The Emerging Law of Actuarial Malpractice

*William D. Hager**
*Paul-Noel Chretien***

Reprinted with permission of the Drake Law Review.
31 Drake Law Review 1982. Pages 831-854.

Table of Contents

I. Introduction

II. Prefatory Considerations

A. Actuaries as Professionals
B. Actuarial Designations and Professional Societies
C. Nature of Liability Exposure
D. Generally Accepted Actuarial Principles

III. Professionals and Malpractice Generally

IV. Actuarial Malpractice

A. Actuarial Malpractice Cases
B. Actuarial Liability to Third Parties
C. NAIC Actuarial Opinions

V. ERISA

A. Joint Board for the Enrollment of Actuaries
B. Plan Qualifications and Reporting Requirements
C. Professional Responsibilities
D. The Actuary and Fiduciary Duties
E. Prohibited Transactions and Parties-In-Interest
F. Enforcement Provisions

VI. Summary

I. Introduction

An actuary is "that professional who is trained in evaluating the current financial implications of future contingent events." [1] Using mathematical skills to define, analyze and solve complex business and social problems, the actuary designs insurance and pension programs and is responsible for their financial soundness. These programs create long-term financial obligations of an enormous magnitude dependent on the actuary's forecasts of probabilities and economic developments. [2]

As a professional, an actuary's performance must confirm to certain standards of care or he will risk malpractice exposure. In essence, these standards of care are the same as those applicable to other professions - they require the actuary to use due care and diligence and to follow generally accepted actuarial principles. [3]

In the past, actuaries were rarely named as defendants in lawsuits and it was even more rare for a court to find an actuary liable.[4] However, recent changes[5] have brought the actuary into the public's eye - partially because of the profession's increased visibility in political forums [6] and partially because of the emerging law of actuarial malpractice. Consequently, actuaries are finding themselves as defendants in lawsuits more frequently [7] and with the increased exposure there is a clear need for lawyers to be conversant in the principles of actuarial malpractice.

Because there is little generally available literature on the structure of the actuarial profession, this article will first provide these key background considerations: (1) that under law, actuaries are deemed to be professionals; (2) the various professional actuarial societies and their designations; (3) the nature of the actuary's liability exposure; and (4) generally accepted actuarial principles. The article will then discuss: (5) the general principles of professional malpractice and the specific principles of actuarial malpractice including recent case development; and then finally, (6) consider the Employee Retirement Income Security Act of 1974 [8] and its relationship to the actuary's liability.

It should be noted at the outset that the term "actuarial liability" can be used in two ways: (1) in the financial/accounting sense, and (2) where through a negligent act or omission, an actuary subjects himself to legal attack. The latter definition will be the focus of this article.

II. Prefatory Considerations

A. Actuaries as Professionals

Any discussion of actuarial malpractice assumes that the law considers an actuary to be a professional and hence subject to standards required of all professionals. We believe the case law supports this conclusion.

Historically, the recognized professions (and hence, those that have been subject to malpractice considerations) have been law, medicine (including its various branches and dentistry) and the ministry. [9] More recently, principles of malpractice have been applied to, among others, the professions of accounting, [10] architecture,[11] and engineering. [12]

It is certain as well, that actuarial work qualifies as a profession. Indeed, state courts have so held in defining actuarial work. One case defined an actuary as: "a person skilled in mathematical calculations whose profession is the calculation of insurance risks and premiums." [13] In another case, an actuary is defined as: "(o)ne whose profession is to calculate insurance risks and premiums . . ." [14]

Indeed, actuarial work meets the traditional professional criteria of a calling involving a "special knowledge of a branch of science or learning." [15] As we shall see, the courts have not only declared the practice of actuarial science to be a profession, but have applied malpractice principles directly to the actuary, [16] leaving the matter unambiguous.

B. Actuarial Designations and Professional Societies

Any evaluation of actuarial liability and malpractice must be accompanied by an understanding of the rather unique array of actuarial societies and their underlying designations. The necessity for this understanding is heightened by the fact that the states do not license actuaries in a fashion similar to other professions and the federal government does so only in a limited fashion in a narrow area of practice. [17]

In the United States, there are four major designation-granting professional actuarial organizations: the Society of Actuaries (Society), the Casualty Actuarial Society (Casualty Society), the Conference of Actuaries in Public Practice (Conference), and the American Academy of Actuaries (Academy). [18]

The society was formed in 1949 by a merger of the Actuarial Society of America (founded in 1889) and the American Institute of Actuaries (founded in 1909). [19] Today, the Society has about 8,000 members, including Canadian members, [20] and is the largest actuarial organization in the United States. Affiliation with the Society is as an Associate, (the designation: A.S.A.) [21] or Fellow (F.S.A.). [22] An Associate has successfully completed the first five examinations. A Fellow has successfully completed ten exams. Society affiliation is generally recognized to connote expertise in actuarial applications in the life insurance and the pension and health areas under some circumstances.

The Casualty Society was organized in 1914 as the Casualty Actuarial and Statistical Society of America. It adopted its present name in 1921.[23] In the early part of the twentieth century, the evolution of worker's compensation laws required the application of actuarial principles to sickness, disability, and casualty events. The differences between these problems and those of traditional life insurance led to the formation of the Society.

Today, affiliation with the Casualty Society is recognized at two levels, Associateship (A.C.A.S.) upon successful completion of seven examinations[24] and Fellowship (F.C.A.S.) upon successful completion of all ten exams.[25] Standing in the casualty Society is generally recognized to connote expertise in property and casualty actuarial considerations. Indeed, the casualty Society is the branch of the actuarial profession that promotes actuarial and statistical science as applies to insurance other than life. [26]

The Conference was established in 1950. The organizational emphasis of the Conference is upon consulting actuaries, and its membership includes individuals from all areas of actuarial expertise whose professional work is substantially limited to consulting. [27]

There are three classes of active membership in the Conference: Associate (A.C.A), member (M.C.A.), and Fellow (F.C.A.). [28] An Associate must have attained membership as an Associate or Fellow of the Society, or of the casualty Society, or Fellow of the Canadian Institute of Actuaries, the Faculty of Actuaries or the Institute of Actuaries or alternatively have attained membership of the American Academy of Actuaries before January 1, 1979. In addition, as Associate must have at least five years of experience in responsible actuarial work. [29]

A Member of the Conference must: (1) be substantially employed in full-time consulting actuarial work as an actuary of a federal, state or local governmental unit or full-time as an enrolled actuary and; (2) have a position of substantial actuarial responsibility and; (3) have either, (a) attained membership as an Associate of the Society or the casualty Society or (b) as a Fellow of the Society, casualty Society, the Canadian Institute of Actuaries, Faculty of actuaries in Scotland or Institute of Actuaries or alternatively have attained membership of the Academy by January 1, 1979; and (4) have at least five years of experience in responsible actuarial work with at least three of those years spent engaged in activities described in (1) above. [30] A Fellow must meet requirements numbers (1), (2), and (3(b)) above, and have at least twelve years of responsible actuarial experience. [31]

The Academy was formed in 1965 as a national accrediting organization by its three underlying constituent organizations: the Society, the casualty Society, and the Conference. Admission into the Academy includes both an examination requirement and an experience requirement. The examination requirement is met by showing the attainment by exam of either an Associateship or Fellowship in the Casualty Society or the Society, or Fellowship in the Conference or the Canadian Institute of actuaries, Faculty of actuaries in Scotland or the Institute of actuaries. In addition, the examination requirement can be met by showing status as an enrolled actuary under ERISA.[32] Persons who belong to the Academy are authorized to designate themselves as "Members of the American Academy of Actuaries" and to append to their names the initials "M.A.A.A." [33]

The current Academy experience is "three years of . . . responsible actuarial work." [34] "Responsible actuarial" work is defined as "work, performed in the United States, which has required knowledge and skill in solving practical actuarial problems in any of the following fields: life and health insurance, group insurance, social insurance, pensions, or property and liability insurance." [35]

As a single body designated to represent all actuaries of all specialties, the Academy makes public statement and offers the profession's positions on the entire range of actuarial issues both at the state and federal level including Congress. [36] The other critical and universal function of the Academy is in the area of professional ethics and standards. By informal agreement among the Society, casualty Society and the Conference, the Academy promulgates professional ethics (Guides and Opinions), and the professional standards relating to work product (Recommendations and Interpretations) which though applicable to Academy members, have profession-wide significance because of the high percentage of membership overlap. The Academy currently has approximately 7,000 members. Moreover, the Academy is the only major professional actuarial organization which admits actuaries whose sole professional designation is that of enrolled actuary under ERISA.

Finally, under ERISA, the Joint Board for the Enrollment of Actuaries issues a license to qualified individuals granting status as an "enrolled actuary". [37] This status is a requirement for performing actuarial services under ERISA, [38] and is granted upon passing two exams, EA1 and EA-2. EA-1 is the same as the Society of actuaries' exam number four. [39] EA-2 is identical to Part 7-E, Section A of the Society's exam. [40]

In addition, three significant foreign designation-granting societies to which many American actuaries belong are worthy of mention: the Canadian Institute of Actuaries (granting the designation F.C.I.A. for Fellows; it also recognizes Correspondents and Students), the British Institute of Actuaries (granting the designation A.I.A. for Associates and F.I.A. for Fellows), and the Faculty of Actuaries I Scotland (granting the designation F.F.A. for Fellows). [41]

C. Nature of Liability Exposure

Having both determined that actuaries are professionals as well as explored the various professional designations, we next focus on what an actuary does that can expose him to liability. [42] The critical determinant of the extent of exposure for the actuary is, of course, the nature of his employment.

Thus, the insurance company actuary, the government actuary, the in-house corporate actuary and the university instructor of actuarial science have relatively minor exposure in contrast to the actuary engaged in a consulting practice. The actuarial consultant is specifically holding himself out to the public as an expert in the actuarial field and as a result, has rather significant exposure.

Examples of the type of errors or omissions that could lead to substantial liability exposure in the pension area for the actuary are: (1) erroneous benefit determination for individuals, or for all participants in a valuation, (2) erroneous minimum funding calculations leading to an excise tax penalty, and (3) overstatement of maximum deposit leading to a carry over and a loss of the alternative use of money.

In the termination and merger area, exposure relates to erroneous determination of liabilities for plan termination, plan amendments, mergers or acquisitions which result in decisions that might not otherwise have been made. Besides the data errors of which the actuary may be aware, there are those of which he is unaware. Courts have held that the professional has a responsibility to challenge a clients information or data if it appears questionable. Indeed, the essence of the allegations in In re Equity Funding Corp. of America [43] was not that the accountants and actuaries knew that the data was erroneous but that by using due care they should have known. [44]

In addition, an actuary could also incur liability for not indicating to his client the risks involved. By analogy, treating physicians in medical malpractice cases have been held liable even though they performed an operation in a reasonable and proper manner, simply because they failed to advise the patient beforehand that there were substantial risks related to the procedure.[45] Courts have held that by failing to advise the patient of the risks, the physician in effect took away from the patient the right to make an intelligent choice not to undertake the operation. [46] If the actuary quite reasonably advises a client that his best estimate of the cost of a pension plan is seven percent of gross pay, but fails to advise the client that the actual cost may be substantially more or less than that, and if for unforeseeable reasons the actual costs are eleven percent of pay, the actuary might be subject to lawsuit for not fully disclosing the possibility and significance of a possible deviation from his forecasts. Finally, an actuary risks liability exposure from unwarranted delays which result in penalties, lost opportunities or wrong decisions.

D. Generally Accepted Actuarial Principles

Similar to the accounting profession, generally accepted actuarial principles are standards and practices that have been recognized by the profession and the courts as appropriate for application in specific actuarial contexts.

Generally accepted actuarial principles have been recognized in law. In United States v. Consumer Life Insurance Company,[47] the United States Supreme Court, in a case involving the determination of an insurance company's reserves for federal tax purposes concluded that the proper calculation of reserves should be carried out "under accepted . . . actuarial standards . . .".[48]

In United States v. Zazove,[49] a case involving insurance reserves and benefits, the Supreme Court determined that the appropriate level of reserves should be determined "under accepted actuarial principles . . ." [50] State courts have similarly recognized the existence of generally accepted actuarial principles. [51]

Having noted the legal recognition of the principles, we next examine their sources. Under informal agreement between the principal actuarial societies in the United States, the

American Academy of Actuaries has undertaken the standard writing function for the profession. Its annual Year Book [52] contains Guides, [53] Opinions, [54] Recommendations, [55] and Interpretations.[56] These provisions are believed to represent the professions' codified portion of generally accepted actuarial principles. [57]

The provisions themselves range in scope and complexity from Guide 1(a), which provides that "the actuary will act in a manner to uphold the dignity of the actuarial profession and to fulfill its responsibility to the public," [58] to Interpretation 6-B entitled, "Choice of actuarial reserving Methods and Assumptions for Participating Policies Sold by Stock Life Insurance Companies." [59]

Finally, as with all professions, standards of practices must be reconciled with applicable provisions of law. Of note here are the various provisions of ERISA which impose statutory requirements on the enrolled actuary. [60] Nonetheless, even ERISA recognizes generally accepted actuarial principles: Section 103(a) of the Act requires actuarial reports to utilize "such assumptions and techniques as are necessary [to enable the actuary] to form an opinion as to whether the contents . . . are . . . reasonably related to the experience of the plan." [61] The American Academy of Actuaries requires that if the actuary deviates from certain standard practices he must explicitly qualify his report to disclose to his client that the calculations were performed using a technique other than that identified as acceptable for the circumstances at issue. [62]

One issue worth discussion is the determination of applicable actuarial principles when either the profession has not codified a principle or no statutory provision applies. Perhaps the most authoritative pronouncement in this area is Opinion A-7 of the American Academy of Actuaries. [63] That Opinion is based on the Academy's Guide 4(b)[64] which requires the actuary to "exercise his best judgment to insure . . . that the [actuarial] methods employed are consistent with the sound principles established by precedent or common usage within the profession." [65]

Opinion A-7 states that sound actuarial principles and practices emerge from the utilization of generally accepted concepts described in recognized actuarial textbooks and actuarial literature including the professional journals [66] and study notes for candidates for membership in the Casualty Society, the Conference, the Society and their predecessors.

In addition, that Opinion requires that an actuary working in a specialized field take into consideration the recommendations and interpretations of the relevant Practice Committees of the Academy including the Committees on Life Insurance Financial Reporting Principles, Property and Liability Insurance Financial Reporting Principles, Pension Actuarial Principles and Practices and Dividend Principles and Practices.

III. Professionals and Malpractice Generally

Before examining cases dealing specifically with actuarial malpractice, perhaps a brief review of general principles of malpractice will be instructive. When a professional advises his employer or client or others with whom he is in privity of contract,[67] a duty to exercise due care arises. [68] Though professions differ, professionals are generally held to the same standard of skill. [69] That standard requires that when a professional is rendering services for compensation he must use reasonable care and competence. [70] A failure to discharge that duty will subject the professional to liability for negligence. [71] In performing duties, a professional does not guarantee correct judgment, only that in formulating his judgment and work product he exercise reasonable skill and competence in good faith without fraud; this is true for physicians, accountants, attorneys, actuaries, and other professionals. [72]

While not an insurer against damage to his client, a professional may be held liable on grounds of "negligence to one with whom he is in privity or with whom he has a direct contractual relation for . . ." [73] damages which naturally and approximately[74] flow from his failure to use the necessary amount of skill and care.

In most cases,[75] a malpractice action is brought under an expressed or implied contract theory. This is the usual case where a professional is hired by a firm or a client to perform a skilled service. If the service is not performed completely, contract law generally allows recovery for all damages proximately caused by the breach. [76] Tort law holds that one is responsible for the consequences of his acts and where his act causes damages to another, he is liable. [77] A tort action could be brought when a third party who had no contractual relationship with the professional was nonetheless harmed by relying on his work. Generally, only gross negligence or fraud by the professional would be sufficient for a third party to bring a successful tort action. [78] Often professionals will disagree as to the proper techniques to apply in a given instance. In this case, the law only requires that the professional use the technique he deems fairly applicable to the situation presented. [79] In the past, when a court judged a professional's acts, it would evaluate the degree of knowledge, skill and judgment usually possessed by members of that profession in the community where the action arose. [80] Recently, as professional literature has become much more readily available to all practitioners, courts have looked less to local standards and instead have evaluated the general standard of care within the profession. [81] Experienced experts in a specific area of a field are held to even higher standards than professionals who have only a general knowledge of the subject. [82]

IV. Actuarial Malpractice

The general law of malpractice has been applied to actuaries in a manner similar to that of other professions. We have stated that in the past, cases of actuarial malpractice were rare, but the emerging trend today illustrates that plaintiffs do not hesitate to name an actuary as a defendant nor the courts to impute liability where the facts warrant.

A. Actuarial Malpractice Cases

Three major cases will be discussed which illustrate the depth and scope of liability that can attach to an actuary's work product. Equity Funding [83] is perhaps the most noteworthy case involving actuaries. The case grew out of an alleged massive securities fraud perpetrated over an eight year period by the Equity Funding Corporation of America (EFCA) and its subsidiaries. [84] EFCA was a small financial services institution that had ostensibly grown into a powerful corporation managing over a billion dollars in assets. [85] This dramatic growth was subsequently exposed as a fraud and EFCA immediately filed for bankruptcy. [86]

Investors in the company sued outside individuals and firms that knew or should have known about the fraud. [87] Among those sued were certified public accountants for EFCA, banks that had given credit to EFCA, and an actuarial firm that did work for one of EFCA's subsidiaries, Equity Funding Life Insurance Corporation (EFLIC). [88]

The actuarial firm had issued reports and opinions indicating EFLIC's reserves, premiums and actuarial calculations were in order. [89] In fact, more than one-third of EFLIC's recorded life insurance policies were fictitious entries. [90] In its pleadings, the plaintiffs alleged the actuarial firm had committed common law negligence, fraud and breach of fiduciary duties under the Securities Act of 1933 [91] and the Securities and Exchange Act of 1934, [92] by not discovering the fraud.

The major portion of the case was eventually settled out of court for a total of $53 million. [93] The actuarial firm paid $3 million of this amount. [94] In the aftermath of the litigation one of the actuaries employed by EFLIC was given a two-year jail sentence [95] and he and another actuary were expelled from their professional organizations. [96] This litigation suggests that actuaries, like other professionals, must use due care and have a duty to investigate when they encounter circumstances which would prompt a similarly situated professional to undertake a more critical inquiry.

In a precedent-setting Canadian case, [97] a life insurance company and its actuary were sued for breach of contract, negligence and breach of fiduciary duties for two errors made by the company's actuary. [98] In the pleadings, plaintiff British Columbia Automobile Association (BCAA) prayed for $500,000 in damages. [99] After the trial, during which four actuarial consultants gave expert witness testimony, BCAA was awarded $295,000 and costs. [100] During the course of the litigation, there was not a dispute that the errors had been made - only a question of whether there were resultant damages and if so, whether they could have been mitigated. [101]

A presentation made by the defendant actuary to BCAA on the effects of a proposed amendment to the BCAA's pension plan contained two "serious errors" according to the judgment. [102] According to the court, one was that although the actuarial presentation purported to use salaries at January 1, 1977 levels, the calculations underlying the presentation were in fact based upon salaries at January 1, 1976 levels. [103] Thus, the costs for indexing the plan's benefits were based on salaries a year out of date.

The second actuarial error noted by the court related to the calculations the actuary made in the presentation to BCAA.[104] In the calculation, the full earnings of the employees were used instead of their pensionable earnings which were usually $1,800 less on an annualized basis. [105] The court held that the contributions made to the original plan were overstated; that BCAA thought there was more money going into the plan than there actually was. [106] Indeed, the actuary projected a $12,500 annual saving for BCAA, instead the amendment cost an additional $50,000. [107] Damages were calculated by considering the lump sum additional cost to BCAA of adopting a plan that was more generous than it would have otherwise adopted had it known the true costs.

This case suggests: (1) a damage formula for actuarial malpractice, and (2) the willingness of at least Canadian courts to apply traditional malpractice considerations to actuaries.

A recent case commented on the consequences of actuarial miscalculation as it affected the costs of benefits in a pension plan. In Saffo v. Occidental Life Insurance Co., [108] pension recipients sued their former employer for reducing their benefits. [109] Benefits were reduced by the employer-sponsored plan when Occidental realized that it had assumed the risk of paying more in benefits than it received in contributions. [110] Occidental's actuaries had erroneously determined that the plan could support a certain level of benefits and Occidental guaranteed this level to the union. [111] When Occidental tried to amend the plan and reduce benefits, it was sued for actuarial malpractice and breach of contract for failing to inform the Internal Revenue Service of the proposed change. [112] The Eighth Circuit Court of Appeals found that Occidental had breached its contract and that it was liable for actuarial malpractice, fraud and breach of fiduciary duty. [113] The court ordered Occidental to pay into the plan what it had initially promised and to pay the benefits that it had withheld when it tried to reduce its payments. [114]

B. Actuarial Liability to Third Parties

Although actuaries may not be held liable upon the theory of ordinary negligence to third parties with whom they have no contractual relationship or for whose special use they did not know their report was made available, [115] an actuary may, upon a theory of fraud, be found liable to such third parties for false financial statements, where he has reason to know or believe that the statement will be relied upon, and fraud may be inferred from conduct amounting to gross negligence. [116] Under such circumstances fraud pre-supposes not only an untrue statement but also a fraudulent intent or reckless disregard for the truth. [117] A mistake in a "reserve statement" which is the result of mere negligence is usually not a basis for recovery by a third person, [118] but a representation certified as true to the knowledge of the actuary when there is no knowledge, a reckless misstatement, or an opinion based on grounds so flimsy as to lead to the conclusion that there is no genuine belief in its truth, is a sufficient basis for finding liability. [119]

An example of a case where there was no fraud on the part of the actuary and therefore no liability to third parties not in privity is Dill v. Wood Shovel and Tool Co. [120] In this case, third parties relied on allegedly negligent actuarial advice concerning the amount of payments to be paid into a pension fund and sued the fund's actuaries. The United States District Court for Ohio held that although the issue of third party liability had not arisen before in an actuarial setting, it had in an accounting case and the principle of not allowing third parties to recover absent fraud by the professional, was equally applicable. [121] Therefore, the claim by the third party against the actuarial consultant was properly dismissed. It should be noted that this case was decided before ERISA was enacted and before plan actuaries had to act on behalf of all plan participants. [122] If the case had been brought after ERISA the actuaries may have been found liable to participants and beneficiaries harmed by the erroneous advice.

C. NAIC Actuarial Opinions

In addition to general consideration of actuarial malpractice, specific actuarial opinions merit consideration. The key public financial report for United States insurance companies is the annual statement blank[123] of the National Association of Insurance Commissioners (NAIC). [124] The blank is used exclusively for financial reporting purposes by all fifty states.

Recently, a statement of actuarial opinion has been added to the Life and Accident and Health Blank as well as the Property and Casualty Blank. The actuarial opinion for both blanks requires the actuary to: (1) state that he is qualified to render the opinion, (2) describe the subjects on which the opinion is to be expressed, (3) describe the scope of his work, (4) express any qualifications he may have about his opinion, [125] and (5) state that the items he examined were calculated in accordance with generally accepted actuarial principles. [126]

The key components of these actuarial opinions relate to the status of the insurer's reserves. The critical element of the balance sheet for both life and property casualty insurers is also the status of reserves; the liability exposure of the actuary who authors the opinion is significant. Not only would the actuary be liable to the direct users (the insurer and affected regulators) for an erroneous opinion, but the actuary would also be liable for damages incurred by third parties not in privity who relied on his opinion. This follows because at the time the actuary wrote his opinion he knew that it would become a public document and outsiders would rely on it. [127]

It may be possible for the actuary to minimize liability by qualifying the NAIC opinions. Both opinions have provisions which permit the actuary to qualify the opinion. [128] If the actuary relies on underlying information that cannot be readily verified, he may create a successful defense by explicitly stating such qualifications. Research has failed to locate any reported cases of an actuary being sued for an actuarial opinion which turned out to be inaccurate because the underlying material he used was inaccurate and where his defense was that he had disclaimed any knowledge of the material's accuracy. In a closely parallel situation in the accounting profession, C.I.T. Financial Corp. v. Glover, [129] accountants were sued over an audit they had performed which listed the value of a company's collateral substantially higher than it was actually worth. Other parties relied on the over-valuation and suffered damages as a result. The accountants, however, had asserted in their audit report appropriate disclaimers qualifying their general assertions about the company's collateral and its financial stability. The United States Second Circuit Court of Appeals held that the disclaimers were warnings sufficient to exculpate the accountants of any liability. [130] This discussion of course, presupposes no fraud on the actuary's part and an absence of suspicious circumstances which would lead a reasonably prudent professional to further investigate. [131]

V. ERISA

A discussion of actuarial liability is incomplete without consideration of ERISA, which became law in 1974. It constituted a massive, complete overhaul of the federal laws relating to affected private pension plans. Every existing employee retirement plan had to be revised to avoid loss of qualified status. [132] Stricter duties and responsibilities were mandated for all professionals including actuaries who service such plans. These added responsibilities concern, inter alia, plan qualification, reporting requirements, and professional and fiduciary duties. In addition, enforcement provisions and a new regulatory board were created to regulate affected actuaries.

Actuaries who provide services for plans under ERISA are subject to certain sanctions if they do not meet its statutory requirements. Specifically, ERISA creates civil and criminal causes of action against individuals, including actuaries, who violate its provisions. [133] ERISA also imposes special status on any person who performs certain functions for a plan and holds them to higher standards of independence and accountability. [134]

A. Joint Board for the Enrollment of Actuaries

As discussed earlier, ERISA created a professional called an "enrolled actuary." To regulate the enrolled actuary ERISA also created the Joint Board for the Enrollment of Actuaries. [135] The function of the Joint Board is to establish admission requirements for actuaries who wish to perform services for plans under ERISA. The Joint Board promulgates standards and requirements for actuaries of all employee pension benefit plans covered by ERISA and enrolls those qualified to practice before the Department of Labor and the Internal Revenue Service. [136] Actuaries who qualify are known as enrolled actuaries. In addition to enrollment, the Joint Board has the power to suspend or terminate enrollment of any actuary if it finds that such individual: "(1) has failed to discharge his duties under this Act or (2) does not satisfy the requirements for enrollment as in effect at the time of his enrollment." [137] Of particular interest are the following sections of the Joint Board regulations: Section 901.20, which sets standards for actuarial services; [138] and sections 901.30 and 901.31 which provide the authority for and the grounds for suspension or termination of enrollment. [139]

B. Plan Qualifications and Reporting Requirements

The Act requires all employee benefit plans to appoint at least one administrator who will have complete responsibility for the operation of the plan and will be deemed a fiduciary. [140]

As a fiduciary, the plan administrator is subject to liability for another fiduciary's acts and must not engage in certain transactions. [141]

ERISA states that all qualified plans must expressly provide: (1) a procedure for establishing and carrying out a [sound] funding policy (2) a description of how responsibilities for the operation and administration of the plan will be allocated, (3) a procedure for amending [the] plan, and (4) the basis on which payments are made to and from the plan. [142] In addition, the administrator must engage an enrolled actuary to prepare the materials comprising the actuarial statement. [143] The actuary is required to submit certain reports to the Department of Labor and the Internal Revenue Service. [144] These yearly actuarial reports must contain a complete actuarial statement describing the plan year prepared by the enrolled actuary and filed by the administrator within 210 days of the close of the year. [145]

C. Professional Responsibilities

In addition to reporting requirements, ERISA increases the accountability and visibility of the actuary. Plan actuaries must act on behalf of the plan and use unbiased, independent judgment when selecting actuarial methods and assumptions. [146]

One new responsibility the actuary incurs under ERISA is the duty to perform an actuarial valuation of the plan at least once every three years, or more frequently if necessary to support his opinion, and include it in the actuarial report. [147] The actuarial report is a comprehensive document which lists all pertinent financial transactions of a plan over a one year period. [148] The actuary must assert that to the best of his knowledge the report is complete and accurate and he must also certify the amount of any contribution necessary to reduce the accumulated funding deficiency to zero. [149] The Act further requires the actuary to justify any changes he makes in the actuarial assumptions [150] or cost methods [151] and to certify that all costs and liabilities are "determined on the basis of actuarial assumptions and methods which, in the aggregate, are reasonable and (taking into account the experience of the plan and reasonable expectations) . . ." [152] The Secretary of the Treasury may challenge the reasonableness of the actuary's choice of assumptions and methods, as they bear on the plan's actual experience. [153] In addition, any change in the funding method of a plan must be approved in advance by the Secretary of the Treasury. [154] Finally, the Act requires that when an actuary prepares a statement he acts on behalf of all plan participants. [155] All of these requirements, coupled with the fact that all reports and certifications are subject to public disclosure and examination make the actuary's role much more visible, and raise his accountability.

D. The Actuary and Fiduciary Duties

ERISA imposes very strict duties on all "fiduciaries" of a plan. ERISA defines fiduciary as anyone who exercises discretionary authority or control over plan management or disposition of assets or anyone who had discretionary authority or responsibility in the administration of a plan. [156] Under this definition an actuary could easily be a fiduciary even though his job description or title implied that he had no such authority.

The actuary's conduct could place him within the definition of "fiduciary." A court will deem him to be one if he, specifically, (1) exercises discretionary authority or control regarding management of a plan, (2) exercises authority or control regarding management or disposition of a plan's assets, (3) renders investment advice for a fee with respect to the assets of a plan or has any authority to do so, or (4) has any discretionary authority in the administration of a plan. [157] As a result an actuary could unwittingly fall into a fiduciary status merely by giving general financial advice to an employer-client who accepts it, thus giving the actuary some "control" over the plan. Consequently, where possible, avoiding fiduciary status under ERISA is critical because of the laws of co-fiduciary liability. [158] If an actuary is a fiduciary he has a duty to monitor the conduct of co-fiduciaries, and can be liable for their breach of duty.

ERISA also provides that, in addition to any other liability which the actuary may have under the Act, a fiduciary is liable for a breach of fiduciary responsibility to another fiduciary with respect to the same plan if he knowingly participates in or tries to conceal an act or omission by the other fiduciary that the actuary knows is a breach. [159] A fiduciary is liable for any loss that results from another fiduciary's breach of duty that the first fiduciary caused by his failure to comply with the fiduciary provisions of the Act. [160] In addition, if a fiduciary has knowledge of a breach by another fiduciary, the first fiduciary will be liable unless he makes reasonable efforts to remedy the breach. [161] In order for co-fiduciary liability to attach, the Act requires that the fiduciary know the other person is a fiduciary with respect to the plan, and that he committed an act which the first fiduciary knows to be a breach. [162] This co-fiduciary provision may allow an actuary to be held liable for the acts of a non-actuary fiduciary.

E. Prohibited Transactions and Parties-In-Interest

In addition to responsibility for co-fiduciary acts, a fiduciary must not cause the plan to engage in prohibited transactions. [163] These include prohibitions against: (1) selling or leasing property to the plan, (2) lending or borrowing between the plan and a party in interest, (3) furnishing of goods or services between the plan and a party in interest, (4) receiving by a party in interest assets from the plan, [164] or (5) acquiring any employer securities or real property which causes the plan to hold more than ten percent of the assets in such securities. [165]

ERISA defines party-in-interest as someone closely connected with an employee benefit plan, such as any fiduciary or employee of a plan or anyone performing a service for a plan. [166] Actuaries could be defined as parties-in-interest since they perform a service for plans. Parties-in-interest, however, are prohibited from engaging in transactions prohibited by ERISA and one of those prohibitions includes, as mentioned above, performing services for a plan fiduciary or the plan. [167]

In addition to the liability for fiduciaries and parties-in-interest, an actuary may be subject to civil penalties. These penalties are in the form of excise taxes [168] which can be levied against any disqualified person [169] who participates in a prohibited transaction. [170] These excise taxes are nondeductible. If an actuary's error caused a plan to pay an excise tax, he could be liable to plan beneficiaries for any tax paid.

F. Enforcement Provisions

To insure adherence to its requirements, ERISA created a statutory cause of action to allow civil, and in some cases criminal, suits to be filed against violators. Section 502 [171] gives a participant or beneficiary the right to bring a civil action to recover benefits due to him under the plan; to enforce his rights under the plan; or to enjoin any act which violates any provision of any plan. This section allows a plaintiff to sue a plan's actuary absent any breach of contract or tortious act.

Other enforcement sections allow the following actions to be taken. The Act provides that anyone who willfully violates any reporting and disclosure requirement is subject to a criminal penalty, either a $5,000 fine and/or one year in jail. [172] It should be noted that anyone convicted of certain crimes, including violations of ERISA, is prohibited from serving as an administrator, a fiduciary, an officer or a consultant to any employee benefit plan for five years after the end of his imprisonment. [173] Additionally, plan administrators face civil actions and fines if they fail to timely file an actuarial report. [174]

Finally, the Secretary of Labor may reject an actuarial report if he finds that such filing is incomplete or that there is a material qualification in the actuary's opinion. [175] As mentioned before, the Joint Board is empowered to disenroll a plan actuary for failure to discharge his duties, provided the actuary is given proper notice and a hearing. [176]

VI. Summary

Courts have begun holding actuaries to the same standard of due care and competence as applied to other professionals in their work. In view of this and the increased responsibilities and visibility created by ERISA, actuaries can expect to be named as defendants in lawsuits with increasing frequency. Courts are more willing to hold actuaries liable for their errors and these errors can have costly and far-reaching implications.

The law imposes a duty on actuaries to investigate the accuracy of information supplied to them when a reasonable professional similarly situated would have investigated. Generally accepted actuarial principles have been recognized by the courts and adherence to them is required by the Academy and NAIC unless adequate justification is provided. An actuary's potential liability could extend to parties not in privity with him if there is fraud by the actuary, the actuary knows the public will rely on his work, or if the action is brought under ERISA.

The enactment of ERISA raises the requirements relating to the actuary's independence and accountability to new levels. It also put actuaries on notice that the giving of general financial advice to a plan may well be enough to be deemed a fiduciary, and thus liable for another fiduciary's acts. In addition, ERISA clearly spells out the transactions that actuaries, as parties-in-interest, may not engage in, and provides stiff enforcement provisions to ensure compliance.

Footnotes:

*****General Counsel, American Academy of Actuaries; Former First Deputy Commissioner, Iowa Insurance Department; B.A. 1969, University of Northern Iowa; M.Ed. 1972, University of Hawaii; J.D. 1974, University of Illinois.
******B.A. 1979, Virginia Polytechnic Institute; J.D. 1982, George Washington University.

1. Kilbourne, 15 ACTUARY 1 (1981). Another definition of equal clarity: "a professional expert who deals scientifically with the financial, social and/or demographic implications and consequences both present and future, of contingent events or risks." SOCIETY OF ACTUARIES, 1981 YEAR BOOK.

2. For detailed descriptions of the history of the actuarial profession, see R. MITCHELL, FROM ACTUARIUS TO ACTUARY: THE GROWTH OF A DYNAMIC PROFESSION IN CANADA AND THE UNITED STATES (1974).

3. For discussion on actuarial malpractice and recent case developments, see text accompanying notes 83-114 *infra*.

4. *See e.g.,* Dill v. Wood Shovel and Tool Co., 80 Lab. Rel. Reference Manual 2445 (S.D. Ohio 1972) (actuary was exculpated from liability to parties not in professional contractual relationship.)

5. For discussion on growing professional liability and duties imposed by The Employee Retirement Income Security Act of 1974, see text accompanying notes 132-176 *infra*.

6. *See e.g.*, testimony by the American Academy of Actuaries on Social Security by the Senate Finance Committee, Subcommittee on Social Security and Income Maintenance Programs July 9, 1981; the House Ways and Means Subcommittee on Social Security, February 27, 1981; and the Senate Special Committee on Aging, June 16, 1981.

7. Speech by Richard P. Donaldson, Enrolled Actuaries Meeting, in Washington, D.C. (Jan. 30, 1981).

8. *See* note 5 *supra*.

9. Georgia State Bd. v. Friedman's Jewelers, 183 Ga. 669, 189 S.E. 238, 241 (1936).

10. Owyhee County v. Rife, 100 Idaho 91, 593 P.2d 995 (1979).

11. Firemen's Mut. Ins. Co. v. High Point Sprinkler Co., 266 N.C. 134, 146 S.E.2d 53 (1966).

12. Potomac Eng'rs. v. Walser, 127 F. Supp. 41, 42, *aff'd*., 223 F.2d 356 (D.C. Cir.1955).

13. King County Employee Ass'n v. State Employee's Retirement Bd., 54 Wash. 2d 1, 336 P.2d 387, 391 (1959) (emphasis added).

14. Champagne v. Unity Indus. Life Ins. Co., 161 So. 52, 53, *reh. den*., 161 So. 783 (La. App. 1935) (holding qualified an actuary as an expert witness at trial) (emphasis added).

15. 72 C.J.S. *Profession* 1216 (1951).

16. *See* text accompanying notes 83-114 *infra*.

17. The federal licensure is carried out by the ERISA-created Joint Board for the Enrollment of Actuaries. The Board licensure entitles the person to hold himself out as an "enrolled actuary." This licensure is to undertake actuarial work under ERISA-affected pension plans. *See* part V(A) *infra*.

18. A fifth society, the American Society of Pension Actuaries, merits mention. However, because its membership consists of many non-actuary pension consultants, it is not commonly recognized within the actuarial profession as having standing synonymous with the four named associations.

19. SOCIETY OF ACTUARIES, *supra* note 1, at 59.

20. The Society publications of note include: *Transactions*, the record of its proceedings; *Record*, which summarizes discussions at its meetings and *The Actuary*, a monthly newsletter to members. *Id*.

21. The exam sequence is as follows (1) general mathematics, (2) probability and statistics, (3) numerical methods and operations research, (4) mathematics of compound interest and life contingencies, (5) advanced life contingency theory, demography, and risk theory. SOCIETY OF ACTUARIES, REQUIREMENTS FOR ADMISSION, 1981, EXAMINATIONS 7 (1981).

22. The exam sequence for Fellows is as follows: (6) philosophy, design administration and taxation of financial security programs, (7) insurance pricing, valuation of liabilities, financial reporting, life insurance as a law and company taxation and employee pension benefit topics, (8) economics, investments and valuation of assets, (9) design, marketing and underwriting of financial security programs, and (10) advanced topics, valuation and financial reporting for financial security programs. *Id*. at 8.

23. CASUALTY ACTUARIAL SOCIETY, 1981, YEAR BOOK i (1981).

24. The sequence of the seven Associateships exams is as follows: (1) general mathematics, (2) probability and statistics, (3) numerical methods and operations research, (4) theory of interest and introduction to life contingencies, (5) principles of economics, theory of risk and insurance, policy forms and coverages, underwriting and marketing, (6) principles of ratemaking, and (7) insurance accounting and expense analysis, CASUALTY ACTUARIAL SOCIETY, 1981.

25. In addition to the first seven, a Fellow completes exams (8) insurance law, supervision and regulation, (9) advanced ratemaking, and (10) financial operations of insurance companies, reinsurance and excess rating. *Id*.

26. CASUALTY ACTUARIAL SOCIETY, 1981, YEAR BOOK at i.

27. Conference of Actuaries in Public Practice, 1981 MEMBERSHIP DIRECTORY at 58.

28. CONFERENCE OF ACTUARIES IN PUBLIC PRACTICE, 1981 MEMBERSHIP DIRECTORY AT 58.

29. *Id*. at 60.

30. *Id*. at 59.

31. *Id*.

32. AMERICAN ACADEMY OF ACTUARIES, 1981 YEAR BOOK at 386.

33. *Id*. at 370.

34. *Id*.

35. *Id*.

36. *Id*. at 2.

37. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406 § 3042, 88 Stat. 829 (1974) (codified at 29 U.S.C. § 1242 (1976) [hereinafter cited as ERISA]. For discussion on the Joint Board, *see* text accompanying notes 132-76 *infra*.

38. The examination requirement for "enrolled actuary" status is met upon successful completion of exams EA-1 and EA-2. These two examinations are jointly sponsored by the Joint Board and the Society of Actuaries.

39. The topics on this exam include mathematics of compound interest and mathematics of life contingencies. SOCIETY OF ACTUARIES, REQUIREMENTS FOR ADMISSION, 1981 EXAMINATIONS 19, 20, (1981).

40. The topics on this exam include (a) principles of pension valuation, including actuarial cost methods and (b) regulatory requirements for pension plans. *Id*. at 31-32.

41. *See* AMERICAN ACADEMY OF ACTUARIES, 1981 YEAR BOOK AT 380.

42. A preventative program can minimize much of the actuary's liability exposure. An attorney advising actuarial clients may wish to consider implementing the following steps. These steps are not suggested, or recommended by the authors, but are merely offered as a starting point: (1) the actuary should use extreme care in articulating requests for data and examining the data itself for calculations to ensure the data is correct. When the data raises suspicions, the actuary has a duty to inquire as to how the data was compiled; (2) establish standards for all the staff and observe them. Establish routine procedures and follow them. For example, one company follows the practice of collectively establishing a set of assumptions to be adopted case by case for most of the plans for which they perform valuations; (3) selectively check the reliability of the data and information provided to the actuary over which he has no control. Steps should be taken to improve the source of such data if he finds them unreliable; (4) have the consequential items checked thoroughly and the most consequential reviewed for perfection. In this way the items that could cause the most damage are screened most frequently; (5) the actuary should ensure that the terms of reference of any assignment and changes in such terms are carefully documented. In addition, no actuary should undertake an assignment unless he has the requisite level of competence in that area; (6) all oral opinions or answers should be confirmed in writing; (7) any documents prepared by an actuary which could be construed as legal documents should be reviewed by an attorney, preferably the client's own legal counsel; (8) enrolled actuaries should take appropriate steps to minimize the likelihood they will be deemed a fiduciary under ERISA, if this is a desired result; (9) continuing self-education by the actuary is crucial *vis-a-vis* current developments; (10) finally, the actuary should consider purchasing professional liability insurance.
There are two different bases under which professional liability is written; the "occurence" basis and the "claims made" basis. The "occurrence" type of coverage is intended to provide protection for the insured for claims made during or after the policy period, arising out of errors occurring during the policy period only. The advantage to the insured is that if he retires, quits his practice or no longer buys insurance, he will be protected against claims for his past work. The "claims made" type of coverage only covers claims against the policy in force at the time the claim is presented. The insured should consider whether any special protection is required in the event he retires or quits his practice in order to have a "run off" of cover for all his past work.

43. *In re* Equity Funding Corp. of America, 416 F. Supp. 161 (C.D. Cal. 1976), *aff'd*, 603 F.2d 1353 (9th Cir. 1979). (C.D. Cal. 1976). For a discussion of this case, see text accompanying note 83 *infra*.

44. *Id*. at 195.

45. Sard v. Hardy, 281 Md. 432, 379 A.2d 1014 (Ct. App. 1977).

46. *Id*.

47. Unites States v. Consumer Life Ins. Co., 430 U.S. 725 (1977).

48. *Id*. at 739.

49. United States v. Zazove, 334 U.S. 602 (1948).

50. *Id*. at 620.

51. *See e.g.*, Leggett v. Missouri State Life Ins. Co., 342 S.W.2d 833, 915 (Mo. 1960).

52. AMERICAN ACADEMY OF ACTUARIES, 1981 YEAR BOOK.

53. Guides are a code of professional conduct relating primarily to the actuary's professional demeanor though a few of the Guides relate to the actuary's work product. Compare Guide 1(a) with Guide 4(a). AMERICAN ACADEMY OF ACTUARIES, 1981 YEAR BOOK at 381.

54. Opinions can be defined as the application of the Guides to specific situations. Opinions are more specific than Guides and vary according to the complexity of the issue and the specificity of the question raised. *Id*. at 385.

55. Defined as the principal standards of professional work product, members are required to take the published Recommendations into consideration and document and justify deviation from them. *Id*. at 406.

56. An interpretation is an expansion of a specific Recommendation. It does not have the force of a Recommendation and is intended to explain, clarify or enlarge on some aspect of the related Recommendations.

57. It should be recognized that the *Year Books* of the Society of Actuaries, Casualty Actuarial Society and Conference of Actuaries in Public Practice each contain selected Guides and in some cases Opinions each of which is substantially identical to similarly numbered Guides and Opinions of the Academy.
However, because much of these constituent organizations has delegated standards-making authority to the Academy and not incorporated it by reference, membership in the Academy is a prerequisite to an individual's agreement to adhere to the standards and the profession's ability to enforce the standards.

58. AMERICAN ACADEMY OF ACTUARIES, 1981 YEARBOOK AT 381.

59. *Id.*

60. *See* part V *infra*.

61. 29 U.S.C. § 1023(a) (1976) (ERISA § 103(a)).

62. AMERICAN ACADEMY OF ACTUARIES, 1981 YEAR BOOK AT 398.

63. Opinion A-7, as drafted by the Academy's Committee on Guides to Professional Conduct, was approved for exposure to the membership by the Academy's Board of Directors on October 9, 1981. It is anticipated that the final pronouncement will be finalized by March of 1982. The Exposure Draft form of Opinion A-7 is available in booklet form from the Academy Washington Office.

64. AMERICAN ACADEMY OF ACTUARIES, 1981 YEAR BOOK AT 382.

65. *Id*.

66. *Journal*, American Academy of Actuaries; The *Proceedings*, Conference of Actuaries in Public Practice; *Transactions*, Society of Actuaries; and *Proceedings*, Casualty Actuarial Society.

67. In some cases no express or implied contractual relationship is necessary. *See* part IV B *infra*.

68. *See* Firemen's Mut. Ins. Co. v. High Point Sprinkler Co., 266 N.C. 134, 146 S.E.2d 53, 60 (1966).

69. Gammel v. Ernst & Ernst, 245 Minn. 249, 72 N.W.2d 364, 367 (1955).

70. Delmar Vineyard v. Timmons, 486 S.W.2d 914, 920 (Tenn. App. 1972).

71. To prove negligence, four elements must be shown: (1) a duty owed to someone, (2) a breach of that duty, (3) injury or damages, and (4) proximate causation. W. PROSSER, LAW OF TORTS 143 (1973).

72. *See* Delmar Vineyard v. Timmons, 486 S.W.2d at 920.

73. *Id*. at 921.

74. *Id*. at 915.

75. *See* part IV *infra*.

76. Lieberman v. Templar Motors Co., 236 N.Y. 139, 140 N.E. 222, 225 (1923).

77. W. PROSSER, *supra* note 71, at 4.

78. *See* part IV *infra*.

79. *See* Gammel v. Ernst & Ernst, 245 Minn. at 72 N.W.2d at 367.

80. Dantzler Lumber & Export Co. v. Columbia Casualty Co., 115 Fla. 541, 156 So. 116 (1934).

81. Brune v. Belinkoff, 354 Mass. 102, 235 N.E.2d 793, 795 (1968).

82. Harris v. Fall, 177 F. 79, 82 (7th Cir. 1910).

83. *See In re* Equity Funding Corporation of America, 416 F. Supp. 161 (C.D. Cal. 1976), *aff'd*, 603 F.2d 1353 (9th Cir. 1979).

84. *Id*. at 170.

85. *Id*. at 170-71.

86. *Id*.

87. *Id*.

88. *Id*. at 171.

89. *Id*.

90. *Id*.

91. 15 U.S.C. § 77a-77m (1976).

92. 15 U.S.C. § 78a-78kk (1976).

93. The National Underwriter, Life and Health Insurance Edition, No. 3 at 1 (Jan. 1977).

94. *Id*.

95. N.Y. Times, March 19, 1975, at 75, col. 7.

96. AMERICAN ACADEMY OF ACTUARIES, PROCEEDINGS 28 (1980).

97. British Columbia Automobile Ass'n v. Manufacturers Life Ins. Co., 14 B.C.L.R. 237 (S. Ct. B.C. 1979).

98. *Id*. at 240.

99. *Id*.

100. *Id*. at 281.

101. *Id*. at 253.

102. *Id*. at 240.

103. *Id*. at 243.

104. *Id*. at 240.

105. *Id*.

106. *Id*. at 243.

107. *Id*.

108. Saffo v. Occidental Life Ins. Co. of Calif., 602 F.2d 1265 (8th Cir. 1979). *Cf.*Alton Memorial Hosp. v. Metropolitan Life Ins. Co., 656 F.2d 245 (7th Cir. 1981) (court held that an actuary can be sued by a plan sponsor under common law standards of negligence for damages the plan sponsor incurs as a result of following the actuary's erroneous advice).

109. *Id*. at 1270.

110. *Id*. at 1268.

111. *Id*. at 1267.

112. *Id*. at 1270.

113. *Id*. at 1271.

114. *Id*. at 1279.

115. *See* Landell v. Lybrand, 264 Pa. 406, 107 A. 783 (1919) (analogy to the accounting profession.) *But see* Shatterproof Glass Corp. v. James, 466 S.W.2d 873, 880 (Tex. Civ. App. 1971) (accountants had duty to use due care to protect third parties not in privity from losses caused by reliance on accountant's negligently prepared audit).

116. *See* Canaveral Capital Corp. v. Bruce, 214 So. 2d 505, 505 (Fla. Dist. Ct. App. 1968); State Street Trust Co., v. Ernst, 278 N.Y. 104, 15 N.E.2d 416, 419 (1938) (analogizing to the accounting profession.)

117. *See* State Street Trust Co. v. Ernst, 278 N.Y. at 15 N.E.2d at 419. *But see* Shatterproof Glass Corp. v. James, 466 S.W.2d at 876-80.

118. *See* O'Connor v. Ludlam, 92 F.2d 50, 53 (2d Cir.), cert. denied, 302 U.S. 758 (1937) (analogizing to the accounting profession); Investment Corp. v. Buchman, 208 So. 2d 291, 292 (Fla. Dist. Ct. App.), *cert. dismissed*, 216 So. 2d 748 (1968).

119. State Street Trust Co. v. Ernst, 278 N.Y. at 15 N.E.2d at 419.

120. 80 L.R.R.M. (BNA) 2445 (S.D. Ohio 1972).

121. *Id*. at 2450.

122. *See* note 155 *infra*.

123. These uniform blanks are the formats within which insurance companies report in detail their financial status to each insurance department of the state in which they do business.

124. The NAIC is an unincorporated association of fifty individual state insurance regulatory officials. The NAIC's objectives are the promotion of uniformity in legislation affecting insurance; the encouragement of uniformity in departmental rulings under the insurance laws of the several states; the dissemination of information of value to the insurance supervisory officials in performance of their duties; the establishment of ways and means of fully protecting the interests of insurance policyholders of the various states, territories and insular possessions of the United States; and the preservation to the several states of the regulation of the business of insurance. NAIC CONST. art. 2.

125. 1980 Instructions for Life and Accident and Health Annual Statement Blank Nos. 10 (1), (2) [hereinafter cited as Life and Accident Blank No.].

126. *Id*., Life and Accident Blank No. 10(8); Fire and Casualty Blank No 9(8).

127. *See* note 116 *supra*.

128. *See* note 123 *supra*.

129. 224 F.2d 44 (2d Cir. 1955).

130. *Id*. at 46.

131. *See In re* Equity Funding Corporation of America Sec. Litig., 416 F. Supp. 161 (C.D. Cal. 1976).

132. PRENTICE-HALL, INC., *Handbook on Pension Reform Law: Employee Retirement Income Security Act of 1974*, at 3 (1974) [hereinafter cited as *Handbook on Pension Reform Law*].

133. ERISA **§** 502, 29 U.S.C. 1131, 1132 (1976). *See* notes 171-76 *infra*.

134. *See* text accompanying notes 147-55 *infra*.

135. ERISA § 3041, 29 U.S.C. 1001 (1976).

136. *Id*. 3042, 29 U.S.C. 1242 (1976).

137. *Id*.

138. 20 C.F.R. 901.20 (1980) provides in pertinent part:
(a) *In general*. An enrolled actuary shall undertake an actuarial assignment only when qualified to do so.
(b) *Professional duty*. An enrolled actuary shall not perform actuarial services for any person or organization which he/she believes or has reasonable grounds for believing may utilize his/her services in a fraudulent manner or in a manner inconsistent with law.
(c) *Advice or explanations*. An enrolled actuary shall provide to the plan administrator upon appropriate request, supplemental advice or explanation relative to any report signed or certified by such enrolled actuary.
(d) *Conflicts of interest*. In any situation in which the enrolled actuary has a conflict of interest with respect to the performance of actuarial services, of which the enrolled actuary has knowledge, he/she shall not perform such actuarial services except after full disclosure has been made to the plan trustees, any named fiduciary of the plan, [and] the plan administrator.

(e) *Assumptions, calculations and recommendations*. The enrolled actuary shall exercise due care, skill, prudence and diligence to ensure that:
(1) The actuarial assumptions are reasonable in the aggregate, and the actuarial cost method and the actuarial method of valuation of assets are appropriate;
(2) The calculations are accurately carried out; and
(3) The report, any recommendations to the plan administrator and any supplemental advice or explanation relative to the report reflect the results of the calculations.
(f) *Report or certificate*. An enrolled actuary shall include in any report or certificate stating actuarial costs or liabilities, a statement or reference describing or clearly identifying the data, any material inadequacies therein and the implication thereof, and the actuarial methods and assumptions employed.

139. 20 C.F.R. § 901.30 (1980) allows suspension or termination of enrollment for:
(a) Failure to discharge duties . . . , or
(b) Failure to "satisfy requirements for enrollment . . ."
20 C.R.R. § 901.31 (1980) provides grounds for termination or suspension for:
(c) *Disreputable conduct* . . . "evidencing fraud, dishonesty, or breach of trust" including:
(1) "Conviction of any criminal offense under the laws of the United States" (including Section 411 of ERISA, 29 U.S.C. 1111), ..."
(2) "Knowingly filing false or altered documents, affidavits . . . ." (3) "Knowingly making false or misleading representations, ..." (4) "The use of false or misleading representations . . . ."

140. ERISA § 402(a), 29 U.S.C. § 1102(a) (1976).

141. *See* text accompanying notes 156-62 *infra*.

142. ERISA § 402(b), 29 U.S.C. (1976).

143. ERISA § 103(a)(4)(A), 29 U.S.C. § 1023(a)(4)(A) 1976)

144. *Id*. 103(a)(1), 29 U.S.C. § 1023(a)(1) (1976).

145. *See Id*. § 104(a)(1)(A), 29 U.S.C. § 1024(a)(1)(A) (1976).

146. *Id*. § 103(a)(4)(B), 29 U.S.C. § 1023(a)(4)(B) (1976).

147. ERISA § 103(d), 29 U.S.C. § 1023(d) (1976).

148. *Id*. § 103(d), 29 U.S.C. § 1023(d) (1976), *as amended at* 29 U.S.C. § 1023(d) (Supp. IV 1980).

149. *Handbook on Pension Reform Law, supra* note 132, at 604-605.

150. ERISA § 103(d), 29 U.S.C. § 1023(d) (1976), *as amended at* 29 U.S.C. § 1023(d) (Supp. IV 1980).

151. *Id*.

152. *Id*. § 302(c)(3), 29 U.S.C. § 1082(c)(3) (1976).

153. *See id*. § 302(c), 29 U.S.C. § 1082(c) (1976).

154. *Id*. § 302(c)(5), 29 U.S.C. § 1082(c)(5) (1976).

155. *See id*. § 103(a)(4), 29 U.S.C. § 1023(a)(4) (1976).

156. ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A) (1976).

157. *See id*.

158. Attorneys advising actuaries may wish to assist actuaries in avoiding attaining the status of fiduciary because of the strict responsibilities ERISA places on fiduciaries. To avoid the status, the actuary should clearly define the issues and options available to the plan administrator without making any of the final decisions. Concerned actuaries should make certain that the minutes of any meetings they take part in clearly state that the ultimate decisions were made by plan fiduciaries. Actuarial firms should be particularly cautious with respect to prohibited transactions and dealings by parties-in-interest. Finally, it would be prudent for actuaries to request written employment contracts that carefully delineate their duties.

159. ERISA § 405(a)(1), 29 U.S.C. § 1105(a)(1) (1976).

160. *Id*. § 405(a)(2), 29 U.S.C. § 1105(a)(2) (1976).

161. *Id*. § 405(a)(3), 29 U.S.C. § 1105(a)(3)

162. *Handbook on Pension Reform Law, supra* note 132, at 624.

163. ERISA § 406, 29 U.S.C. § 1106 (1976).

164. *Id*.

165. ERISA § 406, 407, 29 U.S.C. §§ 1106, 1107 (1976). Under this rule, the transaction is prohibited whether or not the property involved is owned by the plan or party-in-interest, and the prohibited transaction includes sales and the like, from the party-in-interest to the plan, and also from the plan to the party-in-interest.

166. *Id*. § 3(14), 29 U.S.C. § 1002(14) (1976), *as amended at* 29 U.S.C. § 1002(14) (Supp. IV 1980).

167. *Id*. § 406, 29 U.S.C. § 1106 (1976).

168. ERISA § 2003(a), I.R.C. § 4975(a) (1980).

169. ERISA § 2003(e)(2); I.R.C. § 4975(e)(2) (1980), ERISA defines disqualified persons as:

(A) fiduciary;
(B) person providing services to the plan;
(C) an employer any of whose employees are covered by the plan;
(D) an employee organization any of whose members are covered by the plan;
(E) an owner, direct or indirect, of 50 percent or more of:

(i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of a corporation;
(ii) the capital interest or the profits interest of a partnership, or
(iii) the beneficial interest of a trust or unincorporated enterprise, which is an employer or an employee organization described in subparagraph (C) or (D);

(F) a member of the family (as defined in paragraph (6) of any individual described in subparagraph (A), (B), or (C);
(G) a corporation, partnership, or trust or estate of which (or in which) 50 percent or more of -

(i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of such corporation.
(ii) the capital interest or the profits interest of such partnership, or
(iii) the beneficial interest of such trust or estate is owned directly or indirectly, or held by persons described in subparagraph (A), (B), (C), (D), or (E);

(H) an officer, director (or an individual having powers or responsibilities similar to those of officers or directors), a 10 percent or more shareholder, or a highly compensated employee (earning 10 percent or more of the yearly wages of an employer) of a person described in subparagraph (C),(D), (E), or (G); or
(I) a 10 percent or more (in capital or profits) partner or joint venture of a person described in subparagraph (C), (D), (E), or (G).

170. ERISA § 2003(c), I.R.C. § 4975(c) (1980).

171. *Id*. § 502, 29 U.S.C. § 1132 (1976), *as amended at* 29 U.S.C. § 1132 (Supp. IV 1980).

172. *Id*. § 501, 29 U.S.C. § 1131 (1976).

173. *Id*. § 411, 29 U.S.C. § 1111 (1976).

174. *Id*. § 501, 29 U.S.C. § 1131 (1976).

175. *Id*. § 104(a)(4), 29 U.S.C. § 1024(a)(4) (1976).

176. *Id*. § 3042(b), 29 U.S.C. § 1242(b) (1976). *See also* note 139 *supra*.