RECORD OF SOCIETY OF ACTUARIES
1991 VOL. 17 NO. 4B

THE PENSION ACTUARY AND THE LAWYER

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- How do they interact?
- Who interprets what part of the law?
- Will another state try to enact what the Florida Bar proposed?
- How can we help each other?

MR. PATRICK F. FLANAGAN: The degree of interaction between actuaries and lawyers practicing in the pension area has increased significantly in recent years. On the one hand, plan sponsors may gain from this interaction, as members of the two professions bring different perspectives and different sets of skills to bear on their problems. On the other hand, there may be friction in situations where the roles of the actuary and the lawyer overlap. Our panel will discuss the various ways in which actuaries and lawyers interact, and suggest ways to minimize the friction between them.

The first speaker is Alnasir Samji, who is an actuary and principal with TPF&C in Toronto. He's going to talk briefly about the liaisons between pension actuaries and lawyers in Canada. Barry Watson is an actuary with the Wyatt Company in Washington, D.C., who will talk about his experiences in dealing with the relationships between pension actuaries and lawyers in the U.S. Steve Scudder, a lawyer and the chairman of the employee benefits practice group with Coolidge, Wall, Wolmsley and Lombard in Dayton, Ohio, will provide a different perspective and bring us up-to-date on the Florida situation.

MR. ALNASIR H. SAMJI: I'm going to talk a bit about the relationship between actuaries and lawyers in the Canadian environment. I'll do it by way of some case studies and some generalities.

A client of mine called the other day and said, "Alnasir, we're planning a work force reduction program, including an early retirement program. Is this something that you can help us with?" Well, this was innocuous sounding, but it unleashed a glut of activities, which involved the plan sponsor, the lawyer, the legislative authorities and myself, the actuary. I thought we'd play out the drama through a synopsis of events as they unfolded. And I think it'll demonstrate clearly to you the different parts the lawyer and the actuary played in getting the company's needs met in the current Canadian environment.

Act one: The actuary meets the client. The first series of meetings were between the client and the actuary, to discuss the company's work force reduction objectives, the numbers and types of employees who were likely to be involved in the reduction

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program, and the types of benefits to be offered to the employees. This was followed by an estimation of the additional pension funding requirements and the accounting costs of the company resulting from the successful implementation of the program. And this resulted in a draft, and I stress the word *draft*, design for the program.

Act two: Enter the lawyer. The design phase of the program led to a number of issues that had to be resolved. First, the early retirement program was only available to individuals who met certain age and service characteristics. The questions that we had to ask were, could this be classified as a contravention of either human rights or pension legislation? In the U.S., I gather things get really complicated. They don't get as complicated in Canada yet. But don't hold your breath, because I think something could be in the works. The second issue that we identified was that the program resulted in the permanent elimination of a significant number of jobs. Would this be classified as a partial windup of the pension plan, resulting in significantly higher benefits for affected plan members? If so, should the company declare the plan to be partially wound up, or should it wait for the pension authorities to do so? Was the company in breach of its fiduciary responsibilities if it did not declare the plan to be partially wound up? What ramifications, if any, would there be if the pension authorities, rather than the company, declared the plan partially wound up?

I know that many of you are from the U.S., so you probably don't understand the full consequence of a plan being declared partially wound up. But suffice it to say, at this stage in the game, that there would be enhanced benefit rights, meaning there would be more cost to the company. So the lawyer's analysis of the legal implications of these and many other issues encompassing human rights, pension, and employment standards legislation allowed the company to structure a program which we all felt would have a strong chance of being approved by the legislative authorities.

Act three: Submission made to the legislative authorities. Based on the program's structure, pension documentation was drafted by the actuary, and reviewed and modified by the lawyer and the company. Then, with representation from all parties, a submission was made to the legislative authorities by way of a meeting for approval in principle of the programs. At this stage, the actuary provided the necessary financial and administrative information required by the authorities. The presence of the lawyer ensured that any objections raised by the authorities were justifiable within the prevailing legislation. I'm not sure if many of you have experienced this, but I frequently noticed that lawyers have a way of turning black and white into various shades of grey. And they do have the other knack as well. They can see things that we think are really grey and they come back and say, "Well, I don't see it any other way but this. And that's pretty good." I assume that they can do this because their training and their background in case law history allows them this facility. I don't think that's a facility that many of us as actuaries share.

The outcome of the meeting was that the program was approved by the legislative authorities with minimal fuss, as all the legal and actuarial ramifications had been clearly thought through. Fortunately, the program also passed muster with the employees and resulted in its successful implementation.

This is an example of one way in which lawyers and actuaries combine forces to fill their combined obligations, i.e., that of meeting the client's needs. As many of you are probably aware, the last decade has seen a proliferation in pension legislation and pension jurisprudence in Canada. This has resulted in a substantial increase in the number of lawyers who have made Canadian pension law their expertise. I think it would be true to say that as little as 10 years ago, not many of the large law firms had pension lawyers in their practices. And now most of them boast a thriving pension practice. At the same time, the lot of the Canadian pension actuary has not suffered, at least in the short term. Most of us who have made pensions our lives, have found ourselves with more than enough to keep us busy, 24 hours a day! As expected, with this proliferation in legislation, the pension actuary and the lawyer have found their paths crossing in more than one instance. And it could be interesting to go through a couple more case studies to see where this occurs.

One of the most frequent scenarios in which the lawyer and the actuary need to combine forces in Canada is in the matter of surplus ownership and the ability to use funding excesses for reduction in contributions. Prevailing legislation in many Canadian pension jurisdictions calls for the plan to specifically provide for ownership of surplus. To the extent that this ownership is not clearly identified in the plan, the company has to amend the plan document to provide for it. This has resulted in the actuaries and lawyers combining forces to look through all generations of plan documents, to see the pertinent provisions that have existed since the plan was first effective. It isn't sufficient to just look at the current document, and say, oh yeah, this gives the surplus ownership to the employer or the employees. You almost have to track back to day one and see if there was anything there at all that might have alluded to the fact that the money belonged to the employees. You also have to track back to see if there is any validity in any pension plan amendments that might have been made through those days.

So an amendment might have been passed 25 years ago, but if the appropriate things were not done at that time, then it may be rendered invalid. In addition, future changes to the plan have to be constructed so that the appropriate parties are notified. If you're going to change the plan in the future for surplus ownership, you have to go through all the disclosure requirements, and the employees have the option to object before the plan changes are effected. In some cases, the actuary will be required to track back a number of years to demonstrate the existence or lack thereof, of plan surplus at the time an amendment was made. If more than one plan has been involved or if there have been sales, mergers or annuity purchases, then the situation can be even more complex as an attribution of funds may be required. The part the lawyer can play in this analysis is crucial to ensure that the judgment call as made by the actuary will hold water in court, if it comes to that.

One recent example of jurisprudence in the surplus ownership/contribution holiday area was the McMaster University case, in which Judge Donna Haley of the Ontario Court of Justice concluded that the university had the right to take a contribution holiday, without the consent of the faculty association. This was despite the existence of an agreement with the association dealing with salaries and benefits.

Another recent example is the Cluett Peabody case, in which the Pension Commission of Ontario ruled that the Ontario Superintendent of Pensions had the jurisdiction

to order Cluett Peabody to distribute surplus to plan members and, in effect, to decide on the question of surplus ownership. The Commission also declared that Cluett Peabody did not have the legal grounds for amending the pension plan in its favor – 17 years after the plan was first initiated – at least not in respect of surplus existing prior to the amendment.

Some of these issues would not have arisen a decade ago, or if there had been any questions asked, these would generally have been resolved among the pension authorities, the plan sponsor and the actuary. The contemporary stage is such that the pension lawyer and, where a court case is involved, the litigation experts are very much front and center in any surplus ownership and contribution holiday matters.

Another area that I thought we might look at is the sale/purchase of companies. A recent example of this is one which I'm sure many of you are familiar with, where the wording in the sale/purchase agreement, at least in the initial agreement that was struck up, was very vague. It read something like "the vendor's plan would be fully funded." In the Canadian context, it isn't clear whether the plan would be fully funded on the going-concern funding basis, or the accounting basis. Furthermore, as in the provincial pension jurisdiction concerned, the financial condition of the plan, on the plan termination basis, also has an effect on the ongoing funding requirements of the plan, so it could be argued that full funding could also be measured on the plan termination basis. As luck would have it, the differences among the three measurement bases were very significant.

In this case, the actuary's role was substantially one of education to start with, that is to try to explain to the parties involved, the lawyers, the vendor and the purchaser, the differences in the measurement basis. When you see differences of millions of dollars, their eyes start rolling and they say, "Well give me an answer, you're an actuary, aren't you?" And the other aspect that they needed to know from an education standpoint was, "Which bases were common in the Canadian environment for such an agreement and what were the financial consequences of settling on a particular basis?" The lawyer's role was one of interpreting the sale/purchase agreement or concur with its vagueness. And to negotiate a settlement so that the deal could proceed. You can appreciate, especially if you have participated in such negotiations, these are not the most comfortable of circumstances for any party to find itself in. And negotiations were very heated. However, the financial know-how of the actuary and the negotiation and legal skills of the lawyer were both critical to ensure that the deal was made; that both parties to the agreement were fully aware of the future consequences of the deal; that the deal was legally sound and clean (in other words, no wool was being pulled over anyone's eyes); and finally, that the deal was appropriately documented so that no ambiguity could arise in the future.

These are some of the glamour areas in which we, as actuaries and pension lawyers, play our parts. Events like the thrust and parry of sales negotiations and the moments of anxiety when testifying on issues of surplus ownership or funding methodology are far removed from the day to day mundane tasks that both professions have to perform in the ongoing maintenance of pension plans. It may be of interest to review some of these.

Let's start with plan establishment. Jointly, the actuary and employer will generally deal with design and implementation issues such as, which employee groups are eligible for membership, what are the levels of pension benefits, what is the nature and level of ancillary benefits, what are the commencement dates of these benefits and how do we communicate to employees? The lawyer's input is required to ensure that, for instance, (1) the employee groups or classes of employees eligible for membership are defined sufficiently tightly, so that no other groups can lay claim to membership at a later date; (2) the classes of employment are indeed acceptable delineations; (3) the benefits follow the principles of gradual and uniform accrual which is something that you have to have in Ontario, at least; and (4) the company does not discriminate within a class of employees, for example, between the benefits offered to part-time and full-time employees.

We then get to plan documentation and often, in Canada, the actuary will draft the plan document in a manner which permits its use by the plan administrator as a working document, and which reflects accurately the nature of the pension promise, and the actuary will initiate the passage of amendments needed for any changes that are being made to the plan. The actuary will also review any trust documents prepared by the trustee for the plan's funds. The lawyer's expertise is essential. He has to confirm that the plan sponsor's obligations are not subject to unplanned increases due to loose wording, and to confirm that the pension promise is adequately documented. The issue of surplus ownership is one where we've all been burned in the last few years. The lawyer must also make sure that all the legal requirements are met, that amendments are valid, that the appropriate corporate body has passed the amendment and that the appropriate disclosures have been made. The courts and lawyers have shown particular concern on the aspect of lack of disclosure rendering an amendment invalid. This is so particularly where the amendment is an adverse amendment, potentially reducing benefits for plan members.

The lawyer and the actuary work hand in hand in Canada on the matter of plan governance, that is, who administers the plan? Is it the company's board of directors or some other party? Is the board of directors, if it's named administrator, going to make all the decisions or is it going to delegate its responsibilities to a pension committee? And what is the extent of the responsibilities that are delegated? What are the rules and regulations under which the company is going to operate? We actuaries, I think, can help in this process by identifying the administrative functions that need to be addressed and establishing the various administrative procedures that would enable the administrator to carry out his duties. As actuaries we will end up working with these people, so we might as well be there at the start. The lawyer will have to ensure that the appointment of the administrator or any pension committee is made within the company's bylaws, charter or whatever the necessary rules are and that the appropriate documentation is passed.

Given the actuary's understanding of plan liabilities and funding, investment issues have generally been the responsibility of the actuary who works with the plan sponsor to determine how much to fund and when, as well as assisting in developing asset mix and investment policies. Much of this is done through risk/return analysis. The lawyer's task in these areas is, however, becoming much more important in terms of advising on issues such as, is the plan administrator acting in a prudent manner in his funding and investment policies? In particular, if the sponsor is taking contribution

holidays, are these valid? A lot of the onus in Canada, at least in Ontario, seems to switch from the legislative authorities sitting there telling you this is what you need to do, and monitoring what you're doing, to the administrator who is now supposed to be prudent and be dealing with the plan in an appropriate manner. Ignorance is no longer bliss. Is the investment policy in compliance with legislative guidelines? What course of action should be taken for noncompliance of the policy by, let's say, the fund manager? Who is responsible for a shortfall in the fund? Or, for instance, in a defined-contribution plan, who is responsible for the collapse of fund performance due to the insolvency of a funding agency? And how does one go about minimizing this risk and yet retain a pension plan?

Finally, returning to a topic I started with, in the case of a plan windup, while the actuary's expertise will provide the financial impact of the plan windup, and will assist the sponsor with government negotiations, preparing disclosure notices and so on, the lawyer's input is necessary to resolve issues such as who has the authority to wind up the plan? Is the plan wound up in part or in full? Who should windup notices be sent to? What benefits are payable? Who shares in the surplus, and what constitutes an equitable distribution of surplus? What benefits are reducible if there is a deficit?

I have skimmed through some of the many issues that lead to the actuaries and lawyers working as a team: each profession lending his or her own professional skills to arrive at an appropriate solution for the client. Many other issues exist such as marriage breakdown, beneficiary determination and so on, that require the two professions to combine forces, but these are best left to another day. I'm sure that many of you who have joined us from the U.S. will recognize these Canadian issues as being similar to those you face in your day to day activities. Perhaps you may take some comfort in the knowledge that you are not the only ones who are subjected to the rigors of being actuaries, while at the same time being pseudo lawyers, accountants and human relations experts.

MR. CHARLES BARRY H. WATSON: It's a very interesting subject that we have here. I have never personally viewed actuaries and attorneys or lawyers as being in direct conflict. Unlike some other professions that we have relationships with, I think that we work together pretty well.

I'm sure that all of you listening to Alnasir recognized, in what he said, much of what you have seen in the U.S. in terms of how you work with attorneys. There are some differences, and one of the major differences arises because of ERISA. ERISA does indeed change the rules of the ballgame, or at least it potentially changes the rules of the ballgame. The actuary, being able to represent the interests of the pension plan before the Internal Revenue Service, within a fairly broad range of responsibilities can, in theory (and I say in theory because in practice, I don't think it works out too much differently), do somewhat more than is the situation as described in Canada. It may be because of the actuary as pension representative; it may also be because of the fact that Canada is a country that is smaller in many respects, not in terms of geographic area, but smaller in terms of the business and economic community, so that when you speak about the law firms of Canada, there tend to be fewer law firms that deal with substantial clients, and these law firms may indeed have benefit experts on their staff. It has always been my experience in the U.S., granted that

goes back a little bit, that many of the law firms that one dealt with, that were the law firms that one's client used for all purposes, did not have pension experts on their staffs. And I was very interested to learn in talking to Steve Scudder that he indicated that the situation, although somewhat changed, is really not that much different from how I remember it. There are still many law firms, particularly if you're dealing with clients outside the major financial centers, who do not have people who are experts in pension benefits included among the partners.

Now, I have a fairly detailed outline here and I'm not going to go through it in depth. I am going to comment on it in relationship to what was said about Canada, and also in terms of some other aspects that I think are significant. Both the actuary and the attorney do have important roles to play at all times during the life and death of a pension plan.

The role of the attorney, as I see it, tends to be concentrated more upon the tax considerations and upon the question of how case law affects what would be proposed for the various provisions of the plan. The attorney, in short, needs to know what provisions are legally acceptable. On the other hand, it is fairly rare, I think, to find an attorney who is directly concerned with what we would consider the benefit delivery aspects of a pension plan. Some of them do have some experience in this area, but surely we are the ones who have the knowledge of what the employer's competitors are going to be providing in the area of pension benefits. Surely we have had more experience in terms of diverse types of benefit plans to solve diverse types of situations. And basically we are the ones who propose the solutions, or what we hope will be solutions, to the client's benefit delivery problems.

Now that doesn't prove that the solutions are all completely legal, as we propose them, and for that reason, we certainly need to have cooperation with attorneys. But on the other hand, we've had the experience of seeing whether these things have flown in the past, and if they flew once, it's very likely they'll at least get off the ground and flap along for a while.

The attorney also, I think, at the beginning of the plan, is very much concerned with the trusteeship aspects and administrative aspects. As was pointed out, there were a lot of concerns about how a plan will be administered, who will be responsible to do this and that and to make sure that the plan language is understandable, interpretable, and will stand the test of time. These are not matters on which we have had any great experience. At least, certainly I haven't, and these are the types of matters where I think you would want to call upon the attorney in all respects.

When one looks at the question of plan amendment and finally plan termination, ERISA again does provide a certain additional responsibility. I say responsibility because after all, if one is the enrolled actuary for the plan, one has responsibilities to the plan participants, and that of course, puts one in a somewhat ambiguous situation at times. I know that we've talked about this and it's been going on for a long time, but I think there are still grey areas, which even attorneys haven't been able to resolve to black and white, in terms of how we, as actuaries, bear our responsibilities to the participants, and at the same time, serve in our function as advisors to the employer. But when you look at, in particular, plan amendments and terminations, here the actuary does have considerable detailed knowledge of what needs to be

done in these areas, to avoid discrimination, to handle the plan windup matters, the various questions such as who has the rights to the plan assets and in which particular order. I think in the U.S., we tend to believe that we do have, I won't say equally as good, but certainly quite a good understanding to the extent that understanding is possible, of the IRS regulations, relating to these matters. Therefore, it is not as common in the U.S. to hand over to the attorney the complete responsibility for that.

Acquisitions and mergers are another area in which the actuary is very heavily and very directly involved. Acquisitions and mergers always involve liabilities with respect to pension plans. Someone must evaluate these liabilities and beyond that, someone must help to do what is necessary to coordinate or merge the benefit programs of the acquired or merging companies.

On the question of the ongoing day-to-day existence of the plan, I found it's fairly rare that lawyers will be directly involved at those times. The actuary is directly involved in determining the plan contributions, or the expenses under the financial accounting provisions, the calculation of benefits, the determination of options, what have you. Now granted, the option provisions and the various alternatives that exist have been legally worked out within the plan language at the time of establishment or amendment, but in terms of the day to day usage of them, it is the actuary who has the direct responsibility.

Now, this is looking at plans as a generality. The situation can and does differ depending upon the particular circumstances you're looking at. The type of plan can have an impact. Under a defined contribution plan, there is typically less work for actuaries at all times, whether it's at initiation, amendment, termination or ongoing administration. On the other hand, nonqualified plans can give greater focus to the actuary's skills. Granted, there are very significant tax consequences that differ from those of a qualified plan. But here the fundamental aspect can often be the benefit planning, which is where the actuary draws on his strength and his expertise. The type of employer can have a bearing upon it. Smaller companies may or may not have as good access to attorneys who have skill in the area of benefit programs. Therefore, if they do not have that access, they may lean more upon actuaries to do things that attorneys might do for larger firms.

These types of issues where the actuary does a considerable amount in what one might describe as the frontier area, between actuarial work and legal work, can give rise to questions about the improper practice of law. It has been my experience that the best way to handle this is to make it clear at all times to the client, that one is not functioning as an attorney and that as an actuary, one cannot and is not rendering any sort of legal opinion. At the very best the actuary is making suggestions or recommendations, as they relate to matters that are more distant from the law. In terms of language, and yes, we do indeed provide sample language, these are only drafts that must be reviewed by the employer's legal counsel. Now, whether the drafts are actually reviewed by the legal counsel or not is something that the client alone knows. Sometimes when you receive back a document and not one comma has been changed, and not even the obvious misprint you inserted on page two to see if someone read it has been detected, one does wonder, whether it's even been

opened. Perhaps one should put something like a leaf between pages three and four and see if it's fallen out that night. That might provide some indication.

This is unfortunate because the attorney should review the draft. It's important for the client, and it's important for the actuary. I mean why do we want to take on the responsibility for having given the final say-so to this language? I've never been able to understand why accountants think that they are in seventh heaven whenever they can deny to anyone else any responsibility for what appears in accounting statements. I'm much happier if someone else would say, "Yes, I've looked at this, and I think that this is wonderful." So saying that these are drafts and getting the attorneys approval are extremely important.

I will say that I do think that actuaries and attorneys can work together. We have lawyers who are perhaps not as familiar as they could be with what actuaries can do for them. Here I'm thinking particularly of the type of lawsuits that involve the measurement of liabilities that result from damages, from accidents, what have you. They tend to look oddly enough to economists, to measure what these economic damages are, instead of actuaries. And I think that the closer that actuaries and attorneys can work together, there is the opportunity for us to demonstrate that we do have skills that will serve the attorneys very well in representing their clients. This is not just in terms of individual lawsuits. It is also something that arises increasingly in regard to pension plans.

Now that we are having pensions considered as part of the assets of a marital estate, which is subject to division in the event of divorce or legal separation, there is the need for actuaries to provide measurements of the value of the pension benefits that have been accrued. There also is the question of how the value of those benefits is affected by occurrences of the future.

Qualified Domestic Relation Orders (QDROs) have had an enormous impact upon pension benefits in divorce. And the QDROs do, to a significant degree, take precedence over the plan provisions. QDROs, unfortunately, are often drafted by attorneys without a full recognition of this impact. Without recognizing how the vagaries of vesting, the taking of early retirement, the election of options, can all have an impact upon the QDROs. In some cases, you have QDROs that are impossible to interpret, because of the way they've been drafted. Not legally, perhaps, but they're impossible to interpret within the context of the plan. Here is a case where actuarial assistance is clearly called for. And I think that this is another area, an important area where actuaries and lawyers can work together.

MR. STEVEN C. SCUDDER: I want to follow up before I get into my specific remarks on a couple of things that Barry said. First, I would like to start off by indicating that I have never viewed the relationship between lawyers and actuaries as adversarial either. Nor do I think that we're in competition in any meaningful sense. I also believe that he was very much on point when he indicated that there are a lot of law firms out there who have no real expertise in the pension area, which leaves businesses in kind of a quandary, regardless of what we all might conclude or not conclude about what constitutes the practice of law and what doesn't. Businesses have a need for pension-related services and, frequently, do not have an attorney in a local area with the capacity to provide those services. I think that has been a

problem for a long time and it continues to be a problem. This is more so than I would really think that it should be, given the fact that ERISA has been around as long as it has. The area of QDROs that Barry mentioned is a very good example of that. I saw one about two weeks ago that was drafted by a general practitioner lawyer, and Barry's deference notwithstanding, I had no idea what it meant. It was impossible to tell from the order whether it related to a defined benefit plan or a defined contribution plan. So I think that is another area where there are a lot of, particularly, general practitioners out there who need help, and actuaries, among others, are the logical people to help prop them up.

I will try to do something that is counterintuitive for lawyers. I'll try to be brief, so that we have some time to take some questions because I am very interested in your thoughts on this topic. I'd like to focus in on what happened with the Florida Bar recently and see what we can learn from it and what we don't know. As you are all probably aware, virtually every state in the U.S. regulates the practice of law. The regulations are not consistent, however. Some are contained in statutes, some are contained in court rules, and in some cases, you have to go to old court cases. So to the extent that we're talking about unauthorized practice issues, we potentially have 50 different answers to the question. The purpose of the regulation of the practice of law, historically, was to protect the public. If individuals were rendering advice with respect to the application of laws to specific circumstances, there was a public interest in making sure that the person expressing an opinion had some background in the law, and also had been subject to some sort of character and fitness evaluation. Hard as it may seem to believe, lawyers are indeed subject to character and fitness evaluations.

One of the problems that's developed, however, is that these rules are rather old and sometimes very difficult to apply in a modern context. The pension area, I think, is a perfect example of that. A good illustration of the difficulty, I think, is the Florida scenario.

It's important to understand procedurally what happened there, so that we can understand what the scope of the ultimate decision is, because as I'll indicate later, I think there are a lot of questions that are left unanswered. What essentially happened is that the standing committee of the Florida Bar Association was asked to render an advisory opinion with respect to whether or not drafting a pension plan, drafting an amendment to a pension plan or giving an individual advice about the design of a pension plan, could be done by a nonlawyer. In response to that, the standing committee prepared a lengthy recommended opinion for the Supreme Court. That opinion and what was ultimately entered by the Supreme Court are very different. But I think it's useful to look over the arguments and the specific points that were raised by each side to put in better perspective what some of the issues really are from a legal and practical standpoint.

The situation in Florida did not, of course, only involve lawyers and actuaries. Certified public accountants, bankers, insurance brokers, benefit consultants of all varieties were all sort of lumped together in many of the arguments as "nonlawyers" who are participating in the process. I think that, as a practical matter, when you look at some of these issues, and I'll get into the specifics, certain elements of that group need to be separated in terms of the analysis. What may or may not be

permissible for an actuary may be completely impermissible for an insurance broker. Some of the arguments raised by the nonlawyer contingent, I find very interesting. One that remains largely unresolved is the preemption question.

There were two different arguments raised. One was essentially raised by actuaries and accountants. They argue, "The legislative history and indeed, certain portions of ERISA itself, require our participation in the process, that ERISA has completely occupied the field, that any state law's attempt to regulate our activities in the pension area has been preempted and therefore, Florida Supreme Court, it is beyond your jurisdiction to enter the proposed order." I would call that an express preemption argument, because it related to particular provisions and particular regulations in ERISA. A more general preemption argument was also raised on behalf of all of the nonlawyers, and it essentially went along these lines: "ERISA has occupied the entire pension field. Even though it has been silent with respect to the participation of other types of nonlawyers, it nonetheless preempts the entire field, so Judge, you cannot regulate us."

The second argument that was raised, and that I found very interesting, was an antitrust argument. That argument can be summarized very briefly as, "The lawyers are trying to monopolize the pension area. The Sherman Antitrust Act precludes that. Judge, you can't enter this order because it violates the antitrust laws."

Perhaps the most fascinating argument, at least from an intellectual if not technically legal standpoint, was the First Amendment argument. Certain members of the nonlawyer contingent said that practice in the pension area was protected commercial speech under the First Amendment, and could therefore not be regulated.

The final argument, which I think, in many ways, presents some of the most interesting practical issues, was that it really is not in the public interest to enter the order. One key element of that argument is something we've already alluded to. There are certain segments of the business community that simply do not have access to adequate legal assistance in pensions, and as a matter of public policy, it seems foolish to deny those segments access to otherwise competent professionals.

With that in mind, I think it might make some sense to look at how the Florida Bar approached this and what it thought actuaries could and could not do. As a broad proposition, the standing committee of the Bar focused on two areas as justifying the need for the entry of the order. The first was that, with respect to certain nonlawyer providers, there was an inherent conflict of interest. The easy example is the stockbrokers. There are a number of brokerage firms that have prototype documents for adoption by clients, and there are a number of brokers out there who figured out a long time ago that why should they chase Steve Scudder and a bunch of other individuals for $10,000 accounts, when they can chase pension plans and get a small one and have a $250,000 account? Consequently, brokers and certain members of the insurance industry, for example, have been very aggressively marketing their pension-related services, according to the Bar, and I think this is consistent with economic reality. There's a conflict of interest there. The stockbroker doesn't really care if you have a pension plan. He doesn't care why he's managing your $250,000 or $500,000 or $10 million. All he really cares about is that he's getting the commission on the trades. The fact that there was, in the view of the Bar, that inherent

conflict of interest and the fact that members of those two professions, in particular, do not universally have the same kind of technical training and expertise as actuaries might have created some concern in the minds of the Bar committee. The other thing that the Bar focused on is the ability of nonlawyers to assess the impact of pension-related decisions on other business matters. The specific item that it focused on in its discussion is estate planning.

With that in mind, the Florida Bar, after a rather lengthy discussion, concluded several activities were permissible: "Giving actuarial, accounting, economic, insurance or investment advice relating to the designing, drafting, or adoption of a pension plan, without rendering legal advice." Well, that to me is about as helpful as the provision in ERISA that says, "You shall diversify the investments of the plan unless it's clearly prudent not to."

The next thing that the Bar concluded was that the several more activities were okay:

- General discussions about types of retirement plans, coverage, contributions, funding and other factors of a strictly economic and financial nature
- General discussions with another person regarding general principles of law, as opposed to principles of law applied to a specific set of facts
- Promoting, marketing and selling retirement plans
- Gathering client information relating to a retirement plan
- Calculating anticipated costs and liabilities
- Preparation of 5500s and Summary Annual Reports (SARs)
- Drafting administrative forms -- distribution forms, beneficiary designations, etc.
- Allocation of contributions and trust earnings
- Supplying form kits which have not been completed or filled out

That's where the Bar stopped and concluded that the following activities would not be permissible and would constitute the unauthorized practice of law:

- Supplying legal forms coupled with advice as to how the forms should be filled out, or their impact in the context of specific facts or circumstances
- Amending or changing documents to meet specific needs
- Representing that a particular plan is appropriate in a specific situation
- Advising that a plan qualifies for benefits under the Internal Revenue Code, ERISA or a court decision
- Interpreting plan provisions
- Preparing plan documents, including the completion of adoption agreements from master or prototype plans
- Preparing summary plan descriptions
- Preparing specimen documents by a nonlawyer, even including a cover sheet that said, "This is only a specimen. I'm not a lawyer. You should have this looked at by your lawyer." The Florida Bar concluded that even that would amount to the unauthorized practice of law.

All of that, and the Bar's essential reasons supporting those conclusions, are contained in the proposed advisory opinion.

I'd like to shift now to what the Supreme Court actually did. When I first became aware that the Supreme Court had rendered an opinion, I looked at the same advance sheets you probably did and reached the conclusion that the Supreme Court of Florida had, in fact, categorically rejected the position taken by the Bar Association and affirmatively authorized certain conduct. That isn't really what happened. If you look at the opinion, there are really only about three things that are clear. One is that the Florida Supreme Court did not believe that there was a need to enter the proposed advisory opinion at this time. What it ultimately concluded, in a nutshell, was "We're not saying anything other than we don't think you need this now for the protection of the public." Second, the Supreme Court of Florida clearly rejected the First Amendment and antitrust arguments, and said that neither of those bodies of law would have precluded the justices from entering the order, had they felt disposed to do so. The third thing that I think you can learn from that opinion is that the Supreme Court of Florida has a very expansive view of the application of preemption in this context. It is clear, I think, from reading the opinion and talking to some of the people who were involved, that the Court had some concern about its ability to regulate the activity of actuaries and certified public accountants, without violating the ERISA preemption principle. Having said that, while the concern is apparent, there is no definitive decision on that point. Again, the matter did not come before the Court in a specific case. No individual's or institution's conduct was attacked. It was, instead, a general public policy question, if you will, that was before the Court.

Because the Court did not specifically look at all of the things that the Bar Association had itemized in its proposed advisory opinion and say, "Yes, that is the unauthorized practice of law. No, that is not the unauthorized practice of law," I don't think we know for certain what its views are with respect to those specific line items. So I guess I would caution you not to construe what happened too broadly.

There's another matter that I wanted to mention to you. That is a very recent case that touches upon the preemption issue. Again, just to refresh your recollection, there were two separate preemption arguments. One was that, as applied to actuaries and accountants, there is no ability for states to regulate, and the other was that, as applied to anybody practicing in the pension area, there is no ability for the states to directly regulate. Well, consider what happened in Maryland recently. The defendant was the Stuart Hack Company, an insurance brokerage/benefit consulting firm. The individual in question was not an actuary, nor based on my reading of the opinion, was there an actuary on his staff. But a benefit consultant was sued by a client as a result of some erroneous advice in connection with the administration of a defined contribution plan, and specifically, the permissibility of some loans. The issue that ultimately ended up before the Maryland Court was whether the malpractice action that was filed against the Stuart Hack Company was preempted by ERISA. The Court went through a fairly lengthy analysis, and concluded that it wasn't. Well that is, to some extent, the tip of the iceberg, I think, on the preemption issue. The Court, I think, fairly correctly concluded that, if you limited the regulation of the field to ERISA, then persons in the position of the plaintiff would really not have an effective cause of action against a nonfiduciary. If you couldn't categorize the defendant as a fiduciary and ERISA occupied the whole field, it would be very difficult to have a remedy in that situation, and I think the Court very clearly didn't want to leave this point out in the cold, because the advice that had been given was clearly erroneous. The citation to this case by the way, if anybody is dying to look at it, is 1991 Lexsis,

M.D. 160. It was decided by the Maryland Court of Appeals on September 17, 1991.

I guess that case provides a good lead-in to what I think are some practical suggestions and considerations in looking at the whole unauthorized practice issue and the way that you work with lawyers. First of all, the disclaimer language that Barry alluded to earlier, has, I think, been the normal way of doing business for quite some time, and nothing that the Florida Supreme Court or any other Court has done changes that. I think that language is not only appropriate, but also necessary in virtually every state, and I think that had the situation been put before the Florida Supreme Court in a specific context, that given the right facts, the failure to provide that disclaimer might have been dispositive. So I think disclaimer language is something that's very important, and you want to keep doing it and be very careful about it. And to the extent that you're doing things other than providing documents and you have any fear about whether you are stepping over the line, I think the oral disclaimer, if you will, that Barry alluded to, is equally important.

I will shift to a more practical context, and I think this is likewise a follow-up on something that Barry said. Regardless of what you or I or anyone else thinks about what is or isn't the unauthorized practice of law, I think there's a practical reason to get your lawyer involved. That is the same as the one that Barry mentioned. It's a liability shield. You have someone else who, from a professional malpractice standpoint, is passing upon what you're doing. Assuming for the sake of argument that the preparation of specimen documents by a nonlawyer is permissible, using a disclaimer and getting a lawyer to pass on the document shifts the bulk of any professional liability to the lawyer, for what is normally not a tremendous economic cost. The bulk of the time usually is in the document preparation, rather than review, and whether or not you agree with what the Florida Bar said about unauthorized practice, I think you ought to consider whether it makes sense purely from a professional liability standpoint to put one more arrow in your quiver, if you will.

I think that argument is particularly important in light of some of the implied causes of action that some of the appellate courts have recently found under ERISA. There was a feeling for a long time that, if you wanted to sue somebody under ERISA, you could sue a plan, you could sue or a participant could sue a trustee, but if you were going to sue somebody basically the individual had to have standing under ERISA, and proper defendants under ERISA were generally limited to fiduciaries and certain other specific entities. There are a number of cases that have come down. *Brock* vs. *Hendershot* is one in the Sixth Circuit. That basically says that ERISA provides an implied cause of action against nonfiduciaries who materially participate in a fiduciary breach. Well, the U.S. is clearly a litigious society and litigation is expanding everywhere. I think that's one example of the expansion in the pension area that could drag accountants, lawyers, actuaries, and insurance brokers into fiduciary litigation in situations where that was thought not to be possible, at least at one time. I think that's another example of why there might be some value in that liability shield.

I want to quote one sentence from the Florida Bar opinion, which I think really sums the whole thing up. A concluding sentence in that opinion is: "The general consensus is that the client is best served if the attorney and the nonlawyer work together

to formulate, implement, qualify and maintain a pension plan which suits the employer's needs."

MR. ERNEST M. THOMPSON: I think the points are well-taken. Recently a number of our clients have been restructuring or downsizing or whatever you call getting rid of employees, and with all the new Age Discrimination in Employment Act (ADEA) issues that are involved, we've got our job to do just trying to get through the IRS regulations on this thing. So I would highly recommend to people to get the lawyer involved, because where you're going to have the legal issues and the lawsuits that will come along generally from these employees who are probably upset, the lawyers are very helpful.

MR. SCUDDER: I certainly couldn't agree more with that to the extent that you believe that your knowledge, in effect, only covers the surface, and you want more knowledge. You should go and get advice, and this is an area that is so quick moving that you do need it.

MR. ARNOLD F. SHAPIRO: Barry, you mentioned that you could provide a plan document or a trust agreement to a plan and then it comes back and you see that one of the "i's" that should have been dotted wasn't dotted, so you wonder, did the client really look at it? What's the relevance of a signed statement by the sponsor that this has been passed by an attorney?

MR. WATSON: I think that's certainly a good thing to get. You may, in certain circumstances have some reason to question the accuracy of it, and I don't think that it's necessarily going to be absolutely dispositive in a given dispute, but it certainly is awfully strong evidence and is a very sound procedure. You have documented in that instance that you've made the recommendation, and that it is your understanding that the thing has been passed upon by a lawyer. It certainly, under I guess the common construction of what constitutes unauthorized practice, puts you in a very strong position to defend any allegation of that type. I think it's a very good idea.

MR. JAMES L. CLARE: Does it make any difference if the lawyer in that instance is on the corporate staff of the client or if that lawyer is in a law firm?

MR. SCUDDER: Probably not. Under some circumstances, I suppose you might look at a situation where, for example, I'm the corporate general counsel and you happen to know me, and happen to know that I don't know a pension plan from a hole in the ground. When your client comes back to you and says, "Yeah, I had Scudder look at this," you might think, "Wow, I should have had my daughter read it, it would have been cheaper." It's theoretically possible, I suppose, that someone could later say, "You told us to have it reviewed, but you knew that it really hadn't been and you didn't meaningfully pursue that." I wouldn't get too worried about that. I guess when you really cut through all the nonsense, you can lead a horse to water, but you can't make it drink. You can make the recommendations just as I do on a daily basis to clients, to do things that I believe are appropriate, and some small percentage of the time they actually do that. Often they don't, and I think that there is no way that you can control the conduct of a third party. I have heard stories, and I think we all have, of situations where people will hand somebody a specimen document with a disclaimer on it and kind of wink at them and say, "You know you have to have this

reviewed by a lawyer if you're foolish enough to spend the money. I know what I'm doing but I'm obligated to tell you this" and essentially attempt to either directly or indirectly discourage someone from seeking counsel. There are some problems with that. There are some state consumer protection laws that specifically make dissuading people from seeking legal advice actionable, so in that extreme case there might be a problem. But other than that, I think you've done all you can do.

MR. EDWIN C. HUSTEAD: I guess, along those lines, what the Florida Bar was trying to do in addition was to exclude the practice by an attorney-employee of the nonlawyer company. Now if the consulting firm, say, has a lawyer, licensed to do business in that state, what are the implications and should he be doing that role?

MR. SCUDDER: Oddly enough, if you look at the practice of law as regulated, the fact that person has a law degree is not relevant. You are either a law firm engaged in the private practice of law, and therefore licensed in a state to represent people, or you're not. And even if you are a licensed attorney, and you are employed by something other than a law firm, you are for the purpose of the unauthorized practice analysis, a nonlawyer. It's a good question, and obviously a lot of the actuarial consulting firms have some very capable in-house lawyers. But they are ultimately, in the eyes of the regulators at least, nonlawyers for this purpose.

MR. WATSON: That last point that Steve made brings to mind one thing that we do need to watch out for. Even though attorneys whom our firms employ are, indeed, in that situation, they may not be as appreciative of the limitations under which they're operating as we would be. I think that actuaries are inclined to say, "We aren't attorneys and you can't take this as a legal opinion," but the disclaimers may not be used with quite the same frequency by attorneys who work for our firms. I think this is something that needs to be watched to make sure that everyone is on the same bandwagon.

MR. FLANAGAN: Is it likely that the same issue that arose in Florida is going to reappear in other jurisdictions from time to time?

MR. SCUDDER: I'd like to get Barry's reaction to this as well, because in a discussion before the meeting, he indicated some knowledge of a situation in North Carolina with which I am unfamiliar. But as a general matter, I think it is likely that the Florida issue will come up again. My guess is, it's going to come up in a different context. There are a number of situations in which private individuals may be damaged by the negligence or perceived negligence or incompetence of a benefit consultant of any stripe. And what I see happening in terms of the resolution of some of these issues are cases brought by individual plaintiffs, like in the Maryland case that I referred you to, in which the plaintiff alleges that it has received a negligent service from a benefit consultant and in which the consultant attempts to defend himself or herself, using a preemption argument or something like that. If you look at that Maryland case, while the words "unauthorized practice of law" were not uttered, the word "malpractice" was used repeatedly, and the text of the case makes it clear that, in the eyes of the judge, at least in my opinion, what was going on certainly could have constituted unauthorized practice, since the consultant in question apparently acknowledged giving tax advice and that sort of thing. Looking at it from a practical standpoint, whether you are defending yourself from an unauthorized

practice accusation or some other professional malpractice accusation, it is probably a distinction without a difference. Granted, in some cases, unauthorized practice is a misdemeanor as opposed to a purely civil wrong. I think the practical issues are going to come up again. Look, for example, at the small plan audit program and some of the adverse results that have occurred there. I think that's one area where it might come up in the context of an actuary. Would you like to comment on your knowledge of what's going on in North Carolina?

MR. WATSON: I have almost no knowledge of what's going on in North Carolina. I don't think anyone knows what's going on in North Carolina. What I do know is that, when I was talking to the legal counsel at the Academy, he said that there was some talk that the Bar Association in North Carolina was looking into doing a similar sort of thing regardless of what had happened in Florida. This comes up periodically. I can recall 25 years ago, down in Texas, there were problems with the lawyers saying that actuaries were doing unauthorized practice of law. I think at that time it arose because of certain interesting prototype plans that had been designed. This sort of problem might not arise today with the requirements of ERISA, etc., but it's an issue that comes up. And I'm sure it'll come up again.

FROM THE FLOOR: I was surprised by the scope of the Florida Bar's position. It seems to be reaching pretty far. In my experience, most professionals, whether they are actuaries and other actuaries, or actuaries and lawyers, or actuaries and accountants, react pretty favorably to having another professional standing shoulder to shoulder and looking over these things. Things have become complicated enough that we are pretty cooperative and we are not in direct competition, so I was surprised by the scope that the Bar seemed to be going for in its opinion. Was it just shooting for the moon or what was the genesis to this? What prompted this?

MR. SCUDDER: I do not know of any specific set of facts that generated this proceeding. Again, it was a request for an advisory opinion, so it was not anything in which the record indicates that there was a specific group of people who were doing a specific thing that the Bar didn't like. It is more in the nature of, "Give us your opinion of what the role of the nonlawyer is in the process." I think that your point is very well-taken, and I think one of the reasons that the Florida Supreme Court might have done what it did, and I hasten to add, this is purely speculation, is because, to some extent, the Bar Association may have violated what I have euphemistically and historically referred to as the "Pig Rule." You don't try to take too big a bite. I think there were a couple of areas in which the Bar took a very aggressive position. I think that is best illustrated by its position with respect to master and prototype documents, and its statement that the completion of an adoption agreement for a standardized prototype plan with a disclaimer stuck on the front of it would nonetheless constitute the unauthorized practice of law. Now that obviously is a very aggressive position, and when you look at that position in the context of an economic market, which at least to some extent is underserviced by lawyers, it becomes a little difficult to justify that on a public policy basis. If you started with the proposition that there were plenty of lawyers out there who knew about pension plans, and who could meaningfully review those documents, you might reach a different conclusion, but my sense of the situation is that is not now and has never been the case. So I think your point is very well-taken. And I'm not really able to explain why the Bar was

quite as aggressive as it was. I have spoken to some of the lawyers who were involved in the case, and they've given me no specific input on that point.

MR. FREDERICK J. THOMPSON: I think Mr. Scudder really got to the point that I was going to make, but from my perspective, I think this Florida initiative was simply a power grab by the lawyers. If there is any possibility that they were actually doing this to protect the public, then to me there's another presumption that only lawyers know what's going on. And I just don't believe that that's true. If we, the actuaries, buy all of this, if we keep giving in and giving the lawyers more to do in the pension business, I think we're doing exactly the opposite of what the topic of this meeting is. We're narrowing our horizons. I don't think we need to do it, and I don't think we should do it.

MR. SCUDDER: I think to some extent your point is well-taken, as well. One of the things that i might look at a little bit differently is that, you've got at least four or five different groups involved here. You've got actuaries, you've got certified public accountants, you've got stockbrokers, you've got insurance agents, you've got bankers, all with very different backgrounds, and with very different interests in the process. I think that to say to some extent it was a power grab by lawyers, probably isn't all that far off-base. But when you look at the public policy justification for it, I think you might look at actuaries, for example, as a class and reach a very different conclusion than you might if you looked at stockbrokers as a class. And so, while I think it was a very aggressive position, your remarks seem to imply that you thought it was frivolous, and I don't know that I go quite that far.

MR. WATSON: Fred, I think that one can have a lot of sympathy with your position. I think that we can see that the attorneys in Florida were behaving with the same degree of compassion for the general public that actuaries behaved towards the American Society of Pension Actuaries (ASPA) when it first came on the scene.