No. 94-50503

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED TEACHER ASSOCIATES INSURANCE COMPANY

Plaintiff-Counter-Defendant-Appellee-Cross-Appellant,

v.

MACKEEN & BAILEY, INC.

Defendants-Counter-Plaintiffs-Third Party Plaintiffs-Appellants-Cross-Appellees,

v.

THE WHIDBEE CORP., HOYT W. WHIDBEE, JR., AND DAVID M. MORGAN,

Third Party Defendants-Appellees-Cross-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION
FINAL JUDGMENT DATED MARCH 8, 1994 AND
AMENDED FINAL JUDGMENT DATED JUNE 13, 1994

BRIEF OF *AMICUS CURIAE* AMERICAN ACADEMY OF ACTUARIES IN SUPPORT OF APPELLANTS MACKEEN & BAILEY, INC.

Lauren M. Bloom, Esq.
American Academy of Actuaries
1100 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 223-8196

Counsel to the American Academy

of Actuaries

TABLE OF CONTENTS

Table of Contents i

Table of Authorities ii

I. Statement of Interest of *Amicus Curiae* 1

II. Summary of Argument 4

III. Argument 5

A. The District Court Erred in Declaring that Actuaries Are Always Fiduciaries Under Texas Law 5

1. Actuaries Do Not Always Function as Fiduciaries 5

2. The District Court's Decision Is Impermissibly Broad 9

3. The District Court Inappropriately Interjected Itself Into the Development of Texas Common Law 10

B. The District Court Misapprehended the Relationship Between Professional Standards and Fiduciary Breach 11

IV. Conclusion 14

TABLE OF AUTHORITIES

Federal Cases:

Supreme Court Cases:

Erie Railroad Co. v. Tompkins,
304 U.S. 64 (1938) 10

Circuit Court Cases:

Castilleja v. Southern Pacific Co.,
406 F.2d 669 (5th Cir. 1969) 10

Federal Deposit Insurance Corp. v. Claycomb,
945 F.2d 853 (5th Cir.),
aff'd, __ U.S. __, 112 S. Ct. 2301 (1991) 6

Harris v. Atchison, Topeka &
Santa Fe Railway Co., 538 F.2d 682
(5th Cir. 1976) 10

Korioth v. Briscoe, 523 F.2d 1271
(5th Cir. 1975) 9

Pappas v. Buck Consultants, Inc.,
923 F.2d 531 (7th Cir. 1991) 7, 8

Mertens v. Hewitt Associates, 948 F.2d 607
(9th Cir. 1991), *aff'd*, ___ U.S. ___,
113 S. Ct. 2063 (1993) 8

Missouri Pacific Railroad Co. v. Owen,
306 F.2d 887 (5th Cir. 1962) 10

Sheppard Federal Credit Union v. Palmer,
408 F.2d 1369 (5th Cir. 1969) 10

District Court Cases:

Gleason v. Beesinger, 708 F. Supp. 157 (S.D. Tex. 1989) 11

Powell v. Charles Offutt Co., 576 F. Supp. 272 (E.D. Tex. 1983), *aff'd*, 731 F.2d 886 (5th Cir. 1984) 10

United Teacher Associates Insurance Co. v. MacKeen & Bailey, Inc., 847 F. Supp. 521 (W.D. Tex. 1994) 2, 3, 5, 6, 9, 10, 11

Federal Statutes:

29 U.S.C. § 1001 *et seq.* 7

State Cases:

Adams v. American Quarter Horse Association, 583 S.W.2d 828 (Tex. Civ. App. -- Amarillo 1979, writ ref'd n.r.e.) 12

Air Florida, Inc. v. Zondler, 683 S.W.2nd 769 (Tex. App. -- Dallas 1984) 9

Brotherhood of Railroad Trainmen v. Price, 108 S.W.2d 239, 241 (Tex. Civ. App. -- Galveston 1937, err. dism.) 12

Cline v. Insurance Exchange of Houston, 166 S.W.2d 677 (Tex. 1942) 12

Consolidated Bearing & Supply Co. Inc. v. First National Bank at Lubbock, 720 S.W.2d 647 (Tex. App. -- Amarillo 1986, no writ) 6

Consolidated Forwarding Company v. Union Truck Depot, 356 S.W.2d 693 (Tex. Civ. App. -- Dallas 1962) 12

Consolidated Gas & Equipment Co. v. Thompson, 405 S.W.2d 333 (Tex. 1966) 5, 6

Crim Truck & Tractor v. Navistar

International, 823 S.W.2d 591 (Tex. 1992) 6

Dallas Athletic Club Protective Committee v. Dallas Athletic Club, 407 S.W.2d 849 (Tex. Civ. App. -- Austin 1966, writ ref'd n.r.e.) 12

Davis v. Dairyland County Mutual Insurance Co. of Texas, 589 S.W.2d 591 (Tex. Civ. App. -- Dallas 1979, writ ref'd n.r.e.) 9

Firemen's Insurance Co. of Newark, New Jersey v. Burch, 442 S.W.2d 331 (Tex. 1968) 9

Gillum v. Republic Health Corp., 778 S.W.2d 558 (Tex. App. -- Dallas 1989) 8

International Bankers Life Insurance Co. v. Holloway, 368 S.W.2d 567 (Tex. 1963) 5

Lovell v. Western National Life Insurance Co., 754 S.W.2d 298 (Tex. App. -- Amarillo 1988) 6

McKenzie v. McKenzie, 667 S.W.2nd 568 (Tex. App. -- Dallas 1984, no writ) 9

Nelson v. Texas State Teachers Association, 629 S.W.2d 151 (Tex. Civ. App. -- Dallas 1982, writ ref'd n.r.e.) 12

O'Shea v. Coronado Transmission Co, 656 S.W.2d 557 (Tex. App. -- Corpus Christi 1983) 6

Thigpen v. Locke, 363 S.W.2d 247 (Tex. 1962) 6

Thompson v. Elkins, 859 S.W.2d 617 (Tex. App. -- Houston 1993) 5

State Statutes:

Tex. Ins. Code Ann. art. 1.11(d) (West 1993) 2

Tex. Ins. Code Ann. art. 3.28, § 2A(a)(1) (West 1993) 2

Treatises:

7 C.J.S. *Associations*, § 11 12

Miscellaneous:

The American Academy of Actuaries Strategic Plan 1995-2000 (1994) 2, 12-13

Code of Professional Conduct of the American Academy of Actuaries, Precept 8 2

Code of Professional Conduct of the American Academy of Actuaries, Precept 16 12

Guides to Professional Conduct of the Society of Actuaries 3

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ON APPEAL FROM
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FOR THE WESTERN DISTRICT OF TEXAS

BRIEF OF *AMICUS CURIAE* AMERICAN ACADEMY OF ACTUARIES IN SUPPORT OF APPELLANTS MACKEEN & BAILEY, INC.

The American Academy of Actuaries submits this brief as *amicus curiae,* pursuant to Federal Rule of Appellate Procedure 29 of the Rules of this Court, in support of appellants MacKeen & Bailey, Inc., in No. 94-50503. A Petition for Leave to File *Amicus Curiae* Brief accompanies this brief.

I. STATEMENT OF INTEREST OF *AMICUS CURIAE*

The American Academy of Actuaries (the "Academy") is a nonprofit professional association established in 1965 to provide a common membership organization for actuaries of all specialties practicing within the United States, and to seek greater public recognition for the actuarial profession.

To become an Academy member, an actuary must satisfy rigorous education and experience requirements, including successful completion of a series of examinations in relevant areas of actuarial practice. Membership in the Academy is required in many states, including Texas, to perform certain types of actuarial work. Tex. Ins. Code Ann. art. 1.11(d) (West 1993); Tex. Ins. Code Ann. art. 3.28, § 2A(a)(1) (West 1993).

The Academy's membership exceeds 11,000 actuaries nationwide, and includes Mr. W. Duncan MacKeen, a party to this proceeding. Approximately 560 Academy members have their primary place of business in Texas, and the Academy believes that many more of its members located outside the state practice in Texas as consultants or employees of insurers with corporate subsidiaries in the state. These individuals perform a wide variety of professional functions, ranging from primary responsibility for the operation of companies to individual consulting assignments. Thus, a significant number of the Academy's members may be affected by the district court's holding that all actuaries are "fiduciaries" under Texas law.

The Academy's stated mission is "to ensure that the American public recognizes and benefits from: (1) the independent expertise of the actuarial profession in the formulation of public policy; and (2) the adherence of actuaries to high professional standards in discharging their responsibilities." *The American Academy of Actuaries Strategic Plan 1995-2000* (1994). To achieve the second facet of its mission, the Academy has adopted a Code of Professional Conduct to govern the professional ethics of its members.[1]

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[1] The Academy's Code of Professional Conduct was cited by the district court. *See United Teacher Associates Insurance Company v. MacKeen & Bailey, Inc.*, 847 F. Supp. 521, 530-31 (W.D. Texas 1994), *quoting Code of Professional Conduct of the American Academy of Actuaries*, Precept 8. Four other actuarial organizations in the United States (including the Society of Actuaries) have adopted the same Code. The Code supersedes predecessor standards

The Code of Professional Conduct is administered by the Actuarial Board for Counseling and Discipline (the "ABCD"). The ABCD's purpose is to maintain a high quality of actuarial practice by investigating complaints against actuaries, and counseling actuaries concerning the application of standards of practice, conduct and qualification to their professional activities. The Academy and other actuarial organizations that have adopted the Code of Professional Conduct have delegated to the ABCD responsibility to investigate complaints against their members, and to counsel their members in sound actuarial practice and conduct.[2] The ABCD is also authorized to recommend to those organizations that public discipline in the form of reprimand, suspension or expulsion from membership be taken against actuaries where serious violations of the Code of Professional Conduct have occurred.

The Academy has a twofold stake in this proceeding. Not only will a significant number of the Academy's members be affected in their business relationships by the district court's decision, but the Academy's authority to enforce its Code of Professional Conduct against its members may be harmed by the district court's apparent assumption that a breach of professional standards such as the Code is only relevant in the context of a breach of fiduciary duty. Further, the Academy believes that the district court's decision reflects a flawed awareness of the wide range of work that actuaries routinely undertake. The Academy, therefore, has a significant interest in the outcome of this case, and can offer expertise that may assist this Court in its consideration of this appeal.

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of actuarial conduct, including the *Guides to Professional Conduct of the Society of Actuaries,* which was also cited by the district court. *See* 847 F. Supp. at 531.

[2] All five of the United States organizations that have adopted the Code contribute to the funding of the ABCD, which was created by an amendment to the Academy's bylaws. The ABCD's administrative and staff support is provided by the Academy.

II. SUMMARY OF ARGUMENT

The court below erred in declaring that actuaries are always fiduciaries under Texas law. Texas courts have uniformly recognized that fiduciary duty arises out of a long-standing special relationship of trust and confidence between two parties. Although some actuaries undoubtedly have such relationships with their clients or employers, others provide professional services on an arm's-length basis in the context of ordinary business relationships. That such relationships might be cordial or involve an element of mutual trust is not sufficient to create a fiduciary relationship.

Moreover, the district court had no need to make such a sweeping declaration to decide this case. The court had already determined that the facts of this case were sufficient to demonstrate that a fiduciary relationship existed between the parties, and that the relationship had been breached. The court should have decided the case on the narrowest possible grounds, rather than issuing a broad declaration extending beyond the particulars of this case to all actuaries practicing in all situations in Texas. Further, the court should have applied state law as it found it, rather than interject itself into state law with regard to a matter that the court itself acknowledged was a question of first impression.

The district court also erred in its analysis of the relationship between professional standards and fiduciary duty. The court's opinion suggests that a violation of professional standards is significant only in the context of a fiduciary breach. To the contrary, professional codes imposed by associations upon their members represent contracts between the association and the members, and may be enforced by the association regardless of whether a member has breached a fiduciary duty to some third party. The district court's decision, if left uncorrected, could seriously hamper the Academy's authority, and that of other actuarial organizations that have adopted the Code of Professional Conduct, to enforce the Code upon its members.

III. ARGUMENT

A. The District Court Erred in Declaring that Actuaries Are Always Fiduciaries Under Texas Law

The district court, in finding for appellees, declared that "actuaries, in view of the type of professional services they provide and the information confided in them, have a fiduciary relationship with their clients as a matter of law under the criteria established by the Texas courts." *MacKeen*, 847 F. Supp. at 530. For the reasons set forth below, the Academy believes that the district court's declaration is factually inaccurate and unsupported by the record in this case. Moreover, the district court violated several basic legal principles by including this declaration in its opinion.[3]

1. Actuaries Do Not Always Function as Fiduciaries

Texas courts have traditionally recognized certain relationships as inherently fiduciary in nature. *See, e.g., Thompson v. Elkins*, 859 S.W.2d 617, 623 (Tex. App. -- Houston 1993) (attorney-client relationship is fiduciary); *International Bankers Life Insurance Co. v. Holloway*, 368 S.W.2d 567, 576 (Tex. 1963) ("[c]orporate officers and directors are fiduciaries ... "); *Consolidated Gas & Equipment Co. v. Thompson*, 405 S.W.2d 333, 336-37 (Tex. 1966) ("[t]he usual cases of fiduciary relationship have been attorney-and-client, partners, close family relationships such as that of parent-and-child-, and joint adventurers ... "). However, not all business relationships are fiduciary. *See, e.g., Federal Deposit Insurance Corp. v. Claycomb*, 945 F.2d 853, 859 n. 1 (5th Cir.), *aff'd*, __ U.S. __, 112 S. Ct. 2301 (1991) (relationships between borrower-lender, mortgagor-mortgagee and bank officer-customer not fiduciary). Moreover, as the district court conceded, the Texas courts have

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[3] The Academy takes no position regarding the district court's findings that the parties in this case had a fiduciary relationship, and that Mr. MacKeen breached his fiduciary duties to United Teacher Associates Insurance Company ("UTAIC").

never designated the actuary-client relationship to be a fiduciary one as a matter of law. *MacKeen*, 847 F. Supp. at 529. Thus, if a fiduciary relationship invariably exists between actuaries and their clients or employers, it must arise out of the "confidential" nature of their relationships.

The Texas courts have agreed that, for fiduciary duty to exist between parties, they must have developed a relationship of mutual trust and confidence over a period of time prior to the transaction at issue. *E.g., O'Shea v. Coronado Transmission Co,* 656 S.W.2d 557, 563 (Tex. App. -- Corpus Christi 1983); *Consolidated Gas, supra*. The relationship must be such that one party is justified in putting trust in the other. *Lovell v. Western National Life Insurance Co.*, 754 S.W.2d 298, 303 (Tex. App. -- Amarillo 1988), *citing Consolidated Bearing & Supply Co. Inc. v. First National Bank at Lubbock*, 720 S.W.2d 647, 649 (Tex. App. -- Amarillo 1986, no writ). The mere fact that one businessperson trusts another to perform obligations under a contract is not sufficient to create a confidential relationship, nor is the fact that a relationship has been a cordial one, or of long endurance, sufficient in itself to justify imposition of fiduciary duty. *Crim Truck & Tractor v. Navistar International*, 823 S.W.2d 591, 594-95 (Tex. 1992), *citing Consolidated Gas, supra*; and *Thigpen v. Locke*, 363 S.W.2d 247, 253 (Tex. 1962).

Actuaries perform a broad range of services for their clients and employers. Although some actuaries serve as highly-placed corporate executives, trustees of pension plans or trusted investment counselors, many others maintain arm's-length relationships in which they perform actuarial valuations or issue opinions regarding the adequacy of insurance company reserves or pension plan funds to meet future obligations, but do not have control over assets or a significant role in the business decisions of their clients or employers. Actuaries may maintain long-standing relationships with their clients or employers, but they are not required to do so; actuaries frequently take on assignments from

clients on a one-time basis, and need not have developed a long-standing confidential relationship with prospective clients to meet their contractual obligations. Some actuaries' career paths take them out of traditional realms. Many Academy members support themselves by developing computer software (serving as vendors rather than advisors), and other actuaries work for government agencies in a wide range of capacities.[4] Clearly, actuaries do not invariably function in the sort of highly confidential manner that would justify imposition of fiduciary duty.

Two federal courts have examined actuarial practice in the context of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.*, and have concluded that actuaries who provide services to pension plans are not typically fiduciaries. In *Pappas v. Buck Consultants, Inc.*, 923 F.2d 531 (7th Cir. 1991), the court carefully examined the statutory role of actuaries as defined in ERISA and the underlying legislative history, and determined that ERISA defines a specific, limited role for actuaries who provide traditional services to pension plans. The court concluded that actuaries are *not* fiduciaries under ERISA unless they provide services beyond the role specifically contemplated by the statute. *Id.* at 535-37. Similarly, in *Mertens v. Hewitt Associates*, 948 F.2d 607 (9th Cir. 1991), *aff'd*, ___ U.S. ___, 113 S. Ct. 2063 (1993), the court recognized that ERISA's definition of a "fiduciary" is limited to only those persons who exercise discretionary authority over the plan's management, assets or administration. The court concluded that an actuary or other party who merely renders professional services to a plan is not a fiduciary, unless that person exercises authority over the plan "other than by usual professional functions." 948 F.2d at 610 (citations omitted).

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[4] For example, the recent Insurance Commissioner for the State of Texas, J. Robert Hunter, is an actuary and a member of the Academy.

Thus, other federal courts have correctly recognized that actuaries performing traditional services are not invariably "fiduciaries." If the district court wished to take the contrary view, at the very least it should have attempted to issue factual findings about the nature of actuarial services and the relationships that actuaries have with their clients or employers. The district court's opinion is replete with findings about the fiduciary nature of the relationship between Mr. MacKeen and UTAIC, but the decision does not contain factual findings to support the district court's broader conclusion that all actuaries are fiduciaries. Given that actuaries do not always occupy positions of trust and confidence sufficient to justify imposition of fiduciary duty, the Academy believes that the district court would have been hard-pressed to find facts sufficient to support its ruling.

"A fiduciary duty is an extraordinary one and will not lightly be created." *Gillum v. Republic Health Corp.*, 778 S.W.2d 558, 567 (Tex. App. -- Dallas 1989). Such a duty should not be imposed upon all actuaries practicing in Texas, particularly in the absence of factual findings to demonstrate that actuaries invariably and voluntarily assume a level of trust and responsibility commensurate with such duty and in the face of careful analysis to the contrary by two federal courts of appeal. It is not appropriate to impose fiduciary responsibilitiy, and the attendant liability, upon actuaries who do not, in fact, serve in a fiduciary capacity.

2. The District Court's Decision Is Impermissibly Broad

The district court's declaration that actuaries are fiduciaries under Texas law went far beyond what was necessary to resolve the controversy before it. The court had already found that a fiduciary relationship had developed between Mr. MacKeen and UTAIC, and later held that Mr. MacKeen had breached his fiduciary duty to UTAIC. *MacKeen*, 847 F. Supp. at 530-31. Thus, the court was able

to determine the respective liabilities of the parties without opining beyond the issues presented by the specific facts before it.

It is axiomatic that "[c]ases are to be decided on the narrowest legal grounds available." *Korioth v. Briscoe,* 523 F.2d 1271, 1275 (5th Cir. 1975). By seeking to impose fiduciary duty upon all actuaries practicing in Texas, the district court issued its decision on far broader legal grounds than were necessary. As the Texas state courts have recognized, "[i]t is wise jurisprudence for a court to confine its *holding* to the facts actually before it, whatever logical implications the *rationale* for its holding might have. Indeed, a Texas court has no power to determine questions not essential to the decision of the controversy before it." *Air Florida, Inc. v. Zondler,* 683 S.W.2nd 769, 772 (Tex. App. -- Dallas 1984) (emphasis in the original), *citing Firemen's Insurance Co. of Newark, New Jersey v. Burch*, 442 S.W.2d 331, 333 (Tex. 1968); *McKenzie v. McKenzie*, 667 S.W.2nd 568, 570 (Tex. App. -- Dallas 1984, no writ); and *Davis v. Dairyland County Mutual Insurance Co. of Texas*, 589 S.W.2d 591, 593 (Tex. Civ. App. -- Dallas 1979, writ ref'd n.r.e.). The Academy respectfully suggests that the district court should have shown similar restraint, and refrained from reaching beyond the controversy before it in an apparent effort to extend the rationale of its opinion to all actuaries practicing in Texas.

3. The District Court Inappropriately Interjected Itself Into the Development of Texas Common Law

The district court's jurisdiction over this case was based upon diversity of the parties. *MacKeen,* 847 F. Supp. at 525. In diversity suits, it is not the place of federal district courts to interject themselves into the development of state law. *Powell v. Charles Offutt Co.,* 576 F. Supp. 272, 278 (E.D. Tex. 1983), *aff'd,* 731 F.2d 886 (5th Cir. 1984), *citing Erie Railroad Co. v.*

Tompkins, 304 U.S. 64 (1938). Rather, federal district courts are required to seek out applicable rules of state law where they exist, and apply the state laws as the federal courts find them. *Powell, supra, citing Harris v. Atchison, Topeka & Santa Fe Railway Co.*, 538 F.2d 682, 690 (5th Cir. 1976); *Sheppard Federal Credit Union v. Palmer*, 408 F.2d 1369, 1372 (5th Cir. 1969); *Castilleja v. Southern Pacific Co.*, 406 F.2d 669, 675 (5th Cir. 1969); and *Missouri Pacific Railroad Co. v. Owen*, 306 F.2d 887, 890 (5th Cir. 1962).

Here, the district court acknowledged that "[n]o caselaw in Texas supports the specific proposition that actuaries have a fiduciary relationship with their clients." *MacKeen*, 847 F. Supp. at 529. However, rather than limit its decision to the question of whether the relationship between MacKeen and UTAIC was a fiduciary one, a limitation that would have been consistent with existing state law, the district court went on to declare that *all* actuaries are fiduciaries "as a matter of law under the criteria established by the Texas courts." *Id*. at 530.

By announcing this new and sweeping rule, the district court improperly interjected itself into the development of Texas common law. In doing so, the district court exceeded the scope of its authority, particularly because, for the reasons stated above, there was no need for the district court to make such a broad declaration to resolve the controversy before it.[5] The district court's declaration was inappropriate, and should be reversed.

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[5] The Academy recognizes that, on occasion, a district court may have no alternative but to address questions of first impression under state law in order to resolve a particular case. Where a district court must fashion a rule of law in the absence of controlling state precedent, the court should consider all available legal sources, decide the case as it believes the highest court of the state would, and provide a legal analysis on the issue with "greater elaboration than normally befits decisions of a district court." *Gleason v. Beesinger*, 708 F. Supp. 157, 158-59 (S.D. Tex. 1989) and cases cited therein. The Academy respectfully submits that the district court's single-sentence "parenthetical" declaration falls far short of the careful, well-documented analysis required when a federal district court is compelled to shape state law.

B. The District Court Misapprehended the Relationship Between Professional Standards and Fiduciary Breach

Among UTAIC's claims against Mr. MacKeen was an allegation that he breached an "implied covenant to perform services in accordance with the code of professional conduct." *MacKeen*, 847 F. Supp. at 530, n. 7. In dismissing this claim, the district court suggested that a breach of the Code of Professional Conduct is "tantamount to the breach of a fiduciary duty." *Id*. Having found that Mr. MacKeen had, in fact, breached the Code of Professional Conduct, the district court concluded that "MacKeen violated his professional responsibilities and, *consequently*, breached his fiduciary duties .... " *Id*. at 531 (emphasis added). Thus, the district court's opinion suggests that an actuary's breach of the Code of Professional Conduct is relevant only insofar as it also constitutes a breach of fiduciary duty.

The district court's decision ignores the actuary's duty to comply with the professional code established by the actuary's membership organizations, regardless of whether the actuary happens to be functioning in a fiduciary capacity with regard to a third party. This obligation is imposed by the Code of Professional Conduct itself, which specifically requires the actuary to comply with the Code whenever the actuary provides professional services. *Code of Professional Conduct of the American Academy of Actuaries*, Precept 16.

Under Texas law, the rules of an association constitute a contract between its members. *Consolidated Forwarding Company v. Union Truck Depot*, 356 S.W.2d 693, 696 (Tex. Civ. App. -- Dallas 1962), *citing* 7 C.J.S. *Associations*, § 11, p. 34; and *Cline v. Insurance Exchange of Houston*, 166 S.W.2d 677 (Tex. 1942). An association has the right to make, interpret and administer its rules, and members, by joining the association, voluntarily submit to the association's right to do so. *Nelson*

v. Texas State Teachers Association, 629 S.W.2d 151, 154 (Tex. Civ. App. -- Dallas 1982, writ ref'd n.r.e.), *quoting Brotherhood of Railroad Trainmen v. Price*, 108 S.W.2d 239, 241 (Tex. Civ. App. -- Galveston 1937, err. dism.); *accord, Adams v. American Quarter Horse Association*, 583 S.W.2d 828, 836 (Tex. Civ. App. -- Amarillo 1979, writ ref'd n.r.e.); *Dallas Athletic Club Protective Committee v. Dallas Athletic Club*, 407 S.W.2d 849, 850-51 (Tex. Civ. App. -- Austin 1966, writ ref'd n.r.e.) (citations omitted). To the Academy's knowledge, no Texas court has suggested that an association's right to enforce its duly-adopted professional code of conduct upon its members is contingent upon the members' having entered into a fiduciary relationship with a third party.[6]

An association has the right "to promote its declared purpose and advance the best interests of its members." *Adams, supra* at 837, *citing Cline, supra* at 680. One of the Academy's declared purposes is "to ensure that the American public recognizes and benefits from ... the adherence of actuaries to high professional standards in discharging their responsibilities." *Academy Strategic Plan, supra*. This purpose benefits the Academy's members by ensuring that actuaries will be held in high regard by the public, and benefits the public by ensuring that actuaries who are members of the Academy will practice in a manner consistent with the high standards established by the Code of Professional Conduct.

To fulfill its declared purpose, the Academy must be able to investigate complaints against its members and, where appropriate, discipline them for violations of the Code of Professional Conduct. The Academy's authority must not be limited to instances where a member has undertaken fiduciary responsibilities, but must extend to any circumstance in which the member has acted in a

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[6] The Academy takes no position in this appeal with regard to whether, in a particular case, Texas law might impose upon a member a duty to a third party to act in accordance with the professional code of the member's association.

manner prohibited by the Code. By linking the duty to comply with the Code of Professional Conduct to the duty to satisfy fiduciary responsibilities, the district court called into question the Academy's authority as a membership organization to enforce its Code. This aspect of the district court's decision is erroneous, and should be reversed.[7]

[7] The district court's opinion may also hinder the efforts of other actuarial organizations that have adopted the Code to enforce it against their members. This would, in turn, call into question the authority of the ABCD to investigate complaints against actuaries and recommend to their membership organizations that disciplinary action be taken where significant violations of the Code have occurred. Accordingly, the district court's opinion, if left unaltered, could jeopardize the integrity of the national system created by the actuarial organizations for the enforcement of their members' responsibilities under the Code of Professional Conduct.

IV. CONCLUSION

For the foregoing reasons, the Academy respectfully requests that, with respect to the questions of whether actuaries are fiduciaries under Texas law and whether breaches of professional codes are significant outside the context of fiduciary breaches, the decision of the district court be reversed.

Respectfully submitted,

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Lauren M. Bloom, Esq.
American Academy of Actuaries
1100 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 223-8196

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