Legal risks for Actuaries and Consultants

Where will future claims be coming from?

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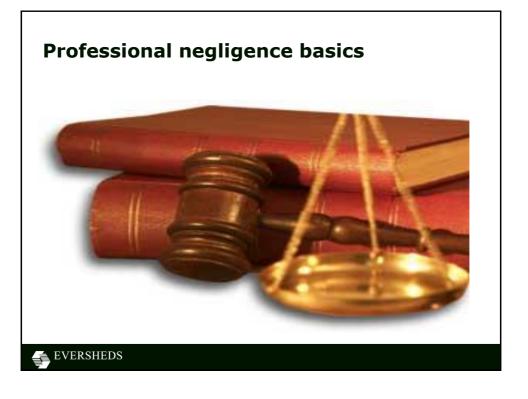
Agenda

- Professional negligence basics
- Pensions Ombudsman key risk areas

- Actuary
- Administrator
- Pensions Consultant
- Investment Consultant
- Hot Topics







Professional negligence basics

- Contract v Negligence
 - Terms of engagement / contract
 - Often the same, but differences:
 - Limitation
 - Measure of damages
 - Contributory negligence
- Negligence
 - Duty
 - Breach
 - Causation/loss





Professional negligence basics

- Duty
 - Duty to persons other than client?
 - Employer and Trustee?
 - Third parties?
 - Precis v Mercer [2005]



Professional negligence basics

- Breach of duty
 - Bolam v Friern Hospital Management Committee [1952]
- Causation and loss
 - Did the breach cause the loss?
 - Who suffers the loss?
 - Calculation of loss
 - Ongoing funding or buy-out





Professional negligence basics

- Maladministration
 - wide jurisdiction
 - wide definition



Practical Considerations

- Risk awareness generally
- Full review of scheme when take it on
- Always check the scheme rules
- Record advice and retain important documents (including terms and conditions)

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Terms and conditions







The Pensions Ombudsman's top 5

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2010/11

1. (1) Ill-health pensions

2. (3) Transfers

3. (5) Calculation of benefits

4. (-) Early retirement pensions

5. (2) Misleading advice

6. Other

% 13 (11)

10 (6)

6 (5)

5 (3)

5 (9)

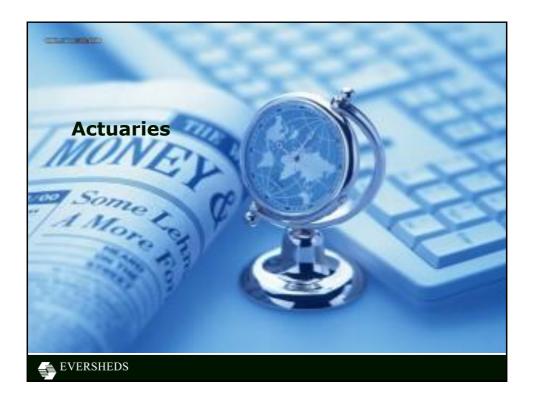
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Source 20010/2011 Annual Report





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Risk Area: Actuarial calculations and assumptions

- Actuarial valuations
 - Assumptions themselves rarely challenged

- Explaining the assumptions
- Lose a set of members
- Loss (for trustees) is hard to prove
- Employers Section 75
 - Cornwell v Newhaven 2005
- Duty to PPF







Risk Area: Overpayments

- Mitigation of loss
- Ability to recover
- Defences
 - Change of position
 - Scottish Equitable v Derby [2001]

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What amounts to a "change of position"?







Risk Area: Documentation

- Foundation of pension scheme
- Formalities
 - Amendment usually requires a deed
 - Hodgson v Toray Textiles (2006)
 - TSL v Dubery (2006)
 - English High Court: very restrictive approach
 - · Walker Morris Trustees v Masterson (2009); but

- Low and Bonar plc v Mercer (2010)
- Foster Wheeler
- Restrictions
 - HR Trustees v German [2009]
- Booklets and Announcements
 - Steria v Hutchinson (2006)





Risk area: DB to DC conversions

- Same rules apply
- IMG case will the Courts still be as strict when FAS/PPF are picking up the bill?



Risk area: Indexation

1997 – 5% LPI – many schemes kept 3% collar

- 2005 2.5% LPI
- 2010 CPI





Risk area: Defective Documents – legal remedies

- Construction What does it really mean? Courts will try to be "Practical and purposive"
- Rectification Document fails to reflect the parties' true intentions
 - High evidential hurdle but getting lower
 - Only the court can rectify
 - Can be retrospective
- Hastings-Bass now Futter v Futter (2011)
- Only available when ultra vires
- Otherwise sue the adviser



Risk area: Ill health

- Biggest problem area with the Ombudsman
- Expensive and emotive
- No excuses
- Check the rules
- Let the member comment on the medical report

- Apply the rules
- Give the reason







Investments - inherently risky

- · Claimant always has 20:20 hindsight
- Investment consultants rarely guarantee performance
- Statistical models are they really so scientific?
- Complex financial products do trustees (or consultants) really understand them?
- Implemented investment consulting conflict of interest?







Equalisation

- Sex equalisation in 1990s still causing claims
- Test Achats 2012 will proxies for sex work?
- GMP Equalisation still to be sorted
- Age discrimination??





Conflicts

- TPR increasingly concerned
- Can the Y model survive?



Employer's Duty of Good Faith

- Imperial Tobacco (1990)
- Prudential (2011)
- Change in policy on discretionary increases not a breach





Tax issues

- Simplification?
- Lower lifetime allowance/annual allowances will affect more people
- PIPs
- EFRBS



Money Purchase

Members who cannot afford to retire will not be happy

- Claims in US
- Set out the risks
- Do you allow members off piste?
- · Default options/lifestyle need most attention
- What is money purchase anyway?





Money Purchase

- Bridge v Yates Supreme Court July 2011
- KPMG correct building block schemes are not money purchase
- Money purchase schemes can be in deficit
- Eg internal annuitisation or guaranteed investment returns
- DWP considering new legislation
- "Chaos or Chaos?" Mummery LJ







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