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Date: February 5, 2015

From: Paul Bargren *PB*
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Cc: Chairwoman Dimitrijevic

Re: Remarks to County Board

I have been asked to comment on potential litigation risks in either passing or not passing the pension ordinance amendments contained in File 15-31, Item 47 on today's agenda.

Some of my thoughts are best left for closed session, and I have expressed them in closed sessions of the Judiciary and Finance committees in recent weeks. I would ask that supervisors continue to observe the confidentiality of those comments.

However, I can offer the following today.

If the amendments are not passed, the Retirement System is required under IRS rules to account for the overpayment of benefits made in violation of System rules. The administration has indicated that this will involve, at a minimum, reductions of about \$10 million in future benefits to approximately 200 retirees or their survivors and to another 24 active employees who have not yet retired, plus another 6 former employees who have not yet started receiving benefits.

The county has already been sued over these reductions, in three different arenas. First, in the *Angeles* lawsuit in federal court over a pension denial made in 2014, the attorneys are attempting to turn that case into a class action representing all of the individuals I just mentioned. And the Deputy Sheriffs' union has filed a grievance over reduced benefits to its members. And finally, the Retirement System is seeking to recover past benefits from five nurses who left the county in 1991 or 1995, and those five have sued in Circuit Court to try to prevent that recovery.

In each case, one of the key arguments is that years or decades ago, the retirees or employees relied upon information from the County in making the Buy In or Buy Back purchases of service, and that in fairness and equity, the System cannot be allowed to change its position now.

In each of these legal actions, the County's legal defenses depend upon persuading the judge or hearing office to accept legal principles that may allow a government to strictly enforce laws or ordinances regardless of whether citizens relied upon mistakes in interpretation or enforcement by government employees, or other considerations of fairness and equity. Around the country, some courts have applied this "government exception," some have not. The precise issue has not arisen in Wisconsin courts, and results in Wisconsin cases dealing with issues other than pensions are mixed. If a judge did not agree to apply this government exception, then presumably the plaintiffs would be able to argue their fairness and equity claims to a jury. Those would be difficult claims to defend in front of a jury.

If the ordinance amendments are passed, generally speaking, there would be far less litigation. The claims from the 200 retirees and survivors would disappear, because they would continue to receive benefits. Likewise with the Deputies' grievance and with the five nurses. Likewise with the 24 current employees and 6 former employees.

There would still be possible lawsuits from about 6 individuals who have been termed "ineligibles," because for a variety of reasons that are not and really cannot be addressed by these ordinance amendments, their service purchases violated other System rules. Recovery efforts are underway. And there can always be isolated cases, like the *Angeles* case, involving circumstances unique to an individual. The prospects of successfully arguing for the government exception to apply in a case like that than is much greater than in the roughly 220 cases addressed in the ordinance amendments, where most of the errors were made long ago.

There has been mention that litigation from some of the other 11,000 members of the plan could be expected, perhaps on the theory that the ordinance amendments weaken the financial strength of the system, perhaps on the theory that some of those members should now be allowed to make purchases of service similar to those being accepted through the amendments. As to the first theory, it has been considered and rejected in a 2006 decision by the Wisconsin Court of Appeals in the *Bilda* litigation. As to the second approach, nothing in the Retirement System rules or ordinances permits someone to initiate this sort of purchase now, and I am confident the IRS will honor that restriction.