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Date: February 20, 2017

To: Honorable Supervisors of the County Board

cc: County Clerk George Christensen (c/o Janelle Jensen)  
County Executive Chris Abele  
Interested Parties

From: Deputy Corporation Counsel Colleen Foley

Re: County Board Settlement Authority for BHD Claims/2013 Act 203

**Introduction/Background:** At the County Board finance committee's January session, questions arose regarding litigation involving the Behavioral Health Division (BHD) post-2013 Act 203. Act 203 created the Mental Health Board (MHB) and imbued it with statutory oversight over all aspects of county mental health functions, programs, and services. The MHB replaced the County Board in that role effective April 2014 with the passage of Act 203.

There are currently two lawsuits (and one notice of claim) against Milwaukee County and BHD<sup>1</sup> that are not insured by the Wisconsin County Mutual Insurance Company (WCMIC). All claims involve pre-Act 203 incidents,<sup>2</sup> therefore occurred during County Board, not MHB oversight of BHD. These cases have brought to the forefront the general issue of responsibility for claims against BHD.

**Settlement Authority:** Act 203 created and implemented the MHB, but it did not change the status of BHD employees as Milwaukee County employees. Indeed, BHD employees remain subject to the county's civil service board for suspensions or terminations. Wis. Stat. §§ 59.17(2)(bm)(1)d and 63.02(2). Likewise, the County as an entity is responsible for BHD worker compensation claims. Wis. Stat. §§ 102.07(1) and 102.01(2)(d). However, BHD budgeted for worker compensation claims pre-Act 203 and continues to do so post-Act 203, so is cross charged for those costs.

Act 203 did not change that the County Board remains responsible for claims against the county for acts committed by public officials or employees within the scope of employment under Wis. Stat. § 895.46. Nor did Act 203 alter the County Board's continuing obligation for claims against

<sup>1</sup> The two lawsuits are: *Estate of Brandon T. Johnson, et al. v. Milwaukee County, et al.*, E.D. Wis. Case No. 16CV1043; *Lloyd N. Johnson v. Rimmer, et al.*, E.D. Wis. Case No. 14CV1408). The notice of claim against Milwaukee County is on behalf of the Estate of Andre Harvey.

<sup>2</sup> Both lawsuits involve causes of action that occurred in 2012. The notice of claim involves a 2013 incident.

the county, regardless of department of origin. In particular, Wis. Stat. § 59.52(12) requires that the County Board “examine and settle all accounts of the county and all claims, demands or causes of action against the county and issue county orders therefore.” The statute grants the County Board authority to delegate settlement of certain claims to either corporation counsel (up to \$500) or the judiciary committee (up to \$10,000). *See also* MCGO 1.11(4)2(a) and 1.11(4)2(d).

**Budgetary Issues:** Act 203 eliminated budgetary discretion by the County Board over mental health matters. It provides that the County Board “shall” incorporate into the county budget for mental health services: the tax levy amount proposed by the County Executive (which must be at least \$53 million but not more than \$65 million) and the amount of the community aids allocation, plus an amount equal to the total amount of the mental health budget, less the community aids amount and the tax levy amount. Wis. Stat. § 51.41(4)(b)4.

Therefore, the County Board cannot transfer the cost of any of these claims to mental health, unless the adopted mental health budget allowed for the payment of such claims (as with the worker compensation claims) or the MHB amended its budget to pay such claims while staying within the parameters of its adopted budget. (*See* Wis. Stat. § 51.41 (1s): DUTIES OF THE BOARD. The Milwaukee County mental health board shall do all of the following: (a) Oversee the provision of mental health programs and services in Milwaukee County. (b) Allocate moneys for mental health functions, programs, and services in Milwaukee County within the mental health budget as defined in sub. (4)(a)2.)

The MHB may also transfer jurisdiction over a Milwaukee County function, service, or program to itself that pertains to mental health or is highly integrated with mental health services and that is not under its jurisdiction by statute, by an affirmative vote of a majority of the MHB *and* a majority vote of the Board of Supervisors. Wis. Stat. § 51.41(5)(b). The Board of Supervisors otherwise has no jurisdiction over mental health policy, functions, programs, or services. Nor may it create new mental health functions, programs, or services that are under its jurisdiction. Wis. Stat. § 51.41(5)(a).

**Conclusion:** Act 203 prohibits the County Board from exercising jurisdiction over mental health matters. But it did not alter the Board’s responsibility for BHD as a county entity and that includes responsibility for lawsuits. Therefore, the County Board is within its authority in addressing how legal liability reserves are set and managed that implicate BHD, non-WCMIC claims in particular. Additionally, the County Board lacks authority over BHD’s budget other than through incorporation into the overall County budget, but the MHB could allot a portion of its budget for litigation matters or the two Boards could collectively vote to shift a function (payment of non-WCMIC litigation claims against BHD) solely to the purview of the MHB.