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**MONTGOMERY COUNTY BOARD OF EDUCATION v.
HORACE MANN INSURANCE CO.:**

***A School Board Must Defend Its Teachers Against Tort
Claims if a Potentiality of Coverage Exists under the
Language of an Insurance Policy***

By: Jacob Statman

The Court of Appeals of Maryland held that a county's board of education ("Board") was required to defend one of its teachers against a tort claim where a potentiality of coverage existed under the language of an insurance policy. *Montgomery Co. Bd. of Educ. v. Horace Mann Ins. Co.*, 383 Md. 527, 860 A.2d 909 (2004). The Court determined that the Board's self-insurance program was liable to the private insurance company that actually defended the case after the Board declined to do so. *Id.*

Barbara Robbins ("Robbins"), a teacher in the Montgomery County Public School System, participated in a mentoring program that was adopted to give students experiencing both academic and behavioral problems special "one on one" attention. The description of the school's mentoring program made it clear that the relationship between a mentor and student was much broader and more involved than that of a normal teacher and student relationship. In February of 1998, a student Robbins formerly mentored filed suit under the name John Doe ("Doe") in the United States District Court, alleging Robbins abused her professional relationship with him in a variety of ways, including engaging in a sexual relationship with him.

Robbins demanded, pursuant to § 4-104(d) of the Education Article, that the Board defend her in the suit against Doe. Section 4-104(d) requires the Board to provide counsel for its employees with respect to claims made against them so long as the conduct complained of was within the performance of the employee's duties and without malice. Upon concluding that Robbins was being sued for actions beyond the scope of her employment, the Board refused to provide her with counsel.

Eventually, the Horace Mann Insurance Company ("Mann"), pursuant to a liability policy it had issued to the Maryland State Teachers Association, defended her in the suit and settled the case with

Doe for \$15,000. Mann then filed an action in the circuit court for Montgomery County seeking reimbursement from the county school board for the cost of attorneys' fees and the settlement. This action was based on the assertion that the Board had breached its statutory duty to defend Robbins. The circuit court granted Mann's motion for summary judgment and entered a final judgment in the amount of \$100,556 against the Board.

The Court of Special Appeals affirmed the decision, stating that while the alleged sexual misconduct fell outside the scope of Robbins' employment, it was necessary to also consider the extrinsic evidence of Robbins' denial of the allegations. The Court of Appeals of Maryland granted the Board's petition for certiorari and affirmed the decision of the Court of Special Appeals.

After beginning its analysis with a discussion of summary judgment rules, the Court of Appeals dove into the issue of potentiality of coverage. *Id.* at 537, 860 A.2d at 915. The Board first contended that Doe's entire complaint was based on sexual misconduct, and since sexual misconduct cannot be regarded as committed within the scope of employment, the Board was not required to provide Robbins with counsel. *Id.* Mann, however, argued that Doe's complaint contained allegations besides sexual misconduct and that fact, coupled with the extrinsic evidence of Robbins' denial, was enough to create a statutory requirement for the Board to defend her. *Id.*

It is well established that where a duty to defend is included in a liability policy, the insurer is obligated to defend the insured "when there exists a potentiality that the claim could be covered by the policy." *Id.* Additionally, a two-part test has been used to determine if the obligation to defend is included in the policy. First, the coverage and defenses under the policy's terms must be considered; and second, whether the allegations in the complaint *potentially* bring the claim within the policy's coverage. *Id.* at 538, 860 A.2d at 915 (emphasis added).

In this case, the duty to defend Robbins is addressed in sections 4-104 and 4-105 of the Education Article, as well as the Board's self-insurance program. *Id.* at 538-539, 860 A.2d at 916. The record did not reveal what kind of coverage the school board had; however, section 4-105(c) requires that the terms of any self-insured group must "conform with the terms and conditions of comprehensive liability insurance policies available in the private market." *Id.* at 540, 860 A.2d at 917.

In *BG&E Home v. Owens*, 377 Md. 236, 833 A.2d 8 (2003), the Court of Appeals dealt with a very similar issue. *Bd. of Educ.* at 539, 860 A.2d at 916. In *Owens*, a utility company self insured its motor vehicle fleet, and the issue arose whether the absence of a duty to defend provision in the self insurance policy was enough to allow the company to not defend its employee when he was arguably not operating the vehicle within the scope of permission at the time of the accident. *Id.* The Court held that the duty to defend is an important and necessary function in all liability insurance policies, and would, therefore, be required in any self-insured policy, including one used by a county board. *Id.* at 541, 860 A.2d at 917.

Having its first argument rejected, the Board then argued that section 4-104(d)(1) of the Education Article sets forth two hurdles that an employee must clear before the Board will be required to defend the employee's actions. *Id.* at 542, 860 A.2d at 918. First, the action must be within the scope of employment and without malice; and secondly, there must be a determination by the Board that the employee was acting within his authorized capacity. *Id.* The Court also rejected this argument, declaring its inability to imagine a situation where an employee was acting within the scope of his employment, and without malice, but not within his authorized capacity. *Id.* at 542-543, 860 A.2d at 918. The Court concluded that the Board was obligated to defend Robbins if there was *any* potentiality of coverage. *Id.*

The Court then set out to determine whether there actually was a potentiality of coverage in this case. *Id.* at 545, 860 A.2d at 920. Had the allegations in the complaint filed by Doe only charged sexual abuse then there would have been no potentiality of coverage. *Id.* Besides being malicious conduct, which would remove it from the scope of coverage, sexual conduct with a minor is a criminal act that is clearly not within the scope of a teacher's employment or authority. *Id.*

Doe's complaint, however, plainly alleged that Robbins abused her relationship with Doe "in numerous inappropriate ways," one of which was sexual conduct. *Id.* at 547, 860 A.2d at 921. After investigating the matter, the general consensus among the Board was that the evidence showed the relationship was inappropriate even without the alleged sexual misconduct. *Id.* Since some of the alleged conduct, while inappropriate, was not malicious or criminal, there was a potentiality of coverage for at least part of the complaint. *Id.* at 548, 860 A.2d at 921. Therefore, the Board had a duty to defend the entire action. *Id.*

In this decision, the Court of Appeals reaffirmed the long-standing policy that if even a small potential for coverage in a tort action exists, the defending insurance company must accept its contractual responsibilities and obligations. Because insurance statutes are remedial in nature, courts will go to great lengths to ensure that school employees are fully covered and protected.