending at +8.0 to +15.0 percent. R.3315a–21a (Def. Exh. 38); R.3299a–305a (Def. Exh. 32). The Trustee for Dallas, Karen Kyle, was chairman of the Trust Rates Committee in November 2006 and voted in favor of the rates proposed for the members of the Trust for the 2007–2008 Plan year. R.3311a–14a (Def. Exh. 37). The

Trustee for Pittston, Robert Linskey, also voted in favor of the rates proposed for the members of the Trust for the 2007–2008 Plan year. R.3311a–14a (Def. Exh. 37). In casting these votes on these rates for the 2007–2008 Plan year, the Trustees, including the Trustees for Dallas and Pittston, made a collective decision to use the net assets (or surplus) to stabilize rates in future years — that is, to take advantage of the surplus slowly over time. Had the plaintiff School Districts stayed in the Trust, they would have shared in the benefit of stabilizing their rates in future years, consistent with the collective vote of the Trustees, including their own Trustees (Karen Kyle and Robert Linskey).

On or about June 12, 2006, Pittston Area School District gave notice to the Trust of its intent to withdraw from the Trust as of June 30, 2007. R.2133a. On or about June 26, 2006, Dallas School District gave notice to the Trust of its intent to withdraw from the Trust as of June 30, 2007. R.2134a.

On April 16, 2007, the Dallas school board voted on whether to withdraw from the Trust and, by a vote of 6 to 3, decided to withdraw from the Trust effective July 1, 2007. R.3324a–25a (Def. Exh. 40). Karen Kyle, Dallas' Trustee on the Health Trust at the time, cast a vote as a Dallas school board member not to withdraw from the Trust. *Id.* Kyle testified at her deposition that she knew that the Trust was sound and that Dallas School District's contribution rates were not increasing. R.6049a (Def. Exh. 142).

On May 29, 2007, the Pittston Area school board voted on whether to withdraw from the Trust and, by a vote of 5 to 4, decided to withdraw from the

Trust. R.3344a (Def. Exh. 46). Robert Linskey, Pittston Area's Trustee on the Health Trust, cast a vote as a Pittston Area school board member not to withdraw from the Trust. *Id.*

At a Board of Trustees meeting on May 23, 2007, Grant Palfey, the alternate management Trustee for Dallas School District, made a motion asking the Trust to provide an accounting for the Trust's entire reserve funds, with respect to each of the school districts referenced in the Trust Agreement, from the inception of the Trust to June 30, 2007, and to deposit the "said funds" pertaining to Dallas School District into a separate Trust Account, with those funds to be used for the sole and exclusive purpose of providing health and welfare benefits to the employees of the Dallas School District and their beneficiaries and dependents. R.2009a–14a (Pl. Exh. 204A). This motion by Dallas' alternate Trustee recognized that up to that point, the Trust had not been segregating the money in the Trust Fund by individual school district but, rather, had been pooling the contributions for the benefit of all of the member school districts.

The Trustees, having sole responsibility for determining the existence, non–existence, nature, and rights of all parties in the Trust Fund, voted on the motion and the motion failed. *Id.* In this lawsuit, each plaintiff school district seeks a return of portions of their contributions made to the Trust Fund for the period from 1999 through June 30, 2007, with the amounts calculated by determining the amounts that each paid in to the Trust in contributions each Plan year, less an amount allocated to each of them for Trust expenses for that Plan year and less the

amount of the health care claims actually paid out by the Trust for each school district's employees and their beneficiaries for that Plan year. R.2546a, 2558a (Pl. Exh. 550 (Richard Kipp report)).

Dallas School District voluntarily withdrew from the Trust effective July 1, 2007. Pittston Area School District voluntarily withdrew from the Trust effective July 1, 2007. In May of 2007, prior to their withdrawal from the Trust, both the Dallas School District and the Pittston Area School District received a letter from Glus, the Trust's actuary, describing the value of having their respective school districts remain in the Trust. R.3332a–36a (Def. Exh. 43). As explained below, approximately six months after withdrawing from the Trust, the Dallas and Pittston Area School Districts commenced this lawsuit against the Trust, contending that the Trust breached the Trust Agreement by not returning monies to them based on a retrospective calculation, for every Plan year from 1999 forward, of premium contributions that they each paid in to the Trust Fund minus the claims and share of expenses paid out on their employees' behalf.

B. Relevant Procedural History

Plaintiffs filed this action in the Court of Common Pleas of Luzerne County in February 2008. R.1a. Once the pleadings were closed and much of discovery had concluded, in November 2009 defendant Trust filed a motion for summary judgment as to the claims contained in plaintiffs' amended complaint and as to the Trust's

counterclaims against the plaintiffs. R.4a. Plaintiffs also filed a motion for partial summary judgment. R.4a.

By means of an order dated April 2, 2010 (*see* Attachment D hereto), the trial court denied defendant's motion for summary judgment and granted plaintiffs' motion for summary judgment in part. More specifically, the trial court ruled that "Plaintiffs are each entitled to an accounting from the Defendant Health Trust as to the amount of the contribution each School District has made each year to the Trust for the period July 1, 2004 through June 30, 2007 and their cost of claims each year and pro rata share of administrative expenses." The trial court ordered the Trust to file such an accounting and serve a copy of the accounting on the Dallas School District and Pittston Area School District. The Trust complied with the trial court's order on October 1, 2010, after the trial court had denied the opposing parties' motions to certify various aspects of the trial court's order for immediate interlocutory appeal by permission.

On November 5, 2010, plaintiffs filed a motion to discontinue the class action claims set forth in Counts II, IV and VIII of their amended complaint. In response, the trial court ordered that the class action counts set forth in Counts II, IV and VIII of plaintiffs' amended complaint be discontinued and that the class action allegations in the amended complaint be stricken.

This case was tried as a non–jury matter from May 31, 2011 through June 6, 2011 before former Luzerne County Common Pleas Judge Lewis W. Wetzel, who had been appointed to the bench to fill a vacancy that resulted when former

Common Pleas Court Judge Peter Paul Olszewski, Jr. lost his retention election. On November 28, 2011, Judge Wetzel issued an opinion and order announcing his decision in the case. *See* Attachments A&B hereto.

Thereafter, the Trust filed timely post–trial motions seeking, among other relief, the entry of judgment in the Trust's favor, a new trial, or a reduction in the amount of the award in plaintiffs' favor. R.6943a–7045a. The plaintiffs also filed a post–trial motion. R.7056a. In December 2011, the trial court granted the parties' joint request to postpone any decision on resolving plaintiffs' claim for attorneys' fees until after this appeal is decided.

On December 27, 2011, only days before the expiration of his judicial commission, Judge Wetzel issued an order denying both sides' post–trial motions in their entirety. *See* Attachment C hereto. On praecipe of the Trust, the trial court entered final judgment in this case on January 18, 2012. R.7085a. Defendant/ appellant Northeast Pennsylvania School Districts (Health) Trust filed its timely notice of appeal on January 25, 2012. R.8a, 7095a. Plaintiffs/cross–appellants Dallas School District and Pittston Area School District filed their notice of cross–appeal on February 1, 2012. R.8a, 7143a.

After Judge Wetzel's departure from the bench, Luzerne County Common Pleas Court Judge William H. Amesbury has considered and resolved several motions filed in this case pertaining to the question of staying execution on the judgment pending appeal.

VI. SUMMARY OF THE ARGUMENT

Presented with an animal that walks like a duck, talks like a duck, and looks like a duck, one would expect with a high degree of confidence that a judge assigned to determine what the animal was would conclude that the animal was a duck. But not in this case, unfortunately, thereby necessitating this appeal.

Here, the trial court was presented with a Trust Agreement whose express language was designed to create a pooled trust. Soon after its creation, the Trust formally represented to the Internal Revenue Service that it operated as a pooled trust when applying for and obtaining tax–exempt status. The trustees of the Trust, shortly after the Trust's creation, officially adopted a resolution governing the treatment of Trust deficits or surplus further confirming the Trust's status as a pooled trust. In addition, the Trust presented a massive amount of uncontradicted evidence establishing both that the Trust has in fact operated as a pooled trust and that it was the intention of the Trust's founding trustees to create a pooled trust.

Notwithstanding all of this evidence, which should have sufficed to compel a neutral arbiter to conclude that the Trust was both created and operated as a pooled trust, in this case the trial judge in essence ruled that a duck was in fact an entirely dissimilar animal. Not only did the trial judge err in holding that the Trust Agreement, pertinent Trust resolutions, the founders' intent, and the actual operation of the Trust failed to establish a pooled trust, but the trial court compounded its error by ruling, contrary to both federal and Pennsylvania law, that pooled trusts violate public policy.

As demonstrated below and in the amicus briefs that are being filed in support of the Trust's appeal, the trial court's conclusion that pooled trusts violate public policy cannot stand. Because the trial court's ruling that the Trust was intended to be, and operated as, a segregated trust was clearly erroneous both as a matter of law and fact, this Court should reverse the judgment and remand with directions to enter judgment in favor of the Trust.

Although it is doubtful that this Court will need to reach the issue, this brief also establishes that the Trust's affirmative defenses also defeat or severely limit plaintiffs' recovery in the unlikely event that this Court were to affirm the trial court's conclusion that the Trust constituted a segregated, rather than a pooled, trust. Lastly, because the Trust was created as a government trust as to which the provisions of the federal ERISA law do not automatically apply, and because the Trust did not expressly incorporate ERISA's statutory provision entitling a prevailing party to recover attorneys' fees, this Court should vacate the trial court's holding that plaintiffs are entitled to recover attorneys' fees in the unlikely event that plaintiffs remain as prevailing parties in this case.

For all of these reasons and the other reasons examined below, this Court should reverse the trial court's judgment and remand with directions to enter judgment in favor of the Trust.

VII. ARGUMENT

A. The Plain Language Of The Trust Agreement, The Trust's Actual Course Of Performance, And The Overwhelming Weight Of Testimony And Other Evidence At Trial Establishes That The Defendant Operated As A Pooled Trust In Which Member Contributions Are Irrevocable

1. The trial court's ruling improperly contravenes the plain language of the Trust Agreement, which establishes that the defendant operated as an irrevocable pooled trust

The Supreme Court of Pennsylvania has held that where the language of a trust agreement is clear and unambiguous, the determination of the trust agreement's meaning presents a question of law as to which an appellate court exercises *de novo* review. *See Scalfaro* v. *Rudloff*, 594 Pa. 210, 215 n.2, 217, 934 A.2d 1254, 1257 n.2, 1258 (2007). Similarly, in *McMullen* v. *Kutz*, 603 Pa. 602, 609, 985 A.2d 769, 773 (2009), Pennsylvania's highest court recognized that "the interpretation of the terms of a contract is a question of law for which our standard of review is de novo, and our scope of review is plenary."

As is pertinent to this case, sections 6.6, 5.1(b), and 4.4(u) of the Trust Agreement unambiguously describe an agreement to pool the contributions of the participating school districts, vocational–technical schools, and the Luzerne Intermediate Unit and to make those contributions irrevocable and not subject to return or repayment to the participating public school entities.

Pursuant to Section 6.6 of the Trust Agreement, contributions made by a participating public school entity to the Trust are "irrevocable," meaning that no

part of the Trust Fund shall revert to any public school entity. Specifically, Section 6.6, entitled "Irrevocability of Trust" provides as follows:

> All contributions made by public school entities to the Trust Fund shall be irrevocable, and no part of the corpus of the Trust Fund nor any income therefrom shall revert to any public school entity or be used for or diverted to purposes other than for the exclusive benefit of the participants and their beneficiaries, except as provided by law, or except as provided in the Plan or this Agreement and Declaration of Trust.

R.3032a.

The above–quoted language contained in Section 6.6 of the Trust Agreement accomplishes a total of three separate results. First, Section 6.6 specifies that all monetary contributions to the Trust Fund made by a school district are irrevocable. In other words, once a contribution is made, the funds become the property of the Trust and cease to be the property of the school district. Second, Section 6.6 provides that none of the money contained in the Trust Fund will be paid back to ("revert to") a member school district. And finally, Section 6.6 specifies that the money contained in the Trust Fund may only be used "for the exclusive benefit of the participants and their beneficiaries," meaning for the benefit of the employees and their beneficiaries of school districts that remain as members of the Trust. This language in the Trust Agreement cannot be overcome by a ruling, such as the trial court made in this case, that money may be taken from the Trust Fund by a former member school district so long as the money is used for the purpose of paying for future health care benefits for the employees and their dependents of a school district that has withdrawn from the Trust.

Section 6.6 does not permit contributions made to the Trust to be returned to the plaintiff school districts, even under the guise that such money will be used for the purpose of paying for the healthcare costs of the plaintiffs for their employees and their employees' dependents, since, by virtue of the plaintiff school districts' withdrawal from the Trust, their employees and their employees' dependents no longer constitute "participants and beneficiaries" of the Trust. Any other interpretation of Section 6.6 would conflict with the requirement of Section 1103(c)(1) of ERISA, *see* 29 U.S.C. §1103(c)(1), that "the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purpose of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan." As a governmental plan, the federal law known as ERISA does not generally apply to the Trust, but the Trust Agreement did specifically incorporate ERISA's fiduciary standards, including Section 1103(c)(1).

Section 5.1(b) of the Trust Agreement likewise makes the irrevocability of contributions unambiguous. Section 5.1(b) provides:

> No amendment to this Agreement shall be effective if it authorizes or permits any part of the Trust Fund (other than such part as is required to pay taxes and administrative expenses) to be used for or diverted to any purpose other than for the exclusive benefit of the Participants and/or their Beneficiaries or estates; nor shall any amendment be effective if such amendment authorizes or permits or causes any portion of the Trust Fund to revert to or become property of any public school entity.

R.3025a.

Section 5.1 of the Trust Agreement contains two separate prohibitions: (1) the language prohibits the diversion of funds "to any purpose other than for the exclusive benefit of the participants and/or their beneficiaries or estates," and (2) the language prohibits permitting or causing any portion of the Trust Fund to revert to or become property of any public school entity. In this case, plaintiffs interpret the irrevocability phrase of Section 6.6, previously quoted above, to have an exception if the funds are used for the exclusive benefit of the employees and beneficiaries of their school districts. Contrary to plaintiffs' proposed understanding, Section 5.1(b) makes absolutely clear that there is no exception (and can never be any exception) whatsoever to the irrevocability of contributions.

Lastly, Section 4.4(u) of the Trust Agreement expressly authorizes the Trust to operate as a pooled trust. That section affirmatively gives the trustees the power:

> to require that the public school entities who are or become party to this Agreement and Declaration of Trust to pay on a monthly, quarterly or annual basis to the Trust Fund an amount of money equal to what is determined by the Trustees to be the allocable, pro–rata share of the total cost of the Trust Fund's total claims payable under its Plan of Benefits to be paid by that public school entity to the Trust Fund for the benefits to be afforded to all eligible employees under the Plan.

R.3020a.

Thus, Section 4.4(u) of the Trust Agreement authorizes the Trustees to determine a pooled contribution rate for public school entities participating in the Trust based on the total costs of the Trust's total claims payable under the Trust's Plan of Benefits for the benefits to be afforded all employees of all participating public school entities under that Plan of Benefits. The Trust Agreement does not

provide for segregated accounts or payments limited or based solely upon the claims of the individual school district, or other public school entity in the Trust. Pursuant to Section 4.4(u) of the Trust Agreement, the Trustees adopted a pooled rating methodology as developed by its Actuary, Conrad M. Siegel, Inc., which was approved by the Board of Trustees on October 16, 2002. R.3216a–20a.

The above–quoted language contained in the Trust Agreement, which representatives of the plaintiff school districts signed and agreed to when they became members of the Trust, establishes that contributions made to the Trust by participating public school entities are irrevocable and not subject to reversion or payment to Dallas or Pittston at any time, including on their voluntary withdrawal from the Trust.

Moreover, Section 1.1(b) of the Trust Agreement states that all of the assets at any time held under the Agreement by the Trustees are referred to collectively as the Trust Fund. R.3008a. That section further provides that all right, title and interest in and to the assets of the Trust Fund shall be at all times vested exclusively in the Trustees. *Id.* Section 2.1(c) then provides that the Trustees "shall have sole responsibility for determining the existence, non–existence, nature and amount of the rights and interests of all parties in the Trust Fund." R.3010a.

Here, as explained above, the Trustees determined that Dallas School District and Pittston Area School District had no right to receive any contributions back from the Trust Fund. But perhaps even more importantly, the Trustees reached exactly the same decision some five years earlier in 2002, when the

Trustees adopted the so–called Scoda Resolution addressing the allocation of Trust deficits and surplus.

In December of 2002, the Board of Trustees voted to approve a Resolution for the "allocation of deficits (Reduction in Net Assets) and/or surpluses (Addition to Net Assets)" that sets out how the Health Trust would handle Trust–wide deficits and/or surpluses. R.3221a–22a. Pursuant to the Scoda Resolution, when a Trust–wide deficit exists, participating member school districts are responsible for payment to the Trust for an amount based on the member's contributions to the Trust as compared to the total contributions of all of the members of the Trust. A school district's liability is not based on the member's contributions paid in versus its actual claims and expenses paid out.

The Scoda Resolution also addresses the possibility of a Trust–wide surplus and restricts the allowable uses of that surplus consistent with Sections 6.6 and 5.1 of the Trust Agreement. Specifically, the Scoda Resolution provides in point 6 as follows:

> In the event that the Trust realizes Unrestricted Net Assets – Surplus, said surplus shall, at the discretion of the Trust, be used for any of the purposes listed below:
>
> (1) Reserved to fund future unanticipated deficits.
>
> (2) Stabilize future member contributions.
>
> (3) Added to required reserve deposits either held by underwriters/carriers or in an escrow investment account held by the Trust solely for this purpose.
>
> (4) Any combination of the above.

R.3222a. None of these allowed purposes approved by the Trustees of the Trust authorizes the payment of any portion of the surplus back to a member school district. Representatives of both the Dallas and Pittston Area School Districts were among the trustees who voted in favor of approving the Scoda Resolution.

In voting for the December 2002 Scoda Resolution, the Trustees rejected the approach of Robert Eyet, the Trustee appointed by the Northwest Area School District. Mr. Eyet had proposed an alternative approach to the allocation of the then accumulated Trust–wide deficit that required the calculation of individual school district surpluses or deficits based on the district's individual claims experience and its size as compared to the size of the other members of the Trust. R.4790a. The evidence establishes, without dispute, that the Trustees voted against Mr. Eyet's "each member pays for its own employees' claims" approach in December of 2002, instead passing the Scoda Resolution. R.1301a, 3223a.

Lastly, Section 5.4 of the Trust Agreement, which provides the procedure for a school entity to withdraw from the Trust, requires a withdrawing district to pay incurred but not reported "runoff" charges for health claims, but contains no express or implied entitlement of any withdrawing district to any of the Trust's surplus. R.3026a–28a. Here, the plaintiffs have conceded that the Trust is entitled to recover the "runoff" amount that the Trust sought in its counterclaim pursuant to Section 5.4(a)(2) of the Trust Agreement. R.7053a. Plaintiffs, in their response to the Trust's post–trial motions, assert that their damages calculation credited the Trust in full for the "runoff" amount sought in the Trust's counterclaim. R.7053a. When this

Court reverses the trial court's entry of judgment in favor of plaintiffs and remands for entry of judgment in favor of the Trust, this Court should specify that the judgment in the Trust's favor should include an award in full for the "runoff" sought in the Trust's counterclaim.

In sum, the language of the Trust Agreement itself and the subsequently adopted Scoda Amendment make clear beyond any dispute that the Trust operated as a pooled trust and that member school districts did not have the ability to withdraw from the Trust and attempt to abscond with whatever supposed share of the surplus they "created" as the result of having experienced better than expected health care claims.

John Rawls, one of America's leading legal philosophers, described in his book *A Theory of Justice* that a system of governance that would be most just to all participants would be one that the participants designed while behind a "veil of ignorance" whereby they would not know what their status in the system would ultimately be while they were designing it. For example, someone who is unable to know in advance whether he would be a slave or a slave–owner would be most unlikely to design a system of governance that permitted slavery.

Here, the school districts that combined to found the Trust at issue in this case were understandably concerned about reining–in out–of–control health care costs and thus created a system whereby a school district's annual contribution was intended to be the *most* that the school district would be liable to pay for that year, regardless of the claims incurred by the school district's members during that year.

To be sure, that system in its operation might result in some school districts paying too much for health insurance for certain periods when their employees are relatively healthy while others, in retrospect, may have paid too little because their employees were not as healthy. That, of course, is a risk inherent in the purchase of insurance. But all school districts in the pooled trust as originally designed will have achieved what they had as their utmost priority, which was achieving rate stability along with limiting their expenditures to no more than the amount prescribed at the beginning of the year, and they will have received the benefit of their bargain — low rates for health care, cost savings, rate stability, and rate certainty.

Any pooled trust system of health care self–insurance is incapable of operating if school districts that experienced better than expected claims during a particular year are entitled to withdraw some supposed "surplus" attributable to them after they happen to have a string of healthy years as compared to other districts in the Trust. The only way that this pooled trust system could successfully operate, whereby no school district would pay *more* than its specified rate no matter how bad its experience, was if no school district would pay *less* than its specified rate no matter how favorable its experience was. The trial court's decision utterly destroys the pooled trust concept that the trustees adopted, implemented, and maintained for the defendant Trust.

2. The Trust's consistent course of performance further confirms that the Trust operated as a pooled trust

Under Pennsylvania law, in determining the meaning of disputed contractual language, the parties' course of performance under the contract before any dispute arose is of particular relevance. *See Solomon* v. *U.S. Healthcare Sys. of Pa., Inc.*, 797 A.2d 346, 350 (Pa. Super. Ct. 2002) (citing *Sunbeam Corp.* v. *Liberty Mut. Ins. Co.*, 566 Pa. 494, 501, 781 A.2d 1189, 1193 (2001)).

Here, the evidence was undisputed that the Trust placed all contributions from school entities into a single, central account, and the Trust paid all health care claims from the proceeds of that single, central account. The Trust did not individually segregate contributions into or make claim payments from separate, individual accounts on a school district by school district basis. The Trust made no retrospective calculations by school district, and the Trust's financial results were never reported to the school district entities on a district by district basis. School districts that were members of the Trust did not receive any statements or reports showing whether claims paid on behalf of their employees and dependents exceeded or were less than the school districts' payments into the Trust. And, perhaps most importantly, the Trust never sought additional payments from a particular school district because that school district's claims exceeded that school district's anticipated claims or contributions, nor did the Trust ever refund or offer to refund to any particular school district any portion of that school district's payments because that school district's claims were lower than expected.

To be clear, the Trust does not rely merely on the commingling of contributions as the sole reason for why the trial court should have concluded that the Trust operated as a pooled trust. Rather, if the Trust did not operate as a pooled trust, the Trust would have reconciled contributions and claims on a school district–by–school district basis, keeping separate account balances for each district. And the Trust would have priced each school district's coverage separately, taking into account the claims experience that each school district had produced in the recent past. This is because with a segregated operation, school districts that were generating more claims, or more costly claims, should have been paying more for their coverage than school districts that were generating fewer, or less expensive, claims than expected.

In the absence of any such course of performance evidence that supported plaintiffs' claims, the trial court was relegated to relying on irrelevant evidence pertaining to a school district that had considered joining the Trust at the Trust's inception, but then ultimately declined to join the Trust. The school district in question was Crestwood School District.

In its decision, the trial court pointed to the fact that the Trust sought to recover money from Crestwood to cover deficits that Crestwood had amassed during the pre–Trust formation phase when Plan3 was administering all districts' separate Blue Cross plans. It is undisputed, however, that Crestwood's labor union, the Crestwood Education Association, never signed the Trust Agreement and that Crestwood School District, therefore, never became a member of the Trust. R.3043a.

A resolution signed by Frank Serino on November 9, 1999 shows that the Trust Agreement was not signed by Crestwood School District and that the Trust voted to authorize submission of the Trust Agreement to the Internal Revenue Service for acquisition of nonprofit status without identifying Crestwood School District as an original Trust participant. R.3037a–38a (Def. Exh. 2).

Moreover, the originating Trustees for Dallas and Pittston, Ernest Ashbridge (R.6033a–34a) and Frank Serino (R.6107a), both testified at trial that Crestwood School District never became a member of the Trust. R.3603a (Trust's Audited Financial Statement for the plan year ending 6/30/00, Note 2). As Note 2 of the Trust's Audited Financial Statement for its plan year ending June 30, 2000 reflects, Crestwood School District had its own separate contract with health insurance service providers. *Id.*

Plaintiffs' claims in this case are based upon the Trust Agreement, whereas Crestwood School District never signed or became subject to that Agreement. Given this undisputed evidence, including the admissions by plaintiffs' former Trustees serving on the Trust, any action that the Trust took with respect to Crestwood School District is irrelevant. In short, because Crestwood never took the steps necessary to become a school district participant in the Trust, the Trust's actions with respect to Crestwood do not and cannot constitute course of performance evidence demonstrating performance under the terms of the Trust Agreement.

3. The trial court's conclusion that the Trust did not operate as a pooled trust was contrary to the great weight of the evidence

The Trust has established in the arguments set forth above that the trial court's conclusion that the Trust did not operate as a pooled trust was erroneous as a matter of law based on both the language of the Trust Agreement and relevant Trust resolutions and based on the Trust's course of performance. Although the trial court did not expressly hold that the Trust Agreement was ambiguous concerning whether the Trust operated as a pooled trust, the trial court nevertheless conducted a trial at which the opposing parties were allowed to present evidence concerning whether the Trust in fact operated as a pooled trust.

As explained above, the evidence introduced at trial concerning whether the Trust in fact operated as a pooled trust was entirely one–sided in favor of the defendant's position that the Trust did operate as a pooled trust. Every founding trustee involved at the creation of the Trust testified consistently that they understood that the Trust was to operate as a pooled trust. The Trust's office staff testified that the contributions from school districts into the Trust, and the payments to health care providers and insurers from the Trust, occurred from a single, central account into which all payments from all school districts were pooled. And the Trust's health care actuary and auditor both testified that the Trust operated as a pooled trust and that the setting of health care rates and the presentation of the Trust's financial performance were at all times based on the understanding that the Trust operated as a pooled trust.

Faced with this overwhelming evidence in support of the defendant's position as to the central issue in this case, the trial court did not find that any of defendant's witnesses were untruthful or unbelievable. Rather, the trial court concluded that it was not credible that a school district would agree to pay a certain rate for health insurance that might exceed the value of the claims for that district's employees and their dependents and then allow any excess premiums to be used to fund coverage of health care claims received on account of employees and their dependents of other school districts.

In essence, the trial court simply rejected the concept of pooled risk that is at the heart of any insurance arrangement. For example, if a school district purchased "fully insured" health care coverage from Blue Cross for the year 2012 for $3,000,000 but only incurred $2,500,000 in covered health care claims for 2012, surely no one would blink an eye at Blue Cross's using the profit realized to pay for losses experienced as the result of other customers whose health care claims were larger than expected.

What the trial court has allowed the Dallas and Pittston Area school districts to accomplish by means of their victory at trial in this case is an unconscionable result whereby those school districts have received the risk reduction and lower rates that result from participating in a pooled trust while retaining for themselves the benefit of any supposed "overpayments" that may have resulted in years when those school districts' claims happened to be lower than expected — to the utter detriment of those member districts whose claims were higher than expected.

Of course, a pooled trust is incapable of successfully operating in that manner. If Dallas School District or Pittston Area School District wanted the ability to profit from generating a supposed "surplus" in years when their actual health care claims were lower than expected, they should have obtained single employer self–insured coverage instead of choosing to participate in a multi–employer self–insurance pool. In a single employer self–insurance pool, however, the single employer not only may have the ability to recover any "surplus" if health care claims turn out to be lower than expected, but the single employer remains on the hook for additional health care payments in the event that health care claims end up being more costly than expected.

By joining the Trust, Dallas and Pittston Area School Districts both made the affirmative choice to participate in a Trust whereby their maximum health care payments for any given year would be capped at the amount set in advance for that year. In exchange for that cost certainty, they thereby elected to forfeit any ability to recoup any supposed "surplus" for years in which their health care claims turned out to be lower than expected.

Because the evidence at trial overwhelmingly established that the Trust operated as a pooled trust in which contributions were irrevocable, this Court should reverse the trial court's decision holding, in the absence of any evidentiary support, that the Trust did not operate as a pooled trust and that plaintiffs were therefore entitled to recover money back.

4. Plaintiffs' claim for unjust enrichment fails as a matter of law

The legal insufficiency of the plaintiffs' claims for unjust enrichment is readily apparent. All of the claims made in the plaintiffs' amended complaint were premised on the alleged breach of the Trust Agreement. R.14a–33a (Amended Complaint at ¶¶ 19–29, 52–53, 56–57, 60, 66–77, 80, 84, 90, 97, 99–100, 104, 107, 109–112). At trial, the Trust Agreement was marked as Exhibit 1 by both the plaintiffs and the defendant. R.1527a, 3001a. The Trust Agreement is a written contract that clearly and unequivocally exists to define the parameters of the parties' respective rights, duties, obligations and responsibilities. As continually recognized by Pennsylvania courts, "the doctrine of quasi contract, or unjust enrichment, is inapplicable where a written or express contract exists." *Northeast Fence & Iron Works, Inc.* v. *Murphy Quigley Co.*, 933 A.2d 664, 669 (Pa. Super. Ct. 2007).

In *Villoresi* v. *Femminella*, 856 A.2d 78, 84–85 (Pa. Super. Ct. 2004), the parties disagreed over the terms of an option agreement. *See id.* at 79. As a result, Villoresi filed a complaint alleging breach of the option contract and unjust enrichment. *See id.* at 80, 83–84. The defendants filed preliminary objections to the complaint, and the trial court entered an order granting the preliminary objections in the nature of a demurrer and dismissing Villoresi's claims. *See id.* at 79. On appeal, the Superior Court of Pennsylvania determined that the parties' transaction was fully delineated within the confines of the written option agreement and confined Villoresi to his remedies under the contract. *See id.* at 84–85. Thus, a claim

for unjust enrichment was not allowed, and the Superior Court affirmed the order of the trial court granting the defendant's preliminary objections to the plaintiff's complaint. In reaching its decision, the court in *Villoresi* held as follows:

> A cause of action for unjust enrichment may arise only when a transaction of the parties not otherwise governed by an express contract confers a benefit on the defendant to the plaintiff's detriment without any corresponding exchange of value. In that event, the law may imply a contract, requiring the defendant to pay to the plaintiff the value of the benefit conferred. Such a "quasi–contract" imposes a duty "not as the result of any agreement, whether expressed or implied, but in spite of the absence of an agreement" where the circumstances demonstrate that it would be inequitable for the defendant to retain the benefit conferred without payment. Where an express contract already exists to define the parameters of the parties' respective duties, the parties may avail themselves of contract remedies and an equitable remedy for unjust enrichment cannot be deemed to exist.

Id. at 84 (citations omitted). The court went on to note that even if the exchange in value was in any way unjust, "the existence of the written agreement would confine Villoresi to a contract remedy and preclude a claim of quasi–contract." *Id.* at 85.

Here, the uncontradicted evidence of record establishes that the parties' relationship is governed by the written Trust Agreement. Accordingly, the existence of the Trust Agreement confines the plaintiffs to a contractual remedy, and the trial court's award in favor of the plaintiffs cannot be upheld on the basis of unjust enrichment.

Moreover, because unjust enrichment is an equitable remedy, it is necessary to consider the consequences of the result that plaintiffs have sought and achieved. Here, the equities favor the Trust's position, because the plaintiffs received the benefit of their bargain in the form of lower rates and reduced risk. The result that

the trial court reached is in fact inequitable to every other member district — to change the rules of the game now when they believed for the last eight Plan years that they would only have to pay their annual contributions, as established in advance, without regard to the actual experiences of their employees during that year. If this were now a segregated trust, those members that have a positive balance will seek to withdraw those funds, and the resulting deficit will have to be made up in the form of additional payments from the districts that have a negative balance, a scenario that very well could doom the Trust's continued existence.

B. The Trial Court Erred In Holding That Pooled Trusts Violate Public Policy

As an alternate basis for its ruling, the trial court relied, *sua sponte*, on an argument that the plaintiff school districts failed to advance in their pleadings or raise in any other manner. The trial court ruled that it would violate public policy for the Trust to operate as a pooled trust. Although the trial court's ruling fails to identify any strongly rooted public policy that pooled insurance trusts supposedly violate, the trial court appears to have concluded that it would violate public policy for the health care contributions of one school district to be used to pay health care claims incurred by employees or their dependents from another school district.

The trial court's public policy–related conclusion is erroneous both as a matter of fact and as a matter of law. The conclusion is erroneous as a matter of fact because once a school district makes health care–related premium payments to the Trust, the money thereby contributed ceases to be the property of the school district

but rather irrevocably becomes the property of the Trust. And what the school district has purchased, operating behind the "veil of ignorance" of being unable to know how large or small the school district's employees' and dependents' health care needs will be for the upcoming year, is the certainty of knowing that the health care costs to the school district will not exceed the premiums set in advance for that year, together with rate stability in the future.

The unfortunate consequence of the trial court's ruling is that school districts will be unable to obtain the type of cost certainty, rate stability, and reduced risk that the Trust has provided to its members for the last ten years. School districts that wish to self–insure will be required to do so individually, with the consequence being that although the school district may fully benefit from any unexpectedly low health care claims, the school district will be fully liable for any unexpectedly high health care claims.

The trial court's public policy ruling is also contrary to both federal and state law. Applying federal law, the Supreme Court of the United States in *Concrete Pipe and Products of Cal., Inc.* v. *Construction Laborers Pension Trust*, 508 U.S. 602 (1993), explained:

> [Concrete Pipe's] argument simply ignores the nature of multiemployer plans, which, as we have said above, operate by pooling contributions and liabilities. An employer's contributions are not solely for the benefit of its employees or employees who have worked for it alone.

Id. at 637–38.

In *Ganton Technologies, Inc.* v. *National Indus. Group Pension Plan*, 76 F.3d 462 (2d Cir. 1996), the U.S. Court of Appeals for the Second Circuit held that an

employer participating in a multi–employer pension plan did not have any right to withdraw and take with it the surplus supposedly attributable to that employer's contributions to the plan. The Second Circuit explained:

> Ganton also claims that the trustees used the Ganton "surplus" to absolve the deficits of the other participating employers and that this demonstrates the unreasonableness of a decision not to transfer assets for financial reasons. To the contrary, the "surplus" was used for proper purposes. As we stated above, the "surplus" never belonged to Ganton, rather it belonged to the Plan which could use the funds to strengthen any weakness in the plan.

Id. at 468.

In *British Motor Car Distributors, Ltd.* v. *San Francisco Automotive Indus. Welfare*, 882 F.2d 371 (9th Cir. 1989), the Ninth Circuit expressly rejected the argument that federal law would not allow pooled multi–employer employee benefit plans. The court explained:

> Subsection 302(c)(5), quoted above, specifically authorizes payments to multiemployer trust funds. In any such pooled fund, depending on the empirically contingent pattern of employee health and sickness, one employer's employees may never need to file a claim and this employer's payments may be used wholly to pay for claims made by a different employer's employees. Because any multiemployer trust fund might result in one employer's payments covering the claims of another employer's employees, the Employers' argument leads inexorably to the conclusion that all multiemployer trust funds violate the "sole and exclusive benefit" rule of subsection 302(c)(5). This conclusion, directly contradicting subsection 302(c)(5)'s explicit authorization of multiemployer trust funds, is untenable.

Id. at 378.

Finally, in *Stinson* v. *Ironworkers Dist. Council of Southern Ohio and Vicinity Ben. Trust*, 869 F.2d 1014 (7th Cir. 1989), the Seventh Circuit explained:

> Almost by definition there will be imprecision regarding pooled funds. *Local No. 5 v. Mahoning and Trumbull*, 541 F.2d at 639. Nothing in §302(c)(5) requires "that an employer's contribution be set aside only for his employees when the employer payments are made to a multi–employer trust fund. The advantages of a 'pooled trust' fund do not accrue to any particular employer, but rather are beneficial to all the employers contributing." *Crawford*, 357 F. Supp. at 373. Likewise, as the Sixth Circuit explained, "[t]hat the amended rule results in certain employers' contributions being used for other than their employees does not violate the 'sole and exclusive benefit' requirement." *Local No. 5 v. Mahoning & Trumbull*, 541 F.2d at 639.

Id. at 1022.

The U.S. Supreme Court and federal appellate rulings quoted above establish that pooled multi–employer benefit funds do not violate public policy or federal law.

Similarly, as the amicus brief submitted by the Delaware Valley Municipal Management Association, *et al.*, explains in detail, various Pennsylvania statutes, including the Public School Code, 24 Pa. Stat. Ann. §5–521, and the Intergovernmental Cooperation Act, 53 Pa. Cons. Stat. Ann. §2301, *et seq.*, authorize school districts and local governments to participate in pooled insurance trusts wherein funds contributed by one school district or local government may be used to pay for benefits accruing to the employees or dependents of another school district or local government.

Section 5-521 of the School Code specifically provides:

> Each board of school directors shall have power to enter into agreements with other political subdivisions, in accordance with existing laws, in making joint purchases of materials, supplies, or equipment, and in performing governmental powers, duties, and functions, and in carrying into effect provisions of law relating to said subjects, which are common to all such political subdivisions.

24 Pa. Stat. Ann. §5–521. Judge Wetzel's ruling in this case improperly inserts an exception for health insurance into that statute, which the drafters of the law did not see fit to include.

Judge Wetzel may have taken personal offense to the fact that his own tax payments, in his capacity as an owner of land located within the boundaries of the Dallas School District, may have been used toward paying for health care claims incurred by employees of other school districts, but that is not enough to give rise to a public policy violation.

As the Supreme Court of Pennsylvania explained in *Eichelman* v. *Nationwide Ins. Co.*, 551 Pa. 558, 711 A.2d 1006 (1998):

> Public policy is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interest. As the term "public policy" is vague, there must be found definite indications in the law of the sovereignty to justify the invalidation of a contract as contrary to that policy[.] . . . Only dominant public policy would justify such action. In the absence of a plain indication of that policy through long governmental practice or statutory enactments, or of violations of obvious ethical or moral standards, the Court should not assume to declare contracts . . . contrary to public policy. The courts must be content to await legislative action.

Id. at 563, 711 A.2d at 1008 (internal quotations omitted).

The Trust also respectfully adopts by reference the persuasive public policy arguments contained in the amicus briefs that have been filed in support of the Trust's appeal.

Because Pennsylvania's School Code and other statutes expressly authorize school boards and local governments to participate in pooled insurance trusts, and

because federal law also authorizes employers to participate in pooled employee benefit trusts, the trial court's holding that school districts violate public policy when they participate in a pooled health insurance trust must be reversed.

C. The Trial Court Erred In Failing To Hold That The Trust's Affirmative Defenses Of Consent, Estoppel, Waiver, Laches, And Statute Of Limitations Precluded Or Significantly Limited Plaintiffs' Claims

The Dallas School District and the Pittston Area School District, by the actions of their Trustees in approving the terms and conditions on which the Trust was established and the terms and conditions on which the Trust operated, induced the Trust to believe that these member entities regarded the actions of the Trust to be appropriate and in accordance with the Trust Agreement. No representative of Dallas School District or Pittston Area School District ever voiced any objection to the manner in which the Trust was operated until after those school districts had voted to leave the Trust. As a result, the Trust at no time made any changes to the manner in which it operated as a pooled, multi–employer trust that spread the risk of high health care claims among all of the Trust member school entities.

The evidence at trial established that the plaintiffs' representatives affirmatively voted for and agreed to the pooled structure and operation of the Trust and further, that plaintiffs agreed "on the front end," prospectively as to each upcoming Trust Plan year, to spread the risk of claims among all members of the Trust. As a result, plaintiffs should have been precluded from now claiming that, because their actual claims experience and share of administrative expenses were

less than what each paid into the Trust based on the established contribution rate, they are entitled to a return of their contributions.

Every action taken by the Trust, in particular the selection of a pooled trust rating methodology, the financial accounting on a pooled trust basis, the contribution rates based upon the pooled rating methodology and the implementation of Sections 5.1 and 6.6 of the Trust Agreement (R.3025a, 3032a) by the December 18, 2002 Scoda resolution regarding allocation of deficits and surpluses (R.3221a–25a), which bars the payment of any portion of any surplus accumulated by the Trust to the participating school districts, was consented to by the plaintiff school districts in the form of their respective trustees' affirmative votes for each of these actions taken by the Trust.

As a result, the trial court should have ruled that the affirmative defenses of waiver, estoppel, and laches are applicable since Dallas and Pittston signed the Trust Agreement agreeing to be bound by the terms thereof, and by their conduct approved and consented to the pooled structure and operation of the Trust. They are both, therefore, barred from obtaining any return, refund, or other payment of a share of the assets of the Trust on their withdrawal therefrom.

The evidence at trial established that Dallas and Pittston understood that they were bound by the Trust Agreement which clearly established the pooled nature of the Trust and the irrevocability of their contributions to it. Both Pittston Area and Dallas approved and consented to the pooled structure and operation of the Trust when, on January 19, 2000, the Trust submitted its application for tax

exemption to the Internal Revenue Service, which indicated that the member school districts would be pooling their resources and that the Trust's assets would not subject to distribution or payment to the participating school districts. R.3046a, 3056a–60a.

Similarly, the evidence at trial included the testimony of the founding Trustee appointed by the Dallas School District to the Board of Directors of the Trust, Ernest Ashbridge, Jr., who signed the Trust Agreement on behalf of the Plaintiff, Dallas School District, and who served on the Board of Trustees of the Trust from 1999 through 2003. Mr. Ashbridge testified that he understood in 1999 that the Trust was created to pool the resources of the 13 school districts who were participating in it, and that the contributions made by the Dallas School District were "irrevocable," meaning they would not be paid back to the District. R.6032a–33a.

The Pennsylvania Supreme Court has explained the elements necessary for a finding of equitable estoppel. In *Novelty Knitting Mills, Inc.* v. *Siskind*, 500 Pa. 432, 457 A.2d 502 (1983), the Court stated:

> Equitable estoppel is a doctrine that prevents one from doing an act differently than the manner in which another was induced by word or deed to expect. A doctrine sounding in equity, equitable estoppel recognizes that an informal promise implied by one's words, deeds or representations which leads another to rely justifiably thereon to his own injury or detriment, may be enforced in equity.

Id. at 435, 457 A.2d at 503.

In this case, the trial court should have precluded Dallas and Pittston from seeking money from the Trust, where Dallas and Pittston approved each and every

attribute of the Trust's operation as a pooled trust, including the prohibition upon the return of contributions to the participating school districts and other public school entities, and the Trust relied on those approvals. Dallas and Pittston should, therefore, have been estopped from asserting the illegality of the Trust's actions or violation of the Trust Agreement by the Trust's actions where those actions were voted upon and approved by the plaintiff school districts' trustees.

In *Samuel J. Marranca General Contracting Co.: Appeal of Amerimar Cherry Hill Assocs. Limited P'ship*, 610 A.2d 499 (Pa. Super. Ct. 1992), the Superior Court defined waiver as follows:

> Waiver is a voluntary and intentional abandonment or relinquishment of a known right. Waiver may be established by a party's express declaration or by a party's undisputed acts or language so inconsistent with a purpose to stand on the contract provisions as to leave no opportunity for a reasonable inference to the contrary.

Id. at 501 (internal citations omitted).

Here, by the votes of the respective Trustees appointed by the Dallas School District and Pittston Area School District, in establishing the Trust as a pooled trust and in its operation on the principle that each participating school district's risk as to payment for its own claims experience would be eliminated by the calculation of contribution rates for each Plan year, those school district have waived any right to take a contrary position in this lawsuit. Similarly, Dallas, by its approval of the December 18, 2002 Scoda resolution implementing Sections 5.1 and 6.6 of the Trust Agreement to prohibit the return of any surplus to any participating school district, has likewise waived its right to take a contrary

position as it has done in this lawsuit. No representative of the Dallas School District or the Pittston Area School District ever voiced an objection to the manner in which the Trust was operated until after the Dallas and Pittston Boards of School Directors had voted to leave the Trust.

Both Pittston Area and Dallas, understood that 1) the Trust was operated by pooling resources and risk; and 2) there could never be any return of money upon withdrawal from the Trust. By agreeing to the rules of the Trust, Pittston Area and Dallas waived any claim or privilege or right to the return of any of the money they paid into the Trust.

This Court, in *White* v. *Township of Upper St. Clair*, 968 A.2d 806 (Pa. Commw. Ct. 2009), explained the doctrine of laches as follows:

> Laches is an equitable doctrine that bars relief when a complaining party is guilty of want of due diligence in failing to promptly institute an action to the prejudice of another. In order to establish laches, a defendant must establish (1) a delay arising from the complaining party's failure to exercise due diligence and (2) prejudice to the defendant resulting from the delay. The test for due diligence is not what a party knows, but what he might have known by the use of information within his reach. Prejudice may be found where there has been some change in the condition or relations of the parties which occurs during the period the complainant failed to act. Whether laches is established requires a factual determination based upon the circumstances of each case.

Id. at 810–11.

In this case, plaintiff Dallas School District, by its approval of and consent to the pooled rating methodology adopted by the Board of Trustees of the defendant Trust, its approval of and consent to the Resolution of the Board of Trustees governing the use of net assets, specifically barring the return or payment of

surplus funds to any participating public school district or public school entity, its approval of the contribution rates and budgets for Trust Plan years 2002–2003, 2003–2004, 2004–2005, 2005–2006, 2006–2007 and 2007–2008, approved and consented to the pooled structure and operation of the Trust in each of the above Trust Plan years. Prior to its decision to withdraw from the Trust, Dallas' representatives, by their continued approval of the manner in which the Trust operated, and their concomitant failure to object to any aspect of the Trust operation during the eight years of Dallas' participation in the Trust, unreasonably delayed the initiation of suit in this matter so that the Trust was prejudiced by Dallas' earlier failure to raise any claim or objection to the manner of the Trust's operation. After eight years assenting to the operation of the Trust as a pooled trust, Dallas filed suit alleging breach of Trust Agreement and breach of fiduciary duty by the defendant Trust. Dallas knew the manner in which the Trust was established and operated during all of its eight years of participating in the Trust, and its failure to initiate suit until 2008 requires that relief be barred under the doctrine of laches.

The same argument applies with equal force to the Pittston Area School District which, likewise, was aware of, voted for, and approved of the Trust's establishment as a pooled trust and the Trust's operation as a pooled trust, the only distinction being that the Pittston Area Trustee at the time of the December 18, 2002 Scoda resolution on surpluses did not attend the meeting and, therefore, did not vote on the enactment of that resolution. However, Pittston Area School District

chose to remain a member of the Trust even after the Scoda resolution was approved, with full knowledge of the existence and content of that resolution.

For all of these reasons, the claims of the Dallas and Pittston Area School Districts should be barred under the various equitable doctrines examined above.

With regard to the issue of statute of limitations, the plaintiffs instituted this action on February 4, 2008. Both plaintiff school districts have had Trustees on the Board of Trustees for this Trust since at least 1999 and had knowledge, from the time that this Trust began formal operations in 2000, that the Trust was not performing any financial accounting that determined the existence of or entitlement to a district–specific surplus. Both plaintiff school districts' trustees knew that their contribution rates were set in advance and that the Trust never went back to any school district seeking a refund if its claims and share of expenses were higher than what it paid in and also that the Trust never issued a credit or refund to any school district if its claims and share of expenses were lower than what it paid in. As such, these school districts knew, from the outset of this Trust, that the contributions from all member school entities were paid into one pot and were used to pay the health care claims for all members, regardless of where the money came from.

In its Order and Opinion, the trial court determined that Dallas and Pittston Area School Districts "are entitled to their pro–rata share of the surplus as of June 30, 2007." (Trial Court Opinion at p. 12). Based on the expert testimony offered by the plaintiffs, the trial court determined that Dallas was entitled to $2,873,419.00 and that Pittston Area was entitled to $2,329,529.00. (November 28, 2011, Order at

¶¶ 1, 2; Trial Court Opinion at p. 12). A review of plaintiffs' expert report shows that these numbers are based on a calculation, for each plan year starting in 1999, of each district's premium contributions paid into the Trust minus the cost of claims of that district's employees and their dependents and minus a share of Trust expenses paid out by the Trust for that plan year. See R.2558a (P–550, p. M–13). In awarding these amounts, the trial court ignored the applicable statute of limitations and improperly permitted the plaintiff school districts to recover money for time periods beyond the limitation period.

Dallas and Pittston Area School District withdrew from the Trust on June 30, 2007. They commenced this action on February 4, 2008. At trial, the claims remaining in the case for disposition were the plaintiffs' claims against the defendant in Counts III and IV of the amended complaint for breach of the Trust Agreement, in Counts VI and VII for unjust enrichment and in Counts IX and X for breach of fiduciary duty.

The statute of limitations for plaintiffs' breach of contract claims is four years. *See* 42 Pa. Cons. Stat. Ann. §5525(a). The statute of limitations for unjust enrichment is also four years. *See* 42 Pa. Cons. Stat. Ann. §5525(a)(4); *Sevast* v. *Kakouras*, 591 Pa. 44, 53, 915 A.2d 1147, 1153 (2007). The statute of limitations for breach of fiduciary duty, however, is only two years. 42 Pa. Cons. Stat. Ann. §5524(7); *Aquilino* v. *Philadelphia Catholic Archdiocese*, 884 A.2d 1269, 1275 (Pa. Super. Ct. 2005).

Although it is not clear under which cause of action the trial court awarded damages, it is clear that the longest limitation period would bar the return of money from the defendant for periods prior to February 4, 2004. As the trial court did not limit its award of damages in accordance with the governing limitation period, or any other applicable limitation period, the trial court's award of damages must be reduced or vacated in the unlikely event that this Court were to uphold the trial court's entry of judgment in favor of plaintiffs.

D. Plaintiffs Are Not Entitled To Any Recovery Of Attorneys' Fees As Prevailing Parties

Based on a clear misapplication of the Employee Retirement Income Security Act of 1974 ("ERISA"), the trial court ordered the Trust to pay to plaintiffs their reasonable attorneys' fees.

In Pennsylvania, it is beyond dispute that litigants cannot recover their attorneys' fees from an opposing party unless otherwise permitted by express statutory authority, a clear agreement of the parties, or some other established exception to the general rule against recovery. *See Mosaika Acad. Charter Sch.* v. *Commonwealth, Dep't of Educ.*, 572 Pa. 191, 206–07, 813 A.2d 813, 822 (2002); *Merlino* v. *Delaware County*, 556 Pa. 422, 425, 728 A.2d 949, 951 (1999). As Pennsylvania's highest court has explained:

> This Court has consistently followed the general, American rule that there can be no recovery of attorneys' fees from an adverse party, absent an express statutory authorization, a clear agreement by the parties or some other established exception.

Merlino, 556 Pa. at 425, 728 A.2d at 951 (citations omitted). In this case, the evidence at trial was clearly insufficient to overcome the general prohibition against an award of attorneys' fees. As a result, the trial court's award of attorneys' fees should be reversed.

The Trust Agreement that gives rise to this lawsuit contains no provision requiring or permitting the award of attorneys' fees. Further, there is no express statutory authorization for the award of attorneys' fees to the prevailing party in this action.

While Section 6.2 of the Trust Agreement incorporates the fiduciary standards of ERISA codified at 29 U.S.C. §§1101–1114, the Trust Agreement does not incorporate the provisions of ERISA which either allow attorneys' fees (29 U.S.C. §1132(g)) or which mandate attorneys' fees (29 U.S.C. §1145). R.3029a–30a. Further, Section 1132(g) of ERISA provides that:

> In any action brought under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary or fiduciary, the Court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

29 U.S.C. §1132(g)(1). As noted above, this section of ERISA was not incorporated into the Trust Agreement. Moreover, and in any event, plaintiffs simply do not have the status of a "participant, beneficiary or fiduciary" of the Health Trust as those terms are defined in ERISA. *See* 29 U.S.C. §1002(7) (defining "participant"); 29 U.S.C. §1002(8) (defining "beneficiary"); 29 U.S.C. §1002(21)(A) (defining "fiduciary"). None of the plaintiffs are employees or former employees eligible to

receive benefits under the Trust's Plan of Benefits. The plaintiff districts no longer participate in the Trust, and their employees received all benefits to which they were entitled while they were still in the Trust. Nor are the plaintiffs fiduciaries of this Trust, as they no longer participate in the Trust, and, even while participating in the Trust, they did not have the power, acting alone, to make fiduciary decisions. *See Eureka Paper Box Co.* v. *WBMA, Inc.*, 767 F. Supp. 642, 651 (M.D. Pa. 1991). Nor does plaintiffs' action arise under the jurisdiction granted to the state and federal courts under Section 1132 of ERISA, since the Health Trust is a "governmental plan" exempt from ERISA, has only incorporated the fiduciary standards of ERISA set forth in Sections 1101–1114 as operating principles for the administration of the Health Trust, and the claims in this action are not the type allowed or even contemplated by any of those fiduciary provisions of ERISA. Accordingly, the trial court erred in holding that plaintiffs were entitled to recover their attorneys' fees.

VIII. CONCLUSION

For all of the foregoing reasons, this Court should reverse the trial court's judgment and direct the entry of judgment in favor of defendant Northeast Pennsylvania School Districts (Health) Trust. This Court should further specify that the judgment in the Trust's favor should include an award in full for the "runoff" sought in the Trust's counterclaim in accordance with Section 5.4 of the Trust Agreement.

Respectfully submitted,

Dated: June 21, 2012

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CERTIFICATE OF SERVICE

I hereby certify that I am this day serving a true and correct copy of the foregoing document upon the persons and in the manner indicated below which service satisfies the requirements of Pa. R. App. P. 121:

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