



**House
Legislative
Analysis
Section**

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**JUDGES RETIREMENT;
SUPPLEMENTAL INCREASE**

**House Bill 4675 as enrolled
Public Act 675 of 2002
Second Analysis (1-13-03)**

**Sponsor: Rep. Jason Allen
House Committee: Appropriations
Senate Committee: Judiciary**

THE APPARENT PROBLEM:

The Michigan Judges Retirement System is a statewide, multiple-employer, defined benefit retirement system. (Judges or officials elected or appointed on or after March 31, 1997 become participants in a defined contribution plan, referred to as "Tier 2" in the statute, rather than in the defined benefit plan.) Public Act 234 of 1992 consolidated the former Judges' and Probate Judges' Retirement Systems into one retirement system. Because judges' salaries are paid by a combination of state and local funds, the retirement system has 174 participating employers. Membership in the retirement system includes judges of the district, probate, and circuit courts, the court of appeals, and the state supreme court, as well as the governor, lieutenant governor, secretary of state, attorney general, legislative auditor general, and the state court administrator. The system is administered by the Office of Retirement Services within the Department of Management and Budget, and is under the direction of a statutorily-constituted board.

Generally, a member of the Judges Retirement System is eligible for regular retirement benefits at age 60 with 8 years of credited service; at age 55 with 18 years of service; or with 25 years of service with no age requirement. The pension benefit varies based on years of service. For a member with less than 12 years of service, the amount is 3 percent of final annual compensation times years of service; for 12 or more years of service, the pension amount is 50 percent of final annual compensation plus 2.5 percent of that compensation for each year in excess of 12, to a maximum of 60 percent of final compensation. The formula for former Michigan Judges Retirement System members varies from that described above; the maximum cannot exceed $66 \frac{2}{3}$ of final annual compensation. "Final annual compensation" also varies, depending on type of judicial service; the statute contains seven benefit "plans" distinguishing among various judgeships and service as state

officials. Members contribute from 3.5 percent to 7 percent of their salaries, again depending on type of judicial service. The retirement system provides, in addition, a disability retirement allowance, and a death benefit to surviving spouses or dependent children. A subsidized health premium benefit is provided only to state elected officials, court of appeals judges, and supreme court justices; other members may enroll in the health plan but must pay the entire premium. There are no post-retirement cost of living adjustments in pension benefits (except that retirees who were active members before September 8, 1961 have their benefits adjusted as active judges salaries change, but reportedly, this is a very small group, estimated at from 10 to 30 living retirees).

In recognition of the fact that the Judges Retirement Act does not provide for post-retirement benefit increases (or COLAs) for the great majority of retired judges, the legislature has, on two prior occasions, provided one-time supplements to boost the base retirement payments of those who have been retired the longest (and therefore are receiving the lowest benefits). Public Act 11 of 1993 made one-time increases for members of the former Probate Judges Retirement System, and Public Act 350 of 1996 made similar one-time increases for members of the former Judges Retirement System. Both acts applied to those who retired prior to 1980. At this time, legislation has been proposed to provide similar supplements for those who retired between 1980 and 1992. However, a group of active and retired Michigan judges are currently suing the state and the Judges Retirement System in both the federal and the state courts, alleging various violations of equal protection and other constitutional issues, with regard to the way benefits are paid under the Judges Retirement Act. Since the plaintiffs in the suit allege a violation of their equal protection rights because the act does not provide for annual percentage increases in the

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retirement allowances paid to retirees, even though certain other retirement plans for state and governmental employees do, and have asked the court for various remedies, some suggest that the proposal to provide a one-time post retirement increase for retired judges only be available for those retirees who waive any claim to damages in the case. (See *Background Information*).

THE CONTENT OF THE BILL:

The bill would amend the defined benefit provisions of the Judges Retirement Act to provide a supplemental increase in the retirement allowances of retirees (and beneficiaries of deceased retirees) who retired between January 1, 1980 and January 1, 1992, if those retirees and beneficiaries waive their claims in the case of *Ernst v Roberts*. Supplements ranging from 3.5 percent to 8 percent would be added to the base retirement allowance of these retirees. The largest increase (8 percent) would go to those who retired during 1980, 1981, 1982, and 1983, and the smallest (3.5 percent) to those retiring in 1992. The supplement provided by the bill would have to be calculated and paid before October 1, 2003. However, the bill specifies that if a retiree died before October 1, 2003 and the retiree has not elected a survivor benefit option, his or her retirement allowance would not be supplemented.

A retiree (or beneficiary of a retiree) who was a member of the former Judges Retirement System before September 8, 1961 would not be eligible to receive the supplement. (This group of retirees benefited from the “escalator” clause that was in effect between 1956 and 1961, which provided corresponding increases in retirees’ pension benefits in response to increases in judicial salaries.)

To be eligible for the supplemented retirement benefit, a retiree or beneficiary would have to file a waiver of any claims under *Ernst v Roberts* between January 1, 2003 and April 1, 2003. By filing such a waiver, the retiree or beneficiary would waive any past, present, or future claim asserted by the plaintiffs in the case, and also waive any claims that could arise from the facts that form the basis of that case, and agree that he or she would not take any action to question the legal effect of, amend, or rescind the waiver. The waiver would say that the person agreed to settle and compromise any claims from the case for the consideration of receiving a supplemented retirement allowance as provided in the bill. Further, the waiver would state that the person expressly agreed and understood that nothing in the waiver agreement would limit the right of the state or its

agencies to any privilege, immunity, or defense that would otherwise be available if the claims had actually been litigated. And, the waiver would state that the person agreed that if the waiver was challenged, invalidated, or otherwise found to be unenforceable, any retirement supplement granted under the bill would cease for any person for which the waiver was challenged or invalidated. Further, a person signing a waiver would have to agree not to fund, offer advice regarding, or otherwise participate in the case or any successor cases raising the same issues, and would further agree to opt out of any such class [in the class action case] and to inform the presiding judge of that opposition and desire to opt out.

Further, the bill states that nothing contained in it could be construed to create any obligation or liability of the state or the retirement system to any person who did not file a waiver agreement, nor to create any admission of liability to any person in any litigation or future litigation. And, the bill would not create any waiver of any privilege, immunity, or defense that is or would be available to the state or its agencies or employees in any litigation or future litigation.

MCL 38.2512

FISCAL IMPLICATIONS:

According to the House Fiscal Agency, the bill would create an unfunded liability of \$2.5 to \$3 million. This liability would translate into an annual cost of \$350,000 to \$375,000 per year. However, because the retirement system is significantly overfunded (nearly 135 percent funded, or \$70.6 million overfunded), no employer contributions will be required in the near future, and the additional cost will be absorbed through the surplus. (1-9-03)

BACKGROUND INFORMATION:

The case of *Ernst v Roberts* [Case No. 01-CV-73738-DT (ED-MI)] was filed in the United States District Court for the Eastern District of Michigan. The suit alleges various violations of the U.S. and Michigan Constitutions based on the both the federal and state equal protection clauses, the wasting trust doctrine, and breach of fiduciary duty. Among the claims asserted in the case are:

- Violations of plaintiffs’ rights to equal protection under the 14th amendment of the U.S. Constitution and under Article I, Section 2 of the

state constitution because, under the Judges Retirement Act, judges of the 36th District Court (in the City of Detroit) have been and are entitled to receive a larger retirement benefit than are plaintiffs, despite having contributed a smaller percentage of their compensation into the retirement plan.

-Violations of plaintiffs' rights to equal protection under the U.S. and state constitutions because the Judges Retirement Act does not provide for annual percentage increases in retirement allowances even though certain other statutes governing state and governmental employee retirement plans do provide for annual increases.

- Violations of plaintiffs' equal protection rights due to the manner in which the actuarial present value (APV) of a member's accumulated benefit obligation was calculated when members were offered the opportunity to transfer their pension assets from the defined benefit plan to a new defined contribution plan. Plaintiffs alleged that the designation of a single date for calculation of APV was "arbitrary and capricious" and resulted in "gross and unjust disparities" between similarly situated members.

- Violations of plaintiffs' equal protection rights because for those who elected to transfer to the defined contribution system, the disparities in the defined benefit formula regarding judges of the 36th District Court as compared to other judges resulted in unequal APV calculations for similarly situated members.

- Violations of the wasting trust doctrine and breach of fiduciary duty regarding employer contributions to the pension fund.

The U.S. District Court dismissed the complaint on September 30, 2002, based on the state's claim of immunity under the 11th amendment to the U.S. Constitution, which states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." The court stated that "This amendment bars suits against a state by citizens of any state. See *Hans v Louisiana*, 134 U.S. 1 (1890)."

The plaintiffs have appealed *Ernst v Roberts* to the U.S. 6th Circuit Court of Appeals. In addition, the *Ernst* plaintiffs have filed a suit raising the state claims in Ingham County Circuit Court. Further, a related state case, *Harvey v State of Michigan*, which originated in 1994, deals with many of the issues

described above with regard to alleged violations of equal protection rights of "outstate" judges as compared to judges of the 36th District Court. That case is currently pending in the Michigan Supreme Court.

ARGUMENTS:

For:

Retirees under the Judges Retirement System do not receive automatic, annual pension cost of living increases. These increases can only be provided through legislation, and the legislature has from time to time enacted such legislation. The bill would again make a one-time adjustment in pensions for those who retired between 1980 and 1992; this group has never received a "bump up". According to information provided by the Michigan Retired Judges Association, nearly 24 percent of the retirees in the Judges Retirement System receive \$1,200 or less per month. Since pensions are based on salary amounts, those who retired in the early 1980s receive far less than those retiring in recent years, as salaries have increased markedly since that time. It has been pointed out that, even with the increases provided for in the bill, the benefits of those retirees who retired before 1995 will continue to be well behind the rate of inflation. (Additionally, several retired judges testified that many retired judges do not receive health benefits, as that determination is made by local governments.) The bill would make a small step in reducing the disparity in pension benefits between older retirees and those who recently retired.

Against:

Given the state's budget situation, is it wise to enact legislation that promises to increase costs (even future costs)?

For:

The bill would offer judicial retirees and beneficiaries an increase in benefits in exchange for settling claims under the pending lawsuit known as *Ernst v Roberts*, which claims that the pension system violates equal protection rights, among other things. One aspect of the suit alleges that because retired judges do not receive cost of living adjustments (as state employees and some other state retiree groups do), that the state discriminates against judicial retirees in favor of other retirees. This assertion of the lawsuit, in particular, seems quite astonishing when one considers that the Judges' Retirement System offers significantly higher benefits than other state-administered retirement systems. Further, each system differs from one another in several ways, and

this should not be considered an ‘equal protection’ issue. Rather, it should be noted that the legislature has written laws specific to each employee group. When financial resources have been available, benefit increases have often been added to each statute, and they have been tailored to meet the needs or desires of the specific retiree groups affected.

In addition, when the statute was amended to institute a defined contribution system for new members elected as judges after March 31, 1997, members of the defined benefit system were given the option of converting their retirement assets and transferring them into the new system. Plaintiffs argue that the method of calculating the actuarial present value of these assets was ‘arbitrary and capricious’ because there was one date on which that calculation occurred, and that created ‘gross and unjust disparities’ between members whose ages or credited service time were but one day different from another member’s. However, it should be noted that all other employee groups (state employees, state police, legislators) were subjected to the same calculation method. In order to allow for efficient administration of this policy change, the legislature had to pick a date in which it would take effect; this is no different than scores of other statutes with effective dates that result in differing treatment for an affected population before the given date and after it. Virtually every change in retirement policy (or *any* policy) results in disparate treatment for one group or another. Consider ‘early retirement’ programs that create an incentive for specific groups to retire if they meet specific criteria as of a specific date. Of course, there are people who miss out on eligibility by one day. There is no practical way to avoid these disparities.

Further, how will this case be impartially considered in the state court system, when any judge asked to rule on the questions will have a conflict of interest (being a member of the retirement system in question)?

Against:

There are other claims made in the lawsuit (and related cases), including some dealing with differing treatment among judges themselves. In particular, the *Ernst* case raises issues previously raised in an earlier case, *Harvey v State of Michigan*, which addresses questions of equal protection as they pertain to retirement benefits and contribution levels of judges serving in the 36th district court as compared to certain other “outstate” judges. The claims of this case apparently date back to legislation enacted in 1980 that reorganized Wayne County and Detroit

area courts and provided for state funding of those courts’ operation, and established a timetable for eventual full state funding of all state trial courts. However, the planned phase-in of state funding for outstate trial courts never took place, at least in part due to the economic recession of the early 1980s. After litigation and various other legislative attempts to provide for state funding of trial courts, some of these funding issues have been resolved, but there remains in the retirement act essentially the same differentiating calculation of 36th district court judges’ pensions that is at the heart of the *Harvey* plaintiffs’ claims. This case is still pending before the state supreme court, and the claims – unrelated to the cost of living issue — may have merit. It is unfair to require the affected judges and retired judges to waive these unrelated claims in order to obtain the supplemented retirement benefit.

Analyst: D. Martens

■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.