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County Executive

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OFFICE OF THE COUNTY ATTORNEY

MEMORANDUM

TO: D. Terry Fleming, Chief
Division of Risk Management
Department of Finance

VIA: Marc P. Hansen *Marc Hansen*
County Attorney

FROM: Patricia Via, Chief *Patricia P. Via*
Division of Litigation
County Attorney's Office

DATE: November 14, 2011

RE: Pension Fund Issues

ISSUES PRESENTED

You have raised the following legal questions concerning pension fund issues and any financial impact on the County's Self-Insurance Program:

1. Do the claims under the pension fund rise to the level of "civil or tortious action" as provided in Montgomery County Code Section 20-37, or is it a contractual relationship, and therefore, a violation of contract terms?

2. If an employee notifies the pension fund of an error and the error is corrected for the employee, but the fund loses money on the transaction, the claim is being brought by the pension fund, not the employee. If that is correct, does the County have a legal obligation to make the fund whole? If yes, does this mean that that there is tortious conduct by the County for which the pension fund could bring an action against the County for the errors?

3. Does the current language of Montgomery County Code Section 20-37 allow for the provision of coverage for the fiduciary liability of the BIT?

RELEVANT LAW AND BACKGROUND

There are several County Code sections that need to be reviewed in order to address these questions. To begin the analysis, we first look to the insurance provisions set forth in Montgomery County Code, Section 20-37. Under that section, the County is authorized to maintain an insurance program to compensate for personal injury and property damage resulting from the negligence or other wrongful act of a County employee, committed in the scope of that employee's County employment:

> (a) It is the policy of the county government to provide an adequate comprehensive insurance program to compensate for injury to persons or damage to property resulting from the negligence or other wrongful acts of the county's public officials, employees and agents and to provide protection for property of the county and for officials, employees and agents acting within the scope of their duties.
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> * * *
>
> (c) The county is further authorized and empowered to provide for an adequate comprehensive insurance program to compensate for injury or death of persons or damage to property resulting **from negligence, deprivation of civil rights, malpractice or any other type of civil or tortious action resulting from the negligence or wrongful act of any public official, agent or employee within the scope of official duties.** The county is also authorized . . . to provide for an adequate comprehensive insurance program including but not limited to comprehensive (sic) general liability, auto, fire, boiler, workmen's (sic) compensation and comprehensive auto liability. . . . (emphasis added.)

Subsection (c) further states that that the coverage can be provided through commercial insurance, self insurance or a combination of both.

The next relevant sections are found in Chapter 33 of the Montgomery County Code. Montgomery County Code, Section 33-34, establishes the County's retirement system and requires the County to maintain an adequately funded system of retirement pay and benefits for its employees. Section 33-37 requires that a full-time County employee or member of a

participating agency must become a member of a retirement plan as a condition of employment once the employee meets applicable eligibility requirements.

Under Montgomery County Code, Section 33-58, a trust is established as part of the County's retirement system for the benefit of members of the retirement system. "The trust consists of the money and property of the retirement system . . . and any earnings, profits, increments, appreciation, and other additions that accrue." Montgomery County Code, Section 33-58(a). Under Section 33-59, the Board of Investment Trustees (BIT) is established to manage and oversee the investments of the trust, which include the Employees' Retirement System (ERS, the defined benefit plan), the Retirement Savings Plan (RSP, defined contribution plan), the Deferred Compensation Plan (457), and the retirees' health trust. While BIT is a County Board, the retirement plans and the health trust are designated as separate entities with BIT members having fiduciary responsibilities for their discretionary authority over the assets of the plans and trust as set forth in Montgomery County Code, Section 33-61C.

The Chief Administrative Officer (CAO) is responsible for the administration of the retirement system plans and health trust under Montgomery County Code, Section 33-47. The CAO determines eligibility; computes the amount of benefits payable to any plan member or beneficiary; authorizes disbursements of benefits; maintains records; authorizes refund of member contributions, and earnings thereon, to correct any contribution or withholding error; and has other related powers and duties as set forth in Section 33-47(d). The CAO has delegated these functions to the Office of Human Resources (OHR). As the administrator, the CAO has fiduciary responsibilities over the assets of the plans and the trust as set forth in Montgomery County Code, Section 33-61C. The fiduciary duty ***requires*** that the CAO ensure the proper administration of the retirement system plans and health trust.

Based on this arrangement set forth in the County Code, BIT oversees the investments and the CAO is responsible for the administration of the retirement plans. The CAO, through his delegation to OHR, directs BIT on the amount of benefit payments to be paid to qualifying members of the retirement system as well as directs the enrollment of employees in the plans and determines the contributions to be withheld for each employee

In addition to the general requirement to maintain insurance to protect against the tortious acts of County employees, the County Code contains a specific requirement to maintain insurance to protect against breach of fiduciary duty by BIT members. As to claims relating to the management and oversight over the assets of the plans, Montgomery County Code, Section 33-61A(f), requires that the County provide insurance for BIT members against ***any*** liability claims based on the board's service. The County may self-insure or obtain commercial insurance for this purpose. It is my understanding that the County, through the Division of Risk Management, has procured commercial insurance for the past several years covering the

fiduciary liability of the members of BIT, which policy covers suits or claims filed by members of the pension system for mismanagement or other wrongful acts that result in a loss of pension funds or benefits owed. I also understand that the policy covers the employees of OHR who handle the administration of the of the retirement system plans as noted above, including claims relating to the calculation and payment of benefits and enrollment of employees in specific plans.

DISCUSSION AND ANSWER OF ISSUES PRESENTED

The issues presented herein arise out of the concern of whether claims involving employee pension plans sound in negligence or contract or both. I have contacted a number of local jurisdictions to see what is done elsewhere with these matters and have received differing views, as noted below.

In Maryland, local pension fund benefits generally are deemed contractual in nature, either established through a statutory provision or a collective bargaining agreement. *See Frederick v. Quinn*, 35 Md. App. 626 (1977) ("In short, the employee must have available substantially the program he bargained for and any diminution thereof must be balanced by other benefits or justified by countervailing equities for the public's welfare. This seems to be the substance of the majority of cases which have found municipal pension plans contractual in nature and it is the view we expressly adopt here.") *See also Quesenberry v. Washington Suburban Sanitary Commission*, 311 Md. 417 (1988). These and other cases have addressed the "contract" nature of pension fund benefits in the context of when the public employer desires to make legislative changes to the pension plans. However, the circumstances involved in the issues addressed in this opinion do not involve purposeful (*i.e.* legislative) action on the part of the County to modify benefits but instead concern negligent or otherwise erroneous conduct on the part of its employees. Thus, the circumstances surrounding the type of claim being made are important to the analysis.

A. A Sampling from Other Jurisdictions

In gathering information from other jurisdictions, the following is a sample of responses from two other counties:

In Baltimore County, when the County either deducts too much or too little from an employee's pay check for contributions to the retirement system, the cases are filed as grievances pursuant to, in the case of the police, the union's Memorandum of Understanding (MOU). In the cases where the County 'caught" the deduction error, it sent letters to the employees notifying them that the deductions were short and that the County required that the employees make the shortage up with interest. While this is a somewhat harsh position (considering it was the County's error), the theory there is that it is the employees' responsibility to review their pay stubs and the County did not get the benefit of interest on the shortage for the time the money

was not collected. The Baltimore County Code provides some language to support that position. However, in most cases, the County was able to resolve the matter prior to the final step in the grievance process. Here, Baltimore County takes the position that the claims typically arise out of contract because the benefits are linked to language in the MOU and other County benefits packages (health, etc.).

In Anne Arundel County, where there is an overpayment, the County argues that the employee has been unjustly enriched, and the County sues the employee to collect overpayments.[1] As to underpayments, the attorneys handle those claims as contract claims where the County arguably did not pay something to the employee that the employee believes he is entitled to pursuant to the employment relationship. These types of claims are handled through the County's Board of Appeals.

As we have discussed, here in Montgomery County we have experienced a number of different factual scenarios which have given rise to the issues presented. For example, where OHR directs BIT to pay a certain amount out of the pension fund to an employee but that amount is miscalculated by an OHR employee and BIT pays too much, BIT or the plan may have a claim against the County for the negligence of the OHR employee.

Another example is where OHR directs BIT to pay an amount that is less than it should have paid. BIT will have to cover the shortage and may look to the County/OHR if covering the shortage costs BIT extra money.

Finally, one other example is where an OHR employee gives "bad" advice to a county employee which makes the employee forego a more lucrative option for her retirement benefits.

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[1] This is somewhat oversimplified. According to Amy Moskowitz, counsel to the Board of Investment Trustees, in Montgomery County, we generally follow the same process and collect overpayments. A simple overpayment caught relatively quickly is usually resolved fairly easily. In fact, Montgomery County Code, Section 33-53, provides that any pension member must return funds he/she is not entitled to. However, the problem arises when there is a large amount of money that was overpaid in the case where the overpayment occurred over a number of years (or other errors resulting in large sums of money). In these cases, the County faces the significant problem of overcoming an equitable estoppel argument by the employee. These cases must be reviewed on a case by case basis, because the facts surrounding the reasonableness of the employee's reliance on the County's calculations of benefits, as well as other factors affecting the equities of the situation, are critical to determining if a viable legal claim can be made against the employee.

There, if BIT corrects the situation, BIT will likely seek recovery from the County because OHR's advice may have resulted in BIT receiving less employee contributions than it was entitled to.

B. Contract v. Tort Analysis

Before reviewing the individual issues presented, it is important to the analysis to understand the relationship between an action in contract and an action in tort (for negligence). Unfortunately, the distinction between the two is not always so simple, and a particular situation may give rise to both a contract and tort action at the same time.

To establish a cause of action in negligence, a party must prove the following four elements: A duty owed to the claimant, a breach of that duty, a legally cognizable relationship between the breach of duty and the harm suffered, and damages. *Cramer v. Housing Opportunities Commission*, 304 Md. 705, 712 (1985). The "duty" arises out of an obligation to which the law will give effect and recognition to conform to a particular standard of conduct toward another. *Jacques v. First National Bank of Maryland*, 307 Md. 527, 532 (1986). In other words, the duty grows out of the relationship of the parties or is otherwise imposed by law.

A contract action is based on a specific agreement entered into between the parties and protects the parties by imposing consequences (*i.e.* awarding damages and in some cases injunctive relief) if promises are not performed. The specific obligations are imposed because the parties manifested consent to the promises being made. The obligation is owed to those specific individuals identified by the contract. *See* Prosser, *The Law of Torts* (4th Ed. 1971), p. 613. While not every contractual duty imposes a tort duty, the contractual relationship may be such both a contract obligation and tort duty are imposed. As the Court of Appeals stated in *Jacques v. First National Bank of Maryland*:

> 'The mere negligent breach of a contract, absent a duty or obligation imposed by law independent of that arising out of the contract itself, is not enough to sustain an action sounding in tort.' *Heckrotte v. Riddle*, 224 Md. 591, 595, 168 A.2d 879 (1961).

Jacques at 534. However, the court went on:

> Still, while every contractual duty does not also impose a tort duty,

> '[w]here a contractual relationship exists between persons and at the same time a duty is imposed by or arises out of the circumstances surrounding or attending the transaction, the breach of such duty is a tort and the injured party may have his remedy by an action on the case, or he may waive the tort and sue for the breach of the contract.' *Slacum v. Trust Co.*, 163 Md. 350, 352-53, 163 A. 119 (1932) (quoting 26 R.C.L. 986).

*Jacque*s, 307 Md. at 534.

In determining whether a tort duty exists, there are generally two major considerations for the court. The first is the nature of the harm that will likely result from a failure to exercise due care, and the second is the relationship that exists between the parties. *Id.* In those cases where the failure to exercise due care creates a risk of economic loss only, the courts generally have "required an intimate nexus between the parties as a condition to the imposition of tort liability."[2] *Id.* And this nexus can be satisfied by contractual privity or its equivalent. *Id.* at 534-35.

Finally, a tort obligation is imposed based on the relationship between the parties,

> and in determining that relation, the law will often take into account what has been agreed between them, either to increase the actor's responsibility or to lessen it, so that the tort duty finally fixed may coincide with that set by a contract, and for its breach either a contract or a tort action will lie. *Prosser and Keeton, supra*, § 1, at 5.

Jacques, 307 Md. at 535.

C. The Issues Presented

With the above discussion of the law in mind, the following addresses the issues as presented:

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[2] But as the *Jacques* court noted, "[a]n increasing number of courts have declined to consider the nature of the risk as a factor in determining the existence of a tort duty, finding no rational basis to distinguish between a risk of personal injury and a risk of economic loss." *Id.* at 535, n. 4 (Citations omitted)

1. *Do the claims under the pension fund rise to the level of "civil or tortious action" as provided in Montgomery County Code Section 20-37, or is it a contractual relationship and therefore a violation of contract terms?*

This issue can be addressed by first determining what is meant by "claims under the pension fund." The answer to this question depends on what the claim is and who is making it. There are a number of different scenarios, as noted above, that may give rise to "claims" under an employee's pension plan. A review of the different factual circumstances is helpful here.

Retirement System Member v. BIT: If the claim results from an act or omission by a BIT member in exercising fiduciary responsibilities in the management and oversight of the pension fund, then the employee would have a claim against BIT, a County board, and its members, for a breach of fiduciary duty (employee vs. BIT/County board).[3] As noted above, under County Code Section 33-61A(f), the County is required to provide insurance coverage, either through self-insuring or a commercial policy, to defend and indemnify BIT members against such liability claims. It really does not matter what the claim is called (either a claim for negligence (professional malpractice) in failing to properly exercise its fiduciary obligations or a claim for breach of its statutory duty under County Code Section 33-59), since the County Code requires that the County obtain insurance to cover any type of claim where BIT has alleged to mismanage or otherwise improperly oversee investments. Moreover, County Code Section 20-37 provides for the County to procure adequate insurance coverage for damage to property (benefits from a pension plan would be considered property) for "any other type of civil or tortious action resulting from the negligence or wrongful act of any public official, agent or employee within the scope of official duties. Finally, the participating agency agreements for those entities in the County's Self-Insurance Program include coverage for "fiduciary liability."

PLAN/BIT v. OHR Employee: If there is a claim by the separate retirement plan or health trust (the plan) (or BIT for that matter) for damage to the fund arising out of the conduct of OHR employees in not administering the plan properly, *e.g.* miscalculating benefits, etc., and the resulting damage is that the plan is not sufficiently funded, then the claim arises out of wrongful or negligent conduct of the County employee who has been delegated with the responsibilities set out in the County Code. In this case, the liability arises out of the County employee's negligence, and thus, the claim sounds in tort. As such, Section 20-37 of the County Code provides that the County have adequate insurance to compensate for damage to property (the separate retirement plan) resulting from negligence or wrongful conduct of any public official, agent or employee within the scope of official duties. Thus, if an OHR employee miscalculated benefits and the plan makes a claim against the County, the claim would be based

[3] The County may also have a claim against the BIT member for breach of fiduciary duty.

on the negligence of the County employee (a tort), and thus, coverage would fall within this Code section.

Employee v. County: However, an employee who suffers an economic loss may file his or her own claim against the Plan and the County[4]. In that case, the claim may arise out of contract since the pension plans are considered contractual in nature. The employee is entitled to certain benefits under that plan, and if he or she has been denied proper payment of benefits, the employee may have a claim under the plan for breach of contract as the employee is the intended beneficiary. In such a case where the denial or loss of benefits under the plan is the result of the OHR employee's negligence, the plan would likely look to the County and could also sue the County for negligence as noted above.

In addition to the breach of contract action against the plan, the employee could file suit directly against the County based on either contract or tort, or both. The employee could sue for breach of contract under the employment "contract" claiming he or she is entitled to certain retirement benefits by statute or collective bargaining agreement. If the loss to the employee is based on the failure of a County OHR employee to properly administer the retirement benefits, which is the County's obligation as a result of its employment relationship with the employee, the employee could claim a breach of that employment obligation under a contract theory. The employee could also make a claim for negligence arising out of the contract because the County has a duty imposed by the statute to properly administer the retirement system. In that situation, the failure to use due care creates an economic injury for the employee, and under the contractual relationship, either through the employment agreement, there is "an intimate nexus between the parties" giving rise to a tort obligation to use due care. The "intimate nexus" is the employment relationship, and the employer's obligation is to properly administer the benefits under the retirement system. In addition, since there is a statutory duty on the part of the County to meet its fiduciary obligations and use reasonable care in administering the plan benefits, the employee could bring a tort action for breach of that duty (negligence).

In the end, the law provides a remedy in these various situations either under contract or tort, or both. Of course, while the employee may have both a contract claim and a tort claim, he or she would be entitled to only one recovery. A savvy plaintiff will know to bring an action under both, with the result being he or she will recover only under one theory. Of course, the damages, even in a tort action, generally would be limited to the economic loss. Thus, given the fact that there is tortious conduct implicated in these different scenarios and since the County Code states that the County must have adequate insurance to cover any . . . civil or tortious action resulting from the negligence or wrongful act of any public official, agent or employee

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[4] The employee would also name the County as a defendant, because the employment contract is between the employee and the County, not BIT.

within the scope of official duties, County Code Section 20-37 authorizers the County to provide adequate insurance to cover these losses.

2. *If an employee notifies the pension fund of an error and the error is corrected for the employee, but the fund loses money on the transaction, the claim is being brought by the pension fund, not the employee. If that is correct, does the County have a legal obligation to make the fund whole? If yes, does this mean that that there is tortious conduct by the County for which the pension fund could bring an action against the County for the errors?*

As discussed above, it is correct that in this situation if the fund rectifies the error, a claim could be brought by the separate entity, the plan. As noted, the County Code provides that the CAO, who has a fiduciary obligation in managing the fund, is authorized to correct the error. In such a case, because of its fiduciary obligation, the County has the duty to make the fund whole. Thus, the plan or fund can bring a civil action for tortious conduct against the County for the error.

3. *Does the current language of Montgomery County Code Section 20-37 allow for the provision of coverage for the fiduciary liability of the BIT?*

Montgomery County Code Section 20-37 is very broadly written and, on its face, appears to cover fiduciary liability. In fact, a review of the participating agency agreements for members of the Self-Insurance Program indicates that such liability was intended to be covered by the Self-Insurance Fund.

In conclusion, the County is obligated to make the pension funds whole. It would appear that procuring adequate insurance is the best way to address the issues noted above to protect the County against those claims where the potential loss may be significant.

cc: Timothy Firestine, Chief Administrative Officer
Linda Herman, Executive Director, Board of Investment Trustees
Joe Beach, Director, Department of Finance
Marc Hansen, County Attorney
Karen Federman Henry, Chief, Division of Finance and Procurement
Amy Moskowitz, Associate County Attorney

Board of Investment Trustees

Montgomery County Employee Retirement Plans

Liability Protection – supplemental submission

Recently, the Risk Manager provided the Board with a very comprehensive and informative analysis of some of the issues associated with protecting the Board from liability. What follows supplements that information.

Board members of the Board of Investment Trustees are protected from liability for all aspects of their service far more comprehensively than any other County official or employee. In addition to the normal protections accorded public officials, the Board is also protected by the provisions of 33-61A of the Code. In its first subsection that Section provides:

> (a) The county must indemnify every member of the board who is or may become a party to any action, suit, or proceeding, including administrative and investigative proceedings, by reasons of service as a member of the board, subject to the conditions stated in this section.

The term "indemnify" means to compensate for damage or loss sustained or expense incurred and to guard against or secure against anticipated loss or to give security against future damage or liability. As an example, an insurance policy is a form of indemnification. The policy generally provides the limits of the indemnification in terms of both the amount and other obligations of the insurer. For example, an insurance policy may provide indemnification up to $1million dollars for any loss, or it might provide indemnification for the same amount for any loss caused by a certain condition, i.e., flood, accident, theft, etc.

Thus, by the terms of Section 33-61A(a), the County has agreed to protect members of the Board against any loss they may incur due to service on the Board without monetary limit, for the following and other similar expenses: a. Reasonable attorney's fees; b. Judgments; c. Damages; d. Fines[1]; and e. Settlements. In addition, this provision expansively provides that the obligation to indemnify arises as the expenses are incurred. There are, however, limitations on the requirement that the County indemnify the board members.

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[1] There are public policy questions associated with whether anyone may indemnify a person for fines. We do not believe the issue has been decided in Maryland. As an example, in the Local Government Tort Claims Act, the State has specifically allowed local governments to indemnify a person for punitive damages, but prohibits the local government from entering an agreement that requires it to do so; it also prohibits the local government from indemnifying law enforcement officers against an award of punitive damages under certain circumstances. *Courts* Article, Section 5-303(c) Md. Code Ann.. Accordingly, a Board member probably cannot be indemnified against punitive damages under Section 33-61A, but may be indemnified as a matter of discretion should punitive damages be awarded.

Two of the limitations are specifically addressed in Section 33-61A:

> (d) The county must not indemnify any member of the board if:
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> (1) The member of the board is found by a court or other tribunal to be liable for gross negligence or willful and wanton misconduct in the performance of a duty to the retirement system; or
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> (2) Liability arises from action that occurred before the date on which all the trustees have accepted the trust in writing.

These limitations seem clear enough that further explanation should be unnecessary. Simply stated each of these limitations is factually based bearing no possibility of doubt as to whether the facts exist. In other words, neither is open to interpretation.

There are two other possible areas of limitation on the County's obligation to indemnify a board member. The following language of Section 33-61A describes those limitations:

> (b) Standards for indemnification.
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> (1) The county must indemnify a member of the board:
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> a. With respect to civil matters, if the member acted in good faith and in a manner that the member reasonably believed to be in the best interest of the retirement system; and
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> b. With respect to criminal matters, if the member had no reasonable cause to believe that the member's conduct was unlawful[2].

The determination as to whether a board member "acted in good faith and in a manner" "reasonably believed to be in the best interest of the retirement system;" or in a criminal matter where the "member had no reasonable cause to believe that the member's conduct was unlawful" rests with the County Attorney under subsection 33-61A(h)(1)[3]. This provision roughly parallels how an insurer handles issues of coverage under a policy. Someone with the insurer reviews the claim and determines if it falls within the coverage of the policy[4]. As with any decision of a government official and just like anyone denied

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[2] The extent to which a local government in Maryland may indemnify a person for criminal conduct is also subject to question. Nevertheless, it is clear that a local government can indemnify an employee, including a volunteer for the costs of successfully defending a criminal charge. *Snowden v. Anne Arundel County*, 295 Md. 429 (1983). Thus, a guilty finding raises public policy questions concerning a local government's authority to indemnify regardless of the Board member's intent and knowledge of the criminal law. As public policy in this area involves a matter of statewide concern, the Council would not be able to pass a law that violates the State's public policy, but the state legislature could effect such a change.

[3] Indeed, Section 33-61A(c) specifically provides that the termination of lawsuits or criminal proceedings alone do not create a presumption of whether a Board member acted within the limitations provided by Section 33-61(b). For this reason, the common practice would be to make the issue one for the court's determination in the underlying suits, although that practice would not be required and a Board member might choose not to have the question decided in the underlying case as a matter of litigation strategy.

[4] Issues of coverage and whether the county must indemnify a board member are separate and distinct from the question of whether the county or an insurer must provide a defense. Under the Local Government Tort Claims Act, Section 5-302(a) requires the County, in a civil action, to provide any

coverage under an insurance policy, a person aggrieved by the decision can seek to have it reviewed by the court. In the event the court determines that indemnification was wrongly denied, the costs of challenging the determination would be recoverable under the broad language of Section 33-61A(a).

The County Attorney is also charged in Section 33-61A(h)(1) with determining whether the costs being indemnified are reasonable. As with the question of indemnification, a person aggrieved by a decision not to pay an expense as unreasonable would be entitled to seek court review and if successful, to recover the costs of seeking that review. The language in Section 33-61A(h)(2) is quite extraordinary. It provides:

> 2) Unless the county attorney approves the settlement, a trustee must not use:
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> a. County funds;
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> b. Funds provided by a self-insurance program of the county;
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> or
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> c. Funds provided under a policy the county has with an insurance company; to settle a claim against the trustee.

While extraordinary, the language does not change the ultimate conclusion that a decision made by the County Attorney on these matters could be reviewed by a court and if the court determined the County Attorney wrongly decided the issue, the costs could be recovered. In addition to the right a member would have to pursue judicial review of a decision not to settle a claim, the County would be responsible for the costs of continuing to defend the case and any judgment that resulted. Furthermore, the extreme risk to the County of denying an insurance settlement suggests that the legislative intent behind Section 33-61A(h)(2) was to protecting the County against a potentially frivolous settlement or a contrived one. Because the insurer would be able to demand the County pay it any additional costs of defense and damages if a final verdict were higher than the rejected settlement, if the County Attorney denied authority to settle under a policy of insurance, such decision would undoubtedly be the rarest of exceptions rather than the rule.

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officer, employee or volunteer a defense if the claim involves an allegation of conduct that is within the scope of the duties assigned by the local government. Thus, in a civil matter, even if the Board member acted with malice or in bad faith, the Local Government Tort Claims Act requires the County to provide the member a defense. See: *Ennis v. Crenca,* 322 Md. 285 (1991), in which the court noted: "It appears that [§ 5-302] requires a local government to defend its employees in actions involving actual malice. . . ." at 322 Md. 292. Similar principles apply in the context of insurance, as the courts interpret most policies to require the insurer to provide a defense even though it may not have an obligation to indemnify the insured for a judgment based on the claim. The *Ennis* case also discussed the test for determining whether acts are within the "scope of employment" saying: "the overall test is whether the tortious acts "'were done by the [employee] in furtherance'" of the employer's business and "'were such as may fairly be said to have been authorized by him. By "authorized" is not meant authority expressly conferred, but whether the act was such as was incident to the performance of the duties entrusted to'" the employee by the employer. . . . Moreover, where an employee's actions are personal, or where the employee is acting to further his own interests, the conduct is normally outside the scope of employment. . . ." 322 Md. at 293-4.

Underscoring the breadth of protection provided Board members, Section 33-61A(f) provides:

> The county must provide insurance for each member of the board against any liability asserted against or incurred by the member of the board with respect to service on the board. Premiums for any insurance must not be paid with assets of the retirement system. The county may self-insure for this purpose, wholly or partly. ***If the county does not provide adequate insurance coverage or indemnification under this section, a member of the board need not pay any amount attributable to liability incurred by serving on the board, and the county must pay any amount due.*** (Emphasis supplied.)

Thus, even were the County to have inadequate insurance coverage, it must stand behind a Board member and pay any amounts incurred.

In addition to these provisions, other County law provides that the County may establish a self insurance program. Section 20-37(c) of the Code provides, in pertinent part:

> The county is further authorized and empowered to provide for an adequate comprehensive insurance program to compensate for injury or death of persons or damage to property resulting from negligence, deprivation of civil rights, malpractice or any other type of civil or tortious action resulting from the negligence or wrongful act of any public official, agent or employee within the scope of official duties. . . . The insurance program may be provided by . . . a self-insurance program funded by appropriations by the county council or by a combination of purchased insurance coverage and self-insurance . . . . The insurance program shall provide for defense of claims as well as compensation for damages and the county is authorized within the limits of appropriations of the funded insurance program to engage necessary claims investigators and adjusters, to provide for defense with attorneys to be selected as provided in the charter, and to settle claims and pay lawful judgments.

As part of the self insurance program, the County Attorney

> . . . shall provide defense for claims against each participating agency, its public officials, employees and agents and shall consult with and advise counsel for each participating agency as to the status of each claim against the participating agency. . . .

MCC, Section 20-37(e)(2).

Thus, board members may[5] be and board staff is covered by the County's self insurance program under policies applicable to every County officer and employee. While it is

[5] I use the cautionary verb "may" only because coverage under 33-61A provides such expansive protections that the provisions of Section 20-37 are not required to apply; Section 20-37 does not become operable to the extent the matter is covered under Section 33-61A. Yet, the provisions of Section 20-37 are available if necessary.

virtually inconceivable that a board member's protection from liability could be any greater than as provided in Chapter 33, should there be a gap in coverage provided under Chapter 33, the provisions of Chapter 20 would provide to board members protection against liability. These laws would be read to harmonize and carry out the Council's intent to provide the greatest possible protection to members of the Board of Investment Trustees.

Chapter 20 also includes a provision regarding settlement of claims. Section 20-2(a) provides:

> On behalf of the county, the county attorney is hereby authorized to effect a settlement of all claims by or against the county and all court cases to which the county is a party where the amount of the claim or the amount involved in the suit is not more than five thousand dollars ($5,000.00) and when the county attorney's judgment it is proper and advisable to do so. The county attorney is further authorized to effect, with the approval of the county executive, a settlement of all other claims by or against the county and all other court cases to which the county is a party, when in the county attorney's judgment and that of the county executive it is advisable and proper to do so. In court cases in which the members of the county council are parties in their capacity as such, the county attorney is hereby authorized to effect settlement on their behalf upon the approval of the council, except in cases where each member of the council may be personally liable or responsible, in which cases settlement shall be made only on behalf of each member approving such settlement.

Thus, in a manner similar to that described for determinations made under Section 33-61A, a determination of the County Attorney or the County Attorney and the Executive[6] are subject to review by a court on the petition of a person aggrieved. This provision has been interpreted to require approvals by the County Attorney and the Executive of settlements made under policies of insurance as the section does not distinguish those cases from ones where no insurance exists. As with decisions made under Section 33-61A to not approve an insurance company's offer of settlement, a decision not to settle under Section 20-2 would be quite unusual as the potential cost to the County of making that decision could be great and would be similar to those described previously.

Similarly, state law, in the Local Government Tort Claims Act, requires a local government to indemnify its employees, officers and volunteers for claims against them occurring within the scope of their duties and which arise from the person's actions that were without malice. *Courts* Article, Section 5-302(b), Md. Code. Ann. Perhaps more importantly, as noted in footnote 4, state law mandates that the local government provide its employees, officers and volunteers a defense against claims arising in the course of

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[6] The Executive has delegated this decision making authority to the Director of Finance for SIF matters and the CAO for all other matters.

their duties without further limitation[7]. *Courts* Article, Section 5-302(a), Md. Code Ann. Also, under the Local Government Tort Claims Act, county liability is limited to $200,000 per individual claim and $500,000 per occurrence. *Courts* Article, Section 5-303(a), Md. Code. Ann. Accordingly, the applicability of the Local Government Tort Claims Act further protects a board member in the doubtful event any gaps exist under the protections of county law.

As the questions involving the Board's liability protection have evolved at the Administrative Committee, some important points sometimes are overlooked. The most important point is the County's mandate that Board members be indemnified as provided in Section 33-61A. That mandate supersedes insurance coverage, so that in the event a claim exceeds the available limits of insurance coverage or a claim does not fall within the terms of the insurance policy, the County is bound to pay any judgment or reasonable settlement, including reasonable attorneys' fees and other costs of defense as prescribed by law. To that end, the law allows the County to establish a reserve fund for insurance and to borrow up to $10 million in order to satisfy its obligations under a program of self insurance, including a pledge of both the good faith and credit of the county as security for the loan and its obligation to levy sufficient taxes to pay the debt[8]. From these provisions, an inescapable conclusion confirms that the County provides significant protections to the Board members.

In short, whether the County has insurance should be immaterial to a Board member, as the Board member will be protected by the County regardless of the existence of insurance to the full extent of Sections 33-61A and Section 20-37 of the County Code and by the provisions of state law under the Local Government Tort Claims Act.

[7] The Act does, however, require a person being defended to cooperate in the defense of the matter or lose the right to the protections of the Act including the government provided defense. *Courts* Article, Section 5-302(d) Md. Code Ann.

[8] See: MCC, Section 20-37(f).