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Pension Actuaries and Fiduciary Responsibility

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The Employee Retiree Income Security Act, or ERISA, establishes an important statutory role for pension actuaries in the United States. As part of its statutory goal to protect the retirement security of America's workers, ERISA requires tax-qualified defined benefit plans to obtain an actuarial valuation of plan reserves each year. When valuing the plan's reserves, the actuary is required by ERISA to act on behalf of plan participants. Thus, the plan actuary fulfills an important role in maintaining the plan's ability to meet its ongoing obligations to the plan participants and their beneficiaries.

Often, pension actuaries provide a broad range of services to pension plans that may include, and are certainly not limited to, reserve valuation. Pension actuaries are expert in the design and funding of pension plans and, in addition to valuing plan reserves, frequently offer advice to plan sponsors and administrators on plan design, taxes, benefits, asset allocation, valuation and management. The courts have recognized that pension actuaries have a common law responsibility to act with due care when providing these services, and pension actuaries who fail to do so may find themselves in state courts defending malpractice claims.

A separate question exists, however, as to whether the pension actuary also has the enhanced responsibility, and attendant liability, of a "fiduciary." Under ERISA, a fiduciary's responsibilities to an employee benefit plan are described in detail:

> [A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and … with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims[.]

ERISA also sets forth explicit responsibilities for plan fiduciaries, and describes specific remedies and a structure to enforce them against fiduciaries who fail to fulfill their statutory responsibility.

Section 3(21)(A) of ERISA defines a "fiduciary" as a person who: 1) has any discretionary authority or control over the management of the plan or its assets; 2) renders investment advice for a fee or other compensation, direct or indirect, with respect to the plan's assets or has any authority or responsibility to do so; or 3) has any discretionary responsibility in the administration of the plan. Thus, fiduciary status and responsibility is created by the activities that an individual actually performs on behalf of a particular plan, and not simply by the individual's title. ERISA requires a plan to formally designate an individual as the plan "fiduciary" in the plan documents, but other individuals who meet one or more of the three criteria listed in the statute become "fiduciaries" under the statute whether they are formally designated or not.

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Even though actuaries are required to act on behalf of the participants when valuing plan reserves, the courts have recognized that actuaries who provide traditional professional services to qualified plans are not fiduciaries under ERISA. The leading case in this area is *Pappas v. Buck Associates, Inc.*, 923 F. 2d 531 (7th Cir. 1991). In *Pappas*, the court reviewed ERISA's language and legislative history and concluded that Congress did not intend for actuaries who rendered professional services to plans to be regarded as ERISA fiduciaries. The *Pappas* court acknowledged that an actuary could become a fiduciary by "undertak[ing] tasks that transcend the usual scope of a professional-client relationship." However, the court explicitly found that "the normal role of an actuary providing advice to an ERISA plan" did not involve fiduciary activity and, therefore, did not make the actuary a fiduciary even if the actuary performed professional services in a negligent or intentionally wrongful manner.

The Supreme Court made a similar determination in *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993). In *Mertens*, participants in Kaiser Steel's employee benefit plan alleged that, when Kaiser Steel began phasing out its steelmaking operations and induced many of its employees to take early retirement, the plan's actuary failed to change the plan's actuarial assumptions to reflect its increased retirement costs, causing the plan to become inadequately funded and, ultimately, to be terminated. The participants argued that the plan fiduciaries breached their duties under ERISA and that the actuary should be liable for knowingly participating in the fiduciaries' breach. In holding that the actuary was not liable for damages under ERISA, the Supreme Court specifically stated that professional service providers, including actuaries, are not liable as fiduciaries until they cross the line from advisor to fiduciary by assuming discretionary authority over or responsibility for the plan's assets or administration.

Thus, under ERISA, a pension actuary is not normally a fiduciary. The actuary only becomes a fiduciary by undertaking responsibilities that transcend traditional actuarial practice, assuming discretionary responsibility over the administration or management of the plan or its assets. The question of whether an actuary has assumed such responsibilities is a factual one, depending on the circumstances of each particular situation.

State common law may also create fiduciary responsibilities for a pension actuary. The laws governing fiduciary status vary somewhat from state to state but certain broad principles commonly apply. Some relationships are usually deemed to be inherently fiduciary in nature, for example, the attorney-client relationship, the relationships of corporate officers and directors to their companies, or the relationships between partners, joint adventurers, or close family members. Otherwise, a fiduciary duty is deemed to exist by the courts if a relationship of mutual trust and confidence has developed between them over a period of time prior to the transaction at issue, such that one party is justified in placing trust in the other. The mere fact that an individual trusts a business associate to meet a contractual obligation is not normally sufficient to create a fiduciary relationship, nor is the fact that a relationship is cordial or long-standing sufficient to establish fiduciary responsibility. As with ERISA, the determination of whether a fiduciary relationship exists under common law is a factual question, and the answer depends on the facts of a particular case. Arm's-length transactions between sophisticated business executives and their professional advisors, including actuaries, are not likely to impose common law fiduciary responsibilities on the advisors. If, however, the advisor voluntarily assumes a more confidential role in the relationship, fiduciary responsibilities may apply.

A common law fiduciary's responsibilities are normally comparable to those imposed on plan fiduciaries by ERISA. The fiduciary is required to act on behalf of the party to whom the fiduciary duty is owed, applying the care, skill, prudence and diligence that a prudent person acting in a similar capacity and familiar with such matters would use under the circumstances when conducting a similar enterprise or undertaking.

Fiduciary responsibility certainly can be satisfied; ERISA plan administrators and asset managers successfully meet their fiduciary responsibilities every day. The pension actuary can, therefore, choose to assume fiduciary responsibility and fulfill it if the actuary wishes to do so. However, the actuary is normally wise to *intentionally* assume a fiduciary role, rather than allowing a relationship to inadvertently evolve into fiduciary status. Otherwise, the actuary may be surprised to discover after the fact that a plan representative, and a court, considered the actuary to have taken on more liability than the actuary intended.

An actuary need not be a fiduciary to offer valuable services to qualified plans and their participants. If the actuary chooses to remain in the capacity of professional advisor, the actuary is normally prudent to provide only traditional actuarial services to a qualified plan and to be very clear in communicating to the plan's representatives that the actuary is not acting as a fiduciary. Actuarial Standard of Practice No. 41, *Actuarial Communications*, may be helpful in providing guidance to the pension actuary in communicating with plan representatives on this point. The actuary may want to avoid offering informal advice about asset management and plan adiministration, particularly when dealing with less sophisticated plan representatives, and may find it beneficial to document conversations with plan sponsors and administrators in writing. If the actuary's relationship with plan representatives seems to be evolving into a more confidential one, the actuary may find it helpful to consult with legal counsel as to whether the actuary has begun to take on a fiduciary role.

If, on the other hand, the actuary chooses to become a plan fiduciary under ERISA or to assume fiduciary responsibilities under the common law, the actuary is well-advised to determine first whether he or she has the necessary qualifications to fulfill fiduciary responsibilities and, if not, to obtain those qualifications before taking on a fiduciary role. Again, communications are likely to be important; the actuary is normally wise to verify that the plan's representatives understand exactly what the actuary will, and will not, do on the plan's behalf and to document that understanding. Legal counsel can also be helpful to the actuary in defining the scope of his or her fiduciary responsibilities and in determining how best to fulfill those responsibilities once they have been assumed. ◆

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