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Session 10PD
Multiemployer Plan Negotiations—Part 1 of Pension Negotiation Seminar

Track: Pension

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Panelists: WILLIAM A. SOKOL†
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Summary: An attorney and an actuary with experience in Taft-Hartley pension negotiations discuss how the Taft-Hartley bargaining process works. Attendees gain an understanding of common practices, differences between industries and the role of the actuary in the bargaining process.

MR. PAUL ANGELO: This session is the first of a three-part series on negotiating pension benefits. This one focuses on multiemployer plans. I'm the moderator for all three sessions. I'm a consulting actuary with the Segal Company in San Francisco. Our lawyer is Bill Sokol from the Van Bourg law firm in San Francisco. Bill has been doing all kinds of legal work for unions and multiemployer plans for about 30 years. The second presenter is Marty Stempel. Marty is a consulting actuary in the Segal office in Los Angeles. He has also been doing multiemployer work for about 30 years.

This session focuses on multiemployer plans, and the second session is on public sector plans. The third session is on general actuarial issues. I'm just going to take a moment to make the distinction. There are really two kinds of pension plans that can provide negotiated pension benefits in the United States. One is the multiemployer plan, which will be our main focus. The other is a single-employer plan that provides collectively bargained benefits. I actually spent most of my early years working on those kinds of plans. They are sort of a hybrid from a legislative and regulatory standpoint. They are single-employer plans and don't have the

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special amortization periods or any of the special rules that apply only in multiemployer plans. They do have some of the political environment that goes with negotiated benefits. They are single-employer plans run by the plan sponsor, which is the employer. You do not have the joint board of trustees—half labor, half management—that characterizes the multiemployer plan.

We're going to focus on the multiemployer plans. If you have any questions about single-employer union plans that provide collectively bargained benefits, you're welcome to bring those up during the questions and answers.

MR. WILLIAM A. SOKOL: I work with the Van Bourg firm. Because you're going to be doing three sessions all together, I want to lay some background about Taft-Hartley plans and lay out a legal framework for it. Then Marty's going to discuss what actuaries do in that negotiating process. I don't want it to be overlooked that I have primarily represented unions, and I have primarily sat as co-counsel for the union trustees, although in some funds, I sit as sole counsel for all the trustees. I come to this with a certain kind of union perspective, as will become apparent.

I would like to talk very briefly about the history of benefit plans because in the world of retirement benefits and deferred benefits, there are probably about 5,000 or 6,000 enrolled actuaries. I'll show you where that joint board comes from. That means there are only 5,000 or 6,000 who actually have some recognized expertise with respect to ERISA and pension plans. Of those, I'm told maybe 5 to10% are actually doing Taft-Hartley. So there really is somewhere in the neighborhood of 300 or 400 enrolled actuaries in this entire nation that actually work with jointly administered Taft-Hartley plans. You are kind of at the heart of the entire battle to win and protect deferred retirement income for working people in the country. As we know, there's this tremendous onslaught to privatize Social Security, which, in my opinion, means the beginning of the destruction of the Social Security system as we know it. You can refer to Paul Krugman articles in *The New York Times* twice a week.

In addition, there's a tremendous effort afoot in the public sector to transform defined-benefit plans into annuity plans or defined contribution plans. Florida led the way, as you know. Florida tells its public sector people that they can take defined benefits and turn them into defined-contribution plans, which again, further undercuts people's retirement benefits. In addition, there's this push into annuity plans and employers' constant attempts to try to have defined-contribution instead of defined-benefit plans.

From my point of view, defined-benefit plans, particularly those that are jointly administered (meaning there are actually union trustees on the plans), provide the most opportunity, chance, and ability to actually hang onto solid, good pensions for people when they retire. On the one hand, I feel like I'm talking to this very small, select group involved in Taft-Hartley. On the other hand, I'm addressing actuaries, who are ultimately keeping these plans sound. You're probably the people who have more to do over the next decade or two with keeping real pensions for real working people in place, solid, and protected. You're probably doing more than anything that's going on anywhere else in our culture, society, and economy. What I'm really saying is please see yourselves as the bulwark. You are the people who are going to either protect the heart of what a real pension is about or watch them go down with the rest.

First, I want to talk very briefly about the origin of benefit plans. I actually think it's important. I'm going to start in the 11th century and eventually work my way up to the present. Some of you might share the misconception that unions grew out of medieval guilds. Actually, the exact opposite is true. Medieval guilds are employer associations. They were employer monopolies to protect and control the price of the goods they produced. The apprentices or the people who worked for them had no associations of their own. The actual origin of unions is benefit plans. Here in the United States, the first unions were really formed by everyone from carpenters to silversmiths to miners so they could plunk a nickel apiece into a benevolent association. They weren't even called unions; they were called benevolent associations. They put a nickel in so that they would have death benefits when the mine caved. The money would be used to give the miner a decent burial and give a couple bucks to the wife and the kids to tide them over when there was nothing else.

The reason I start with that is not just because it's a cool little anecdote, but because I want to drive home that these plans are at the very origin or the very heart of the unions that I represent and those working people's expectations. Ultimately, as we sit here at the beginning of the 21st century, what can unions offer that no one else in the economy can offer to workers? Companies catch up and pay decent wages. They have the Family Medical Leave Act, Equal Employment Opportunity Commission (EEOC), and a whole plethora of laws to protect individual workers. What unions tend to have that isn't equaled in the rest of the private or public sector are decent benefit plans. So workers and union leaders take that very active interest in these plans. You're probably aware of it, but you don't see the rest of the panoply of what they do. You're at the heart of it. You are most important. You are what often differentiates what a union is from what a nonunion workplace is because of that history.

I want to talk a little bit about pre-Taft-Hartley to give you a sense of what Taft-Hartley means to unions, workers, and the people I tend to represent. Folks tend to see Taft-Hartley as this wonderful act that protects pensions. Actually, there's a very different historical origin. John L. Lewis was the head of the United Mine Workers. He was a very powerful person in America from about 1919. There was a giant strike where President Wilson had to negotiate with him personally to keep the entire economy from being shut down. He was powerful through World War II when he led huge, illegal strikes to get mine workers better wages. Back in the 1920s and 1930s, before World War II, he asked the mine owners up and down Appalachia, to give him a nickel an hour to provide health care and a nickel an hour to set aside as a pension for the miners. After much bloody struggle and strikes, they got their nickel an hour for health and the nickel an hour for pensions.

Before Taft-Hartley, that money went directly to the union. The employer gave the money to the union, and it went into the union treasury. John L. Lewis and the United Mine Workers used the health money to set up a series of little clinics up and down Appalachia. There were small doctors' offices and little clinics. They provided health care in places like Kentucky, West Virginia, Alabama, Arkansas, Pennsylvania, Indiana, Ohio, and Illinois. As those clinics grew and developed, it ended up that you couldn't get decent health care in many parts of the eastern United States away from the seaboard unless you were related to the United Mine Workers or to somebody who worked in a mine.

Imagine the power and strength of an organization that can determine who in your district, if you are a Congressperson, gets health care or doesn't get health care. He took all those nickels for the pension plan, and he put that money into one bank in Washington, D.C., and that money grew and grew and grew. They didn't pay interest on it. They just kept it there. Eventually, he bought the bank, and the United Mine Workers owned the single largest bank in Washington, D.C., the capitol of our nation where the Congress and the President gather to do the business of the nation.

Through World War II, the mineworkers were the only ones who would conduct strikes. There were actually thousands of strikes during the war, but they were mostly illegal wildcats. Only John L. Lewis actually ran union-backed strikes in direct violation of the law during World War II. When we came out of that war in 1946 we had one of the most strike-ridden years in the history of the entire 20th century. The year 1919 was another strike-ridden year. GIs came back from the war, workers had been under wage controls, and there were literally about 8,000 strikes in the year 1946. Both Congress and President Truman were furious with the labor movement. The labor movement, because of the National Labor Relations Act in the 1930s, had expanded tremendously in the 1930s and through World War II. There were 21 million people in unions. About one-third of the workforce by the end of World War II was in unions. They had contracts. They had arbitration clauses. They started striking. We had literally more than one million people out on strike at one point in 1946. So, there was a tremendous demand for some kind of legislation to control those unions before they took over the country, as many thought they would.

We got the Taft-Hartley Act in 1947. The Taft-Hartley Act is a profoundly antiunion law, for those of you who may not be aware of that. It outlawed secondary boycotts, the most effective weapon labor had. It outlawed hot cargo clauses, the second most effective weapon. For the first time, it made unions liable for damages for secondary boycotts. It addressed unfair labor practices that unions could commit. Up to that point, only employers could commit them. What is most important, for our purposes, is Section 186, restrictions on financial transactions.

What Taft-Hartley says in Section 186(a) is payments of money by employers or agents to employees' representatives or their labor organization shall be unlawful. Simply put, employers can't give money to unions or union agents. This section of the law was designed to make bribes, payoffs, and kickbacks illegal and to impose criminal sanctions if employers paid off union people. The entire origin of these jointly administered plans went back to John L. Lewis and many other unions that controlled their own pension plans. They controlled their own health and welfare plans. They determined who got pensions, and who got health and welfare. They felt it was their money, and they would do what they want with it.

Under an exception to the anti-bribery section, which brings in criminal penalties, there is 29 USC 186(c)(5). You'll hear a lot of talk or you'll see them referred to as 302(c)(5) plans, because 29 USC 186(c)(5) is Section 302(c)(5) of the Taft-Hartley Act. What they said is, as an exception to bribery and payoffs and kickbacks, it's going to be legal for an employer to make contributions in a certain instance. It says, "for the sole and exclusive benefit of the employees of such employer, and their families and dependents." We'll let them give money if it's solely and exclusively for the employees of the employer, and their families and dependents. If the money is held in trust, and if there's a detailed basis on which payments are to be made and specified in a written agreement, and if the employees and the employers are equally represented in the administration of such a fund, and if those equal numbers run into a deadlock, an impartial umpire shall decide what's going to happen. It also says there shall be provisions for an annual audit of the trust fund.

Here's the origin of what we all work on today. In 1947 there was an attack on plans that were totally controlled by unions. The way that the government attacks or the way that Congress eventually works this out is by saying it is not going to trust unions to manage their own pensions and health and welfare plans. It will insist that there be an equal number of employer trustees as there are union trustees. There will be somebody from totally outside, an umpire, appointed by a U.S. District Court judge, to decide when they hit deadlocks. I tell you all of this not only because I think it's relatively important to understand where we come from, what we're working on, and the legal structure for it, but also to suggest to you why you'll find a certain bias amongst the trustees that you work with. You'll find that union trustees believe that they own this money, and it all belongs to them because their guys worked for it. The employer trustees will say, "This is all coming out of our pockets. It could be our profits, and instead it's being paid into this trust fund."

Each side thinks they own the money and have a prior claim to the money, if you will. They're in that uneasy relationship. You will find a wide variety of industries and different Taft-Hartleys. However, you'll find almost uniformly those that have existed the longest, the Taft-Hartleys that go back the furthest, are those where the union has most control, and those that are set up more recently are those where employers have more control. I'll show you why, historically, this happened. Unions, historically, totally controlled the money and their attitude when employer trustees were put on was, "You can be here, but it's our money, and we'll decide what to do. You just rubber stamp as we go along." More recently, you tend to have employers say, "It's my money—Union, you just sit there. You're just kind of my watchdog to make sure I don't screw it up, but I control it."

This becomes important when you start talking about the negotiation process. What we have to know is that because of this history of the legislation and labor history, two sides come to this fund. In my opinion, there are very different ideas about who this money belongs to, who controls it, and who should have the upper hand. Ultimately, the language that has made the most law has to do with the fact that both sides are supposed to act on the sole and exclusive benefit of the employee. I'm going to get to that issue a little later.

You can see when you walk into negotiations that you have to think about who has what interest with respect to this money? The union rep walks in, and he says, I have an undivided loyalty. I represent these workers. They all want bigger pensions: "Employer, give me more money so I can give them bigger pensions." The union trustee will under Taft-Hartley act solely and exclusively on behalf of the employees. I already do that at the union. So when I come in and sit down and put on my hat as an ERISA or Taft-Hartley trustee or union trustee, I'm working for the same people. I want them to have the biggest, fattest pensions. I want the employer to give them the most money. There are no conflicts, in my mind.

From the employer's point of view, it's much more complicated and much more sophisticated and tricky. When I have to advise employer trustees, it's pretty difficult. You can see my prejudices and biases in my points of view. The employer wants workers who are hard working, faithful, committed, and really well paid so they'll live a good life. At the same time, the employer wants to put as little as possible into that pension. He wants to keep the money to build his company and to grow its revenues and its profits. He doesn't want to put it aside into his pension plan.

But when I put on this different hat, I have to act solely on behalf of those participants and beneficiaries. It creates a certain kind of schizophrenia that an employer trustee has that a union trustee doesn't have. It goes back to the time when the unions controlled the money exclusively. When the employers were put in on those funds to be co-trustees, they had this immediate split that they have to somehow slide down the razor blade of life.

Let's talk a little bit about where ERISA comes from and what ERISA does. From 1947 to 1974, we had the reign of Taft-Hartley, and in 1956 we saw the Kefauver hearings. This was the first time America saw its government in action on television and they were absolutely mesmerized. It was not a congressional hearing about the economy or congressional hearings about foreign policy or health care. The ratings went off the charts. The Estes Kefauver committee was investigating organized crime and corruption in labor unions. Americans' first impression of these unions on television is that they're full of corrupt thugs and hoods. It's interesting not just because it was going to shape ERISA, but also because it shaped the way America sees unions to this day. The first mass media image was the Kefauver hearings. People watched that avidly, not just because it was about unions or corrupt thugs and hoods, but also this was their first look at a real congressional committee in action.

That created a perspective on unions during the late 1950s that carried through into the 1960s. RFK, as you know, went after Jimmy Hoffa with a vengeance. Jimmy Hoffa hated RFK with a vengeance, and the two fought until Jimmy Hoffa went off to jail. The Central States Pension Fund that Hoffa ran was one of the most profoundly corrupt piles of money that America has known, and we've known some pretty corrupt piles of money. It was pretty amazing to learn how they used and misused that money. It was easy pickings once the government started to really take a close look. What that did was create a constant drumbeat for some further regulation of pension funds that finally met its day in ERISA in 1974. I want to walk you very briefly now through what ERISA says about actuaries.

In talking with actuaries, I asked them if they're aware of what ERISA specifically says. I'm not sure, but my sense is that people don't have to read the statutes. What ERISA did was try to address the fact that these union funds were corrupt. It also set out to address situations like my stepfather encountered. He worked 19 years at Youngstown Sheet and Tube, but he didn't make the 20-year vesting cut-off. Therefore, after 19 years, he received no pension at all. The reason I ended up doing a lot of work in this area is because, in 1975, one year after the act was promulgated, I went to work as a law student for the United Mine Workers' Pension Fund.

A guy named Ian Lanoff was the general counsel at that time. He later became head of PWBA and ERISA Enforcer for the Department of Labor. He hired about a dozen law students, and our responsibility was to pick through these boxes of miners' applications scrawled in pencil in all these wonderful, hard-to-read handwritings and printing. These were applications from mine workers from up and down Appalachia primarily for pensions. One of the guys who had been running the fund after John L. Lewis stepped down was a guy named Tony Boyle, and basically he and others just didn't give out pensions. They didn't want to waste the pension fund on retired miners. So, they would just routinely deny these pension applications. We went through box after box and applied ERISA as it was supposed to be applied, as it modified the plan requirements. It was our job to pick out those applications for those mine workers who were actually entitled to pensions. Then we had the privilege and pleasure, which really hooked me on doing this kind of work for life, of then notifying the miners that they were actually going to get a pension.

Having accomplished that task, Ian said to me, "Your next job is to write a paper on how to enforce ERISA." He forced me to actually read a statute for the first time in my life. I was two years into law school, and I hadn't had to read a statute yet. I finally read ERISA. This is where actuaries first come on board as a matter of law. Up to that point, Taft-Hartley said to just do an annual audit. There was no requirement that actuaries be involved in the life of a pension fund until the last 25 years. You guys didn't have to be there as a matter of law until ERISA said we're going to set up this joint board for the enrollment of actuaries. That comes out of ERISA.

The statute in Section 1023(a)(4) outlines the duties of an actuary. It says the administrator of the benefit plan shall engage an enrolled actuary, and the actuary shall prepare an actuarial statement as required under ERISA. Somebody was asking whether the assumptions for each fund have to be reasonable or whether they just have to be reasonable in the aggregate? The statute spells out most of the answers you need. The enrolled actuary shall utilize such assumptions and techniques as are necessary to enable him to form an opinion, which are, in the aggregate, reasonably related to the experience of the plan and to reasonable expectations. It has to represent your best estimate of anticipated experience under the plan.

The subheading 20 CFR 901.20 covers the way that our government imposes regulations and requirements upon us. First, the statute is passed, and then the agency that's given responsibility for enforcing the statute gives us regulations that are printed in the Code of Federal Regulations. It says that you can undertake an actuarial assignment only when you're qualified to do so. The only part I want to call your attention to is Subsection C, Advice or Explanations. It makes it mandatory that an enrolled actuary shall provide to the plan administrator, upon appropriate request, supplemental advice or explanation relative to any report signed or certified. I've actually run into this a couple of times. You cannot simply give the report and say that's it. I've had an actuary actually mail in a report, deliver copies to the trustees, and not show up to explain it. It's a violation of the law. You need to know that the regulation makes it mandatory that you shall, upon request, explain your report.

Then it tells you all about conflicts of interest. If you have conflicts, you can't do the work unless you disclose it. I bow to you and your expertise with respect to conflicts of interest in your field. I still don't understand them as the lawyer, let alone when two of my clients have jurisdictional beefs about who's going to sit in the crane. It is never clear to me what role I'm allowed or not allowed to take. I don't know what happens to you if your firm has anything to do with doing actuarial studies for a company that also makes contributions into a fund. If you're going to do studies on both sides, do you have a conflict to reveal? I don't know. I'll bow to the experts here.

It's time to watch very closely what happens with respect to liability, particularly the partners in Arthur Andersen. Also watch what happens to Sidley & Austin, the law firm that was so closely integrated into Enron. I think it's going to make for some very fascinating law and practical problems for us. I listened to a talk by an attorney from a law firm that deals in all the shareholder plaintiff's work against every big company. They immediately file huge lawsuits, and everybody hates them because they collect millions of dollars in attorneys' fees.

I was talking with this attorney a couple of weeks ago about how he's going to attack the whole Arthur Andersen case because he represents the University of California Pension Fund against Enron. I said, "So they have $350 million in insurance. You're looking at a couple of billion dollars in losses. I know you'll get rich, but what about the workers out there and all the people who didn't get a penny?" He says that he has joined in as the party's defendant in the law firm that was involved and the accounting firms that were involved. He's going to try to go after them. I said, "How broadly are you going to go after them? Who are you going after?" He said he was going after the assets of every single partner in Arthur Andersen and every single partner in Sidley & Austin. I think that some interesting law is going to be made. I don't mean to get hung up on this particular topic.

Tort reform hasn't happened. If you're asking whether there is any statute on the books right now that excludes other partners from liability, that's exactly what they're going to spend the next decade litigating. In my field of law, I can show you all kinds of statutes about limited liability corporations, limited liability partnerships, and statutory language that appears to suggest that individual partners can be held liable for their own malpractice. You can't go after any other partner's assets or the assets of the partnership or corporation. I could also show you the lawsuits where plaintiffs' attorneys are challenging that and suggesting it's not as bulletproof as the lawyers who had it enacted wish it were.

MR. ANGELO: I think that the conflicts of interest might not arise so much in the direct performance of the enrolled actuary's work in certifying to the Schedule B but in the other ancillary services that the firm might provide. I remember hearing about a case where the actuary for the firm was the enrolled actuary for a very large multiemployer plan. He lost that assignment because one of his small offices was very active in helping an employer withdraw from the plan. I don't know whether that was a legal issue or not. Presumably, both could do it without a conflict of interest. There was such a Chinese wall. The head office of the firm couldn't stop the local office from providing that service. In the long run, they did a disservice to the firm by losing a major client.

MR. SOKOL: The next topic is shoe horning Taft-Hartley plans into ERISA. There was an interesting decision by the U.S. Supreme Court in 1986. I was going to spend some time talking about the fact that there are defined-benefit plans and defined-contribution plans. From the U.S. Supreme Court's point of view, jointly administered Taft-Hartley plans are neither cleanly defined-benefit nor cleanly defined-contribution plans. The court said in 1986, "We're not sure which it is. It looks like both, so we're not going to address it right now." They've never come back to it. The reason they say that is because, on the one hand, in Taft-Hartley, the employer or the union negotiates a defined contribution. They will put in three bucks an hour. But because we have all of that withdrawal liability responsibility of an employer since 1980, it is really a defined-benefit plan because if there's not enough money in there, the employer's going to be obligated to put more money in to protect those benefits.

So it's defined benefit, but the only thing you negotiate is defined contribution, which is where you come in, most importantly. The reason I quoted from this at length is to say to you that there's an open issue here. It's kind of where you live. The parties just negotiate contributions, but your responsibility, even though they only bargain contributions, is to make sure there's enough in there to pay that defined benefit. Because of that tension, I'll tell you some stories. The real hard work of actuaries in negotiation is making sure that the numbers you present to them provide whatever their defined benefit shows, it doesn't exceed what they're really negotiating about, which is just a defined contribution.

MR. ANGELO: Can we go back to the earlier point you made? In some ways, the labor trustees don't really have to change perspectives when they move from negotiating to being a trustee because they're working now for the members, whereas the management side has a conflict. Just to push against that idea, let's say you have a fixed rate of contribution going in, which is what the union guy as negotiator has set. Now he puts his trustee hat on, and isn't his job, just as much as a management trustee, to live within that contribution? It's not a matter of getting the largest benefits possible. Get the largest benefits possible consistent with the negotiated rate. That seems to more closely link the management interest and the union trustee interest than what you said in your earlier comment.

MR. SOKOL: I agree with you 100%. We want to see how they come back together again.

Collective bargaining is about serving masters wearing many hats. I define the parties there as the employer, the union, the employer trustee, the union trustee, the participants, the beneficiaries, and the bargaining committees. What I suggest to you is when you're in the negotiation process, you have to know that there are all those separate parties working together but not necessarily with similar interests. The employer and union are entities. However, the employer trustee has certain rights, privileges and responsibilities under ERISA and Taft-Hartley that neither the employer nor the union has. The employer and union created the original trust. They don't have all those responsibilities in most situations that the trustees have. I say participants and beneficiaries stand alone. What people sometimes forget is that the bargaining committees are bargaining with each other. You usually have some union leaders and some rank-and-file employees, and they are creatures unto themselves that are not the union. They're not the employer; they're not the trustees; and they're not the participants or beneficiaries. You have to tread very carefully when you're dealing with a bargaining committee. If you're ever actually brought into bargaining committees, either employer or union, you have to be hyper-perceptive about who's on that committee. Who are the elected leaders of the union? Are they rank-and-file members of the union? Are they on the same political ticket as the elected leader, or are they opponents of one another on that committee on the union side? On the employer side, are you dealing with a CEO, or a single small owner who sees that every penny is coming out of his pocket? Or are you dealing with the guy who's the head of human resources or personnel who has just been thrown in the trust fund because he deals with labor issues? It's not his money, and he doesn't understand the money that well. Are you dealing with the chief financial officer who understands every penny and believes he's personally responsible for every single one of them? You have to be acutely aware of who's on those bargaining committees. I suspect Marty will talk more about that.

Section 4(b) is defining differing and common interests of the parties. Say that the employer just wants to make low contributions. The employer doesn't want to take money from the union; it just wants the most money it can get. But then together they want the highest benefits for the lowest contributions. The union wants to underfund and have some withdrawal liability to keep employers in, but they want to have over-funding so they can allow for the fullest benefits possible. The employer wants to underfund to lower contributions, and to over-fund to allow them an easy way out. In my opinion, those are the kinds of interests that are at play. That's very ragged. You've said it in a far more sophisticated way. You've put it in legal terms. Don't they both have the same interest in maximizing the benefits within the amount that has been negotiated? I think what's happening under the surface is each of them has a reason they want it underfunded. Each of them has a reason they want it overfunded. They're always looking for that point in between where it isn't underfunded too much, but it isn't overfunded too much.

The most important thing I'm going to tell you is something my boss taught me. We're supposed to be talking about bargaining of the benefits. Because benefits are the most important thing in that entire union contract nowadays, bargaining never stops. There is an illusion that they bargain this contract once every three years. At my first trust fund meeting back in 1976, my boss told me I would see the bargaining begin. Everything that happens in this trust fund is bargaining between employer and union trustees. The bargaining never stops. If you think about it, that's probably been your experience. They never stop negotiating with each other about the level of benefits and about the amount of the contribution. They bargain about which mortality table to use and when we have to introduce it.

They will bargain about what the interest rate assumption should be. They will bargain about any assumption that's out there, and one should never assume that anything that happens in the Taft-Hartley context ever happens outside the bargaining process. My experience has proven that everything that goes on with regard to Taft-Hartley shows that the two sides are always in negotiation with each other. Part of what I do as the attorney and part of what you do as the actuary, in a certain sense, is define the limits for their bargaining. My experience is if you want to live a long life as either an attorney or an actuary, you give them as many options as possible rather than saying this is it, period, catch you later. You may disagree with me, in which case, I'd love to talk about it.

You have to communicate much more than you ever had. The funds I work with here in the western United States need communication from the actuary. There is no way that an actuary can survive, in my opinion, in the funds that I sit on now without being in constant communication with the trustees about everything that he does. Every single assumption seems to be up for discussion and negotiation at all times.

You have to be aware of whom you are communicating with at all times. You have to be consistent with all the parties because I've also watched actuaries boot it out because they say one thing to one person and then something slightly different to another person.

Recognize that actuaries are perceived as magicians. I find that for longevity with funds, you have to dispel that idea. During those first 10 years or so, you just did it. Now it's my experience that the trustees are looking for understanding of how you do the tricks, and if the trick doesn't work, you're out, unless they understand how you tried to do it. They don't mind if it doesn't work if you explain why it's not going to work. You work your way up to it. Communicate fully with them about why you can't just knock the interest rate assumption up to 8%, 9% or 12%. There has to be a lot of talk about why the interest rate assumption is what it is.

There has to be a lot of disclosure of different mortality tables so they really understand what a mortality table is. When talking to the participants and beneficiaries, emphasize that the good news is they are living longer, and the bad news is they are living longer. It's really great that they are living longer, but it means we need more money to pay for those benefits that are now needed for a longer amount of time. We've got to monkey with things. They really have to understand all that. We are past the day of being able to say, "We're going to adjust the mortality table."

I've now read all the case law about you guys and Taft-Hartley. There isn't that much, but the most important thing that I discovered in these cases is you turn out to be the ones who determine whether people have breached their fiduciary duties and are in big trouble. These are disability cases where a trust fund doesn't do what its document says it's supposed to do. It doesn't pay out some kind of benefit it's supposed to pay. If there's an actuary's report justifying that, there's no breach of fiduciary duty. If there's no actuary's report justifying what happened, the person goes down on a breach of fiduciary duty. So you become the definers of who is and who is not breaching fiduciary duty. Please be aware of that. It was much more acute than I had realized in my years with plans until I actually read through the cases.

MR. MARTIN STEMPEL: I'm obligated to say that I'm personally indebted to Bill for his presentation, which I think was outstanding. I think we all benefited from that.

This is very interesting and challenging work for us. It is interesting because we get a chance to observe this collective bargaining process, and, as Bill said, not only at the time of bargaining but at every trust meeting and in the phone calls and letters in between. It's hardly routine work. Even the next round of negotiations will not be the same as they were before.

I have a client where the attorney and I were the people who served the longest on the trust fund—25 years. As most people might not realize, the union officials in most unions are subject to election and reelection. This certainly colors their position toward the employee benefit plans. Many union officials have lost elections, lost their jobs, and been forced to actually go back into the bargaining unit because of benefit decisions that might or might not have been in their control. There might have been benefit cutbacks or even benefit improvements that didn't satisfy their constituency. It is certainly a challenging part of our work, often because of the time constraints involved.

My first experience, when I worked for a large formerly mutual insurance company on the East Coast, was to assist in their bargaining with their unionized sales agents. Because we were in the east, and the negotiations were in Phoenix, I would stay in the office until they finished, and at eight o'clock at night I would get their calculation demands for the next day, which I had to coordinate in time to be able to call them back by eight or nine o'clock in the morning.

Bill touched on some of the special constraints. There is full disclosure, watching for conflicts of interest, and generally being as wide awake and, in his word, perceptive as possible because of the many currents that can flow into the process.

One of the first things we want to do is make sure we know who the client is. I would like to make a distinction that Bill didn't emphasize as much as I would like to which is that you might or might not be the enrolled actuary for the trust fund. You might have no continuing relationship to the trust fund. You might be brought in on behalf of one side or the other to assist them in the bargaining. That makes a different standard.

Even if you're <u>the</u> trust actuary, and you are providing information requested by either side and providing answers to both sides, it's still not exactly the same as being the trust enrolled actuary. I would caution if someone asks you, "What would it look like if we do earn 10% for the next three years? What could we do then or what could we do at the end of the three years?" I think if the question is asked, and you're authorized to do the work, then you do it. But you have to be careful to also say what would the result be if they earn something close to the ongoing actuarial assumption.

The only time I was ever actually called on to be a witness in a dispute involving a former client was because I was the only one that was still around who had files. The attorney, the administrator, and everybody else were gone. That's the other caveat. I thank Bill for not only the historical background, but also the sage advice of obviously one who has had long experience in this area on how to keep a client and how to lose one.

You might be the co-actuary to the fund, which, is clearer because your position is known. If you are the union actuary or the corporate actuary, then it should be clear to everyone where you stand. In other cases, and for most of my clients, I am the trust actuary. In that case, I always have to bear in mind that I will ultimately have to certify to the funding status of the plan.

The actuary has to not only deal with the client but also with himself or herself at those moments at four o'clock in the morning. I didn't mention ERISA. We still have our principles and practices, our code of conduct, and, in particular, an Actuarial Standard of Practice (ASOP) on actuarial communications that broadly defines what is an actuarial communication and what the standards are for communication. That includes proper disclosure, disclosure of conflicts of interest, and guarding against misuse of the information. This is especially difficult when you've given oral advice, oral numbers, and oral opinions. That will eventually be misused at the bargaining table.

Who makes the rules? There is quite a bit of variation among who has the power to actually change the plan because the bargaining will be, say, "simply" on the basis of contributions and cents per hour. They often bargain for benefits. There are some trust funds where the contribution is not fixed, but the bargaining agreement provides for so much money per hour to be reallocated later by the bargaining parties from time to time. In these days, several clients have been reallocating money from the pension plan to the health care plan. I hope that, at some point, they might need to put the money back. They often negotiate contributions and benefits, both of which make life more exciting.

How do you deal with that kind of plan where contribution rates are increasing and things have turned around? I was going to talk about that in terms of benefit design and the advice you can give your clients. You must still maintain a level of normal cost that is supported by the contributions. In my own practice, even before the recent events in the stock market the last couple of years, the suggestion was that you take these gains and spend them. You do not raise the normal cost. We have plans that a couple years ago were in overfunded positions. Many of them took those gains and increased the accrued benefit or increased the future benefit temporarily. They were called a bonus accrual, and as long as the assumption was met, at any contribution rate, they would continue to support the benefit.

I believe that the same thing could occur in a unit benefit plan. If you've used the illusory gains to support the benefit unit, then sooner or later the unit will have to be reduced or the contributions will have to be increased.

MR. SOKOL: Just one very practical suggestion. For some of the funds that I sit on, there's none where the actuary, the investment monitor, or some investment overseer haven't gotten together and sat down with the chair and co-chair and started to talk about this. I think we are in for some dark times in the Taft-Hartley field, as in the rest of the deferred market. However, I think that the key here is to actually be talking with the leaders about it and say to them, there are years coming where this might happen. You might have to earmark. You might have to figure out some way that we get more money into this thing to keep it afloat. At least they get the distant and early warning now as opposed to three years from now when suddenly it's going to eat them up.

MR. STEMPEL: I've actually written several warning letters like that. I mean in negotiating a substantial increase in early retirement benefits, I also had a client that said he was going to put in x cents per hour for that and that it would not be part of the percentage of accrual benefit base.

When I'm talking on this one about the benefit unit increases we still have plans that increase the benefit unit and it applies to everyone backward and forward. It applies to the retireds and even to the surviving spouses. In some cases, it's in a trenched position. They have always done it that way. They can say whatever they want about the contributions of the people that were there when the plan or the union started. There were very low benefits initially. This kind of pattern can be very difficult. My personal bias is not to increase the benefit for vested terminated employees. This is an area where you have to have a keen ear for the sense of the trustees. We have clients where there are retired representatives on the board, and they obviously have a different opinion as to where benefit improvements should be focused. In some cases, the constituency that includes retired members elects union officials. This is often critical in the other side of the house. The health care program, as contribution money becomes scarce, is right there at the table with you when you're talking about pensions.

There might not be benefit decreases today, but there might be some next week. Of course, we have to be careful about 411(d)(6) and the protections that exist for accrued benefits. Early retirement and service pensions is an area that many plans increased in the good old days. There is now a different way of looking at it. We've had several clients that have tried to cut back the service pension, which is an unreduced pension at any age after so many years of service. One plan required a minimum age, but only for participants that came into the fund after 1997. It's a pretty slow process in how that helps you save cost.

The cost basis in your calculations is often very important. There might be a trust funding policy where you have a 15-year rolling amortization period. In the course of the bargaining, you might be asked to calculate benefit funding for an improvement over a shorter period, even as short as the next bargaining cycle or the next two cycles. Or you might be asked to do special targets to focus benefits in such a way that there would be no unfunded vested benefit liability over the next five or six years. Again, it's another serious pitfall. Or you might need to maintain a specified ratio of the asset value to the vested benefit liability to minimize the risk of an unfunded vested benefit liability.

That's part of our role. We might need to help advise them on alternatives to what they really want. Many trustees want a short-term guarantee. We are trying to talk about long-term actuarial estimates. You can put in all the caveats you want. Very often what they hear is what they want to hear. What is worse is they will act on it.

Part of our job, as Bill reminded us, is that the bargaining is always a bazaar. Sometimes, it's part of our job to remind people of the nature of actuarial funding and the nature of the estimates that we're providing. Ultimately, the contributions pay a relatively small part of the benefits, and it's the interest and the experience that will drive the fund. One of the interesting things about a percentage of contributions plan is that, in some ways, it's very easy to describe the benefit. If you have 3% of the contribution plan in 33-1/3 months, the participant essentially gets back every dime that was put in on his behalf.

We must never forget, in doing all these estimates, that if you're being asked to do things that depart from the regular actuarial basis in your Schedule B, you should disclose that. Ultimately, it's important to maintain the contribution base. Issues might come up in collective bargaining where they don't think you're involved. An example might be putting a cap on hours for which contributions will be paid or for the compensation base. I have heard about one fund in New York that, two years ago, was overfunded and had to make benefit improvements to satisfy deductibility. They went ahead and negotiated a cap on the contribution base. They had to defer some of the increases in the maximum benefit to maintain minimum funding.

Another one that I've had a lot of experience with is waiting periods for contributions. It might sound legitimate for an employer not to want to put contributions from the first hour worked for a guy that he knows is going to load four trucks and then disappear. That being said, if the plan's funding has always assumed that contributions would be made in such a way, then changing it can deteriorate the contribution base. It's another area for which we're keeping in close contact with the trustees, and the bargaining parties can help avoid a problem.

On the other side, there's a need to educate the actuary. The actuary must be aware, seek guidance from the party or parties, learn about trends in the industry, be aware of the bargaining climate and the history, and keep an eye out for the status of the retirees in the minds of the bargaining parties. In the best of all worlds, it's great to do these things in advance. You can make adjustments. You can deal with these sharp asset value changes in a valuation that's nearly one year old. You have the time to make accurate estimates of new benefits or possibly changing assumptions.

On the other side, we have the on-site estimates and watching out for what I labeled actuarial hubris. When one of our associates comes to us and asks for an idea of what something costs, we've all been tempted to give them our opinion. It's one thing if it's done within the walls of your office, and it is another thing when you're advising trustees. Avoid field underwriting and back of the envelope or oral estimates, if possible. If you are on-site, and I rarely have been, get yourself a private room so you can have your computers and be able to call the office. You want to be able to link to your support staff to get the requests done in a reasonable but accurate basis.

Watch out for projections. If you have the time, and if you do these things in advance, you should take the longer view that we're accustomed to looking at and project for them what the story might be. The stock market results and the investment returns, in particular, have re-raised the specter of withdrawal liability. I was at a foundation meeting last October and an actuary I've known for a long time asked me whether I remember how to do those calculations. Withdrawal liability has been a thing of the past for most of our plans. In one of our cases, there was an employer of actually 10 participants that was worried about withdrawal liability. We had to show that the trust fund would have to lose two-thirds of its assets before his percentage would get above the radar level. If you are forced, or if you have to make estimates orally, confirm them in writing. Put it into the record because, when you're long gone from that case, 10 years later, and nobody really remembers what you said, it's good to have put it in writing.

There are some pitfalls. I don't think you'll have a withdrawal liability. In making an estimate, if you are a penny off in a $3 cost, it can sometimes cost you a client. Watch out for benefit increases without looking at the assumptions. It was pointed out to me that (a) + (b) can never be less than (a + b). If you are increasing a benefit unit substantially and improving early retirement substantially, the cost might be substantially greater than the sum of the individual costs that you made. That is due to the increased use of that benefit. Overspending really goes back to the enrolled actuary side. If the trust fund overspends to the extent of having a deficit funding position over the next several years, that's clearly, in my mind, overspending.