

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

GRAPHIC ARTS MUTUAL INSURANCE COMPANY	:	
	:	CIVIL ACTION
vs.	:	
	:	
LOWER MERION SCHOOL DISTRICT, THE BOARD	:	NO.
OF DIRECTORS OF LOWER MERION SCHOOL	:	
DISTRICT, CHRISTOPHER W. MCGINLEY,	:	
Superintendent of Lower Merion School District, and	:	
BLAKE J. ROBBINS, a minor, by his Parents and	:	
Natural Guardians, MICHAEL E. ROBBINS and	:	
HOLLY S. ROBBINS	:	

COMPLAINT FOR DECLARATORY JUDGMENT

I. THE PARTIES

1. Plaintiff, Graphic Arts Mutual Insurance Company (hereinafter "Graphic Arts") is a corporation incorporated under the laws of the State of New York with its principal place of business in New Hartford, New York, and is authorized to transact the business of insurance in the Commonwealth of Pennsylvania.

2. Defendant, Lower Merion School District ("the School District") is a municipal corporation created and operated in the Commonwealth of Pennsylvania with a principal place of business at 301 East Montgomery Avenue, Ardmore, Pennsylvania, 19003.

3. Defendant, Board of Directors of the Lower Merion School District ("the Board") is believed and therefore averred to be the nine (9) member board elected to act as a corporate body to fulfill the School District's obligation to provide public education. It is further believed and therefore averred that the Board can be contacted through its Secretary, Fran Keaveney, also with the address at 301 East Montgomery Avenue, Ardmore, Pennsylvania 19003.

4. Defendant, Christopher W. McGinley, (hereinafter "McGinley"), is the Superintendent of Schools for the District, and the Administrator appointed by the Board to supervise and manage the day-to-day operation of the School District. As the Superintendent, Mr. McGinley is believed and therefore averred to be responsible for the implementation of the policies, procedures and practices instituted by the Board. Mr. McGinley is believed and averred to be a citizen and resident of the Commonwealth of Pennsylvania. Currently he can be reached at 301 East Montgomery Avenue, Ardmore, PA 19003.

5. Defendants, Blake Robbins, a minor, and his parents and natural guardians, Michael E. Robbins and Holly S. Robbins, (hereinafter "the Robbins"), are citizens and residents of the Commonwealth of Pennsylvania residing at 437 Hidden River Road, Penn Valley, Pennsylvania 19072-1112.

II. JURISDICTION AND VENUE

6. Jurisdiction in this case is based on 28 U.S.C. §1332.

7. Venue is proper in this District as the defendants all reside and/or conduct their business in this District and all of the operative events occurred within the District.

8. The matter in controversy exclusive of interest and costs exceeds the sum of \$75,000.00.

9. Plaintiff brings this declaratory judgment action pursuant to 28 U.S.C. §2201 and Fed. R. Civ. P. 57.

III. FACTS

10. Graphic Arts issued to the Lower Merion School District a Commercial General Liability Insurance policy, policy # CPP 1672167, ("the Policy"), effective for policy period July

1, 2009 to July 1, 2010, with a Personal and Advertising Injury Limit of \$1,000,000.00. A true and correct copy of the Policy is attached hereto as Exhibit "A". For convenient reference to the policy, Exhibit A has been Bates-stamped as POL 0001 et seq.

11. On February 16, 2010, the Robbins filed a Compliant against the School District, the Board and Superintendent McGinley (collectively "the School District Defendants"). That action is pending in this Honorable Court styled as Robbins, et al v. Lower Merion School District, et al., Civil Action # 2:10-CV-665-JD. A true and correct copy of the Robbins Complaint is attached hereto as Exhibit "B".

12. Once it was served upon the School District Defendants, the Robbins Complaint was tendered by or on behalf of the School District Defendants to Graphic Arts seeking insurance coverage, including a defense and indemnity, for the claim under the Policy.

13. In response to the School District's tender of the Robbins Complaint, Graphic Arts has issued to the School District Defendants a reservation of rights which asserts the insurer's position that the Robbins' Compliant is not within the scope of coverage afforded by the Policy, informs the District of the insurer's intent to seek this coverage declaration, and agrees to assist in the funding of the School District Defendants' defense of the Robbins lawsuit pending a judicial declaration adjudicating the insurance coverage dispute.

14. There exists a present case and controversy between the School District Defendants and Graphic Arts over whether the insurer owes a duty to defend or a duty to indemnify the School District Defendants in connection with the Robbins' lawsuit against them.

IV. THE ROBBINS COMPLAINT

15. The Robbins Complaint is filed on behalf of a putative class consisting of the Robbins Defendants "and all other students of Harriton High School and Lower Merion High School who

have been issued by the School District a laptop computer with a webcam, together with their families." The Complaint also alleges certain exclusions from class membership not pertinent herein. See Robbins Complaint, Exhibit B, para. 12.

16. The Robbins Complaint seeks damages allegedly caused to the Robbins and other class members by the School District Defendants' "invasion of Plaintiff's privacy, theft of plaintiffs' private information and unlawful interception of and access to acquired and exported data and other stored electronic communications" in violation of several statutes, the Fourth Amendment to the United States Constitution, and Pennsylvania common law. id., para. 1,3.

17. More specifically, the Complaint contains several paragraphs detailing the conduct upon which the claims against the School District Defendants are based, including but not limited to the following allegations:

2. Unbeknownst to Plaintiffs and the members of the Class, and without their authorization, Defendants have been spying on the activities of Plaintiffs and Class members by Defendants' indiscriminant use of and ability to remotely activate the webcams incorporated into each laptop issued to students by the School District. The continuing surveillance of Plaintiffs' and the Class members' home use of the laptop issued by the School District, including the indiscriminant remote activation of the webcams incorporated into each laptop, was accomplished without the knowledge or consent of the Plaintiffs or the members of the Class.

* * * *

12. Plaintiffs bring this action as a Class Action under Rules 23(a), 23(b)(1), 23(b)(2) and 23(b)(3) of the Federal Rules of Civil Procedure on behalf of a Class consisting of Plaintiffs and all other students of Harriton High School and Lower Merion High School who have been issued by the School District a laptop computer equipped with a webcam, together with their families. Excluded from the Class are the Defendants herein, any subsidiary of any of the Defendants, any family members of the Defendants who attend either high school, all employees and directors of Defendants or any subsidiary, and their legal representative, heirs, successors or assigns of any such excluded person or entity.

* * * *

22. An examination of all of the written documentation accompanying the laptop, as well as any documentation appearing on any website or handed out to students or parents concerning the use of the laptop, reveals that no reference is made to the fact that the school district has the ability to remotely activate the embedded webcam at any time the school district wished to intercept images from that webcam of anyone or anything appearing in front of the camera at the time of the activation.

23. On November 11, 2009, Plaintiffs were for the first time informed of the above-mentioned capability and practice by the School District when Lindy Matsko ("Matsko), an Assistant Principal at Harriton High School, informed minor Plaintiff that the School District was of the belief that minor Plaintiff was engaged in improper behavior in his home, and cited as evidence a photograph from the webcam embedded in minor Plaintiff's personal laptop issued by the School District.

24. Michael Robbins thereafter verified, through Ms. Matsko, that the School District in fact has the ability to remotely activate the webcam contained in a students' personal laptop computer issued by the School District at any time it chose and to view and capture whatever images were in front of the webcam, at without the knowledge, permission or authorization of any persons then and there using the laptop computer.

25. Additionally, by virtue of the fact that the webcam can be remotely activated at any time by the School District, the webcam will capture anything happening in the room in which the laptop computer is located, regardless of whether the student is sitting at the computer and using it.

26. Defendants have never disclosed either to the Plaintiffs or to the Class members that the School District has the ability to capture webcam images from any location in which the personal laptop computer was kept.

* * * *

38. Defendants' actions complained of herein were conscious, intentional, wanton and malicious, entitling Plaintiffs and the other members of the Class to an award of punitive damages.

See Robbins Complaint, Ex. B.

18. Based upon those core operative allegations, the putative Robbins class pleads seven claims against the School District Defendants:

- Count I – Interception of Electronic Communications under the Electronic Communications Protections Act (ECPA);
- Count II - Theft of Intellectual Property under the Computer Fraud and Abuse Act (CFAA);
- Count III - Violation of the Stored Communications Act (SCA);
- Count IV - Violations of the Civil Rights Act, 42 U.S.C. §1983;
- Count V- Invasion of Privacy under the U.S. Constitution, Fourth Amendment;
- Count VI - Violation of the Pennsylvania Wiretapping and Electronic Surveillance Act (PWESA); and
- Count VII - Invasion of Privacy under the Pennsylvania Common Law.

V. THE POLICY PROVISIONS

19. The School District Policy issued by Graphic Arts includes multiple sections and coverages, including but not limited to liability coverage sections for Bodily Injury and Property Damage Liability (SECTION I, COVERAGE A) and for Personal and Advertising Injury Liability (SECTION I, COVERAGE B). (POL 0082, POL 0085).

20. Certain of the terms, provisions and exclusions set forth in the main Commercial General Liability Coverage Form (CG 00 01 10 93) are modified, amended or replaced by certain endorsements contained in the Policy, including inter alia the Educational Institution Coverage Endorsement (form 8-E-1687 (PA) Ed. 01-2004), the School Endorsement-Personal Injury (Form 8-E-3146 Ed. 1-2000), the General Liability Revision Endorsement (Form 8-E-

3390 Ed. 7-2002, and the Exclusion – Recording and Distribution of Material or Information in Violation of Law Endorsement (Form 8-E-3673 Ed. 05-2009).

21. The claims pleaded on the face of the Robbins Complaint do not state any claims for "bodily injury" or "property damage" as those terms are defined in the Policy. (POL 0090, POL0092).

22. The Insuring Agreement for COVERAGE B. PERSONAL AND ADVERTISING LIABILITY is set forth in the main COMMERCIAL GENERAL LIABILITY COVERAGE FORM, and provides as follows:

1. Insuring Agreement.

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal injury" or "advertising injury" to which this insurance applies. We will have the right and duty to defend any "suit" seeking those damages. We may at our discretion investigate any "occurrence" or offense and settle any claim or "suit" that may result. But:

(1) The amount we will pay for damages is limited as described in LIMITS OF INSURANCE (SECTION III); and

(2) Our right and duty to defend and when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverage A or B or medical expenses under Coverage C.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under SUPPLEMENTARY PAYMENTS – COVERAGES A AND B.

(POL 0085).

23. The definition of the term "personal injury" as it appears in the Insuring Agreement quoted above is modified in two of the endorsements identified above, including the General

Liability Revision Endorsement (POL 0075 et seq.) and the Educational Institution Coverage Endorsement. (POL 0028 et seq.)

24. In the General Liability Revision Endorsement, the Policy states:

GENERAL LIABILITY REVISION ENDORSEMENT

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

The following changes supersede any other provision to the contrary. In the event that your policy includes other provisions which modify the Commercial General Liability Coverage Form, those other provisions will apply, but only to the extent that they do not conflict with these changes.

* * *

D. "Personal injury" is replaced by the following:

"Personal injury" means injury, other than "bodily injury", arising out of one or more of the following offenses:

- c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;
- e. Oral or written publication, in any manner, of material that violates a person's right of privacy.

(POL 0075, POL0078).

25. In the Educational Institution Coverage Endorsement, the Policy states:

EDUCATIONAL INSTITUTION COVERAGE ENDORSEMENT

This endorsement modifies insurance provided under the following:

**COMMERCIAL GENERAL LIABILITY COVERAGE
PART**

With respect to the operation of any educational institution by you or on your behalf the insurance is amended as follows:

* * *

T. PERSONAL INJURY LIABILITY EXTENSION:

The definition of "Personal Injury" means injury including mental anguish, shock or humiliation; other than "bodily injury"; arising out of one or more of the following offenses:

3. Wrongful entry into, or eviction of a person from, a room, dwelling or premises that the person occupies.
5. Oral or written publication of material that violates a person's right of privacy;...

(POL 0028, POL 0037).

26. Pursuant to the express prefatory language of the General Liability Revision Endorsement, the definitions of Personal Injury contained in the Educational Institution Coverage Endorsement apply only to the extent that they do not conflict with the definitions of Personal Injury provided in the General Liability Revision Endorsement. (POL 0075)

27. To the extent, then, that sub-parts T.3 and T.5 from the Educational Institution Coverage Endorsement conflict with sub-parts D.c and D.e from the General Liability Revision Endorsement respectively, then those latter sub-parts apply.

28. Notwithstanding, but without waiving, the foregoing, even if the insured School District Defendants were given the benefit of all four of the sub-parts of the Personal Injury definition quoted above, neither the claims set forth on the face of the Robbins Complaint nor the facts alleged in the Complaint as the basis for those claims fall within any of those four defined offenses included in the Policy's personal injury coverage.

29. In addition to, and not in derogation of, the foregoing, the Policy contains certain exclusions which are or may be applicable to the Robbins claims against the School District Defendants.

30. In the endorsement entitled School Endorsement – Personal Injury, the Policy states:

2. Exclusions

This insurance does not apply to:

a. "Personal injury" or "advertising injury":

- (1) Caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict "personal injury" or "advertising injury."

(POL 0027.)

31. In the endorsement entitled Exclusion – Recording and Distribution of Material or Information in Violation of Law, the Policy states:

The insurance provided under Section I – Coverage A – Bodily Injury and Property Damage Liability and Coverage B – Personal Injury and Advertising Injury Liability does not apply to any claim or "suit" arising out of or resulting from any action or omission that violates or is alleged to violate:

- (4) Any federal, state or local statute, ordinance or regulation, other than the TCPA, CAN-SPAM Act of 2003 or FCRA and their amendments and additions, that addresses, prohibits or limits the printing, dissemination, disposal, collecting, records, sending, transmitting, communicating or distribution of material or information.

(POL 0069.)

32. In addition to, and not in derogation of the foregoing, the law of the Commonwealth recognizes that it is against public policy to provide liability insurance coverage for punitive damages imposed upon an insured defendant.

WHEREFORE, and based upon a comparison of the facts appearing on the face of the Robbins Complaint and the terms and provisions of the Commercial General Liability Insurance Policy issued by Graphic Arts to the Lower Merion School District, Graphic Arts prays this Court for a judicial declaration pursuant to 28 U.S.C. §2201 declaring that:

1. The claims asserted in the Robbins Complaint against the School District Defendants are outside the scope of the Personal Injury coverage contained in the Graphic Arts policy issued to the School District;
2. Graphic Arts has no duty to defend the School District Defendants in connection with the Robbins' lawsuit pending in this Court at Civil Action No. 2:10-CV-665-JD;
3. Graphic Arts has no duty to indemnify the School District Defendants in connection with the Robbins' lawsuit pending in this Court at Civil Action No. 2:10-CV-665-JD; and
4. Enter such other relief as the Court deems appropriate under the facts alleged in the Robbins Complaint, the terms and provisions of the Policy, and the law.

Respectfully submitted,

MARSHALL, DENNEHEY, WARNER,
COLEMAN & GOGGIN

BY: 

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