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Pensions Convention 2004

7 June 2004

PROFESSIONAL NEGLIGENCE CLAIMS AGAINST ACTUARIES

BILL DIXON – PINSENTS

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Background

■ "Compensation Culture"

■ Scheme deficits

■ Hardening market for professional indemnity cover

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Main planks of a professional negligence claim

One needs

■ Some kind of legal duty which is owed by the actuary to someone (eg in contract or tort)

■ The duty of care needs to have been breached (eg the actuary has fallen short of the standards of the reasonably competent actuary)

■ A loss needs to have been suffered by the claimant

■ The breach of duty needs to have caused the loss

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Scope of legal duties

■ Contract:

- The trustees
- The appointment letter
- The employer
- Effectiveness of limitation of liability clauses
- Contracts (Rights of Third Parties) Act 1999

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Tort - negligence

■ Duties to:

- Employers
- Members
- Others? Intended purchaser of the principal employer?
- Need for an assumption of responsibility
- Conflict of interest

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Overlap with duties owed by others

- Solicitors
- Investment advisers

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Overlap with duties owed by others (cont)

- Joint and several liability for loss - Who has the "Deep Pocket"?
- Part 20 Contribution claims - spreading the blame

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Nature of the duty of care and how it gets to be breached

- The reasonably competent actuary
- Special skills or experience
- Expert evidence
- Professional guidance notes
- Not all mistakes amount to negligence

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Nature of the duty of care and how it gets to be breached (cont)

- "Reasonably" competent - do not have to be a paragon of virtue
- "Cutting edge" techniques
- Getting within a range of reasonable outcomes
- Errors which cancel each other out

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Particular areas where problems can arise

- Who is the actuary acting for? Herbert Smith's recent advice to the profession on conflicts.
- Clarifying responsibility among different professionals
- Clear communication (eg need to explain assumptions/possible implications to client)

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Causation and loss

- Can only recover losses caused by and flowing from the negligence
- Particular loss/causation problems with pension schemes
- One can recover damages even if this puts scheme in surplus

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Causation and loss (cont)

- Undervaluation or overvaluation of assets causing too little or too great a contribution from employers. Is there a loss?
- Does one first have to seek to recover the loss elsewhere?
- Events may have more than one cause: the "but for" test for causation

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Causation and loss (cont)

- The "loss of a chance" approach
- Falls in market values independent of negligence - who bears the loss?

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Risk management

- The importance of the documentary record
 - defining scope of task
 - confirming advice
 - attendance notes
- Most contemporary documents will have to be disclosed to the other side in the event of a claim

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Risk management (cont)

- Be alive to potential conflicts
- Clear demarcation lines with other professionals
- Make sure clients are aware of risks/assumptions - preferably in writing
- Refer potential claims to insurers/internal legal department as soon as aware of them

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