Actuarial Liability: ERISA, Malpractice and the Equity Funding Fraud

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ACTUARIAL LIABILITY: ERISA, MALPRACTICE AND THE EQUITY FUNDING FRAUD

I. Introduction

The role of the actuary has undergone major changes, especially since passage of the Employee Retirement Income Security Act of 1974 (Act). Prior to that Act, actuaries enjoyed relative professional anonymity, but ERISA has changed this, affording actuaries new and perhaps unwanted exposure. Under ERISA, actuaries are now required to certify their work. The Act further provides for mandatory membership in the “Enrolled Society of Actuaries” before an actuary can prepare any actuarial statements or reports filed with the Department of Labor or the Department of the Treasury (Internal Revenue Service). These developments suggest that actuaries may be held accountable for their negligence. In addition, actuaries are now confronted with the controversial issue of whether they are or can be fiduciaries under ERISA. As such, they would be subject to further duties and responsibilities, as well as liabilities, and sanctions for breaches of any duty owed. So, ERISA has introduced new responsibilities to the role of the actuary who must act independently and on behalf of all the plan participants in determining pension costs.

The provisions of ERISA evidence the overriding Congressional concern for the protection of the benefit rights of plan participants and beneficiaries. To accomplish this, increased responsibilities are

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1. An actuary has been defined as one trained in mathematics and statistics whose business is to calculate insurance and annuity premiums, reserves, and dividends. Webster’s Third New International Dictionary 22 (unabr. ed. 1964). Today, actuaries, especially those specializing in pensions, provide many additional services in an advisory capacity and therefore have exposed themselves to greater professional liability.


5. The Act imposes on all fiduciaries a general requirement that they must discharge their duties solely in the interest of the participants and beneficiaries of the plan. In addition, a fiduciary must act exclusively for the purpose of providing benefits to participants and beneficiaries and defraying reasonable expenses of the plan. Similarly, he must conform to the documents and instruments governing the plan, but only insofar as they are consistent with the regulatory provisions of the Act. See text accompanying notes 77-79 infra.

imposed on all plan parties including actuaries. These new obligations address plan qualification, reporting, disclosure, fiduciary responsibility, vesting, funding, and plan termination insurance. In addition, the actuary will be obligated to perform his duties with greater independence. With this requirement, however, will come greater scrutiny and accountability to all parties.

II. Actuarial Requirements of ERISA

The inclusion of detailed actuarial requirements in ERISA established standards for pension actuaries and recognized certain realities of actuarial practice, among them that pension actuarial work had become a specialized field and the majority of actuaries, including those in the recognized actuarial organizations, were involved in more than strictly pension actuarial work, and often had no real pension knowledge. In addition, a number of individuals had developed proficiency in pension actuarial work through experience rather than through passage of actuarial examinations. Many of these individuals were not members of any actuarial organization. Finally, some individuals who called themselves pension actuaries were not competent in mathematics and actuarial concepts, although many had a reasonable knowledge of the pension field.

A. The Joint Board for the Enrollment of Actuaries

The ERISA solution was to create the Joint Board for the Enrollment of Actuaries, whose function is to identify and establish standards of competence for a pension actuary. The legislative history indicates the intent of Federal enrollment of actuaries — the achievement of independent, competent professional work. The Joint Board establishes professional qualifications and standards for actuaries of all employee benefit plans covered by ERISA and enrolls those qualified to practice actuarial matters before the De-

8. Id.
9. Id.
10. Id. at 442.
partment of Labor and the Internal Revenue Service.\textsuperscript{13} The Joint Board also is authorized to suspend or terminate enrollment of an actuary whose conduct has not been in compliance with the provisions of the Act.\textsuperscript{14}

The Act requires all employee benefit plans to appoint one or more administrators who have full responsibility for the operation of the plan. The administrator's authority and responsibility are deemed to include the establishment of a funding method and policy consistent with the objectives of the plan\textsuperscript{15} and the power to amend the plan when necessary to meet the requirements of the regulatory provisions of the Act or to protect the interests of the participants.\textsuperscript{15} Although the enrollment process and its inherent prerequisite qualifications and standards are in effect, the pension plan administrator's duties are not discharged merely by ascertaining that an actuary holds a certificate of enrollment. The plan administrator is a "named fiduciary"\textsuperscript{16} under ERISA, and therefore must exercise prudence in selecting and retaining the enrolled actuary for the plan.\textsuperscript{17} In selecting an actuary, the administrator or trustees should inquire as to the experience of the actuary or his firm, the range of services provided, the ability of the actuary to communicate in a manner which is understood, and the actuary's familiarity with governmental requirements for pension plans.\textsuperscript{18}

B. Responsibilities and Professional Independence

Multiple responsibilities accrue directly to the enrolled actuary of a defined benefit pension plan. The actuary must perform an actuarial valuation of the plan at least once every three years, or more frequently if necessary to support his opinion, included in the actuarial report and also in the event of a plan merger or consolidation.\textsuperscript{19} An actuary must also state that to the best of his knowledge the actuarial report is complete and accurate\textsuperscript{20} (for both Department

\begin{itemize}
  \item \textsuperscript{14} Id. § 3042, 29 U.S.C. § 1242 (Supp. V 1975).
  \item \textsuperscript{15} Id. § 402, 29 U.S.C. § 1102 (Supp. V 1975).
  \item \textsuperscript{16} Id. § 402(a)(2), 29 U.S.C. § 1102(a)(2) (Supp. V 1975).
  \item \textsuperscript{17} H.R. REP. No. 1280, 93d Cong., 2d Sess. 301 (1974).
  \item \textsuperscript{18} Grubbs, Jr., EMPLOYEE BENEFITS J. 15 (Winter 1977).
  \item \textsuperscript{19} ERISA § 103(d), 29 U.S.C. § 1023(d) (Supp. V 1975).
  \item \textsuperscript{20} Id. In addition, the actuary must state that, in his opinion, "the assumptions used in the aggregate a) are reasonably related to the experience of the plan and to reasonable
of Labor and Internal Revenue Service purposes), as well as certify what plan contributions are necessary to reduce any accumulated funding deficiency to zero.21 Furthermore, the actuary must justify any changes in the actuarial assumptions or cost methods22 and state that all costs and liabilities are determined on the basis of reasonable actuarial assumptions and methods which, in combination, offer the actuary’s best estimate of anticipated experience under the plan.23 Moreover, the actuary is obliged to offer an opinion that the contents of the matters in the actuarial report meet the criteria above.24 Finally, the actuary must report all information necessary to fully and fairly disclose the actuarial position of the plan.25

These extensive responsibilities appear to raise the accountability of the actuary to the highest levels. All actuarial reports and statements are subject not only to Department of Labor and Internal Revenue Service review but also to public disclosure. Furthermore, the Act provides that all the above enumerated duties be performed on behalf of all plan participants.26

expectations, and (b) represent [his] best estimate of anticipated experience under the plan." Int. Rev. Form 5500, Schedule B, Actuarial Information.
22. Id.
25. Id. Similarly, when performing an audit, a certified public accountant must observe "generally accepted auditing standards" which are comprised of general standards, fieldwork standards, and standards of reporting. The standards of reporting are that:

(1) the report shall state whether the financial statements are presented in accordance with generally accepted accounting principles; (2) the report shall state whether such principles have been applied consistently in the current period in relation to the preceding period; (3) informative disclosures in the financial statements are to be regarded as reasonably adequate unless otherwise stated in the report; (4) the report shall contain either an expression of opinion regarding the financial statements taken as a whole, or an assertion that an opinion cannot be expressed. When an overall opinion cannot be expressed, the reasons therefore should be stated. In all cases where an auditor's name is associated with financial statements, the report shall contain a clear-cut indication of the character of the auditor's examination, if any, and the degree of responsibility he is taking.

AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS, STATEMENT ON AUDITING STANDARDS No. 1 § 150.02 (1973).

For a proposal on adopting a code of principles and practices in the actuarial profession, see McGinn, The Urgent Need for Actuaries to Adopt Their Own Code of Principles and Practices, 2 PENS. AND PROFIT-SHARING TAX J. 3 (Winter 1975).
Congress designed the above responsibilities of the actuary to foster loyalty to the plan participants, and to insure that the actuary's independent judgement of the appropriate actuarial methods and assumptions to be used is not compromised by the plan sponsor or others who might attempt to exert influence on the actuary. The Act also intends that a single set of actuarial methods and assumptions be employed for all reporting, funding, and disclosure requirements (e.g. in determining minimum funding and maximum tax deduction limits, reporting to participants and stockholders, etc.).

By forcing the actuary to act in an independent manner, the new law strives to accomplish its dual purpose of protecting the plan participant and establishing a reasonable tax basis for allocating and allowing pension costs.

ERISA sets forth additional regulatory constraints within the scope of which the actuary is to exercise independent judgment. The Secretary of the Treasury may require actuarial valuations more frequently than every three years in particular cases. The Secretary may also challenge the reasonableness of the actuary's choice of assumptions and methods, as they relate to the plan's actual experience in the aggregate. Any change in the actuarial cost method (funding method) must be approved in advance by the Secretary of the Treasury. The actuary will also have to comply with numerous other requirements defining actuarial and funding terms (e.g. acceptable actuarial cost methods and asset valuation methods).

C. Reporting and Disclosure

The actuary summarizes his results in reports filed with both the Department of Labor and the Internal Revenue Service. The annual report to the Labor Department must include a complete actuarial statement relative to the plan year prepared by the enrolled actuary and filed by the plan administrator within 210 days after

the close of the plan year.\textsuperscript{33} The actuarial report to be filed by the plan administrator must also be prepared by an enrolled actuary.\textsuperscript{34} The plan administrator must file an actuarial statement of valuation with the Internal Revenue Service not less than thirty days before a merger, consolidation, or transfer of assets of a plan.\textsuperscript{35}

\textbf{D. Enforcement}

ERISA places great import on the reporting requirements and is replete with remedies to enforce them. The failure to file an actuarial report on time or without acceptable cause for delay may subject the plan administrator to a $1,000 penalty\textsuperscript{36} as well as to a civil action.\textsuperscript{37}

The Secretary of Labor may reject a filing of a report if he determines that such report is incomplete or that there is a material qualification contained in the opinion of the actuary.\textsuperscript{38} He may then retain an enrolled actuary on behalf of the plan participants to prepare an actuarial statement.\textsuperscript{39} The plan actuary may also be disenrolled, after notice and hearing, for failure to discharge his duties under the Act.\textsuperscript{40}

Other more general enforcement provisions also serve to check the conduct of the actuary. Persons who willfully violate the reporting and disclosure provisions are subject to criminal penalties.\textsuperscript{41} In addition, those convicted of specific crimes, including violations of ERISA, are prohibited from serving as consultants to any employee benefit plan.\textsuperscript{42} However, it is the fiduciary responsibility provisions

\begin{itemize}
\item \textsuperscript{34} Id. § 103(a)(4)(A), 29 U.S.C. § 1023(a)(4)(A) (Supp. V 1975).
\item \textsuperscript{35} Id. § 1031, 26 U.S.C. § 6058 (Supp. V 1975).
\item \textsuperscript{36} Id. § 1033, 26 U.S.C. § 6692 (Supp. V 1975).
\item \textsuperscript{38} Id. § 104(a)(4), 29 U.S.C. § 1024(a)(4) (Supp. V 1975).
\item \textsuperscript{39} Id. § 104(a)(5)(B), 29 U.S.C. § 1024(a)(5)(B) (Supp. V 1975).
\item \textsuperscript{40} Id. § 3042(b), 29 U.S.C. § 1242(b) (Supp. V 1975).
\item \textsuperscript{41} Id. § 501, 29 U.S.C. § 1131 (Supp. V 1975).
\item \textsuperscript{42} Id. § 411, 29 U.S.C. § 1111 (Supp. V 1975). A person who has been convicted of specified crimes (e.g. robbery, bribery, extortion, fraud, a violation of any provision of ERISA, and certain other felonies, etc.) is prohibited from serving as an administrator, officer, trustee, custodian, counsel, agent or employee of a plan. In addition, such person is prohibited from serving as a consultant to a plan. Intentional violation of this provision of the Act carries
of the Act which have given actuaries the most concern. A fiduciary who breaches any of the responsibilities imposed by the Act not only is subject to removal, but is also held personally liable to restore any losses resulting therefrom. A fiduciary also has a "co-fiduciary" responsibility to prevent a breach by another fiduciary.

a maximum fine of $10,000 or imprisonment for not more than one year or both. Both the person who served the plan in violation of the Act and the person who permitted him to do so are subject to the foregoing punishment. Id.


44. ERISA provides that a fiduciary who breaches any of his responsibilities or duties is liable personally to restore any losses to the plan or profits made from the use of plan assets as a result of such breach. ERISA § 409, 29 U.S.C. § 1109 (Supp. V 1975). The fiduciary is also subject to any other equitable remedy that a court deems appropriate, including removal. Such an action may be brought by the Secretary of Labor, a beneficiary, participant, or another fiduciary. ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) (Supp. V 1975). Furthermore, a beneficiary or participant may bring a civil action to recover any benefits due him, to enforce any rights that the beneficiary or participant may have under the plan, or to clarify any future rights. ERISA §§ 502(a)(1), 502(a)(3), 29 U.S.C. §§ 1132(a)(1), 1132(a)(3) (Supp. V 1975). Eaves v. Penn, 426 F. Supp. 830 (W.D. Okla. 1976) is an excellent example of the Labor Department's enforcement of the fiduciary provisions of ERISA. The case was the first such action brought by the Department of Labor under ERISA. The Department alleged that the three trustee-fiduciaries of Glen's, Inc. Profit Sharing Plan sold corporate stock to the plan in violation of fiduciary obligations imposed by ERISA, causing substantial injury to the plan, its participants and beneficiaries. By exchanging cash assets for securities of undeterminable market value, the transactions impaired the plan's ability to meet obligations to participants and beneficiaries. The three trustees executed an agreement for the sale to the third trustee and the profit sharing plan of all stock of an Oklahoma City restaurant owned by two of the trustees. The Labor Department further alleged that the three trustees benefited because one of them gained control of the restaurant, its assets, and the profit sharing plan assets without paying substantial consideration and because the other two trustees were allowed to liquidate their holding in the restaurant for more than $1 million.

The United States District Court for the Western District of Oklahoma found that the three trustees were fiduciaries and breached their responsibility to act solely in the interest of participants and beneficiaries and to defray reasonable expenses of plan administration. The three trustees failed to perform their duties with the care, skill, prudence, and diligence under the circumstances that a prudent man acting in a similar capacity and familiar with such matters would use in the conduct of such a plan. The failure to meet their fiduciary obligations with respect to the plan violated §§ 404(a)(1)(A) and 404(a)(1)(B) of ERISA, the court held. Having found such violations, the court relied on its broad discretion to provide remedial and equitable relief and ordered a rescission of the sale and removal of the trustees. The court further ordered restoration of income and profits lost to the plan, and the appointment of a court-appointed trustee.

Finally, a fiduciary must not cause a plan to engage in a prohibited transaction.46

III. The Fiduciary Provisions of ERISA

A. ERISA's Amorphous Definition

Section 3(21) of ERISA and section 4975(e)(3) of the Internal Revenue Code define the term “fiduciary.” As so defined, a fiduciary is anyone who exercises discretionary control or authority over plan management or assets or anyone possessing discretionary authority or responsibility in the administration of a plan. A fiduciary is also anyone who provides investment advice to a plan for compensation.47 The broad scope of this definition is readily apparent and even though a person has not been officially designated as a plan fiduciary, he must be extremely careful to avoid such status and therefore not assume the duties imposed on fiduciaries by ERISA.

An actuary, strictly defined, does not seem to be a fiduciary, definitionally, under ERISA. The Department of Labor, in an interpretive bulletin, has stated that an actuary who renders actuarial consulting services to an employee benefit plan (other than as an investment advisor) is not a fiduciary of the plan solely by rendering such services.48 However, an actuary’s conduct will classify him as

47. ERISA § 3(21)(A) provides:
a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.
48. An actuary, attorney, accountant, or consultant will be a fiduciary if his or her authority or actual performance falls within the definition of the term fiduciary. 29 C.F.R. § 2509.75-5, D-1 (1977). The Internal Revenue Code notes that such persons would also be considered to be fiduciaries within the meaning of section 4975(e)(3) of the 1954 Internal Revenue Code. § 4975(e)(3) of the Internal Revenue Code provides:
the terms fiduciary means any person who:
(A) exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets,
(B) renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or
a fiduciary within the meaning of the Act, if the actuary 1) exercised discretionary authority or control respecting management of the plan, 2) exercised authority or control respecting management or disposition of the plan's assets, 3) for a fee (direct or indirect), renders investment advice with respect to the assets of the plan or has any authority or responsibility to do so, or 4) has any discretionary authority or responsibility in the administration of the plan. Inasmuch as the determination of fiduciary status is based essentially on conduct, a person not normally considered a fiduciary (e.g., an actuary) may become one by virtue of his conduct relative to the plan.

B. The Actuary as a Fiduciary

The activities necessary to elevate the actuary to the status of a fiduciary will most likely be determined on a case by case basis in the setting of the statutory definition. Yet, it is clear that ERISA perceives the actuary as acting "like," if not "as" a fiduciary, at

(C) has any discretionary authority or discretionary responsibility in the administration of such plan.

Id.

49. An actuary shall be deemed to be rendering investment advice to a plan within the meaning of § 3(21)(A)(ii) of ERISA if:
   (i) Such person renders advice to the plan as to the value of securities or other property, or makes recommendation as to the advisability of investing in, purchasing, or selling securities or other property; and
   (ii) Such person either directly or indirectly (e.g. through or together with any affiliate)-
       (A) Has discretionary authority or control, whether or not pursuant to agreement, arrangement or understanding, with respect to purchasing or selling securities or other property for the plan; or
       (B) Rends any advice described in paragraph (c)(1)(i) of this section on a regular basis to the plan pursuant to a mutual agreement, arrangement or understanding, . . . and that such person will render individualized investment advice to the plan based on the particular needs of the plan regarding such matters as, among other things, investment policies or strategy, overall portfolio composition, or diversification of plan investments.


50. Although the Department of Labor has taken the position that actuaries are not fiduciaries simply by performing their typical professional services, they may be considered fiduciaries if they exercise authority or control. Since the fiduciary provisions of ERISA are so broad, an actuary may be deemed to exercise control over a plan, since in many instances the employer-client usually takes his advice. As a result, the actuary is subject to suit under ERISA and would then have the burden of proving he was not in fact a fiduciary. PENS. REP. (BNA), No. 160, Oct. 24, 1977 at A-29.
least with respect to the specified duties of the actuary as imposed by ERISA. The following comparisons explain this conception.

The positions of the enrolled actuary and fiduciary under ERISA are analogous in that the former is required to be engaged on behalf of all plan participants, and the latter is required to act solely in the interest of the participants and beneficiaries.

Furthermore, the requirement that the enrolled actuary exercise independent judgment in the selection of actuarial assumptions and methods in order to give his best estimate of anticipated experience under the plan may vest the actuary with "discretionary authority or discretionary responsibility in the administration of the plan," that is similar to the discretion of a fiduciary.

Finally, the actuary's express responsibility to use reasonable assumptions is similar to that of the fiduciary, who must exercise prudence in carrying out his duties.

The House Committee on Education and Labor, in a report to Congress, has explicitly stated that the actuary is a fiduciary when he performs his normal plan functions, and will be held to the duties and potential personal liability, imposed on such fiduciaries for any breach of such duties. Since the Committee intended to include a broad range of persons within the definition of fiduciary, the Committee was convinced that additional constraints were necessary to establish the professional qualifications of those performing vital services to the plan. The Committee conceded there was a substantial burden imposed on the actuary, but such burden was consistent with the important functions performed by the actuary (fiduciary).

C. Co-Fiduciary Liability

There should be major concern and substantial effort by the actuary to avoid being designated as a fiduciary under ERISA, even

51. Mueller, What Practitioners Should Know About the Expanded Role of the Actuary Under ERISA, 42 J. TAXATION at 151. Regarding performance of other services by the actuary, determination of fiduciary status will be on the particular facts of the situation. Id.
53. Id. See text accompanying notes 47-49 supra.
54. Id.
56. Id.
57. Id.
though he is subject to malpractice liability for negligent performance. This is so because potentially the most significant exposure created for an actuary who has been determined to be a fiduciary is the liability that exists for the breach of a fiduciary duty by another fiduciary. An actuary can have a broad obligation to monitor the performance of co-fiduciaries (those other than actuaries rendering services to the plan) once he or she has become a fiduciary. Accordingly, an actuary who is found to be a fiduciary may also be liable for the acts of non-actuary fiduciaries.

Under ERISA, a fiduciary of a plan is to be liable for the breach of fiduciary responsibility by another fiduciary of the plan if he knowingly participates in or conceals the other fiduciary's breach of a duty. In addition, a fiduciary is liable for another's breach of fiduciary responsibility if he knowingly undertakes to conceal a breach committed by the other. In order to establish this scienter, a plaintiff must show that the participating fiduciary knows that the other is a fiduciary with regard to the plan, knows of the act, and knows that it constitutes a breach. Moreover, if a fiduciary knows that another fiduciary of the plan has committed a breach, and the first fiduciary knows that this is a breach, the first fiduciary must take reasonable steps under the circumstances to remedy the breach. Furthermore, a fiduciary also is to be liable for the loss caused by another fiduciary's breach of his fiduciary responsibility if, through his own failure to exercise prudence or otherwise comply with the basic fiduciary rules of ERISA in carrying out his specific responsibilities, he enables the other fiduciary to commit a breach. Finally, a fiduciary has the duty not to allow the plan to engage in a prohibited transaction.

58. See text accompanying notes 86-92 infra.
60. Id. § 405(a)(1), 29 U.S.C. § 1105(a)(1) (Supp. V 1975). Under this rule, the fiduciary must know the other person is a fiduciary with respect to the plan, must know that he participated in the act that constituted a breach and must know that it was a breach.
61. Id. For example, A, an actuary exercising control over the plan, and B, a trustee of the plan, are considered fiduciaries, and B invests in a certain type of security in violation of the trust instrument. If B tells A of this investment, A (the actuary) would be liable with B for the breach of fiduciary responsibility if he (A) concealed this investment.
62. Id. § 405(a)(3), 29 U.S.C. § 1105(a)(3) (Supp. V 1975). See note 76 infra. If A had the authority to do so, and if prudent under the circumstances, A may be required to dispose of the security acquired by B.
D. The Party-in-Interest and the Excise Tax

Liabilities are also imposed on an actuary as a party-in-interest to the plan. An actuary clearly qualifies as a party-in-interest since he performs services for the plan, but no direct duties are imposed on a party-in-interest by ERISA. Rather, a party-in-interest is one who is forbidden to engage in certain transactions with the plan fiduciary. For example, an actuary, as a party-in-interest, cannot engage in a prohibited transaction and is therefore forbidden to 1) sell or lease property to the plan, 2) lend or borrow from the plan, 3) furnish goods or services to the plan, 4) receive assets from the plan, or 5) acquire any employer securities for the plan. The duty, however, is placed upon a fiduciary to insure that no party-in-interest engages in these transactions. This duty is imposed when he "knows or should know" that the transaction is a prohibited one. ERISA provides additional sanctions against prohibited transactions where the actuary himself has a liability exposure, since section 4975 of the Internal Revenue Code specifically allows for civil penalty in the form of a 5% excise tax of the amount involved in the transaction. This tax is imposed for the taxable year of the transaction and for each subsequent year (or portion thereof) in which it is not corrected. If the prohibited transaction is not corrected, the party-in-interest (perhaps an actuary) is subject to an excise tax equal to 100% of the amount of the transaction. Neither the 5%
excise tax nor the 100% excise tax is deductible. Similarly, payment of the tax does not relieve the party-in-interest of his duty to the plan or of his obligation to correct the transaction. 76

E. Summary

The determination of whether fiduciary status exists is one of the most important determinations under ERISA for the actuary or any other professional rendering services to the plan.

Actuaries would, in any case, be subject to a strict standard of liability for the negligent performance of their functions, quite apart from any provisions of ERISA. 77 The significance and the danger of being held to be a fiduciary relates more to the statutory prohibitions and responsibilities associated with such status under ERISA than to the standard of care required. Thus, an actuary as a fiduciary may be responsible not only for his own performance, but also for that of others under the co-fiduciary rules. If a person who deals with a plan but who is not a fiduciary should discover that the plan trustee (a fiduciary) has violated his trust, he has no responsibility under ERISA with respect to such breach. If, however, his relationship to the plan is that of a fiduciary, he will be required, under ERISA, to take appropriate action to remedy the breach. Furthermore, a fiduciary becomes subject to the prohibited transaction rules of ERISA which may result in liability whenever he benefits individually from a transaction, or when he causes or permits the occurrence of one of the specifically prohibited transactions of ERISA.

76. Federal taxes are non-deductible expenses. See I.R.C. § 164.
77. See text accompanying notes 86-92 infra.
Individual fiduciary status within the firm most probably attaches to the directors of the corporation, the committees and individuals who control the ERISA plan it maintains for its employees, and others who accept appointments as trustees or administrators of the plan. Fiduciary status may be conferred on an actuary merely for his certification of values if such amounts to discretionary plan management authority. In addition, the power to order payments of particular amounts of pension benefits may be viewed as discretionary administrative authority.

IV. ERISA’s Impact

The greatest impact of ERISA is increased consumer awareness. Participants and beneficiaries of a pension plan are now more often inclined to commence litigation. ERISA creates a new dimension in the actuary’s relationship with his clients; e.g., the actuary may have to become the liaison for the participants in discussions with employers.

Actuaries who do not desire to be classified as fiduciaries should delineate issues and alternatives for their clients’ consideration, but should be circumspect about making final decisions. Actuaries should be certain that records of any meetings reflect that final decisions were made by plan fiduciaries and not by the actuary. In addition, it may be advantageous for the actuary to have a written contract which details his responsibilities. Actuarial corporations should exercise caution with regard to prohibited transactions and multiple services. To further limit professional liability, peer review and the establishment of study sessions for actuarial employees to discuss personal liability have been recommended.

79. Id. at 505.
81. Id. at A-13.
82. Id.
83. Id. There will be uncertainties in the area of personal liability of the actuary, particularly with the ill-defined fiduciary provisions of ERISA. So long as an actuary does not commit a wrongful act or violate ERISA, he will not be subject to a criminal sentence, however, if some error is made, any liability may be incurred by his employer. Prospective plaintiffs will contend that the enrolled actuary is a fiduciary under ERISA. Accordingly, enrolled actuaries should take certain preventive measures. Actuaries should place priority attention to matters of financial consequence; personal standards should be established and
V. Errors and Omissions

Several types of errors or omissions that an actuary might commit could lead to substantial liability. These include erroneous benefit determinations for individuals, or for all participants in a valuation, erroneous minimum funding calculations leading to an excise tax penalty, overstatement of maximum deposit leading to a carryover and a loss of the alternate use of money, and erroneous determination of liabilities for plan termination, plan amendments, mergers, or acquisitions which result in decisions that might not otherwise have been made. The actuary may incur liability by relying on employer provided data, by a failure to advise of the possibility of substantial deviation of results, or from unwarranted delays which result in penalties, lost opportunities or wrong decisions.

A. Malpractice

The actuary, in making benefit determinations (either calculated by the actuary, his firm, or the client under a system developed by the actuary), can be sued for damages if these determinations are wrong. For example, if an employee were overpaid his benefits, the employer may never recover the excess, in which case the plan has suffered a loss on account of the actuary. This amount would be minimal in the case of one employee. However, if the actuary's mistake is a recurring one (i.e., a systematic error), overpayments can accumulate rapidly to the employer's detriment.

observed. In addition, actuaries should be certain that consequential items are reviewed thoroughly. Furthermore, actuaries should be aware and familiar with all applicable laws, particularly ERISA. Most importantly, actuaries must be careful not to act like a fiduciary unless they are prepared to face the potential consequences. PENS. REP. (BNA), No. 173, Jan. 30, 1978 at A-21.

Within the actuarial firm, it has been suggested that quality controls (e.g., a set of rules assigning and delegating responsibilities to certain individuals) include having a senior actuary responsible for the computational procedures used in a final report. Also, principles and procedures should be established in regard to data collection and the use of appropriate actuarial methods and assumptions. Additionally, an actuary should state his reliance on another professional's work where applicable (e.g., an accountant or attorney).

Although an enrolled actuary is subject to civil action under common law, as well as being professionally liable under ERISA, the risks are not very high and can be controlled if the actuary acts in a professional and responsible manner. Id. at A-22.

85. Id.
86. Address by Donald S. Grubbs, Jr., The Joint Meeting of the American Academy of Actuaries and the Conference of Actuaries in Public Practice (Feb. 28, 1977).
Another problem in benefit determination could arise if the actuary informs a participant of the amount of benefit under various options and these serve as the basis for an employee's selection of an optional form of benefit. For example, if an employee who selected the life annuity dies shortly thereafter, and it is subsequently determined that the joint and survivor benefit quoted was too low, the surviving beneficiary may argue that the decedent would have selected the joint and survivor annuity if he or she had received correct information.

Minimal funding requirements of the plan sponsor are also determined by the actuary. If an employer is required to pay an excise tax for a funding deficiency because the actuary misinformed him of the proper minimum funding requirements, the employer may attempt to recover from the actuary.

Actuaries often determine the maximum deductible contribution. Errors in this area, however, can conceivably result in the disallowed contribution being carried over and deductible in a subsequent year, so that there may be no actual damages to the employer. There are situations, however, where the net effect is an increase in taxes for which the employer may anticipate recovery from the actuary.

Employer's liability on plan termination may also be determined by the actuary. Ordinarily, this situation would not cause any damages to the employer, since any excess in the contingent employer liability which has been paid could normally be recovered. At times, however, the loss of the use of money can damage a business far beyond the interest gained on that money. Of greater import, if the actuary has erred in the calculation of liability on plan termination and his miscalculation is the basis for the employer's decision concerning whether or not to terminate the plan, both employer and the participants could sustain substantial damages.

The actuary often determines cost and liabilities for amendments to the plan which may include the increase in contingent employer liability upon subsequent termination. The actuary's calculations

87. Id.
88. Id.
89. Id.
90. Id.
91. Id.
concerning a potential amendment may influence the employer's decision regarding whether to adopt the amendment. If the actuary erroneously has advised the employer that a particular amendment will increase the plan costs by $X and the actual increase is $2X, the employer may claim that the excess is a damage he suffered as a result of accepting the actuary's determination.

B. The Equity Funding Scandal

The incidence of claims against professionals has risen sharply in recent years. Professional liability insurance now is being written for at least seventy different categories of professionals, including actuaries. The massive fraud involved in the Equity Funding debacle serves to reinforce this statement.

The Equity Funding litigation arose out of an alleged securities fraud perpetrated through Equity Funding Corporation of America (EFCA) and its subsidiaries. The fraud at EFCA was committed over an eight year period with the aid, complicity, and neglect of many outside individuals or firms that knew or should have known about the fraud. These " aider and abettor" defendants included certified public accountants for EFCA and its subsidiaries, underwriters of the EFCA debentures, national banks that extended credit to EFCA, and a large national actuarial firm that did work for one of EFCA's subsidiaries, Equity Funding Life Insurance Corporation (EFLIC).

The actuarial firm rendered an opinion in support of EFLIC's reported calculation of policy reserves, premiums, and accrued costs of recapture of reinsured EFLIC policies. Common law negligence

92. Id.
94. Id.
95. Equity Funding Corporation of America, a financial services institution, began operations in 1960 with ten thousand dollars. By 1973, EFCA claimed to manage assets of one billion dollars, a truly remarkable and unprecedented accomplishment. This growth was then exposed as a complete fiction and the corporation soon filed for bankruptcy. EFCA came to be known as "Wall Street Watergate." For a thorough narrative history of one of the greatest frauds ever perpetrated, see R.L. Dirks & L. Gross, The Great Wall Street Scandal (1974).
97. Id. at 171.
98. Id. at 195.
claims against the “aiders and abettors” and common law fraud and breach of fiduciary duty claims were asserted. The complaint alleged that the actuaries knew or should have known about the fraud at EFLIC, through the exercise of due care (one-third of all of EFLIC’s recorded life insurance policies were bogus entries). The plaintiffs brought their claims under various sections of The Securities Act of 1933 and The Securities Exchange Act of 1934. The complaint clearly alleged that false and misleading statements were issued by the actuarial firm in connection with the sale or purchase of a security.

One of the actuaries employed by EFLIC was given a two year jail sentence for his part in the fraud and the consulting actuarial firm settled out of court for $3 million. The exact issue raised in Equity Funding (i.e. that the independent accountants or actuaries “should have known” that the data was incorrect) could occur with regard to a pension plan as easily as it did in a life insurance company.

VI. Conclusion

Actuaries and other professionals necessarily are concerned about their potential exposure since the passage of ERISA and its fiduciary provisions. It will be up to the courts to determine fiduciary status on a case-by-case basis. There are a great number of possibilities for an actuary to become a fiduciary under ERISA. The actuary may become involved in design, implementation, and administration, especially in the case of a small pension plan where the

99. Id. at 172.
100. Id.
103. 416 F. Supp. at 195.
105. Barron’s, Jan. 10, 1977, at 46, col. 2. See also N.Y. Times, Nov. 27, 1976, at 29, col. 5 and N.Y.L.J., Nov. 26, 1976, at 2, col. 4 which report a total settlement by accountants, actuaries, and underwriters to be between fifty and sixty million dollars.
client is either unsophisticated or unwilling to do such for itself. If it is proven that the actuary's conduct conforms to the above or his advice is not in fact independent, but rather changed or modified to comply with the client's desires, the actuary is no longer independent as ERISA mandates that he must be. It will be a facts and circumstances question and actuaries must be extremely careful to avoid making decisions for their clients so that they do not attain fiduciary status with its corresponding duties and responsibilities. Plan participants are not unprotected if an actuary is not a fiduciary under ERISA. The actuary must still exercise due care and will be subject to liability for any fraud or negligence.

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