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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

DANIEL V. WILLENS,

Plaintiff,

v.

THE NORTHWESTERN MUTUAL
LIFE INSURANCE COMPANY;
STANLEY N. COLLINS; and DOES 1
through 10, Inclusive,

Defendants.

Case No. BC 221648

ASSIGNED FOR ALL PURPOSES TO:
JUDGE CHARLES W. McCOY
DEPARTMENT 323 (Central Civil West)

***AMICUS CURIAE* BRIEF OF THE
AMERICAN ACADEMY OF
ACTUARIES**

Action Filed: December 15, 1999
Status Conference: August 16, 2002
Filing Date: March 29, 2004
Trial Date: August 23, 2004

The American Academy of Actuaries (the “Academy”) submits this *amicus curiae* brief because, for the reasons discussed below, this Court’s decision has the potential to significantly impact members of the Academy practicing in this jurisdiction.¹

STATEMENT OF INTEREST

The Academy is a not-for-profit professional association incorporated in Illinois with its primary place of business in Washington, D.C. The Academy was established in 1965 to provide a common membership organization for actuaries of all specialties (*e.g.*, property and

¹ The Academy takes no position with respect to the specific facts of this case.

casualty insurance, health insurance, life insurance and pensions) practicing in the United States.

The Academy's membership is approximately 15,000 actuaries nationwide, or 85% of all the actuaries practicing in the United States.²

The Academy is the actuarial profession's primary vehicle for public policy outreach, communications, and professionalism, operating under the following Mission Statement:

As the organization representing the entire United States actuarial profession, the American Academy of Actuaries serves the public and the actuarial profession both nationally and internationally through:

- a. establishing, maintaining, and enforcing high professional standards of actuarial qualification, practice, and conduct,
- b. assisting in the formulation of public policy by providing independent and objective information, analysis, and education, and
- c. in cooperation with other organizations representing actuaries
 - representing and advancing the actuarial profession, and
 - increasing the public's recognition of the actuarial profession's value.

² The Academy has four sister organizations in the United States: the Society of Actuaries and the Casualty Actuarial Society, which administer the profession's examination system; the Conference of Consulting Actuaries, which provides continuing education and other services to consulting actuaries; and the American Society of Pension Actuaries, an organization for professionals (including actuaries, attorneys, accountants and plan administrators) who provide services to pension plans under the Employee Retirement Income Security Act, 29 U.S.C. § 1101 *et seq.* ("ERISA"). These organizations look to the Academy as the organization with primary responsibility for fostering actuarial professionalism in the United States.

Mission Statement, *Strategic Plan 1998-2003 of the American Academy of Actuaries* (1998).

The Academy fulfills its mission with respect to actuarial professionalism in several ways. The Academy is home to the Actuarial Standards Board (the “ASB”), the body responsible for establishing Actuarial Standards of Practice (“ASOPs”) to guide actuaries as they perform a wide range of professional services in the United States. The Academy also maintains the Joint Committee on the Code of Professional Conduct, a committee charged with developing the *Code of Professional Conduct* (“Code”), the ethical standards imposed upon member actuaries by the Academy and all of its sister organizations.³ The Academy also houses the Actuarial Board for Counseling and Discipline, the body charged with investigating complaints against actuaries, counseling actuaries in professional practice, and recommending appropriate discipline to the membership organizations for actuaries who are found to have breached the profession’s standards. In addition to these functions, the Academy maintains numerous committees that focus on various aspects of actuarial professionalism. These committees report to the Academy’s Council on Professionalism, an oversight body chaired by a Vice President of the Academy. The Council is responsible for ensuring that the Academy fulfills its responsibility to foster a high level of professionalism among members of the actuarial profession.

As the organization with primary responsibility for representing and advancing the actuarial profession in the U.S., *see Mission Statement, supra*, the Academy occasionally files *amicus curiae* briefs in cases where the Academy can offer special expertise to the court. This is one such case. The Academy understands that some of the experts in this proceeding have made

³ Members of the Academy and its four sister organizations who fail to comply fully with the *Code* are subject to discipline, up to and including expulsion from membership in the organizations.

representations concerning the applicability of the ASOPs promulgated by the ASB and the nature of the ASB's standard-setting process. The Academy is submitting this brief to clarify the facts surrounding both points to permit the Court to reach a better-informed decision in this proceeding. All of the Academy's points are supported by publicly-available documents of which the Court can take judicial notice when conducting its review of the parties' contentions.

STATEMENT OF FACTS

Precept 3 of the *Code* requires actuaries to ensure that actuarial services provided by them or under their direction comply with applicable standards of practice.⁴ In the United States, the ASOPs promulgated by the ASB are the standards to which Precept 3 refers. However, the *Code* also recognizes that not all ASOPs apply to each assignment. Accordingly, Annotation 3-2 of the *Code* provides as follows:

Where a question arises with regard to the applicability of a standard of practice, or where no applicable standard exists, an [a]ctuary shall use professional judgment, taking into account generally accepted actuarial principles and practices.

The ASB was established by the Academy's bylaws to promulgate ASOPs for actuaries practicing in the United States. Its purposes are to:

- A. Expose, promulgate or adopt, and publish [ASOPs], within its sole discretion and pursuant to such procedures as it deems appropriate, in all areas of actuarial practice ...
- B. Provide continuous review of existing [ASOPs] and determine whether they are in need of amendment, alteration, expansion, or elimination.

⁴ A copy of the *Code* is appended to this brief.

- C. Direct and manage the development of [ASOPs] by its operating committees in all areas of practice.⁵

The ASB fulfills its purposes by operating within a duly-adopted set of published procedures. *See* ASB Procedures Manual (2001) (“Manual”).⁶ Given the highly technical nature of actuarial work, it is essential that the ASOPs be developed by actuaries who understand the principles of actuarial science and can describe appropriate actuarial practices in various settings. Consequently, the ASB consists of nine experienced actuaries specializing in various areas of actuarial practice (employee benefits, health insurance, life insurance, and property/casualty insurance), each of whom has equal authority and responsibility to pass judgment upon all matters under consideration by the ASB. Section I(D), Manual. The ASB maintains five operating committees of actuaries who volunteer their time and expertise in the various practice areas and who are “intended generally to represent various interests and subspecialties in the profession for the particular practice area.” Manual at Section II(C)(2).

The ASB’s operating committees prepare proposals for new or amended ASOPs for the ASB’s consideration and approval; the operating committees also prepare first drafts of the new or amended ASOPs. The ASB reviews, discusses and edits the operating committees’ drafts, often extensively, and releases them to the actuarial community for discussion and comment. *See generally* Manual at Section III(A). All comments received by the comment deadline are given due and impartial consideration by the operating committees. Manual at Section V(C)(1). The operating committees then prepare proposed final or amended ASOPs that

⁵ Article XI, Section 1, Bylaws of the American Academy of Actuaries, appended to this brief.

⁶ A copy of the ASB Procedures Manual is appended to this brief.

reflect comments received upon the drafts. The ASB again reviews, discusses and edits all proposed final or amended ASOPs before re-exposing or adopting them. *See generally* Manual at Section III(A). Thus, the operating committees play an important part in the development of new or amended ASOPs. However, it is the ASB that retains exclusive authority to edit and approve exposure drafts and final ASOPs. *Id.*

ARGUMENT

I. The ASOPs are an Appropriate Source of Guidance for Actuaries

The Academy understands that some question has arisen in this case with respect to the application of ASOP No. 15, *Dividend Determination for Participating Individual Life Insurance Policies and Annuity Contracts* (“ASOP No. 15”). ASOP No. 15 applies on its face to “dividends illustrated or distributed under the provisions of participating policies issued for delivery in the United States by mutual and stock life insurance companies and by fraternal societies and associations.” It has been represented to the Academy that, in the absence of an ASOP expressly dealing with dividend determination for disability insurance policies, the actuaries at Northwestern Mutual Life Insurance Company (“Northwestern Mutual”) looked to ASOP No. 15 for guidance in how to allocate divisible surplus among different groups of policyholders, and that the Plaintiffs in this suit have questioned the appropriateness of the actuaries’ decision to do so.

The ASOPs provide a framework for actuaries when they provide professional services to their clients and employers, and articulate many of the principles underlying good actuarial practice. However, as the *Code* recognizes, questions may arise concerning the applicability of a particular ASOP to professional services provided by an actuary in a specific

situation. *See Code* Annotation 3-2. If an assignment falls expressly within the stated scope of an ASOP, the Code requires an actuary to comply with that ASOP. *Code* Precept 3. However, if no ASOP clearly applies to a particular assignment, the *Code* requires the actuary to “utilize professional judgment, taking into account generally accepted actuarial principles and practices.” *Code* Annotation 3-2.

Here, the disability policies at issue may have fallen directly within the scope of ASOP No. 15; if so, Northwestern Mutual’s actuaries would have been required to comply with the ASOP when working with those policies. However, to the extent the policies are determined to fall outside the scope of ASOP No. 15, in the absence of an ASOP dealing expressly with allocation of divisible surplus for disability insurance, the *Code* would require the actuary to exercise professional judgment and take into account the guidance set forth in ASOP No. 15, consistent with generally accepted principles and practices, to divide the surplus.

II. The ASB Process Is Objective

The Academy understands that some of the witnesses testifying in this case may have called into question the objectivity of the ASB’s standard-setting process, suggesting that the participation of an actuary employed by Northwestern Mutual in the development of ASOP No. 15 somehow affected the language adopted by the ASB. The Academy objects strenuously to any suggestion that the ASB’s standard-setting process has been compromised by the participation of any of the dozens of professional actuaries who generously donate their time and talent to the development of the ASOPs.

As the Manual indicates, the ASB’s process involves a full operating committee in the development of each proposal to promulgate or amend an ASOP, each exposure draft, and

each final standard. Every proposal, exposure draft and final standard is carefully reviewed, edited and voted upon by the ASB. Every new or amended ASOP is taken through broad notice-and-comment exposure to the actuarial profession and other interested parties before adoption. Comments are carefully considered and answered in writing by the operating committees, and the ASB oversees all aspects of their work.

The version of ASOP No. 15 in existence at the time of the events at issue in this case was developed by an operating committee of twelve actuaries, with the Northwestern Mutual actuary serving as the chair, then reviewed and approved by the nine-member ASB, none of whom had served on the operating committee. As the transmittal memorandum accompanying the standard describes, the changes made to that edition of ASOP No. 15 were fairly minimal, and were made to conform ASOP No. 15 to ASOP No. 24, *Compliance with the NAIC Life Insurance Illustrations Model* as well as to a new format for ASOPs adopted by the ASB. Indeed, only one comment letter was received in response to the exposure draft of ASOP No. 15; that comment was summarized and answered in the Appendix to the ASOP.

The Academy takes seriously the credibility of the ASOPs, and believes that the ASB's processes appropriately maintain the integrity of the standards with which actuaries must comply under the *Code*. It would be inappropriate, if not almost impossible, to prepare ASOPs that would contain meaningful guidance without the participation of actuaries in their development. The ASB's processes are carefully designed to provide ample opportunity for all actuaries to contribute their thoughts as to what an ASOP should contain or how it should be worded. In the absence of actual proof of wrongdoing, which the Academy has no reason to believe exists in this case, it is irresponsible at best to suggest that a drafting process involving

the active participation of a score of competent and honest professionals was somehow unduly influenced by a single individual. The Academy respectfully requests that any effort by the parties in this suit to impugn the integrity of the ASB and its operating committees be rejected by the Court.

CONCLUSION

The Academy respectfully requests that the Court decide this case in a manner consistent with the arguments put forth herein.

Respectfully submitted,

American Academy of Actuaries

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