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TOPIC: ACTUARIAL LIMITATION OF LIABILITY AND INDEMNIFICATION PROPOSALS

EXECUTIVE SUMMARY: RECENT PROPOSALS BY SEVERAL NATIONAL ACTUARIAL FIRMS TO PLACE LIMITS ON THEIR LIABILITY AND TO INDEMNIFY THEM AGAINST THIRD PARTY CLAIMS FILED IN CONNECTION WITH SUCH ACTUARY'S NEGLIGENCE OR MALPRACTICE HAVE CREATED A FIRESTORM AMONG THE MULTIEMPLOYER CONSUMER COMMUNITY. IN RESPONSE, THE CENTRAL PENSION FUND OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS (CPF) HAS FILED A REQUEST FOR ADVISORY OPINION WITH THE DEPARTMENT OF LABOR TO OBTAIN GUIDANCE WITH RESPECT TO THE IMPLICATIONS OF SUCH ARRANGEMENTS FOR PLAN FIDUCIARIES. THE NCCMP HAS JOINEDTHE CPF IN THIS EFFORT BY SUBMITTING A COMPANION LETTER TO THE DOL. COPIES OF EACH ARE ATTACHED FOR YOUR INFORMATION.

PURPOSE:	INFORMATIONAL
CATEGORY:	REQUEST FOR ADVISORY OPINION
ISSUER:	N/A
TARGET AUDIENCE:	DEFINED BENEFIT PENSION PLAN TRUSTEES AND PROFESSIONAL ADVISORS
INPUT REQUESTED:	EXAMPLES OF SIMILAR PROPOSALS SUBMITTED TO YOUR FUND
OFFICIAL COMMENT PERIOD ENDS:	N/A
NCCMP DEADLINE:	N/A
FORWARD COMMENTS TO:	*Multi-elert@nccmp.org*
REFERENCE:	VOLUME 2, ISSUE 2
FOR ADDITIONAL BACKGROUND SEE:	(ATTACHED FILES)

March 6, 2002

Mr. Robert J. Doyle, Director
Office of Regulations and Interpretations
Room N5660
Pension and Welfare Benefits Administration
United States Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Re: Request for Advisory Opinion regarding Limitation of Liability and Indemnification Proposals from Actuarial Firms

Dear Mr. Doyle:

The National Coordinating Committee for Multiemployer Plans ("NCCMP"), a national, nonpartisan, non-profit organization of multiemployer pension, health and welfare plans and their labor-management sponsors, joins with the Central Pension Fund of the International Union of Operating Engineers and Participating Employers ("CPF") in its request for guidance from the Department of Labor regarding the issue of limitation of liability and indemnification sought by several actuarial firms performing valuations of multiemployer defined benefit pension plans as required by ERISA § 103. As you have undoubted discerned from your review of the facts in the CPF submission, the subject of this request has significant ramifications, both legal and practical, beyond the presenting case. Because we represent the interests of the multiemployer plan community at large, we believe that the both the Department and the NCCMP have a common objective in seeing that fund trustees and other fiduciaries are provided with appropriate guidance in this matter and we would welcome the opportunity to meet with you to discuss this matter in depth.

Background

Many of the largest actuarial firms in the country have recently reported that they are requiring, or considering requiring, the type of limitation of liability and indemnification clauses which precipitated CPF's submission in this matter. In a January 21, 2002 article appearing in Pensions & Investments magazine (included as Exhibit 2 with the CPF submission), Watson Wyatt Worldwide, Towers Perrin and William M. Mercer, Inc. were all reported to be requiring these clauses, while Milliman USA and The Segal Company were reported to be studying the situation. Each of these firms is a large national organization that has traditionally provided actuarial services to multiemployer pension and welfare plans throughout the United States. It is fair to say that, as a group, they are leaders in the industry.

Irrespective of the business considerations behind the motivation for these demands (which are briefly discussed below), they present a clear dilemma for multiemployer plans and their trustees and participants. Specifically, trustees may violate ERISA by agreeing to such demands and, if agreed to, participants will be left without protection from errors caused by actuarial malpractice.

Discussion

For the reasons discussed in the submission of the CPF, we concur with their conclusion that a reviewing court might well conclude that trustees violate Sections 404(a)(1)(A), 404(a)(1)(B) and 406 (a)(1)(D) of ERISA by agreeing to the limitation of liability and indemnification clauses such as those proposed.

Because this is an issue of first impression, and one with enormous potential consequences for ERISA plans, guidance from the Department is necessary to assist trustees in addressing this issue in a manner consistent with their statutory obligations.

As suggested in the Pensions & Investments article, and discussed in greater detail in the CPF submission, the new demands for these clauses may have been precipitated by recent judgments and claims in actuarial malpractice cases, which have created an insurance dilemma for the firms involved, and possibly for the industry as a whole. If such a dilemma exists, however, it cannot excuse the trustees from their duty to act solely in the interests of plan participants and beneficiaries.

If actuarial firms are faced with a business challenge because of their past malpractice, they must make their own business judgments to address that challenge. If insurance markets have properly identified certain firms as unacceptable risks, then those firms may be required to refocus their business plan on that portion of the market for actuarial services that can legally indemnify them and limit their malpractice liability. ERISA plans are only one part of their potential market.

A wide variety of businesses other than ERISA plans utilize actuarial services, most notably life, health and casualty insurance companies. Such commercial clients are governed by the relatively liberal “business judgment” rule in deciding whether to accept financial liability for actuarial malpractice. They place corporate assets in jeopardy by accepting such liability. ERISA trustees, on the other hand, are governed by the more exacting “prudent man” rule, and place plan assets in jeopardy by accepting such liability.

As reflected in the comments of Watson Wyatt spokesman, Eric Lofgren, in the Pensions & Investments article, actuarial firms may regularly require such liability-shifting clauses from their non-pension fund clients. However, in attempting to extend those clauses to pension fund clients, we believe that actuarial firms are seeking to cross an uncrossable divide established by Congress.

Actuarial firms that are unable to secure malpractice insurance, and unwilling to expose their business assets to malpractice liability, may make a business judgment to withdraw from the ERISA market. While this may leave plan trustees with fewer firms to choose from, we believe that outcome to be far better for plan participants than accepting the enormous financial risks presented by these clauses.[1]

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[1]The insurance consequences of such liability-shifting clauses are perverse. If the clauses are accepted, the actuarial firms are relieved of liability. As evidenced in the letter of the Chubb Insurance Group included as Exhibit 3 of the CPF submission, the CPF trustees have been advised that damages resulting from actuarial malpractice would not be covered by fiduciary insurance, and Chubb would not write an endorsement for the trustees covering such liability. Indeed, it would be puzzling if Chubb or any insurance company would insure any plan for actuarial malpractice. A fundamental of insurance underwriting is the ability to measure

Given the economic incentive to secure these clauses, and the apparent momentum of the leading national actuarial firms to pursue them, we are extremely concerned that if the Department, through action or inaction, signals that these clauses are acceptable, they will quickly become an industry standard. We are also concerned that, by extension, this policy would be a standard soon emulated by the other professionals relied upon by ERISA plans, namely, auditors and attorneys.[2]

Among the lessons of the current Enron debacle is that greater accountability must be required of the professionals whose opinions corporate shareholders and employees rely upon. Certainly there should be no lesser expectation of the professionals relied upon by plan participants for their heath and retirement security. Enron has resulted in a call for new legislation to require such accountability. We believe ERISA already requires such accountability, and we request that the Department reaffirm this fact and provide clear guidance to this effect in response to the CPF submission. This is especially true with respect to the actuarial profession because of the unique statutory position of the Department in the establishment of the Joint Board for the Enrollment of Actuaries.

risk. There is no ability to measure the risk of actuarial malpractice if the applicant for such insurance is a board of trustees, not the actuary who actually performs the calculations and who has control over the quality of its work product. It's ironic that to measure the risk of such insurance, the underwriters would rely on professional actuaries.

[2] The limitation of liability and indemnification of these plan professionals is readily distinguishable from that routinely contained in the commercial contracts of other service providers retained by plans, such as data system consultants, internet service providers and bulk printers where trustees can objectively measure potential damages and agree to limit liability accordingly. With actuaries, auditors and attorneys the financial viability of the plans they serve is, virtually, always at stake.

The NCCMP would welcome an opportunity to discuss these issues and the related practical implications for plans and their trustees with the Department in order to obtain guidance as to how ERISA fiduciaries can respond to this situation. Please contact me at your earliest convenience to schedule such a discussion, or if you have any questions regarding this submission. Thank you for your consideration of this request.

Very truly yours,

Randy G. DeFrehn
Executive Director

April 3, 2003

Mr. Robert J. Doyle, Director
Office of Regulations and Interpretations
Room N5669
Pension & Welfare Benefits Administration
U.S. Department of Labor
200 Constitution Ave., NW
Washington, DC 20210

Re: Request for Advisory Opinion or Other Appropriate Guidance

Dear Mr. Doyle:

The undersigned is Fund Counsel for the Central Pension Fund of the International Union of Operating Engineers and Participating Employers (the "Fund"), a defined benefit, multiemployer pension fund. The Fund's Employer Identification No. is 36-6052390 and the Fund's Plan Number used in reporting to the United States Department of Labor (the "DOL") is 001. On behalf of the Fund, the undersigned is writing to request an Advisory Opinion, or other appropriate guidance, with respect to the acts or transactions described below.

BACKGROUND

As of the Plan Year ending January 31, 2001, the Fund had net assets of $7.02 billion, with approximately 96,000 active participants and 50,000 pensioners and beneficiaries. Approximately 7,000 participating employers contribute to the Fund pursuant to collective bargaining agreements with 81 Local Unions of the International Union of Operating Engineers throughout the United States. The Fund was established in 1960 and is headquartered in Washington, D.C.

At all times in its history, the Fund has utilized the services of professional actuarial firms to perform annual valuations to assure the adequate funding of present and future benefits, determine the feasibility of contemplated plan improvements, and evaluate the feasibility of mergers. Most recently, from February 1, 1999 through January 31, 2002, the Fund retained Watson Wyatt & Company ("Watson Wyatt") to perform these services, pursuant to a three-year letter of engagement.

In early January of this year, the Fund commenced discussions with Watson Wyatt for renewal of the existing engagement. At that time, the Fund was advised that, as a condition of renewal, Watson Wyatt was requiring that all new engagement letters be accompanied by "Attachment B," which sets forth uniform terms and conditions of the engagement. A copy of "Attachment B" is attached as Exhibit 1. The Fund's prior engagement letter did not include "Attachment B."

Included in "Attachment B" are numbered clauses 7 and 8 titled, respectively, "Limitation of Liability" and "Indemnification." Taken together, these clauses require the Fund to agree not to seek recovery from Watson Wyatt in excess of the greater of $250,000 or one year's fee, for any damage caused to the Fund "regardless of the cause of action"; and to indemnify and hold Watson Wyatt harmless for any amount exceeding the same limits, "from any third party claim or liability" arising from or in connection with Watson Wyatt's services to the Fund. (Inasmuch as the Fund's most recent annual fee was less than $250,000, the applicable limitation under these clauses would be $250,000.)

On January 17, 2002, Watson Wyatt presented "Attachment B" (see Exhibit 1) to the Fund's Board of Trustees at its regularly scheduled meeting. After full discussion, the Board voted unanimously to reject the proposal, commence a search for a new actuarial firm and seek guidance from the DOL on the permissibility of such limitation of liability and indemnification clauses under the Employee Retirement Income Security Act of 1974 ("ERISA" or the "Act"), as amended.

The January 21, 2002 issue of Pensions & Investments magazine contained a front-page article, which reported on the action taken by the Fund's Board of Trustees, and further reported that most of the largest national actuarial consulting firms, effective January 1, 2002, were either requiring such limitation of liability and indemnification clauses, or were considering requiring such clauses. See Vineeta Anand, Actuaries Seek Client Contracts That Limit Firms' Liabilities, Pensions & Investments, Jan. 21, 2002, at 1. A copy of the Pensions & Investments article is attached as Exhibit 2.

On February 19, 2002, the Trustees' apprehension with the proposed clauses was further magnified by a letter of that date forwarded to the Fund's Chief Executive Officer, Michael Fanning, by Mr. Tim Connolly of the Chubb Group of Insurance Companies, the underwriter of the Fund's fiduciary liability insurance policy. In addressing the proposed clauses, while citing a policy exclusion and reserving the right to review particular facts and circumstances, Mr. Connolly unequivocally advised Mr. Fanning that:

> Not only is it not our intent to cover an assumption of risk such as this, we have no desire at this time to amend our policy to cover this exposure via endorsement and additional premium. The Labor Management Trust Fiduciary Liability Policy is a policy designed to protect Insureds against liability established by ERISA. It is not designed to cover professional

> liability exposures normally associated with Actuarial Errors & Omissions coverage.

Letter from Tim Connolly, Chubb Group of Insurance Companies, to Michael R. Fanning, Chief Executive Officer, Central Pension Fund of the International Union of Operating Engineers and Participating Employers (Feb. 19, 2002). A copy of the letter is attached as Exhibit 3.

Assuming the Pensions & Investments article is accurate, it is likely that the Fund's Board of Trustees will be faced with demands for these limitation of liability and indemnification clauses in its current search for a new actuary, as will trustees of plans throughout the country. Accordingly, guidance from the DOL is both timely and necessary to guide trustees on this issue --- an issue which, to our knowledge, is one of first impression.

DISCUSSION

A. The Special Role of Plan Actuaries

Defined benefit plans must rely on the guidance of three sets of professional advisers: attorneys, auditors and actuaries. Of the three, the services provided by actuaries are the least comprehensible to the most prudent of trustees. Attorneys provide guidance on compliance with publicly available statutes, regulations and cases that, generally speaking, can be communicated to, and reasonably understood by, lay persons. Auditors provide their opinion on the reliability of the financial statements prepared by the plan's own accountants. Actuaries, however, advise the trustees on their most fundamental fiduciary concern: the plan's financial health and viability. And, they provide this advice based upon a myriad of complex and arcane mathematical calculations, methods and assumptions that are extremely difficult for trustees to critically evaluate. Indeed, having exercised due diligence in the selection of the plan's actuary, trustees must then repose in the actuary a level of reliance not unlike that reposed by patients in their physicians.

As described in a 1982 Drake Law Review article titled, "The Emerging Law of Actuarial Malpractice":

> An actuary is "that professional who is trained in evaluating the current financial implications of future contingent events." 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 often enormous magnitude dependent on the actuary's forecasts of probabilities and economic developments.

William D. Hager & Paul-Noel Chretien, The Emerging Law of Actuarial Malpractice, 31 Drake L. Rev., 831, 831-32 (1981-82) (citations omitted).

Because of the special role of plan actuaries, Congress included in ERISA, not only the requirement that plan valuations be performed only by Enrolled Actuaries, but created, in Section 3041, 29 U.S.C. § 1241 (1999), the Joint Board for the Enrollment of Actuaries, and charged it with the authority to create eligibility standards for those actuaries authorized to perform actuarial services for plans governed by the Act. The regulations of the Joint Board for the Enrollment of Actuaries set forth specific standards governing the performance of actuarial services, including the requirement that:

> 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.

29 C.F.R. § 901.20(e) (2001).

While the legislative history of ERISA is replete with references to the critical role played by plan actuaries, and the need to assure standards of competence, the following excerpt from the House Report on H.R. 12855, captures well the legislative concern:

> Your committee recognizes that the amount required to fund a pension plan is in large part determined by actuaries' estimates of future plan costs, which in turn are based on the actuarial methods and assumptions used for each plan. Consequently, the determination of the amount of contributions that must be made to a plan to adequately fund the plan benefits is significantly affected by the professional decisions of the plan's actuary. Since there is no existing government regulation or licensing requirement for actuaries as there is for, ***e.g.***, lawyers and accountants, your committee believes that minimum standards of competence should

> be established for persons who make actuarial computations for qualified plans.

H.R. 12855, 94th Cong. (2d Sess. 1976), reprinted in 2 Legislative History of the Employee Retirement Income Security Act, 1974, at 3194 (1976).

B. The Magnitude of Damages Caused by Actuarial Malpractice

Congressional concern with actuarial competence appears to be well founded, as evidenced by recently reported judgments and claims in actuarial malpractice cases.

In a case involving a single employer plan with merely a handful of participants, damages of $589,920 were awarded against Watson Wyatt for the negligent performance of its services. Orthopedic Clinic of Monroe v. Ruhl, 26 Employee Benefits Cas. (BNA) 1070 (La. Ct. App. 2001).

In a second case involving a multiemployer plan with only $169 million in assets, a Connecticut jury awarded $39.5 million in damages against Watson Wyatt for breach of contract and actuarial malpractice. Farnham v. Watson Wyatt & Co., No. 3:99 CV 00792 (D.C. Conn. 2001). This was a jury verdict that was not appealed. Copies of the Amended Complaint and the district court's ruling on post-trial motions are attached as Exhibits 4 and 5, respectively. The court's ruling clearly describes how an actuary's errors in basic assumptions and calculations can go undetected by trustees, in this case for nearly a decade, and create massive debt for the plan.

Finally, the January 30, 2001 issue of the Pension & Benefits Reporter, reported on a $2 billion lawsuit filed in the California Superior Court by the Los Angeles County Employees Retirement Association, with damages allegedly caused over a period of 20 years by the malpractice of that plan's actuary, Towers, Perrin, Forster & Crosby, Inc. See Tom Gilroy, Los Angeles Retirement Fund Sues Towers, Perrin Over $2 Billion Miscalculation, 28 Pens. & Ben. Rep. (BNA) No. 5, at 560 (Jan. 30, 2001). A copy of that article is attached as Exhibit 6.

These cases are sobering examples of the staggering scope of damages that can result from actuarial malpractice.

C. The Need for Guidance

Simply put, it is our belief that if the Fund's Trustees were to agree to the clauses proposed by Watson Wyatt, as set forth in "Attachment B" (see Exhibit 1) --- fully aware of the scope of potential damages --- they would subject themselves to personal liability for any damages to the Fund, in excess of the $250,000 limitation, which might thereafter be caused by actuarial malpractice. And, they would do so without benefit of fiduciary insurance to protect them from that liability.

In the absence of guidance to the contrary by the DOL, we believe a reviewing court could conclude that the Trustees' agreement to such clauses violates Section 404(a)(1)(A) and (B), 29 U.S.C. §§ 1104(a)(1)(A), (B) (1999), and Section 406(a)(1)(D), 29 U.S.C. § 1106(a)(1)(D) (1999), of the Act for the following reasons.

1. Section 404(a)(1)(A)

ERISA Section 404(a)(1)(A), 29 U.S.C. § 1104 (1999), requires trustees to exercise their duties solely in the interests of participants and beneficiaries, and for the exclusive purpose of providing benefits and defraying reasonable expenses of administering the plan.

If, as in the Farnham case, this Fund were to suffer $39.5 million in damages from actuarial malpractice, but the Trustees had contractually agreed to forfeit the Fund's right of recovery to all but $250,000 of such damages as a cost of securing actuarial services, we do not believe such forfeiture could be considered a reasonable cost of administering the plan. Indeed, were this Fund of $7 billion to suffer damages proportional to those of the plan in Farnham --- almost 25% of plan assets --- the assets forfeited would approach $1.6 billion.

Given the magnitude of the potential cost to the Fund stemming from actuarial malpractice, we believe any agreement to waive or forfeit such costs would be deemed unreasonable, per se, and thus render the Fund's Trustees personally liable for such costs.

It is further our view that, without clear guidance to the contrary from the DOL, no reasonable trustees of any plan would risk exposing themselves to such liability.

2. Section 404(a)(1)(B)

The selection of a professional service provider, such as the plan actuary, involves the disposition of plan assets and is an exercise of authority or control within the meaning of ERISA Section 3(21)(A), 29 U.S.C. § 1002(3)(2)(A) (1999). Accordingly, the selection decision constitutes a fiduciary act subject to the general fiduciary responsibility standards of Section 404(a)(1)(B) of the Act, 29 U.S.C. § 1104(a)(1)(B) (1999), which requires plan trustees to utilize the care, skill, prudence and diligence that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of a similar enterprise with like aims. We believe that agreement to the clauses contained in "Attachment B" (see Exhibit 1) are inconsistent with the mandates of Section 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B) (1999), for the following reasons.

Agreement to the limitation of liability clause of "Attachment B" would constitute an agreement to forego any claim against the plan's actuary, for damages exceeding the limits specified, for professional malpractice or any other cause of action that may subsequently arise. In so agreeing, the Trustees would relinquish any opportunity to evaluate the merits of such claims, including an assessment of the nature and duration of the malpractice involved, the magnitude of the damages suffered by the Fund, or the anticipated costs of litigation compared to the likelihood of successful recovery. Such a complete relinquishment, we believe, would constitute an abdication of the Trustees' duty of care. In our view, plan trustees can only make a decision not to pursue such claims for actuarial malpractice <u>after</u> the claim has arisen, and then only after they have performed the due diligence required by Section 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B) (1999).

Agreement to the indemnification clause of "Attachment B" would constitute an even more sweeping dereliction of fiduciary duty. By agreeing to indemnify and hold harmless the actuary from any third-party liability, the Trustees would not only be relinquishing the opportunity to evaluate the merits of the claims, but would also be forfeiting any ability to control, review or oversee the costs or quality of the legal defenses presented, or the basis upon which the claims might be compromised in settlement by Watson Wyatt.

In the context of claims for delinquent contributions, the DOL has set forth in some detail the nature and scope of the analysis required of trustees when determining whether or not to pursue claims for recovery. Prohibited Transaction Exemption 76-1, § 1(a)(3) 41 Fed. Reg. 12,740 (Mar. 26, 1976), requires that the plan must have made reasonable, diligent and systematic efforts to pursue the claim, and the determination not to pursue a claim must be set forth in writing. In addition, such determination must be reasonable and appropriate based on the likelihood of collecting the delinquent contributions or the approximate expenses that would be incurred if the plan continued to attempt to collect.

Likewise, in the context of suits brought by the DOL against trustees who have failed to file lawsuits to recover damage claims, the courts have recognized the duty of trustees to evaluate each potential claim on its merits, balancing the cost of pursuing the claim against the likelihood of recovery. Herman v. Mercantile Bank, 137 F.3d 584 (8th Cir. 1999); Martin v. Feilen, 965 F.2d 660 (8th Cir. 1992).

Clauses 7 and 8 of "Attachment B" (see Exhibit 1) constitute a blanket relinquishment of the Trustees' legal right, and renunciation of their legal obligation, to pursue causes of action which can have the gravest potential consequences for plan participants. As such, we believe the act of agreeing to such clauses would constitute a violation of the Trustees' duty of care and prudence imposed by Section 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B) (1999), of the Act.

3. Section 406(a)(1)(D)

We also believe that the Trustees' agreement to contractual language similar to that in "Attachment B" (see Exhibit 1) may constitute a transaction prohibited by ERISA Section 406(a)(1)(D), 29 U.S.C. § 1106(a)(1)(D) (1999), and which is not exempted by ERISA Section 408(b), 29 U.S.C. § 1108(b) (1999 & Supp. 2000). Specifically, we are concerned that an agreement by the Trustees --- through either limitation of liability or indemnification --- to waive or pay damages caused to the Fund, which would otherwise be payable by the Fund's actuary, may constitute a direct or indirect transfer of plan assets for the benefit of a party in interest. While the actual transfer of plan assets would be conditioned upon the actuary's causation of damages, the making of the agreement itself would constitute the transfer of a "thing of value," because it would immediately transfer a contingent liability from a party in interest to the Fund.

We do not believe the transaction would fall within the exemption of ERISA Section 408(b)(2), 29 U.S.C. § 1108(b)(2) (1999 & Supp. 2000), because that exemption permits only reasonable arrangements with service providers for no more than reasonable compensation. The second part of this test, the "reasonableness" of the actuary's compensation, can be objectively determined by the Trustees through a diligent search process that produces competitive bids from responsible bidders. However, regardless of the compensation, the arrangement itself cannot be deemed reasonable if it incorporates an agreement to forfeit unknown, and potentially enormous, damages to which the Fund would be otherwise entitled.

In our view, the only circumstance where the Trustees' concession to contractual terms similar to those set forth in "Attachment B" (see Exhibit 1) might be deemed reasonable is if no responsible bidders are willing to provide actuarial services to the Fund absent such concessions. While this outcome might be the current goal of the actuarial industry, and one of understandable business desire, it is entirely contrary to the interests of the participants and beneficiaries of the ERISA plans they serve. When these two interests conflict, the interests of the participants and beneficiaries must prevail.

Guidance by the DOL advising the Trustees that entering into actuarial services' contracts containing limitation of liability and indemnification provisions similar to those contained in "Attachment B" (see Exhibit 1) would constitute neither a breach of fiduciary duty nor other violation of ERISA, would provide material protection to the Trustees in terms of their personal liability, but would provide no protection whatsoever to the Fund's participants.

CONCLUSION

In light of the recently reported judgments and claims in actuarial malpractice cases, it may be a rational business judgment for actuarial firms to seek to shift their professional liability to the pension plans they serve.

In our view, however, it is precisely because of these recent cases that trustees must require full accountability of their actuaries for damages caused to their plans due to professional malpractice. Informed by these cases of the scope of potential damages flowing from actuarial malpractice, plan participants can rightfully expect that their trustees will not invite an even greater potential for actuarial malpractice by eliminating the actuaries' single greatest incentive for professional excellence --- the obligation to pay for their mistakes.

For the foregoing reasons, we respectfully request that the DOL provide guidance on this important and emergent issue. If further information is required, please contact the undersigned.

Sincerely yours,

Michael A. Crabtree
Fund Counsel

MAC:gj

Attachments

Attachment B

Watson Wyatt & Company

Terms and Conditions of Engagement

1. General. These master terms and conditions ("general terms") will apply to all engagements for services ("services") provided to Client by Watson Wyatt & Company or any entity directly or indirectly owned or controlled by Watson Wyatt & Company ("Watson Wyatt") unless the services furnished by such other entity are the subject of a separate written agreement. The term "Client" means the addressee(s) of an engagement letter or, if no engagement letter is provided, the entities to which Watson Wyatt provides services. These general terms may be changed only by a written amendment signed by the duly authorized representatives of the parties.

2. Engagement Letters. From time to time, Watson Wyatt may issue engagement letters for particular projects or assignments. All such engagement letters will be deemed, unless they provide otherwise, to incorporate these general terms, as they may have been amended by mutual written agreement from time to time. Except with respect to the description of specific services and fees for any engagement, these general terms will prevail over any conflicting terms of any engagement letter. Together with such engagement letters, these general terms state the entire understanding between the parties concerning Watson Wyatt's services (the "agreement") and supersede any prior proposals, correspondence or discussions.

3. Scope of Services. Watson Wyatt will provide the services described in our engagement letters or other communications through which Watson Wyatt agrees to provide services. Watson Wyatt's undertakings will be limited to advising Client concerning those matters on which we have been specifically engaged. Watson Wyatt will perform our services with due care and in accordance with the engagement letters, these general terms and prevailing consulting industry standards for comparable services. Watson Wyatt is not a law firm and we do not provide legal advice. Except for the warranties expressed in these general terms, Watson Wyatt makes no warranty, either express or implied, with respect to our services.

4. Fees and Expenses. Unless the parties agree otherwise, Watson Wyatt's fees will be determined taking into account factors that generally include the circumstances relevant to the particular engagement, the time required to perform the services, the novelty and difficulty of the work, the skill required, the experience and seniority of the associates who perform the services, any time limitations or other unusual conditions that may be applicable, and Watson Wyatt's standard hourly rates in effect at the time services are performed. In addition, Watson Wyatt will charge a technical and administrative fee based on a percentage of the consulting fees. Client will reimburse Watson Wyatt for reasonable out-of-pocket expenses, including travel, incurred in performing the services. Our invoices for services rendered and expenses incurred are payable 30 days after receipt. A late payment charge is payable on balances outstanding more than 30 days. Client is responsible for any sales, gross receipts or similar taxes applicable to the services but not taxes based upon Watson Wyatt's net income.

5. Client's Responsibilities. Client will provide Watson Wyatt with all necessary documentation and information required in order to enable Watson Wyatt to provide the services. Client will also ensure that its employees and any third parties who are otherwise assisting, advising or representing Client will co-operate on a timely basis with Watson Wyatt in the provision of our services. Watson Wyatt may rely upon information provided by Client and its employees and agents-as-accurate and complete. Watson Wyatt may rely upon any directions provided by Client and its employees and agents concerning the provision of the services, including without limitation directions with respect to the interpretation of Client's employee benefit plans or matters reflecting the exercise of discretion by Client or the administrator of such plans. If Client or its employees and agents are unable to participate in the project as required, or if information provided by Client or its employees and agents is inaccurate, incomplete or delayed, the scope of the services may be different, the schedule may be delayed, Watson Wyatt's fees may be higher than described, and/or Watson Wyatt may be unable to perform some or all of the services as originally agreed.

6. Resolution of Disputes. The parties will try to resolve any dispute or claim arising from or in connection with this agreement or the services provided by Watson Wyatt by appropriate internal means, including referral to each party's senior management. If the parties cannot reach a mutually satisfactory resolution, then any such dispute or claim will be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association ***("AAA'),*** and the Federal Arbitration Act, and judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction. The arbitration will be conducted in the principal location where Watson Wyatt is providing services to Client or in another mutually agreeable location before a panel of three neutral arbitrators, with one arbitrator named by each patty and the third named by the two party-appointed arbitrators, or, if they should fail to agree on the third, by the ***AAA.*** The arbitrators may not award non-monetary or equitable relief, punitive damages or any other damages not measured by the prevailing party's actual damages. This paragraph will not prevent any party from pursuing equitable remedies to the extent required to protect rights or property or to prevent irreparable harm. If any dispute or claim between the parties is subject to judicial proceedings, each party expressly waives any right it might have to demand a jury trial in such proceedings.

7. Limitation of Liability. If any of Watson Wyatt's services do not conform to the requirements of this agreement, Client shall notify Watson Wyatt promptly and Watson Wyatt shall reperform such services at no additional charge or, at Watson Wyatt's option, shall refund the portion of the fees paid with respect to such services. If reperformance of the services or refund of the applicable fees would not provide an adequate remedy for damages arising from the performance, nonperformance, or breach of this agreement, Watson Wyatt's maximum total liability, including that of any employee, affiliate, agent or contractor, relating to the services, regardless of the cause of action, will be limited to direct damages in an amount not to exceed two hundred fifty thousand dollars ($250,000) or, if greater, the fees payable with respect to the particular engagement (or one year's fees in the case of annually recurring services) pursuant to which such liability arises. Neither party shall be liable for any indirect, special or consequential damages. The limitation of liability contained in this paragraph shall not apply to the extent that any liability arises from the willful misconduct of Watson Wyatt, its employees, affiliates, agents or contractors.

8. Indemnification. Watson Wyatt will indemnify and hold Client harmless from and against. any third party claim or liability (including reasonable defense costs and attorneys' fees) to the extent arising from or in connection with the negligence of Watson Wyatt or its employees or agents in the course of performing the services or from infringement by Watson Wyatt of any United States patent or copyright. Watson Wyatt's liability for indemnification is subject to the limitation of liability set forth in paragraph 7 above, provided, however, that this limitation will not apply in the case of claims arising from bodily injury, death of any person, damage to real or tangible personal property, or patent or copyright infringement. Except to the extent that Watson Wyatt is obligated to indemnify Client pursuant to this paragraph, Client shall indemnify and hold Watson Wyatt, its employees, agents and alliance partners harmless from any third party claim or liability (including reasonable defense costs and attorneys' fees) arising from or in connection with the services performed by Watson Wyatt or Client's use thereof.

9. Watson Wyatt Not a Fiduciary. Watson Wyatt is not being engaged to perform or assume any fiduciary functions, including those of any plan administrator, with respect to Client or any employee benefit plan of Client or its affiliates. If Watson Wyatt is deemed to be a fiduciary with respect to any services, Watson Wyatt's responsibility as a fiduciary shall extend only to those activities deemed to be fiduciary activities under applicable law and shall in no event extend to any acts or omissions of any other person.

10. Termination. Either party may terminate any engagement upon ten days' prior written notice.

Client will compensate Watson Wyatt for all services provided through the effective date of termination.

11. Confidentiality. Watson Wyatt agrees to take reasonable measures to preserve the confidentiality of any proprietary or confidential information that Client provides to us in connection with the services. At the conclusion of any engagement, if Client requests the return of any materials, data or documents provided to Watson Wyatt, Watson Wyatt may retain a copy of these materials for archival purposes, subject to its confidentiality obligations hereunder. Client shall retain ownership of all data and materials provided to Watson Wyatt. Watson Wyatt does not confer to Client any interest ~n the materials, tools, software or know how used or developed by Watson Wyatt to provide the services.

12. Governing **Law.** These general terms will be governed by and construed in accordance with the laws of the jurisdiction where the Watson Wyatt office principally responsible for providing services to Client is located.

Pensions&Investments®

The International Newspaper of Money Management

January 21, 2002

AT $3.5 TRILLION

Assets of top 200 U.S. pension funds sink 14%

By Mike Kennedy

A year after climbing over the $4 trillion mark, assets of America's 200 largest retirement plans tumbled 14.4% to $3.5 trillion, *Pensions & Investments'* annual survey shows.

Assets of the largest 1,000 funds, which had topped $5 trillion, slid 12.7% to $4.8 billion.

"The snapshot ... is of one of the worst one-year time periods we've ever had," said Janine Baldridge, director–client relationships in the consulting arm of the Frank Russell Co., Tacoma, Wash. She attributed the horrible showing to the equity markets' negative returns as well as the survey period ending on Sept. 30, only two weeks after markets reopened following the Sept. 11 terrorist attacks.

Indeed, it was the funds' stock exposure that did them in growth-wise.

Among defined benefit plans, the aggregate allocation to domestic equities dropped about four percentage points, to 43.2% for the top 200 and 44% for the top 1,000. International equity exposure was down less than one percentage point for both the top 200 and top 1,000. Yet the decline in equity allocations was less than would have been expected from the market drop, suggesting some plan sponsors rebalanced toward their target equity exposure.

▸The full P&I 1,000 report begins on page 11.

"I have a feeling there's ... a mix of plans that range between disciplined rebalancing procedures and letting the trend unfold," said Brian Hersey, investment director of Watson Wyatt Investment Consulting, Chicago.

DC stock exposure

Equity exposure declined more sharply (about seven percentage points) among defined contribution plans. The average defined contribution plan in the top 200 had a 64% allocation to equities, including sponsoring company stock, as of Sept. 30; the average top 1,000 plan had a 61% exposure.

"In 2001, we didn't see the same kinds of shifts out of stocks (as) 1998," said Ms. Baldridge, who said 1998 was a year when plan participants moved a significant amount of assets out of equities. She added plan participants have more market savvy now and are less tempted to make shifts in asset allocation after a short period of negative returns.

On the defined benefit side, fixed-income allocations rose about three percentage points; real estate equity, about one point; and private equity, about a half point.

See Overview *on page 72*

AT DEADLINE

Florida plan may sue Alliance

Florida State Board of Administration officials are considering legal action against

NOT OVER YET

Funds' liabilities outpace assets by

Doug Goodman

PROTECTION IN LAWSUITS

Actuaries seek client contracts that limit firms' liabilities

By Vineeta Anand

Actuary

Continued from page 1

timillion lawsuits over the consultants' actuarial work in recent years.

Milliman's review was prompted by its insurance company, which is threatening to yank the consulting firm's coverage or raise its deductible by millions of dollars if it does not adopt such provisions, said Tom Custis, national director •for pensions, in the firm's Brookfield, Wis., office. Milliman will decide next month whether to ask clients to limit its liability to an equivalent of two or three years' fees. The firm has no plans to adopt an indemnification clause for routine actuarial work, Mr. Custis said.

• Union funds object

Labor union funds are up in arms.

Trustees of the Central Pension Fund of the International Union of Operating Engineers and Participating Employers, Washington, last week decided to look for a new actuarial consultant after Watson Wyatt presented the new clauses, said Michael R. Fanning, chief executive of the fund. The $6.5 billion fund's three-year contract with Watson Wyatt expires Jan. 31, but the firm has agreed to continue with the • fund under the existing contract's terms until a new firm is hired.

Trustees also decided to ask the Labor Department's pension office for guidance on whether acceptance of such clauses could cause trustees to violate their fiduciary duties.

In a Jan. 15 letter, Frank Hanley, general president of the international Union of Operating Engineers, asked all local plans to "vehemently oppose any attempt by actuarial firms to escape from liability for their own negligence."

William Dale, managing partner in the Washington law firm of McChesney & Dale PC, which represents several union funds, said three funds received a request from Watson Wyatt to add the provisions in their consulting contracts; he expects all three will reject the provisions within the next month.

Joyce Mader, a partner at the Washington law firm of 0'-Donoghue & O'Donoghue, which represents more than 120 pension plans, mostly union funds, also is asking clients to reject such clauses and search for new consultants. Ms. Mader said she was "outraged" at the actuaries' efforts to limit liability in case of screwups.

Another request

Meanwhile, the Washington-based National Coordinating Committee for Multiemployer Plans, which represents about 650 Taft-Hartley funds, also might ask the Labor Department's pension office to clarify the issue, said Randy DeFrehn,. executive director.

"This is totally unacceptable. You have to be able to rely on your professionals and their advice and have the confidence in them that if they make a mistake they are willing to stand behind it," he said.

A Towers Perrin spokesman said no pension fund clients have objected to the new provisions in their contracts, although one TP executive said the firm did stop doing work for a small pension fund that refused to accept the provisions.

And Eric P. Lofgren, global director of the benefits consulting group at Watson Wyatt, Philadelphia, said the firm has had a policy on its books of insisting on formal "letters of engagement" from all clients, but only recently has begun asking pension funds to sign them. "We frankly think that what we are proposing is fairly mainstream here," he said. •

CHUBB

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February 19, 2002

Michael R. Fanning
Chief Executive Officer
Central Pension Fund of the International Union of Operating Engineers and Participating Employers
4115 Chesapeake Street, NW
Washington, DC 20016

Dear Mr. Fanning:

Thank you for bringing to our attention the recent request made by Watson Wyatt & Company to limit their liability and hold them harmless for services they provide to the Central Pension Fund.

While it is impossible to state in the abstract whether the policy would necessarily provide coverage in any give situation, it is not the intent of Federal Insurance Company's Labor Management Trust Fiduciary Liability Policy to cover the errors and omissions of your actuary. We believe any assumption of exposure such as this would be excluded under our policy via Exclusion 5(e) Which reads as follows: "based upon, arising from, or in consequence of liability of others assumed by the Insured under any contract or agreement, either written or oral, except to the extent that the Insured would have been liable in the absence of the contract or agreement or unless the liability was assumed in accordance with or under the agreement or declaration of trust pursuant to which the Trust or Plan were established." Whether or not or to what extent a particular loss is covered depends on the facts and circumstances of the loss and the terms, conditions, and endorsements of the policy as issued.

Not only is it not our intent to cover an assumption of risk such as this, we have no desire at this time to amend our policy to cover this exposure via endorsement and additional premium. The Labor Management Trust Fiduciary Liability Policy is a policy designed to protect Insureds against liability established by ERISA. It is not designed to cover professional liability exposures normally associated with Actuarial Errors & Omissions coverage.

We hope you can appreciate our position and value the long-term relationship between our two organizations. If we can be of any further assistance, please do not hesitate to let us know through your insurance broker.

Sincerely,

Tim Connolly

Tim Connolly
Underwriting Manager
Chubb Executive Risk
Wholesale Division
860-408-2692 phone
860-408-2614 fax
connollt@chubb.com

cc: Joseph Vaccaro
ARC Excess and Surplus
300 Old Country Road
Mineola, NY 11501-4112

NOV 0 6 2000

DOCKETED

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JOHN B. FARNHAM, RICHARD S. MONARCA, MATTHEW CAPECE, ROGER CHAPMAN, THOMAS R. FOGG, GLENN MARSHALL, MARVIN B. MORGANBESSER, DAVID PALMISCIANO, JOSEPH RAYMOND, and JOHN SCARAMOZZA, as Trustees and on behalf of the CONNECTICUT CARPENTERS PENSION FUND, Plaintiffs,	:	JURY TRIAL DEMANDED
v.	:	Index No.: 3:99 CV 00792 (EBB)
WATSON WYATT & COMPANY, Defendant.	:	September 25, 2000

FIRST AMENDED COMPLAINT

Plaintiffs, by their attorneys, Paul, Weiss, Rifkind, Wharton & Garrison and Reid and Riege, P.C., for their Complaint, allege:

Nature of the Action

1. This is an action for gross negligence, malpractice, breach of contract and negligent supervision stemming from defendant Watson Wyatt & Company's persistent errors and neglect in providing actuarial services to the Trustees of the Connecticut Carpenters Pension Fund (the "Fund"), an employee pension plan benefitting thousands of carpenters in the State of Connecticut.

Parties

2. The Connecticut Carpenters Pension Fund is an employee pension benefit plan within the meaning of Section 3(2) of the Employee Retirement Income Security Act of 1974, as amended 29 U.S.C. § 1001, *et seq.* ("ERISA"). The Fund was established under an Agreement and Declaration of Trust effective as of February 25, 1958 (the "Trust Agreement"). As required by the Trust Agreement, the Fund is administered by a Board of Trustees consisting of 10 members (the "Board of Trustees" or the "Trustees"), who manage the Fund for the benefit of its more than 6,000 participating carpenters, retirees and beneficiaries.

3. Plaintiffs John B. Farnham and Richard S. Monarca are co-chairs of the Board of Trustees.

4. Plaintiffs Matthew Capece, Roger Chapman, Thomas Fogg, Glenn Marshall, Marvin B. Morganbesser, David Palmisciano, Joseph Raymond, and John Scaramozza are members of the Board of Trustees.

5. Defendant Watson Wyatt & Company is a corporation organized under the laws of Delaware. On information and belief, Watson Wyatt & Company is the successor in interest to the Wyatt Company, and is sometimes known as Watson Wyatt Worldwide. Watson Wyatt & Company, the Wyatt Company, and Watson Wyatt Worldwide are referred to herein, collectively, as "Watson Wyatt."

Jurisdiction and Venue

6. This Court has subject matter jurisdiction over this action under 28 U.S.C. § 1332.

7. Venue is proper in this Judicial District under 28 U.S.C. § 1391.

8. This Court has personal jurisdiction over Watson Wyatt under Fed. R. Civ. P. 4(k) and Conn. Gen. Stats. § 33-929(f), as this action arises out of (1) a contract made in this state and to be performed in this state; and (2) tortious conduct in this state. Watson Wyatt has an office located in Stamford, Connecticut, and is registered to do business in this state.

<u>The Fund</u>

9. The Fund is an employee pension fund that receives contributions from multiple employers. Employees who work for any employer who contributes to the Fund may qualify to receive Fund benefits. Such funds, known as "multi-employer funds," typically are found in industries such as construction, where workers may be employed over the course of their careers, on a project by project basis, by many employers, and therefore may not work for any single employer long enough to qualify for retirement benefits under that employer's pension plan.

10. Approximately 400 employers make contributions to the Fund according to the terms of collective bargaining agreements. Contribution rates, defined in terms of dollars per hour worked, are paid to the Fund monthly. Contributions are invested and used to pay Fund benefits.

11. Under the Trust Agreement, the Trustees of the Fund have full authority to determine the nature, amount and duration of benefits to be paid by the Fund. The terms and conditions of these benefits are set forth in detail in the Connecticut Carpenters Pension Plan (the "Plan Document"). Under ERISA, the terms of the Plan Document may be amended to reduce benefits to be earned by employees in

the future. ERISA, however, strictly limits the power of the Trustees to reduce benefits already earned by employees.

Watson Wyatt's Services to the Fund

12. Beginning in approximately 1979 and continuing until March 5, 1999, the Trustees retained Watson Wyatt, an employee benefits and actuarial consulting firm, to provide advice, analyses and recommendations concerning the structure and costs of Fund benefits. Specifically, the Trustees engaged Watson Wyatt for the purpose of procuring professional expertise and advice in valuing the Fund's assets and liabilities, complying with statutory funding standards, and meeting certain ERISA filing requirements. In return for Watson Wyatt's services, the Fund paid Watson Wyatt more than $400,000 in fees between 1991 and 1998.

13. Before and during the time the Trustees engaged Watson Wyatt, Watson Wyatt held itself out as an experienced and qualified employee benefit consulting and actuarial firm well-suited to service the Fund's needs. In a written proposal to the Fund, the Fund's acceptance of which Watson Wyatt described as a "legally enforceable contract," Watson Wyatt undertook to provide accurate, reliable and quality service, touted its "automated systems and extensive review processes," and promised the Fund "no surprises."

14. At the outset of and throughout the period Watson Wyatt served as the Fund's actuarial consulting firm, the Trustees provided Watson Wyatt with extensive documentation concerning the Fund, including the Plan Document and all amendments as such amendments were adopted. The Trustees also supplied Watson Wyatt with data concerning contribution rates and the Fund's participants, retirees, and beneficiaries.

15. To fulfill certain of its obligations to the Fund, Watson Wyatt prepared an annual actuarial valuation report (the "Valuation Report"), which it submitted to the Trustees each fiscal year. Watson Wyatt's Valuation Reports described the benefits prescribed by the Plan Document, summarized data on the Fund's participants and beneficiaries, and purported accurately to value the Fund's assets and liabilities based on reasonable actuarial assumptions and methods and the Fund's experience. Prior to 1998, each Valuation Report Watson Wyatt presented to the Trustees represented that the Fund's contribution rates were sufficient to meet the Fund's obligations without change and also were adequate to meet ERISA's minimum funding requirements.

16. Watson Wyatt regularly attended meetings of the Trustees, where it reviewed the assumptions, methods, findings and conclusions of the Valuation Reports, and otherwise advised the Trustees concerning the financial integrity of the Fund. Watson Wyatt knew that the Valuation Reports served to inform the Trustees whether the Fund's assets exceeded its liabilities. Watson Wyatt also knew that the Trustees would rely, and the Trustees in fact relied, on Watson Wyatt and the Valuation Reports to determine whether to increase, decrease or maintain benefits or to seek adjustments in contribution rates.

17. From 1991 through and including 1997, Charles Austin was the principal Watson Wyatt actuary responsible for the actuarial services provided to the Fund by Watson Wyatt. Mr. Austin personally attended Trustees' meetings, completed and signed the annual actuarial valuations and provided extensive advice to the Fund regarding issues such as benefit increases and other plan amendments.

Watson Wyatt's Malfeasance

18. Through persistent neglect and reckless, wanton disregard of its professional responsibilities to the Fund, Watson Wyatt, beginning in or about 1991, committed critical errors in preparing the annual Valuation Reports and other materials provided to the Trustees. As a result, Watson Wyatt erroneously measured and severely and materially under reported the liabilities and annual costs of the Fund, causing the Trustees to make decisions concerning whether to increase, decrease or maintain benefits or seek adjusted contribution rates based on materially inaccurate information. Despite its professed expertise and vaunted automated systems and review processes, Watson Wyatt failed to discover these egregious errors for more than seven years.

19. Beginning with the Valuation Report for the fiscal year beginning April 1, 1991 ("Fiscal 1991") and continuing through the Valuation Report for the fiscal year beginning April 1, 1997 ("Fiscal 1997"), each Valuation Report prepared by Watson Wyatt materially under reported the Fund's costs and liabilities (vested and unvested) for various benefits described in the Plan Document, even though these benefit obligations were known to Watson Wyatt and described in the Valuation Reports themselves. In particular, Watson Wyatt materially understated the Fund's liabilities as follows:

(a) Watson Wyatt failed to account for benefits owed to disabled retirees.

(b) The Plan Document permits carpenters to elect a pension benefit payment option known as "Ten Years Certain and Life Pension." Under this option, a retired carpenter receives benefits for the remainder of his life. If, however, the retired carpenter dies within 10 years after retirement, the retiree's beneficiary continues to receive retirement benefits for a period ending ten years after the carpenter's retirement. Watson Wyatt incorrectly valued the benefits payable under this option to carpenters retired for fewer than ten years as if such benefits cease after ten years.

(c) The Plan Document provides for payment of benefits, known as "pre-retirement death benefits," for spouses of participating carpenters who die prior to retirement when the participating carpenter's retirement benefits were vested at his or her time of death. Although ERISA mandates a minimum pre-retirement surviving spouse benefit equal to at least 50% of the amount the deceased carpenter would have received had he retired immediately prior to death, the Plan Document prescribes a higher pre-retirement surviving spouse benefit, *i.e.*, a benefit equal to 100% of the retirement benefit the carpenter would have received had he retired immediately prior to death. Watson Wyatt incorrectly valued the costs of the Funds' pre-retirement surviving spouse benefit as if the Plan Document prescribes only the 50% minimum benefit required under ERISA.

(d) Although the Plan Document provides for payment of monthly benefits equal to up to $90 for each year of qualified service (depending on the participant's average contribution rate), Watson Wyatt valued monthly benefits payable by the Fund as if they were capped at $50 for each year of qualified service.

20. These errors, and Watson Wyatt's wanton failure to discover them prior to 1998, caused Watson Wyatt to understate the Fund's liabilities for each fiscal year from Fiscal 1991 through and including Fiscal 1997. By Fiscal 1997, the cumulative effect of Watson Wyatt's multiple errors caused it to under report the Fund's liabilities by more than $32 million. As a result, at the beginning of Fiscal 1997, the

Fund's liabilities were nearly 25% *higher* than the liability figure reported by Watson Wyatt to the Trustees before discovery of Watson Wyatt's errors. Moreover, whereas Watson Wyatt reported before disclosure of its errors that the Fund's assets were greater than or equal to the Fund's vested liabilities, the Fund in fact had an unfunded vested liability for Fiscal 1997 of approximately $20 million.

21. As a result of the huge errors in Watson Wyatt's valuations, its prior representations to the Trustees that the Fund's contribution rates were sufficient to fund the benefits prescribed by the Plan Document were false. Whereas Watson Wyatt reported for Fiscal 1997 that the Fund's expected average contribution rate exceeded the Fund's total costs, the Fund's average contribution rate was in fact substantially *less than* the Fund's costs. As a result, absent deep reductions in plan benefits or substantial increases in contribution rates, the Fund will be unable to meet its continuing obligations to pay benefits and to comply with statutory minimum funding requirements.

22. Watson Wyatt compounded its errors in massively understating the Fund's costs and liabilities by failing to use reasonable actuarial methods and assumptions in preparing the Valuation Reports. Specifically, in calculating the Fund's liabilities, Watson Wyatt used an outdated mortality table, which failed adequately to account for increasing life expectancies in recent years. For Fiscal 1997, Watson Wyatt's use of the outdated mortality table caused it to under report the Fund's total liabilities by approximately $12 million.

23. Watson Wyatt was aware beginning no later than January 1994 that Charles Austin's performance was severely deficient. For example, in January 1994, a senior Watson Wyatt actuary authored a scathing review of Mr. Austin's performance

for another Watson Wyatt actuarial client. This performance review clearly indicated that, because of Mr. Austin's deficient understanding of computer programming and other problems, the actuarial calculations performed for the client were inaccurate by very large percentages, 35%-45% initially. These inaccuracies required repeated corrections. The work for this Watson Wyatt client was described in the review as "the worst actuarial information [the reviewer had] ever presented to a client."

24. Despite being aware of Mr. Austin's severely inadequate performance, Watson Wyatt did not remove him as primary actuary for the Fund or, upon information and belief, otherwise limit his responsibility for the Fund's actuarial services. Nor did it audit his work for the Fund -- an audit that would have disclosed gross errors. Instead, Watson Wyatt intentionally or recklessly disregarded Mr. Austin's significant deficiencies as an actuary and kept Mr. Austin's manifest deficiencies secret from the Fund. Watson Wyatt intentionally or recklessly permitted a manifestly unqualified actuary to continue working for the Fund and to continue committing gross and repeated actuarial errors that injured the Fund severely.

25. The multiple errors in Watson Wyatt's valuation of the Fund's liabilities, and its reckless failure to discover and disclose these errors to the Trustees, continued from at least 1991 through and including September 1998, when Watson Wyatt revealed to the Trustees for the first time its errors and their severe adverse effect on the Fund's financial status. Had the Trustees known the true facts concerning the Fund's liabilities, they would have reduced benefits payable by the Fund or sought higner contribution rates in order to preserve the Fund's financial integrity.

FIRST CAUSE OF ACTION

(Negligence)

26. Plaintiffs repeat and reallege the allegations of paragraphs 1 through 25.

27. Watson Wyatt owed plaintiffs a duty to exercise due care and skill in providing actuarial services to the Fund.

28. By recklessly, wantonly and repeatedly committing gross errors in providing actuarial services to the Fund, and in failing promptly to discover and disclose those errors to the Trustees, Watson Wyatt acted recklessly and with gross negligence.

29. As a direct, proximate and foreseeable result of Watson Wyatt's gross negligence, the Fund has suffered actual damages in an amount to be determined at trial, but in no event less than $45 million and is entitled to punitive damages.

SECOND CAUSE OF ACTION

(Malpractice)

30. Plaintiffs repeat and reallege the allegations of paragraphs 1 through 25.

31. In undertaking to provide actuarial services to the Fund, Watson Wyatt owed a duty to the Fund to discharge its professional obligations with the degree of skill and competence expected and required of actuaries.

32. By recklessly, wantonly and repeatedly committing gross errors in providing actuarial services to the Fund, and in failing promptly to discover and disclose those errors to the Trustees, Watson Wyatt failed to discharge its professional obligations to the Fund with the degree of skill and competence expected and required of actuaries.

33. As a direct, proximate and foreseeable result of Watson Wyatt's malpractice, the Fund has suffered actual damages in an amount to be determined at trial, but in no event less than $45 million and is entitled to punitive damages.

THIRD CAUSE OF ACTION

(Breach of Contract)

34. Plaintiffs repeat and reallege the allegations of paragraphs 1 through 25.

35. Watson Wyatt entered into a contractual relationship with the Trustees to serve as the Fund's actuary. Among other things, the contract obligated Watson Wyatt to provide accurate, reliable and quality actuarial services on behalf of the Fund.

36. The Trustees, acting on behalf of the Fund, performed all of their obligations under their contract with Watson Wyatt.

37. By recklessly, wantonly and repeatedly committing gross errors in providing actuarial services to the Fund, and in failing promptly to discover and disclose those errors to the Trustees, Watson Wyatt breached its contract with the Trustees.

38. By reason of the foregoing, the Fund has suffered actual damages in an amount to be determined at trial, but in no event less than $45 million and is entitled to punitive damages.

FOURTH CAUSE OF ACTION

(Negligent Supervision)

39. Plaintiffs repeat and reallege the allegations of paragraphs 1 through 25.

40. Watson Wyatt owed a duty to the Fund to supervise its employees who provided actuarial services to the Fund, in order to prevent significant actuarial errors, particularly when Watson Wyatt was aware that a specific employee's performance was substandard and had previously resulted in significant actuarial inaccuracies for other Watson Wyatt clients.

41. By recklessly and wantonly disregarding its knowledge of Charles Austin's inadequate performance and by failing to take any precautionary or remedial actions to ensure that such deficiencies had not and would not continue to have a negative impact upon the Fund, Watson Wyatt negligently breached its duty to the Fund to supervise its employees.

42. As a direct, proximate and foreseeable result of Watson Wyatt's negligent supervision, the Fund has suffered actual damages in an amount to be determined at trial, but in no event less than $45 million and is entitled to punitive damages.

WHEREFORE, plaintiffs request judgment against Watson Wyatt awarding:

1. Damages in an amount to be determined at trial, but in no event less than $45 million;

2. Punitive damages in an amount to be determined at trial;

3. Prejudgment interest pursuant to Conn. Gen. Stats. § 37-3(a);

4. The costs and expenses of this action, including reasonable attorneys' fees; and

5. Such other and further relief as the Court deems just and proper.

JURY DEMAND

Plaintiffs hereby demand a trial by jury of all issues that may be so tried.

Dated: New York, New York
September 25, 2000

PAUL, WEISS, RIFKIND, WHARTON
& GARRISON

By: ____________________
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Counsel for Defendant

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JOHN B. FARNHAM ET AL, as Trustees and on behalf of the CONNECTICUT CARPENTERS PENSION FUND, Plaintiffs	:	
v.	:	3:99-CV-00792 (EBB)
WATSON WYATT & COMPANY, Defendant	:	

RULING ON MOTION TO ALTER OR AMEND THE JUDGMENT, OR IN THE ALTERNATIVE, FOR A NEW TRIAL ON DAMAGES

INTRODUCTION

Following the conclusion of the four-week trial on claims of, *inter alios*, breach of contract and actuarial malpractice, the jury returned a verdict in favor of the Plaintiffs in the amount of $32.2 million, taking failure to mitigate into consideration in their deliberations. Plaintiffs were also awarded $7.3 million in interest under Conn.Gen.Stat. Section 52-192a because the jury verdict was greater than their offer of judgment, for a total of $39.5 million. Defendant now moves to amend or alter the judgment, or in the alternative, for a new trial on damages, asserting that the jury verdict was against the weight of the evidence and that the very most the jury could have awarded was $18.9 million, plus $3.8 million in potential interest income.

STATEMENT OF FACTS

The Court sets forth only those facts deemed necessary to an understanding of issues raised, and decision rendered on, this Motion. The Court has previously issued a myriad of opinions and orders in this case, with which it assumes familiarity, and incorporates them by reference herein.

Plaintiffs' evidence at trial demonstrated that, for over a near decade, actuarial errors were made by Defendant in the calculation of the liabilities of the Connecticut Carpenters' Pension Fund and that the Trustees of the Fund relied on these erroneous calculations to its detriment, leaving the Fund with a present enormous debt. As the Trustees and experts testified at the trial, had the Trustees known the true financial state of the Fund, they would have decreased benefits and/or raised contributions to ensure that the Fund maintained its historically low Unfunded Accrued Liability ("UAL"), and an Unfunded Vested Liability ("UVL") of zero. *See* Testimony of Matthew Capece 143:18-144:1, 2/15/01 (Exhibit 1); Roger Chapman 91:4-92:2, 110:1-110:15, 2/9/01 (Exhibit 2); Joseph Raymond 140:12-140:25, 2/8/01 (Exhibit 4); John Cunningham, 234:24-235:6, 2/20/01 (Exhibit 14); and David Salibar, 243:18-244:6, 2/20/01 (Exhibit 15). Each of these individuals emphasized that they would have done whatever it took to reduce the liabilities and have no UVL, and each testified that this was possible. Mr. Raymond testified that this was a "major priority" of the Trustees. The Trustees also produced in Plaintiff's Ex. 1 three letters, in 1992, 1993 and 1995 from Watson Wyatt, pricing various benefits increases and reflecting the Trustees' unwavering focus on avoiding UVL and excessive UAL. Summarizing his review of the documentary evidence, one of the Plaintiffs' experts, Mr. Arnold, testified that the Trustees never enacted a single benefit increase which would have deviated from their financial priorities. *See* Arnold testimony at 155:24-156:11 (1/30/01)(Exhibit 17).

Charles Austin, the Defendant's actuary during the period of errors, testified that avoiding UVL was very important throughout his tenure an as the Fund's actuary and that its investments were, accordingly, on the conservative side. *See* Austin testimony at 156:4-10 (2/6/01)(Exhibit 19). Wayne Foster, the Watson Wyatt actuary who discovered the errors, testified, as did the Trustees uniformly, that the Trustees could have raised contributions or decreased benefits if they had been given accurate, rather than erroneous, information over the years.

Plaintiff's expert, Daniel Arnold, gave significant and highly detailed testimony as to the financial impact of the Defendant's errors on the status of the Fund. He quantified that impact as $44.7 million, and for illustrative purposes, showed the jury several different scenarios which the Trustees could have followed to maintain the Fund's financial position, had they received accurate information. *See* Arnold testimony at 35:18-36:2; 38:10-39:2; 89:20-90:1 (Exhibit 21).

Watson Wyatt's expert, Vincent Amoroso, conceded that, with control over benefit levels, contributions and investments, there were innumerable ways ("hundreds of thousands") for the Trustees to adjust the finances of the Fund to achieve their financial goals, over the years in which they received the false information. *See* Amoroso testimony at 80 (Exhibit 22).

Defendant asserts that the Fund has not been damaged by the loss of past contributions, as it may make them up in the future. The Court disagrees. The ability to collect contributions in the future in no way undermines the past damage to the Fund. It was the Fund which suffered as a result of lost contributions because it has forever lost the opportunity to collect those contributions and invest them accordingly. Due to the massive debt the Fund is now struggling under, the amount that the contributions would have to be increased to is not possible, because they would have to be "massive". *See* Capece testimony at 141:25-143:17 (2/15/01) (Exhibit 28). *Accord* Chapman testimony at 86:12-87-18 (2/9/01)(Exhibit 29); 85:2-85:25 (Exhibit 30).; Donald Pierce testimony at 16:5-17-5 (2/13/01)(Exhibit 31).

In addition to this testimony, it is beyond cavil that the harm accrued to the Fund -- not the employers, as Defendant contends. It was the Fund -- not the contributing employers -- that lost the contributions. It is the Fund that now has a massive deficit, has had to cut benefits radically and is forced to allocate most of its contributions to debt service and not to benefits. In fact, Defendant's expert agreed with Plaintiff's expert that the opportunity was lost on the part of the Fund to take the contributions, invest them and get investment returns, especially in the favorable stock market of the late 1990s. *Cf.* Arnold testimony at 34:16-34:19 (Exhibit 35)(1/30/01); 146:12-147-4 with Amoroso testimony at 128:11-20 (2/22/01) (Exhibit 36).

The current disastrous shape of the Fund is further evidence that it suffered greatly from the near decade of false reports. Kathleen Riley, the Fund's current actuary, testified that the current rate of contributions is insufficient to pay even the interest on the Fund's huge UAL, let alone the principal. Riley testimony at 131:15-133:6 (1/14/01)(Exhibit 37).

LEGAL ANALYSIS

I. The Standard of Review

Rule 59(a) of the Federal Rules of Civil Procedure provides that a court may order a new trial following a jury verdict "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." Fed.R.Civ.P. 59(a)(1). Rather than being bound to construe the evidence in the light most favorable to the non-movant, the Court may consider the credibility of the witnesses and the weight of the evidence, as this Motion calls for it to do. "Where the resolution of the issues depended on assessment of the credibility of the witnesses, it is proper for the court to refrain from setting aside the verdict and granting a new trial." Metromedia Co. v. Fugazy, 983 F.2d 350, 363 (2d Cir.1992); *see also* Tennant v. Peoria & P. Union Ry., 321 U.S. 29, 35 (1944)(jury's credibility assessment are entitled to deference).

While a new trial may be granted if there was substantial error in the admission or exclusion of evidence or the court committed error in its jury instructions, *see* Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 251, 61 S.Ct. 189, 194, 85 L.Ed.2d 147 (1940), the court may not grant a new trial unless it is convinced that "the jury has reached a seriously erroneous result or that the verdict is a miscarriage of justice." Smith v. Lightening Bolt Productions, Inc., 861 F.2d 363, 370 (2d Cir. 1988) *cited in* Sargeant v. Serrani, 866 F. Supp. 657, 662 (D.Conn. 1994). *See also* Mallis v. Bankers Trust Co., 717 F.2d 683, 691 (2d Cir. 1983)(alternative motion for new trial brings into play other considerations, chief of which is court s duty to prevent miscarriage of justice). *Accord* Bevevino v. Saydjar, 574 F.2d 676, 684 (2d Cir. 1978); Compton v. Luckenbach Overseas Corp., 425 F.2d 1130, 1133 (2d Cir.), *cert. den'd*, 400 U.S. 916 (1970). Such a motion should not be granted unless an intervening change in the law has occurred, new evidence is available, or there is "the need to correct a clear error or prevent manifest injustice." Virgin Atl. Airways, Ltd v. Nat'l Mediation Board, 956 F.2d 1245, 1255 (2d Cir. 1992). The burden on the Defendant is therefore substantial.

"A district court has broad discretion in determining whether to grant a motion to alter or amend the judgment." Baker v. Dorfman, 239 F.3d 415, 427 (2000).

II. The Standard As Applied

After a thorough review of the transcripts and documentary evidence in this case, the Court will exercise its discretion and DENY Defendant's Motion to Alter or Amend the Judgment or For A New Trial [Doc. No. 198]. The weight of the evidence in this case lay heavily in favor of Plaintiffs, as demonstrated above in the Statement of Facts. Defendant does nothing more than reiterate arguments that the jury found unavailing at the trial of the matter.

Further, in reply to Defendant's claim that, because the jury came back within a few hours after a four-week trial and therefore, of necessity, had to have misunderstood the evidence, this Court rejects such a contention. *Accord* Baker v. Connecticut Bank & Trust, 125 F.R.D. 25, 28 (D.Conn.1988) (EBB) (movant's "hypothesizing regarding the jury deliberations . . . is sheer conjecture. The fact may well be that the jury felt [Defendant] had no case at all and viewed extended discussion as pointless"). This jury was one of the most attentive this Court has seen.

CONCLUSION

The Court finds that Watson Wyatt has failed to meet its "very heavy burden" to prove that the verdict in this case was against the weight of the evidence. Norton's v. Sam's Club, 145 F.3d 114,118 (2d Cir. 1998).

The Clerk is directed to close this case.

SO ORDERED

ELLEN BREE BURNS

SENIOR UNITED STATES DISTRICT JUDGE

Dated at New Haven, Connecticut this 18th day of June, 2001.

Arbitration

Provision in Stock Purchase Accord Requires Arbitration of Employment Claims

Five employees terminated by Leggett & Platt Inc. must arbitrate their employment-related claims under the arbitration provision included in a stock purchase agreement that governed their employment, the U.S. District Court for the Northern District of Illinois ruled Jan. 12 (*Abinanti v. Leggett & Platt Inc.*, N.D. Ill., No. 00 C 6029, 1/12/01).

Judge Ruben Castillo granted Leggett's motion to stay a trial and compel arbitration. He rejected the argument of T. Michael Abinanti, Sharon Abinanti, Grant L. Gillihet, William P. Goddu, and Thomas A. Modrowski that their claims for breach of contract, tortious interference, bad faith, and slander fell outside the scope of the stock purchase agreement's arbitration provision.

"A broad arbitration clause such as the one contained in the [stock purchase agreement] 'necessarily create[s] a presumption of arbitrability,' because the clause embraces every dispute between the parties having a significant relationship to the contract regardless of the label attached to the dispute," Castillo wrote. "Plaintiffs' complaint makes clear that all of their claims relate to their contractual relationship with [Leggett], under the [stock purchase agreement] and the Employment Agreements."

Former Employees of Met Displays. The plaintiffs are five former shareholders and employees of Met Displays Inc., a manufacturer of store display fixtures. Leggett, which also makes store fixtures, acquired Met in June 1999 through a stock purchase agreement. Under the stock purchase agreement, Gillihet, Goddu, Modrowski, and the Abinantis each became an employee of Leggett through individual employment agreements.

Section 8.15 of the stock purchase agreement, titled "dispute resolution," provided: "Except as provided in Section 1.3 (relating to the calculation of the Purchase Price), any dispute, controversy or claim arising out of or relating to this Agreement or any agreement contemplated hereby shall be settled by binding arbitration."

Section 1.3 of the agreement required Leggett to prepare a closing balance sheet for Met to use in calculating the actual purchase price of the company. The section also gave shareholders 30 days after the preparation of the balance sheet to file a notice of disagreement stipulating any objections. Any determination made in the balance sheet that was not objected to "shall be deemed final and binding upon the parties upon delivery of the Notice of Disagreement," Section 1.3 said.

After the employees were terminated, they sued in the Cook County Circuit Court, arguing that Leggett:

- breached the stock purchase agreement and each employee's employment agreement;
- tortiously interfered with the employees and Met by directing Met to terminate them;
- ordered their terminations in bad faith; and
- slandered the employees by publishing untrue statements about them regarding purported misconduct.

Leggett removed the case to the federal district court and moved to compel arbitration.

Claims Related to Stock Purchase Agreement. In determining that the employees' slander, tortious interference, and bad faith claims are arbitrable, Castillo held that "the factual allegations underlying the claims fall within the arbitration provision in the [stock purchase agreement]."

The court said the employees' complaint acknowledged that their claims arise out of their contractual relationship with Leggett. Plus, the arbitration provision required the arbitration of all claims "arising out of or relating to [the stock purchase agreement] or any agreement contemplated hereby," the court said.

"But for the [stock purchase agreement] and the Employment Agreements, Plaintiffs' claims would never have arisen," the court wrote. "They arise from the very heart of their relationship with [Leggett]. . . . Therefore, they are logically 'contemplated by the [stock purchase agreement] and are subject to arbitration pursuant to § 8.15."

The court also rejected the employees' argument that their claims concerned the calculation of the purchase price, falling within Section 1.3 of the stock purchase agreement, and therefore were not subject to arbitration.

The employees complained that Leggett officials ordered their termination to avoid paying $6.1 million of the $48 million purchase price that was guaranteed to the employees as minority shareholders, via a performance-based bonus pool. Since this claim concerned the purchase price, it was not subject to arbitration, they argued.

The court disagreed. "[Section] 1.3 describes the *calculation* of the purchase price," he wrote. "At the time this lawsuit was filed, the purchase price already had been calculated, and both parties had agreed to it. Therefore it is hard to imagine how Plaintiff's claims could concern the calculation of the purchase price."

In addition, the bonus pool issue raised by the employees was "not mentioned anywhere in § 1.3, but rather, explained in § 1.5," the court said. Since the claims based on the bonus pool money fall under Section 1.5, they are subject to arbitration, the court said.

As for the claims that Leggett breached the employees' individual employment contracts, Castillo said it "is clear from the language of the [stock purchase agreement] that the Employment Agreements were contemplated by the contract, and thus are also arbitrable."

BY MARK CUTLER

Public Plans

Los Angeles Retirement Fund Sues Towers, Perrin Over $2 Billion Miscalculation

LOS ANGELES — The Los Angeles County Employees Retirement Association (LACERA) filed a lawsuit Jan. 12 against Towers, Perrin, Forster & Crosby Inc. to recover more than $2 billion in losses LACERA claimed it incurred as a result of miscalculations that went undetected for 20 years (*Los Angeles County Employees Retirement Association v. Towers, Perrin, Forster & Crosby Inc.*, Cal. Super.Ct., BC243235, 1/12/01).

The $32 billion retirement fund charge in the complaint that Towers, Perrin, which served as LACERA's

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actuary from 1977 until April 1998, "grossly undercalculated the amount of contributions that should have been paid" into the fund. For 20 years, Towers, Perrin "also failed to detect and correct their own calculation errors," the lawsuit alleged.

"As a result, LACERA was deprived of 20 years of additional contributions which should have been paid, and the significant earnings on those contributions which would have been realized," LACERA said in the lawsuit.

The lawsuit, which listed causes of action for negligence, breach of written contract, and breach of implied contract, sought damages which the complaint said exceeded $2 billion.

In a statement, Towers, Perrin said the LACERA plan is financially secure and in fact, is overfunded. "When Towers Perrin began its actuarial consulting work with LACERA in 1977, the plan had only 41.7 percent of the funds needed to pay its retirement benefit obligations. When Towers Perrin concluded its work in 1998 with the submission of the 1997 valuation report, the plan was 118 percent funded," the company said.

"The assets of the plan have been preserved, all benefits will be paid, and the plan is well-funded. That's the reason you do an actuarial evaluation," Steve Kerstein, managing director of Towers, Perrins' global retirement business told BNA. "We're basically saying: 'mission accomplished'," he added.

In order to make its claim for damages, LACERA will have to prove economic loss, which Towers, Perrin believes did not occur, given the state of the retirement fund, Kerstein said. In any case, the company plans to "vigorously defend" itself if the case goes to court, he added.

LACERA discovered what it claimed were two major miscalculations by Towers, Perrin in 1998, after the retirement fund retained Milliman & Robertson to conduct an independent audit of Towers, Perrin's most recent actuarial investigation, and its most recent actuarial valuation.

Future Liability Calculation. In its report to LACERA, Milliman & Robertson said Towers, Perrin had mistakenly calculated LACERA's expected future liability to members who worked until an "ultimate retirement age" — the age at which the actuarial model assumed all workers of a certain age would retire and claim benefits — to be zero. The actuarial model used age 60 as the ultimate retirement age for "safety" employees, such as fire fighters and law enforcement personnel, and 70 for all other members, the lawsuit noted.

"In other words, Defendants' error had the effect of assuming that members who retired at the ultimate retirement age would receive no benefits from the plan," LACERA asserted. The "zero benefit error" resulted in an understatement of the "actuarial accrued liability (AAL)" that, by 1997, was about $930 million, the lawsuit claimed.

Towers, Perrin had sufficient information about the plan and its members that it should not have made the error, LACERA charged. "Indeed, it is elementary that members who retire at the ultimate retirement age would receive substantial, not zero, benefits from the plan," it added.

The other major error, Milliman & Robertson reported, related to the calculation for disability retirements for safety members, according to the complaint.

The county plan allowed members who became disabled as a result of injury or disease arising out of their employment to claim service-connected disability benefits equal to 50 percent of their final compensation, the lawsuit said. If, however, the member would otherwise be entitled to a service retirement based, in part, on years of service, and if that service retirement exceeded the 50 percent disability retirement allowance, the member was entitled to the greater allowance.

While Towers, Perrin knew of this component of the plan, and even applied it correctly when calculating the liability of service-connected disability retirements for general members, the firm "failed to account for this aspect of the plan when calculating potential benefits due to safety members, failing to recognize that a substantial number of these members would be eligible for benefits at the higher service retirement rate," the lawsuit charged.

That error resulted in an understatement of the actuarial accrued liability of about $200 million by 1997, LACERA said. The two errors together amounted to more than a $1.1 billion undercalculation. Including lost contributions and related investment earnings, the damages totaled more than $2 billion, the lawsuit claimed.

On numerous occasions in early 1998, Towers, Perrin officials acknowledged the errors, both orally and in writing, the lawsuit said. Moreover, LACERA said it could not have known about the errors prior to the Milliman & Robertson report through the exercise of reasonable diligence.

The retirement fund charged that Towers, Perrin failed to exercise the care and skill possessed by reputable actuaries, including properly reviewing and testing the accuracy of its work.

"LACERA is informed and believes that Towers Defendants did not verify the integrity of the computer program or other system they used in the actuarial valuation as of June 30, 1977, and in each and every one of the later valuations through and including those as of June 30, 1996, and failed to test vital calculations that were the basis for their reports, valuations and recommendations," the lawsuit asserted.

Kerstein declined to comment specifically on the alleged admission of error by company officials in 1998, saying the firm preferred to focus on the basic issue of whether the actuarial evaluations accomplished LACERA's stated goal of achieving a 100 percent funded plan.

Peter W. Devereaux, one of the Latham & Watkins attorneys representing LACERA, told BNA that since the complaint had only recently been filed, no trial date had yet been set.

BY TOM GILROY

Disabilities

Shift of Worker to Ad Hoc Job at Same Pay Not Valid Basis to Deny Disability Retirement

An Office of Personnel Management policy of denying disability retirement eligibility to federal employees whose agencies find work for them to do in ad hoc positions at the same grade and pay level as their official position but with reduced duties is unlaw-