ASPA
Dedicated to the Private Pension System

THE ASPA JOURNAL

Nov–Dec 2002
Vol. 32, No. 6

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Limitation of Liability Provisions in Service Provider Contracts

By Joseph C. Faucher

IF YOUR COMPANY PROVIDES SERVICES FOR EMPLOYEE BENEFIT PLANS, AND YOU HAVE BEEN IN BUSINESS FOR ANY APPRECIABLE LENGTH OF TIME, YOU MAY HAVE EXPERIENCED THAT GUT WRENCHING FEELING THAT COMES WHEN YOU OPEN YOUR ERRORS AND OMISSIONS INSURANCE RENEWAL NOTICE. YOU FIND OUT THAT YOUR ANNUAL PREMIUM HAS GONE UP 50%, OR FIND THE EVEN MORE DEPRESSING REALIZATION THAT "DEFENDANT" HAS BEEN ADDED TO YOUR LIST OF TITLES WHEN THE PROCESS SERVER SHOWS UP WITH A MALPRACTICE COMPLAINT.

A recent Department of Labor (DOL) advisory opinion addresses one of the ways in which service businesses may seek to reduce their exposure to claims and lawsuits—including a "limitation of liability" provision in the service agreement.

Limitation of liability clauses are apparently in increasingly wide use among service providers, especially large, national employee benefit consulting firms. (This article refers collectively to service providers, including third party administrators, actuaries, and consultants, as "Consultants.") Most often, these provisions put a cap, or limit, on the amount of damages that a plan or plan sponsor may recover in connection with the Consultant's services. Typical provisions limit

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WASHINGTON UPDATE

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Election Special—Outlook for the New Congress

by Brian H. Graff, Esq.

NEEDLESS TO SAY, THE RESULTS OF THIS YEAR'S ELECTION SURPRISED MANY OF US. FOR MANY REPUBLICANS, THE RESULTS, FRANKLY, EXCEEDED EVEN THEIR MOST OPTIMISTIC EXPECTATIONS. FOR DEMOCRATS, THE HANGOVER OF THE MORNING AFTER WILL UNDOUBTEDLY LAST FOR A WHILE. FROM A PURELY POLITICAL STANDPOINT, THE NEW CONGRESS WILL OBVIOUSLY OPERATE QUITE DIFFERENTLY FROM THE WAY THE PREVIOUS CONGRESS OPERATED. HOWEVER, IN TERMS OF PENSION POLICY, IT IS QUITE LIKELY THE DEBATE OVER PENSION LEGISLATION WILL LOOK MORE OLD THAN NEW. THIS IS BECAUSE—AND THIS MAY SURPRISE SOME OF YOU—THE PROSPECTS FOR ENACTING "PENSION REFORM" LEGISLATION IN RESPONSE TO ENRON WAS ACTUALLY ENHANCED BY THE ELECTION RESULTS.

ENRON PENSION BILL

Already, in several speeches since the election, the President has indicated that he wants to complete the rest of his pension reform proposals (*e.g.*, quarterly benefit statements and the right to diversify employer stock), in addition to the proposals included in Sarbanes-Oxley Act (*i.e.*, blackout notice and insider trading restrictions during a blackout). He is also probably going to mention these proposals in his upcoming State of the Union address. Given that these proposals have already been drafted and passed the House last Congress, it is likely that pension legislation will be brought to the legislative forefront fairly early during the next Congress. Of course, with Republicans in control of both houses of Congress, the legislative process will naturally look different.

As a practical matter, the somewhat larger Republican margin of control in the House of Representatives matters very little. In the House, the party in control pretty much controls everything. The larger margin may have some impact on more controversial issues—health care, for example—but for pension legislation, it is basically status quo. This means that the starting point for the House will be last year's Enron pension

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From the Editor

It's Time to Make Your List of New Year's "ASPA-rations"!

AT THE BEGINNING OF EACH NEW YEAR, MOST OF US GET AMBITIOUS AND COMPILE OUR LIST OF NEW YEAR'S RESOLUTIONS. WE VOW TO LOSE WEIGHT, EXERCISE MORE, SPEND MORE TIME WITH FAMILY AND FRIENDS, PRIORITIZE OUR LIVES, ETC. I WOULD LIKE TO PROPOSE THAT AS YOU SIT DOWN THIS YEAR TO MAKE YOUR LIST OF NEW YEAR'S RESOLUTIONS, THAT YOU MAKE AN ADDITIONAL LIST WITH A FOCUS ON ASPA. ACTUALLY, MAYBE IF YOU CALL THEM NEW YEAR'S "ASPA-RATIONS" INSTEAD OF RESOLUTIONS, YOU WILL "ASPIRE" TO KEEP THEM AND NOT BREAK THEM!

ASPA, as an organization, offers many benefits to its members, and selecting a few "ASPA-rations" to carry out over the coming year can be your way of capitalizing on those benefits and also giving back to the organization. Here are some sample New Year's "ASPA-rations" that you could put on your list:

- **Lose wait!** Register online for your next ASPA function. Get immediate up-to-date information from the Web site about the event and receive your confirmation electronically.
- **Exercise your options!** If you need CE credits, try something different. Take the online quiz from each issue of *The ASPA Journal* or try out a live ASPA webcast (or a recorded one, for added convenience). Refer to the list of webcast recordings on page 11.
- **Prioritize!** It is always important, first and foremost, to recognize the value of family and friends and give them highest priority. ASPA should also be high on your priority list. If you are reading this publication, most likely you have chosen a career involving retirement planning. To enhance and preserve your career, you need the support of ASPA's influence in education and government affairs—and ASPA needs your support to remain effective. Make your ASPA involvement a priority!
- **Make a difference!** If you are an ASPA member, join the ASPA PAC (Political Action Committee). No matter how small your contribution is, you increase the PAC team's count by one more member. There's strength in numbers, so by contributing and joining forces with the ASPA PAC, you help to strengthen and empower our PAC.
- **Volunteer your time!** Find out more about ASPA's many committees, identify one that interests you, and volunteer! ASPA is an organization of diverse individuals, and our committees thrive from the valuable input and time that our members offer.
- **Get organized!** Be sure to update your indicative data for the upcoming ASPA yearbook. If your situation changes during the coming year, update your information online on the ASPA Web site by accessing the Members Only section.
- **Spend more time with your peers!** Join a local ABC (if one is available near you). Besides earning CE credits, you will enjoy the company of people who share common interests regarding retirement planning. Encourage an ABC member or other peer to join ASPA and tell them about the many benefits you receive as an ASPA member.

Hopefully, you'll adopt a few of these "ASPA-rations" and maybe even add a few of your own to the list. As the holiday season approaches and you bid farewell to 2002, get ready to hit the deck running in 2003 with your increased ASPA involvement. Focusing on a few of these constructive, easily attainable goals in 2003 will provide you with a feeling of accomplishment and will enhance your overall ASPA experience.

Have a wonderful holiday season and a happy and healthy new year! ▲

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The purpose of ASPA is to educate pension actuaries, consultants, administrators, and other benefits professionals, and to preserve and enhance the private pension system as part of the development of a cohesive and coherent national retirement income policy.

ASPA members are retirement plan professionals in a highly diversified, technical, and regulated industry. ASPA is made up of individuals who have chosen to be among the most dedicated practicing in the profession, and who view retirement plan work as a career.

To submit comments or suggestions, send an e-mail to **theaspajournal@aspa.org**.

ASPA
4245 North Fairfax Drive
Suite 750
Arlington, Virginia 22203
Phone: (703) 516-9300
Fax: (703) 516-9308
E-mail: aspa@aspa.org
Web: **www.aspa.org**

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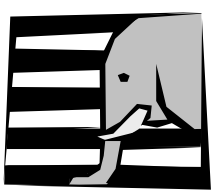
Washington Update

bill. ASPA GAC will, once again, need to work quickly to ensure that the legislation does not inadvertently hurt the private pension system. For example, last year's bill required quarterly benefit statements and investment education notices for all DC plan participants, even if they did not have the right to direct investments. We now need to make sure that the use of the most recent valuation date is permitted for benefit statements so that plans with assets that are not publicly traded are not overburdened.

The political effect of the elections will be more dramatic in the Senate where Republicans have regained control, including control of coveted committee chairmanships. Nowhere is this more significant than with the Senate Health, Education, Labor, and Pension Committee, which will now be chaired by Senator Judd Gregg (R-NH) instead of Senator Ted Kennedy (D-MA). The Enron pension bill coming out of that committee will most certainly not be the same as the bill reported out last year. Thus, some of the more potentially onerous provisions that were in play last year are not likely to receive serious consideration this year. These provisions included the mandatory joint trusteeship (*i.e.*, equal numbers of employee and employer representatives of DC plans), and required fiduciary insurance for DC plans providing "reasonable coverage."

In no way does this mean that the Senate bill will simply be identical to the President's proposal. A slight majority in the Senate does not mean the party in control can dictate the content of legislation. Sixty votes are needed to close off debate in the Senate allowing for a final vote on any piece of legislation. Consequently, if an Enron pension bill is to come out of the Senate, Republicans will have to make some compromises with Democrats. Right now, the political willingness to make such compromises appears to exist, although it is unclear how long this "window" will last. From a lobbying standpoint, ASPA GAC needs to make sure that any compromises made sense and do no harm to the private retirement system.



EGTRRA Permanency

The Republican takeover of Congress does present an opportunity to get an early permanent extension of the pension reform provisions passed last year in EGTRRA, which are scheduled to expire in 2011. Since Congress uses 10-year budget windows to score all tax legislation including pensions, it would be easier from a revenue standpoint to permanently extend pension reform now rather than later since eight out of the 10 years are "already paid for." Thus, ASPA GAC has already been refocusing some of its lobbying efforts to try to exploit this opportunity. One possibility is tying EGTRRA permanence to Enron pension reform since that legislation, with the push by the President, could become law conceivably by this summer. The trick will be that the White House may not want to break apart EGTRRA, and instead may want to keep it together and use the more popular pension provisions to get more controversial provisions, like the estate tax repeal, also made permanent. We will have to watch this carefully to see if we can leverage the White House's desire for an Enron pension bill to obtain EGTRRA permanency.

Economic Stimulus Bill

The White House is also likely to push an economic stimulus bill to respond to the current economic slowdown. The centerpiece of such a bill will most certainly be a package of tax cuts, which are expected to include some pension proposals. The Republican takeover significantly increases the probability that such a bill could become law. Most likely it will be considered as part of a budget reconciliation package next year. The acceleration of some of the limit increases passed in EGTRRA [*e.g.*, immediate increase of the 401(k) limit to $15,000 and the IRA limit to $5,000] and an increase in the required beginning date for minimum required distributions (*e.g.*, 70½ to 75) are some of the pension proposals currently being considered for this package.

Other Items

Congress will also need to deal with the problem of the 30-year Treasury bond rate. Finding a sensible replacement interest rate benchmark for DB plan funding and for purposes of calculating lump sum distributions will need to be a priority. In preparation for next year, ASPA GAC has already had several meetings with congressional staff on this issue. In addition to finding a replacement interest rate benchmark, ASPA GAC is also pushing to fix the interest rate used for calculating the Section 415 limit for lump sums, as it was prior to GATT. Just imagine actually being able to tell your clients exactly what they can expect at retirement—what a concept!

And if that is not enough, do not forget the next generation of pension reform. ASPA GAC continues to work on a series of proposals, including the DB/K proposal, many of which are expected to be introduced next year. The coming year will not be boring, in case you were worried. ▲

Brian H. Graff, Esq., is Executive Director of ASPA. Before joining ASPA, Brian was legislation counsel to the US Congress Joint Committee on Taxation.

How Plan Administrators Need to Review Qualified Domestic Relations Orders (QDROs)

by Barry Kozak, MSPA

I. What is a Qualified Domestic Relations Order?

Under ERISA §206(d) and IRC §401(a)(13), the retirement benefits promised to an employee through a qualified plan cannot be assigned or alienated. This provision of the original law not only prohibited assignments to an employee's personal creditors, but it also prohibited assignments to an employee's former spouse or children upon a divorce. In 1984, through the Retirement Equity Act (REA), Congress added the QDRO rules and thus allowed the alienation and assignment of retirement benefits between a plan participant and his or her former spouse or children upon a divorce.

A state court issues a domestic relations order upon a divorce, which dissolves the marriage, divides the marital property, and provides for the support of the former spouse(s) and children. However, if some of the marital property to be divided or paid as support represents an employee's retirement benefits in his or her employer-sponsored qualified retirement plan, a separate document must meet the statutory Qualified Domestic Relation Order rules [basically, identical provisions are at ERISA §206(d)(3) and at IRC §414(p)]. An "Alternate Payee" thus becomes any former spouse or child who gets a property right in a qualified plan through a QDRO.

However, until a document satisfies all of the statutory rules, is executed by a state court with proper jurisdiction, and is delivered to and accepted by the Plan Administrator, it has no legal effect on the plan. The discretion to accept or deny a document as satisfying the QDRO requirements lies solely with the Plan Administrator (and not with the state court judge or either party's attorney). Therefore, the Plan must adopt reasonable written procedures to determine the qualified status of domestic relations orders and to administer distributions under such qualified orders. According to the Department of Labor, a Plan Administrator does not need to be an authority on state law and must accept an order if it ostensibly complies with state laws; however, the Plan Administrator cannot ignore evidence that indicates that the order is not valid. Plan Administrators are authorized to seek advice from attorneys, actuaries, and other employee benefits professionals in making such determinations.

Unfortunately, unless an ERISA attorney drafts the proposed QDRO, there is a good chance that the proposed document will not meet the statutory requirements. A proposed QDRO might need several rounds of revisions before it complies. Although there is no time limit for the perfection of a QDRO, Congress included an 18-month period, beginning on the date the first document purporting to be a QDRO is delivered to the Plan Administrator, during which the Plan Administrator must act in good faith and must segregate any benefits that might potentially be paid to an Alternate Payee, if the failed order is perfected within the 18-month period.

Once a QDRO is accepted by the Plan Administrator, the Alternate Payee immediately receives all ERISA rights that any plan participant or beneficiary is entitled to, which includes all rights and privileges provided under the plan document, the receipt of all notices and communications that go from the Plan to all plan participants and beneficiaries, and the right to sue the Plan Administrator for the statutory ERISA causes of action. Once all benefits have been paid to the Alternate Payee pursuant to the QDRO, the Alternate Payee ceases to have any additional ERISA rights. An individual who is indicated as a potential Alternate Payee in a proposed QDRO will generally have standing as a plaintiff to have a federal court determine whether the Plan Administrator has properly denied the QDRO or whether it has either willfully or arbitrarily denied it. Similarly, an Alternate Payee claiming that the Plan Administrator prematurely cut off his or her ERISA rights will generally have standing as a plaintiff to dispute such a decision.

Therefore, although not required by the law, it is highly recommended that the attorneys drafting the proposed QDRO send the document, in draft form, to the Plan Administrator. Therefore, if there are any problems, they can be rectified before appearing in front of a state court judge. Otherwise, if the judge has already signed the failed document, then multiple appearances by the attorney would be necessary. It is advisable for all plans to develop a model QDRO that, if used by the participant and his or her spouse upon divorce, will automatically be accepted by the Plan Administrator.

II. What Are the Statutory Requirements of a QDRO?

Following are some basic "dos" and "don'ts" of a proper QDRO:

First, the order must be a domestic relations order, which is defined as "any judgment, decree, or order (including approval of a property settlement agreement) which: (1) relates to the provision of child support, alimony payments, or marital property rights to a spouse, child, or other dependent of a participant, and (2) is made pursuant to a state domestic relations law (including a community property law)." As previously stated, the Plan Administrator does not need to be an expert on state divorce laws, and should accept anything that appears to be a proper court document unless the Plan Administrator has specific knowledge that places the document's authenticity in jeopardy.

Next, the order must **clearly** specify the parties' names and addresses, the amount or percentage of the benefit payable to the Alternate Payee (or the manner of determining such amount or percentage), the number or period of payments, and the plan to which the order applies. As explained below, most proposed QDROs fail because they are not clear enough for the Plan Administrator.

Finally, the order must not require the plan to: (1) provide any type or form of benefit or option to the Alternate Payee that is not otherwise provided under the plan; (2) give more than 100% of the participant's benefits to the Alternate Payee; and (3) require amounts to be paid to this Alternate Payee that are already due to be paid to another Alternate Payee through a prior QDRO.

III. Why Do Most Proposed QDROs Fail to Comply?

As stated above, most Plan Administrators deny orders that fail to clearly state the amount, term, and mechanics of the benefits assigned to the Alternate Payee. Other than the obvious ambiguities, the main reasons an order that is drafted by a non-ERISA attorney is not clear to a Plan Administrator or to its ERISA counsel are as follows: (1) the order fails to acknowledge the plan type, (2) the order fails to indicate the method of assigning benefits, (3) the order fails to instruct the Plan Administrator on the mechanics of the desired distribution, or (4) the order fails to take into account all possible contingencies for the deaths of either the plan participant or his or her Alternate Payee.

This section of the article provides some of the main reasons that a proposed QDRO should be rejected. The main point is that the Plan Administrator should accept any proposed QDRO that can be followed. If there is any doubt, then that doubt must be clarified before the QDRO is accepted; otherwise, there can be unexpected litigation against the Plan in the future by either party. There is nothing wrong with the Plan Administrator sending a letter to both parties of the divorce, in advance of formally accepting the proposed QDRO, stating exactly how he or she interprets the QDRO, or, if ambiguous, what provision needs clarification. The author cautions, however, that any such communication must be absolutely neutral because the participant and the former-spouse negotiate all terms of the divorce, and the job of the Plan Administrator is to mechanically alienate a portion of the participant's qualified retirement benefits, regardless of how the parties agreed to such a division. Please note that although QDROs are usually legal documents separate from a settlement agreement, divorce settlement, or judgement, they do not legally need to be. Some courts have recently held that substantial compliance with the IRC §414(p) rules, rather than absolute compliance, may be enough to deem a document a valid QDRO.

(A) The Order Fails to Acknowledge the Plan Type

Under ERISA, there are two mutually exclusive types of retirement plans, each with their own properties and rules. A plan must either be classified as a "defined contribution plan" or a "defined benefit plan." Similarly, a QDRO must be drafted to assign an Alternate Payee the right to receive all or a portion of the benefits payable to a participant from either a defined contribution plan or from a defined benefit plan.

A **defined contribution plan** "provides for an individual account for each participant and for benefits based solely on the amount contributed to the participant's account, any income, expenses, gains and losses, and any forfeitures of accounts from other participants...." Money purchase plans, profit sharing plans, 401(k) plans, Employee Stock Ownership Plans (ESOPs), thrift savings plans, and target benefit plans are all examples of defined contribution plans. Basically, the participant has an "account balance" that gets valued from time to time and can be divided through a QDRO. Generally, the Plan Administrator invests the plan assets, but some plans, like 401(k)s, might allow the participants to self-direct their respective accounts.

Some of the more common problems with failed QDROs are when: (1) an order defines a valuation date that is not authorized under the controlling plan document; (2) an order for assignment from a self-directed plan fails to indicate how the Plan Administrator collects the total benefits payable to the Alternate Payee and how they should be invested for the Alternate Payee if there is not an immediate distribution;

(3) and an order fails to indicate whether the Alternate Payee is entitled to employer contributions or forfeitures accrued as of the intended assignment date, but not yet paid into the plan.

A **defined benefit plan**, on the other hand, is defined as "any plan that is not a defined contribution plan." Defined benefit plans, cash balance plans, pension equity plans, and any plan called a "pension plan"—other than a money purchase plan—are examples of defined benefit plans. Basically, the plan document defines a benefit annuity at retirement, which accrues over the working life of the employee. Therefore, at any point in time, the plan participant has an "accrued benefit," which can never be reduced, and a "projected normal retirement benefit" which will be payable if the employee continues working until his or her normal retirement date (assuming that the plan document is not amended before then). In most cases, a portion of the participant-spouse's "accrued benefit" is assigned to an Alternate Payee.

Some of the more common problems with failed QDROs are when: (1) an order uses the term "account balance" rather than "accrued benefit;" (2) an order fails to specify the exact date that the accrued benefit is to be calculated; (3) an order does not specify what salaries will be used to calculate the accrued benefit if the benefit is based on a percentage of salary and the employee's salary continues to grow after assignment, but before the benefits are distributed to the Alternate Payee; (4) an order fails to specify whether the Alternate Payee's share of benefits increases if the participant's accrued benefit increases due to amendments to the plan document, early retirement subsidies, ad hoc cost-of-living adjustments, or changes in the federal laws that limit plan benefits; (5) or an order allows the Alternate Payee to take his or her benefits earlier than or in a manner different than the plan document allows.

(B) The Order Fails To Indicate the Method of Assigning Benefits

The IRS and the DOL classify the assignment of retirement benefits through QDROs into two mutually exclusive methods: a "shared interest" and a "separate interest." These distinctions were developed based on the differences between post-marital support and division of marital property, respectively. However, for purposes of a valid QDRO, the method need not match the intention.[1]

Under the **shared interest approach**, the Alternate Payee only receives a portion of the payments that the plan actually pays to the participant-spouse. Under this method, the Alternate Payee gets absolutely no timing or type of benefit distribution

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Message from the Enrolled Actuaries Meeting Committee

The 2003 Enrolled Actuaries Meeting is March 17–19, at the Marriott Wardman Park Hotel in Washington, DC. As always, you will be able to satisfy half of your EA continuing education requirements for this three-year cycle by attending this one meeting!

Panelists at the 2003 General Sessions will explore how actuaries can and should protect themselves from liability; the new paradigm in setting actuarial assumptions for determining pension liabilities, and the impending retirement crisis in the United States. A strong slate of concurrent sessions, including sessions on any new legislation that might become law prior to the meeting, is planned, and of course the IRS and PBGC will be well represented. We are pleased to have Mark Shields, a nationally known political commentator (CNN's *The Capital Gang*) and columnist (*The Washington Post*), as our Monday luncheon speaker.

Register early and come to DC in March to hear how other pension professionals are handling the issues we must all address in our actuarial practices.

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Limitation of Liability Provisions in Service Provider Contracts

the damages that may be recovered in a lawsuit or arbitration to one year's fees, or to the greater of one year's fees or a specific sum, for instance, $10,000.

For those Consultants who have never been sued, or had a liability claim asserted against them by one of their clients, this might seem like a mundane, "boilerplate" provision that has little relevance in the real world. To those who have been sued, and to the litigation attorneys who sue and defend them, these kind of provisions are often more important to the outcome of the claim than to the question of whether the Consultant did anything wrong in the first place. Why?

Consider this Example:

A Consultant prepares an amended and restated defined benefit plan. (The Consultant did not draft the original plan document.) The old plan includes a provision excluding those employees who are covered by a plan through a collective bargaining agreement from participating in the company plan. The company owner—who responds to the Consultant's information requests—has always responded by indicating that the company has only one employee. In fact, the company has numerous employees, but all but one (the owner) are covered by a separate plan through a collective bargaining agreement. When the Consultant prepares the amended and restated plan document, he neglects to review the prior plan document and omits any provision excluding union employees from the plan. The client looks to the Consultant to make the contributions to the plan for the benefit of the participants who would have been excluded from participating but for the Consultant's oversight. The damages are claimed to be more than $300,000. (These were the facts of an actual lawsuit.)

If the Consultant used an engagement agreement, and if the engagement agreement included an enforceable limitation of liability clause, the damages that the plan sponsor might recover from the Consultant could be limited to the amount of the Consultant's fees. In the example above, that could mean that despite the fact that the client has a funding obligation of $300,000, the Consultant's liability could be limited to less than $10,000 (depending upon the exact terms of the limitation of liability provision).

Consultants who are considering using a limitation of liability provision have several issues to address. The first question, and the one that the DOL addressed, is whether a plan fiduciary violates his fiduciary duty to the plan by agreeing to a limitation of liability provision in favor of a Consultant. In DOL Advisory Opinion 2002-08A, the DOL noted that "…limitation of liability and indemnification provisions may be becoming increasingly popular with actuarial firms, according to press and other reports." Consequently, the DOL was responding to a request for an Advisory Opinion regarding "...whether inclusion of certain indemnification and hold-harmless provisions in a plan's service provider contract would violate the fiduciary provisions of ERISA."

The DOL first noted that ERISA §404(a)(1) requires fiduciaries to discharge their duties solely in the interest of participants and beneficiaries, and with the care, skill, prudence, and diligence that a person acting in a like capacity would use under the same circumstances. The DOL also referred to ERISA's prohibited transaction provisions, noting that a plan fiduciary shall not cause the plan to engage in a transaction if he or she knows that the transaction constitutes a direct or indirect furnishing of services between the plan and a party in interest, or transfer of any plan assets to a party in interest. [ERISA §406(a)(1)(C) and (D).] ERISA provides a statutory exemption to these prohibited transactions when one is contracting or making reasonable arrangements with a party in interest for services related to the establishment or operation of the plan, provided that no more than reasonable compensation is paid. [ERISA §408(b)(2).]

The DOL instructed that "…the responsible plan fiduciary must engage in an objective process designed to elicit information necessary to assess the qualifications of the provider, the quality of services offered, and the reasonableness of the fees charged in light of the services provided. In addition, such process should be designed to avoid self-dealing, conflicts of interest, or other improper influence."

The DOL concluded "[t]he Department does not believe that, in and of themselves, most limitation of liability and indemnification provisions in a service provider contract are either *per se* imprudent under ERISA §404(a)(1)(B) or *per se* unreasonable under ERISA §408(b)(2). The Department believes, however, that provisions that purport to apply to fraud or willful misconduct by the service provider are against public policy and void. It would not be prudent or reasonable to agree to such provisions. Other limitations of liability and indemnification provisions,

applying to negligence and unintentional malpractice, may be consistent with §§404(a)(1) and 408(b)(2) of ERISA when considered in connection with the reasonableness of the arrangement as a whole and the potential risks to participants and beneficiaries. At a minimum, compliance with these standards would require that a fiduciary assess the plan's ability to obtain comparable services at comparable costs either from service providers, without having to agree to such provisions, or from service providers who have provisions that provide greater protection to the plan."

In addition, the DOL stated that compliance with ERISA's fiduciary provisions would also require that the fiduciary assess the following: (1) the potential risk of loss that might result from a service provider's act or omission subject to a proposed limitation of liability provision, (2) the outside limits of potential loss, and (3) other actions that may be available to the plan to minimize such a loss.

Therefore, the only "sure thing," according to the DOL Advisory Opinion, is that a fiduciary will breach his or her duties to the plan by agreeing to a limitation of liability provision that purports to limit liability arising out of the Consultant's "fraud or willful misconduct." Whether a fiduciary violates his or her fiduciary duty in agreeing to other limitations of liability will be decided on a case-by-case basis.

Presumably, this DOL opinion could result in more widespread use of limitation of liability provisions in Consultant service agreements. If the courts follow the DOL analysis, plan fiduciaries will not automatically be found to have breached their fiduciary duties in agreeing to such provisions, as long as they engage in "procedural prudence" in deciding whether to execute agreements with these provisions.

So, should Consultants routinely require these provisions as part of their agreements with their clients? That is a more complicated question, the answer to which depends on a complex weave of risk management, insurance strategies, and marketing considerations.

Given the DOL's opinion, if the number of Consultants that require these agreements increases dramatically, it may very well decrease the chances that a plan fiduciary will be found to have breached his or her fiduciary duty by agreeing to limit the Consultant's liability. After all, to overcome a fiduciary breach claim, according to the DOL, a fiduciary should "...assess the plan's ability to obtain comparable services at comparable costs either from service providers without having to agree to such provisions." If *every* Consultant required a limitation of liability provision, it would be impossible for a plan fiduciary to obtain professional services for the plan without agreeing to a limitation of liability provision. In that circumstance, it may also be impossible to successfully argue that the fiduciary breached his or her duty by agreeing to the provision.

On the other hand, if only relatively few Consultants require these provisions as a condition of performing services, plan fiduciaries could presumably secure similar services without having to agree to limit their Consultants' liability. That could prompt some Consultants to simply obtain insurance against large malpractice claims and to attempt to set themselves apart from other Consultants by emphasizing their willingness to work without requiring limitation of liability provisions.

While the DOL has indicated that use of limitation of liability provisions does not *per se* give rise to a breach of fiduciary duty, another issue is whether these provisions are enforceable under the laws of the state in which the Consultant practices—or more precisely, the state

in which a Consultant gets sued. This issue may be the most significant that a Consultant considers in deciding whether to use a limitation of liability clause in its contracts. After all, most courts that have considered the question have decided that state negligence and malpractice laws apply to claims against Consultants who are alleged to have committed negligence in providing their regular, non-fiduciary professional services. {See, *e.g., Berlin City Ford, Inc. v. Roberts Planning Group*, 864 F.Supp. 292, 295 (D.NH 1994); *Coyne & Delany Co. v. Selman*, 98 F.3d 1457 (4th Cir. 1996): [holding that "garden-variety" state law professional malpractice claims are not preempted by ERISA].}

In California, for instance, the courts will consider a host of factors in deciding whether a limitation of liability provision violates public policy or is otherwise unenforceable. Among other things, the courts consider whether the services being performed are a practical necessity for some consumers, whether the party seeking the limitation possesses a "decisive advantage of bargaining strength" over those who seek their services, and whether the party seeking the limitation uses a standardized contract that does not allow a customer to pay additional reasonable fees and obtain protection against negligence.

A thorough analysis (and comparison) of the various state laws regarding limitation of liability provisions is beyond the scope of this article. However, consider this: if it is questionable whether a limitation of liability provision is enforceable under state law, it may make little business sense to use them. Discriminating clients may question the provisions, negotiate their limits, or in the worst case, hire another Consultant altogether if they feel the proposed provision is overreaching.

Meanwhile, Consultants should be able to insure against claims that arise due to simple negligence or malpractice. While errors and omissions insurance premiums for benefit plan Consultants have seen significant increases, Consultants may be able to soften the blow by relatively modest increases in their fees. Assuming that you are able to obtain errors and omissions insurance, and thus, your insurance carrier bears most of the risk of a lawsuit, you should ask yourself whether you are really receiving any benefit from a limitation of liability provision that trumps the potential loss of goodwill that may follow. ▲

Joe Faucher is a partner with the Los Angeles firm of Reish Luftman McDaniel & Reicher and chair of the firm's ERISA Litigation Department. His practice focuses on representation of benefit plan fiduciaries and service providers. He is a regular columnist on 401(k) plan investments for the Journal of Pension Benefits *and is a frequent speaker on ERISA matters and risk management issues for plan service providers.*

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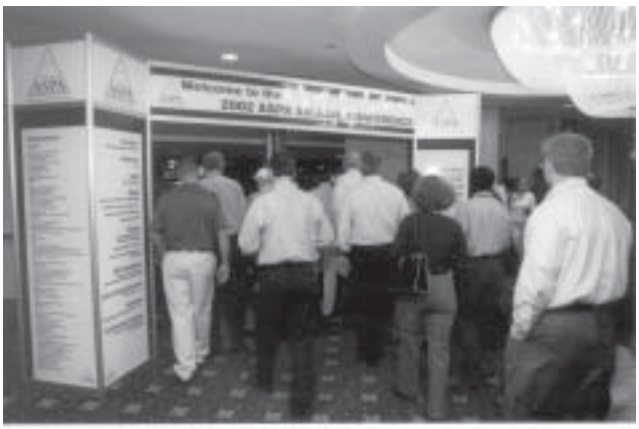
WOW! A new home, a great Conference agenda, the largest ASPA Exhibit Hall ever, and more than 1,530 attendees added up to the biggest and best ASPA Annual Conference to date!

all photographs by Bill Petros



Through this entranceway pass some of the best and the brightest retirement plan professionals in America.

One of the most popular features of our new home was classroom style seating!

Cathy Green, CPC, QPA, Chair of this year's Annual Conference, will serve as Conferences General Chair in 2003.

Chris Stroud, MSPA, 2002 Chair of The ASPA Journal Committee, and Karen Jordan, CPC, QPA, Chair of the ASPA Political Action Committee, admire Mike Bain's, MSPA, Co-Chair of the Education and Examination Committee, patriotic necktie prior to the Opening General Session.

2002 ASPA President Craig Hoffman, APM, passes the gavel to the 2003 ASPA President, Scott Miller, FSPA, CPC, and wishes him a great year.

Karen Jordan, CPC, QPA, 2002 Chair of ASPA's Political Action Committee; Stephen Dobrow, CPC, QPA, QKA, 2003 Chair of ASPA's Political Action Committee; Sal Tripodi, APM, ASPA Board member; and Brian Graff, ASPA's Executive Director, at the closing general session where Sal gave his ever-popular Keeping Current *and updated the* ERISA Love Story.

The Annual Conference is an event that gets ALL the ASPA staff involved. Chip Chabot, Webmaster/Multi-media Manager; Janet McFadden, Meetings Coordinator; Jonathan Watson, Exhibit and Sales Manager; R.C. Smith, Joanne's fiancé; Joanne Lawrence, Director of Meetings; and Julie Thomas, Meetings Coordinator, gathered at the Gala for a brief pause before starting up again at 6:00 a.m.

A Few of the Many Wonderful Speakers at the Annual Conference...

C. Fred Reish, APM, is one of the Government Affairs Committee's Senior Advisors;

The hilarious Derrin Watson always gets the audience involved;

Lorraine Dorsa, MSPA, is a frequent speaker at ASPA's conferences;

Joan Gucciardi, MSPA, CPC, is ASPA's 2002 Educator's Award recipient; and

Bob Guarnera, MSPA, ASPA's 1993 President, informed the attendees about QDROs.

The Exhibit Hall was packed with more vendor/partners than ever before. And there's still room to grow!

See you next year at the Washington Hilton for the 2003 ASPA Annual Conference, October 26–29, 2003!

The Monday morning session is very popular and features speakers from the government agencies as well as our own Executive Director. Stephen Kandarian, PBGC; Carol Gold, IRS; Brian Graff, ASPA; Ann Compbs DOL/PWBA; William Sweetnam, Treasury

How Plan Administrators Need to Review Qualified Domestic Relations Orders (QDROs)

Continued from page 7

choices. Although not limited to cases where the retirement benefit represents support or alimony, this method generally works best if used for such purposes, especially if the participant of a defined benefit plan is already receiving monthly retirement benefits.

Example: Assume a participant's accrued benefit from a defined benefit plan is $1,000 per month, starting at age 65 and continuing for the rest of his life, and he is already in pay status when he gets a divorce at age 70. If the QDRO is drafted to give his former spouse a "shared interest" of 60% of his benefits, then the Plan would write one check for $400 to the Participant and a second check to the Alternate Payee for $600. Both checks would be paid monthly for the rest of the Participant's life. However, once the Plan stopped paying the Participant his share of accrued benefits (*i.e.*, upon the Participant's death), the Plan would stop paying the Alternate Payee her share of accrued benefits at that point in time as well. Although it is clear that in this example the Alternate Payee has no further rights in plan benefits if she survives the participant, courts are divided as to whether the Alternate Payee's rights to future benefits can be transferred to her beneficiary upon her death if she dies before the participant.

Under the **separate interest approach**, the Alternate Payee becomes a true beneficiary of the Plan, entitled to his or her own accrued benefit. Under this method, the Alternate Payee gets the same timing or type of benefit distribution choices that the participants are offered. Although not limited to cases where the retirement benefit represents division of marital property, this method generally works best if used for such purposes, especially if the participant of a defined benefit plan is still working and will accrue further benefits, or if the participant of a defined contribution plan is still working and will receive further contribution and forfeiture allocations.

Example: Assume a Participant's accrued benefit from a defined benefit plan is $1,000 per month, starting at age 65 and continuing for the rest of his life, and he is still working when he gets a divorce at age 50. If the QDRO is drafted to give his former spouse a "separate interest" of 60% of his benefits, then the Plan Administrator would consider the participant's accrued benefit to be $400 per month, starting at his age 65 and continuing for the remainder of his life, and would consider the Alternate Payee a plan beneficiary with an accrued benefit of $600 per month, starting at the participant's age 65, and continuing for the remainder of her life. (The plan document will have actuarial factors to calculate a mathematically equivalent benefit for her if her age is different and she starts distributions at a different date.) Unless the QDRO affirmatively provides for increases, the Alternate Payee's accrued benefit is thereafter locked in and will not increase. However, the participant's accrued benefit can increase as he continues working and accrues further benefits in accordance with the plan document.

(c) The Order Fails to Instruct the Plan Administrator on the Mechanics of the Desired Distribution

The most common mechanism for dividing retirement benefits, especially those from a defined benefit plan, is to include **a fraction that represents the portion of total benefits that are deemed "marital property."** The most common description of the fraction is that the numerator is to equal the period of total plan service credited to the participant during the marriage and for the denominator is to equal the period of total plan service credited to the participant for all years as an employee.

Another common problem with QDROs drafted by non-ERISA attorneys is the lack of understanding of **when payments may begin**. Most defined contribution plans allow for an immediate distribution of benefits; however, most defined benefit plans offer annuities starting at a certain age and lump sums only in certain circumstances. The earliest date that an Alternate Payee can receive a distribution if the participant-spouse is still working is known as the "earliest retirement age," which is the earlier of the date that the participant could receive a benefit from the plan or the participant's 50th birthday. Although most QDROs have a statement that the order purports to be a valid QDRO and that all non-confirming provisions are ignored, most Plan Administrators should deny a proposed QDRO that mandates a distribution to start earlier than, or be in a form of, a benefit that is not provided for in the plan document.

As mentioned, some of the problems with a QDRO assigning benefits from a defined contribution plan,

especially a 401(k) plan, involves **the participant's self-direction of investment options**. By default, if the QDRO is silent, the Plan Administrator will simply take proportionate amounts from all of the participant's current diversification of funds.

Example: If the participant has an account balance of $100,000, where $20,000 is invested in a risky overseas fund, $20,000 is in employer stock, $40,000 is in a growth fund, and $20,000 is in government securities, and if the QDRO assigns his Alternate Payee 60% of his current account and provides no instructions for the Plan Administrator, the Alternate Payee will receive $12,000 from the overseas fund, $12,000 in employer stock (converted to cash in accordance with the plan document), $24,000 from the growth fund, and $12,000 from the government fund. This may not be the most desirable way of getting funds to the Alternate Payee because the fees charged by the various funds and lost opportunity costs might be very high. Therefore, the QDRO might specify

Welcome New Members

Welcome and congratulations to ASPA's new members and recent designees.

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(assuming that both parties agree) that the Alternate Payee gets the entire growth fund and the entire government fund, thus still providing an aggregate assignment of $60,000 (*i.e.,* 60% of the participant's account balance), yet leaving the overseas fund and employer stock in tact for the participant. If the QDRO or the plan document does not allow an immediate distribution to the Alternate Payee, then at least this method would provide conservative investments for the Alternate Payee until he or she has an opportunity to choose a different investment strategy.

(D) The Order Fails to Take Into Account All Possible Contingencies for the Deaths of Either the Plan Participant or His or Her Alternate Payee

Another way that QDROs typically fail is that they might not clearly indicate what the Plan Administrator should do upon the deaths of either the Participant or the Alternate Payee. Therefore, a Plan Administrator generally looks to see if the QDRO addresses the following four contingencies: (1) The Participant has not yet reached his "earliest retirement age" and he dies but the Alternate Payee survives; (2) The Participant has not yet reached his "earliest retirement age" and the Alternate Payee dies but the Participant survives; (3) The Participant has reached his "earliest retirement age" and he dies but the Alternate Payee survives; and (4) The Participant has reached his "earliest retirement age" and the Alternate Payee dies but the Participant survives. Again, the Plan Administrator has no reason to question the goals and understanding of the parties going through a divorce, but the Plan Administrator must have clear instructions in the QDRO which anticipate all contingencies and which will not be subsequently challenged through litigation.

At the same time Congress added the QDRO rules to ERISA and to the Internal Revenue Code, they also added "qualified joint and survivor" rules to protect the surviving spouses of married participants upon their death. Basically, the rules provide that a surviving spouse will always get at least 50% of the participant's accrued benefit, and that if the participant wants to elect a different type of benefit, then the spouse must consent to that election in writing (and be notarized). Congress included these provisions to protect a widowed spouse from the participant electing, while still alive, an irrevocable optional form of benefit or named beneficiary that provides nothing to the surviving spouse. Congress included a provision in the law that similarly protects former spouses after a divorce. Therefore, a QDRO may contain an affirmative provision that treats a former spouse as a "surviving spouse" for purposes of a Qualified Pre-Retirement Survivor Annuity and/or for purposes of a Qualified Joint and Survivor Annuity. Again, it is up to the parties to determine what is in their collective best interests and to memorialize a QDRO that accomplishes those intentions.

IV. Conclusion

The tension with QDROs is that state laws govern the dissolution of marriages and the division of marital property; whereas federal laws govern the mechanical and procedural aspects of a QDRO. Unfortunately, many attorneys who draft QDRO documents are family attorneys who are very knowledgeable about state marital laws, but not very knowledgeable about ERISA. Therefore, it is up to ERISA specialists to help their Plan Administrator clients to review a document which is supposed to be a QDRO and accept it if and only if it satisfies all of the statutory requirements.

ERISA governs the division of marital property through a qualified retirement plan. Although ERISA generally preempts all state laws that relate to employee benefit plans, courts have been trying to figure out how state marriage and divorce laws affect ERISA governance (especially those states that have community property law). Only attorneys, after researching relevant state and federal case law, can offer legal advice to the parties or the Plan Administrator as to how the legal rights of each of the divorcing spouses, granted through a valid QDRO, can be protected or divested upon their respective deaths. The Plan Administrator, however, does not need to be concerned with the minutia of state laws and ERISA preemption; rather, a Plan Administrator needs only to make certain that a proposed QDRO satisfies all of the requirements of IRC §414(p).

Further insight is provided through two recent US Supreme Court cases, *Boggs v. Boggs* (1997) and *Egelhoff v. Egelhoff* (2001), even though QDROs were not specifically at issue in either case. Both cases held that ERISA preempts state law. In *Boggs*, the sons of a participant's first wife filed suit against the participant's second wife and used the congressional intent for implementing the QDRO rules as support for their argument that they, rather than the participant's second wife, were entitled to the participant's Plan benefits. In his majority opinion, Justice Kennedy looked at the Congressional intent and powerfully stated "The QDRO provisions … reinforce the conclusion that ERISA is concerned with providing for the living. The QDRO provisions protect those persons who, often as a result of divorce, might not receive the benefits they otherwise would have had available during their retirement as a means of income. In the case of a predeceased spouse, this concern is not implicated." In *Boggs*, the Court held that ERISA's protection for the participant's living second spouse upon the participant's death is more important than, and is preemptive of, a Louisiana state community property law that allows the participant's first spouse to leave her share of the Plan benefits to her children through her will. In *Egelhoff*, the Court held that ERISA's rules for valid beneficiary designations are more important than, and are preemptive to, a Washington state law that automatically revokes a former spouse's rights to take any benefits from a pension plan upon a divorce. Therefore, even though QDROs are not specifically at issue in either *Boggs* or *Egelhoff*, great insight is provided for family law attorneys who need to understand the intersection between state laws governing divorce and the federal ERISA law governing the use of qualified retirement plans as marital property to be divided upon divorce.

In a clear case of how the federal QDRO rules and state marriage laws intersect, a 2002 Second Circuit Court of Appeals case pits a father of a deceased participant against the daughters of the same deceased participant (*i.e.*, grandfather against granddaughters). In *Metropolitan Life Insurance Co. v. Bigelow*, the Plan Administrator does not know whether to pay the father (who claims that the "Judgement" at issue was not a QDRO, and therefore, New York State law dictates that he is entitled to his son's benefits) or the daughters (who claim that the "Judgement," entered when their father divorced their mother, satisfied all of the rules of IRC §414(p), and, therefore, they are entitled to their father's benefits). The Plan Administrator agrees that it will follow the Court's decision. The Court's opinion states that "This, then, is the nub of the present dispute: if the Judgment is a qualified domestic relations order (QDRO), ERISA does not preempt it, and the Daughters are the proper beneficiaries; if, however, the Judgment is not a QDRO, then ERISA preempts, and the Father is the proper beneficiary." The Second Circuit Court of Appeals ultimately determined that although the "Judgement" was not a separate document purporting to be a QDRO, based on some of the provisions and terms in the "Judgement," it substantially complied with the QDRO rules. Therefore, substantial compliance, rather than absolute compliance, might be enough to deem a domestic relations order a Qualified Domestic Relations Order. Based on this recent holding, the author cautions that although it is stated several times in this article that generally a QDRO is a separate document from the actual settlement agreement or the overall domestic relations order itself, courts can apply the IRC §414(p) requirements to any legal document or judicial order to determine if a valid QDRO has been agreed to by the divorcing parties.

In reviewing the QDRO, care must be taken so that the review is purely objective. If the participant and the Alternate Payee have negotiated fairly and agreed to the terms of a QDRO, the Plan Administrator must accept it, even if it favors one of the parties over the other. On the other hand, if a document fails to be a QDRO, the Plan Administrator must give objective advice to both parties as to what is causing the document to fail and neutral suggestions on how the failure can be cured. ▲

[1]See IRS Notice 97-11 and QDRO Guidance, issued in 1997 by the Pension Welfare Benefit Administration of the Department of Labor and available online at **http://www.dol.gov/dol/pwba**.

Barry Kozak, JD, LL.M., EA, MSPA, ChFC, is the Director of Academic Development for the Graduate Tax Law and Employee Benefits Programs at the John Marshall Law School, and is an adjunct professor of law. Additionally, Barry is employed as a Legal Consultant at Chicago Consulting Actuaries, LLC.

Eidson Founder's Award Recipient, Curt Hamilton, Reflects on His Tenure at ASPA

by Amy E. Iliffe, Director of Marketing and Development

CURTIS D. HAMILTON, MSPA, CPC, IS THE 2002 HARRY T. EIDSON FOUNDER'S AWARD RECIPIENT. CURT, AS HIS FRIENDS KNOW HIM, JOINED ASPA IN 1975 AND HAS MADE SIGNIFICANT CONTRIBUTIONS TO ASPA AND TO THE PENSION PROFESSION SINCE THAT TIME.

Curt was presented with the Eidson Founder's Award at the 2002 ASPA Annual Conference. The award is given in honor of ASPA's late founder, Harry T. Eidson, FSPA, CPC, and recognizes exceptional accomplishments that contribute to ASPA, the private pension system, or both. Ed Burrows, MSPA, 1986 President of ASPA and someone who has first hand knowledge of Curt's achievements, presented Curt with the award. Also during the 2002 Annual Conference, I had the pleasure of sitting down with Curt to discuss his contributions and the highlights of his many years of involvement with ASPA.

While serving as President of ASPA in 1983, Curt was instrumental in the development of ASPA's Statement of Purpose, which has been a critical factor in the success of the organization. The statement remains unchanged to this day and reads as follows:

The purpose of the American Society of Pension Actuaries is to educate pension actuaries, consultants, administrators and other benefits professionals, and to preserve and enhance the private pension system as part of the development of a cohesive and coherent national retirement income policy.

Photograph by Bill Petros

Past President, Ed Burrows, MSPA, presents Curt Hamilton, MSPA, CPC, with the 2002 Harry T. Eidson Founder's Award at the opening session of the 2002 ASPA Annual Conference.

Curt provided me with some history behind the development of this statement. The Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) had passed in August and Curt was going to assume the ASPA presidency in 1983—the year that a great number of TEFRA's provisions would become effective. This was significant because TEFRA was so punitive and proved to be the first in a series of subsequent laws that brought persistent attacks on qualified plans, in general, and defined benefit plans in particular. TEFRA presented ASPA and the actuarial professional with some major challenges. This change in climate was a call to action for ASPA's Board of Directors. ASPA had made valiant efforts to defuse some of TEFRA's onerous provisions but without too much success. ASPA's leadership wanted to have greater influence in Washington. To do so would require ASPA to become larger, stronger, and more recognized. It was a daunting challenge, but one they believed could be accomplished. The first step toward achieving this goal, the leaders felt, was to have a clear and concise core purpose around which all our other activities could be built.

Accordingly, in late 1982, Curt gathered a group of ASPA's past Presidents together for a two-day meeting at the Westgate Plaza in San Diego, CA. It did not take long to decide on the core purpose since (believe it or not!) those participating were in agreement about what the purpose should be. Most of the time was spent "word-smithing" the message. They knew that ASPA's commitment to education would continue to be of paramount importance and wanted to broaden the education from just pension actuaries to consultants and other practitioners. In addition, they wanted ASPA to attain national recognition and prominence so that their professional opinions and suggestions would have a greater impact on legislators and the direction of our country's retirement policy.

"This meeting not only resulted in the development of ASPA's Statement of Purpose, but was also the beginning of ASPA's Long Range Planning Committee (LRPC)." Curt, who served as the first chair of this committee, explained that, "the purpose of the LRPC was to provide long-term vision of what ASPA was, what we wanted to become, how we were going to get there, and what steps needed to be implemented to achieve the goals."

The LRPC established several goals that first year. It was clear at that time that ASPA's leadership wanted ASPA to become the voice of the retirement plan profession. As Curt recalls, "We attempted to have a public relations campaign to gain this recognition, but the task was compounded because we were so starved for resources in those days. We were trying to allocate our nearly non-existent cash reserves as effectively as we could to gain increasing visibility and prestige. With TEFRA's passage and retirement plans coming under attack, we knew how vital it was for the private pension system that we make our voice heard. Another of our desired outcomes was to have ASPA become recognized as offering the most prestigious credentials to the retirement plan community, creating market value for both our actuarial designations and our CPCs." Several additional goals were to educate actuaries, increase the number of people entering the profession who were taking the actuarial exams, and establish a vibrant Government Affairs Committee. Increasing the scope and effectiveness of ASPA's government affairs activities were critically important so that ASPA would have a voice in the discussion about the direction of the country's retirement program. ASPA's leadership wanted to be heard as an objective educational body and hoped to have compelling input on pinpointing the problems with the retirement system.

Curt reflected back on the goals established by the LRPC at that time and how well he thought ASPA has succeeded in their achievement. In his opinion, ASPA has accomplished the goal of gaining national recognition through its widely recognized education program and prestigious credentials. Curt wonders if perhaps ASPA should expand its scope to include benefit plans other than just retirement plans. According to Curt, "Many of us run firms that provide consulting and administration for retirement plans, Section 125 or flex plans, and other employee benefit programs. By confining itself to the retirement plan field, ASPA narrows its candidacy base, which in some ways also reduces services to our members' firms. That said, however, businesses and organizations must focus on their core competencies." One of his disappointments is that while ASPA has gained ground in its total membership because of the addition of other designations, ASPA has not been as successful in matriculating actuaries—ASPA has actually seen attrition in the number of actuaries because of the number of retirees. And last but not least, with regard to the establishment of a vibrant Government Affairs Committee—this goal was met over and above all expectations, thanks in large part to the early efforts of Andrew (Andy) J. Fair, APM, 1998 recipient of the Eidson award.

During his presidency, Curt initiated the development of the National Retirement Income Papers (NRIP) project—a project that made a significant contribution to the development of a cohesive and coherent National Retirement Income Policy. As Curt explained, despite the increasing concern about the future of Social Security, consistent attacks on defined benefit pension plans and qualified retirement plans continued. Tax policy was clearly overwhelming retirement income policy. ASPA's leadership felt that the country needed a long term, comprehensive integration of benefit programs.

Those involved in the project started working on a statement of retirement income policy. According to Curt, "We needed to establish a realistic and affordable private pension system, so that as the Social Security system confronted its future problems, private industry would be encouraged to become the primary provider of retirement benefits. We were trying to develop a coherent and integrated balance between the three-legged stool—private savings, corporate sponsored plans, and government mandated programs." Curt admits that the group was putting themselves at risk by stepping forward with a policy statement. "We knew that by taking the initiative we were opening ourselves up to a great deal of criticism because others would

have very different ideas about how the system should be structured. But at least we were setting forth a program that seemed to be coherent."

Another of Curt's activities was his representation of ASPA on the Strengthening of the Profession Task Force. This task force was formed by member representatives from ASPA and the other actuarial organizations: the American Academy of Actuaries, Society of Actuaries, Casualty Actuarial Society, Conference of Consulting Actuaries, and Canadian Institute of Actuaries (CIA). The stated objective was to tackle the challenge of how to make the actuarial profession stronger, more visible, and more sought after. It was generally conceded that this was more likely to be accomplished by all of the organizations working together rather than competing with one another. There was a concern among all the actuarial organizations that the profession was not growing as rapidly as it should and that they were losing qualified people to other vocations. Many of the candidates they were vying for were obtaining masters' degrees or investment advisory expertise and choosing to work on Wall Street, for example, rather than entering the actuarial profession.

Beyond the broad accomplishments of the task force in general, the most significant individual benefit for ASPA was that it requested and received a position on the Council of Presidents (COP)—a forum to promote cooperation and coordination among the leadership of each actuarial organization. According to Curt, "Until that time, ASPA had always been a pariah to some of the actuarial bodies, and other actuarial organizations knew little or nothing about us. They began learning more about ASPA through the task force activities and soon realized we were doing more for pension professionals than anyone else." Curt, Brian Kruse, FSPA, CPC, and later Ed Burrows, MSPA, were ASPA's representatives on the task force. Their efforts led to greater recognition and gave ASPA a stronger voice in the profession.

Another of the outcomes of the Strengthening Task Force was the collective agreement by all the actuarial bodies (excluding the CIA because of Canada's governance) to create the Actuarial Board for Counseling and Discipline (ABCD). Along with Joe Leube, FSPA, CPC, Curt was selected as one of ASPA's representatives and founding members, and served in that capacity for three years as the Board developed its Operating Principles, coordinated with all the organizations, and began implementing the processes and procedures to provide guidance for actuaries.

Curt and I also discussed his active involvement in ASPA's conferences program. As a Conference Committee Chair and committee member in the 80's, he worked to conceptualize and establish what is currently known as the Business Leadership Conference.

Curt explained that ASPA had established Business Techniques Seminars, but that what was needed was a forum for business owners to discuss issues with one another that might not be appropriate for the techniques seminars. He and Brendan O'Farrell, FSPA, CPC, decided to start the Business Owners Conference, which included topics such as developing corporate visions and values, growing our businesses, investing in and training our people, developing succession leadership within our firms, and other subjects to help business owners.

At the end of our interview, I asked Curt to reflect back and compare ASPA today to what it was when he first became involved. He is delighted with ASPA's success. Curt stated that ASPA now has presence and momentum. That is, its progress is self-sustaining. ASPA has wide recognition, more revenue, more active participation, and has been successful carrying out its mission.

He hopes that ASPA will never lose sight of the goals of being an educational body and of speaking objectively about retirement plans (perhaps including other employee benefits) and the national retirement income strategy. Curt admits that this is a balancing act when you have a vested interest in preserving a certain structure or status quo (*i.e.*, the complicated private pension system). "This is part of the challenge. How does ASPA determine and do what's best for our US society and at the same time do what is best for the membership?"

Curt added that he has truly enjoyed watching the organization grow as new leaders become involved. One of the criteria ASPA had originally set was that it would only allow actuaries to be presidents.

"Making the transition to accept CPCs as leaders was a major step. I was one of those who supported the rationale of changing our name to embrace our changing constituencies. Now we are accepting APMs and even had an APM as president this year. There are very talented people in all aspects of our profession and perhaps we need to broaden our scope.

Certainly, there are perpetual issues. Every organization needs to reevaluate who they are every now and then. The profession and the industry are changing. We need to adapt to the marketplace, as circumstances require, so that we continue to stay strong and grow."

Curt expressed his gratitude to ASPA and appreciates being able to participate and watch the organization grow. He remembers how difficult it was in the early years.

"We had such dedicated volunteers who were also busy building their own businesses. Most of the leaders then had their own firms. It was difficult to run your own business, stay involved with your family, and still find time to make a meaningful contribution to ASPA. It's rewarding to see what ASPA has become today and how much it's grown. I was fortunate that I found ASPA. The organization gave me guidance, access to people, and helped me enhance my business and career. It has been an incredible journey and I am confident that I have received far more from ASPA than I could have ever given. I am deeply honored to receive this award. To be recognized by ones' peers is, for me, the ultimate compliment. Thank you."

It is ASPA's privilege to honor Curt by presenting him with the prestigious Harry T. Eidson Founder's Award. Through his years of dedication and hard work Curt has helped ASPA and the profession thrive and gain national recognition. ASPA extends its appreciation to Curt and is pleased to present him with this well-deserved award.

The award is given in honor of ASPA's late founder, Harry T. Eidson, FSPA, CPC. Previous winners of the Eidson award are as follows: Ruth F. Frew, FSPA, CPC, in 2001, Leslie S. Shapiro, J.D., in 2000, Howard J. Johnson, MSPA, in 1999, Andrew J. Fair, APM, in 1998, Chester J. Salkind in 1997, John N. Erlenborn in 1996, and Edward E. Burrows, MSPA, in 1995. ▲

Amy E. Iliffe, ASPA's Director of Marketing and Development, has been working at ASPA for six years. She has held a variety of positions at ASPA, including Director of Membership, Director of Human Resources, and Education Services Coordinator. Amy lives with her husband and son in Ashburn, VA.

Are You a Pension Expert and a Teacher at Heart?

If so, ASPA has unlimited opportunities for you! ASPA is looking for instructors for webcasts and Web courses. Proposals for webcasts can be any "timely" or "timeless" topic of your choosing that you think would be important to ASPA members and to the retirement plan industry. Webcasts are 100 minutes in length.

ASPA is actively pursuing instructors who are familiar with ASPA's education program to teach one or more topic(s) covered by one of the exams. An easy way to begin thinking about ways you can participate is to look at the table of contents for one of the study guides, choose a subject, and start an outline. Web courses should be divided into 10 to 13 100-minute segments.

ASPA takes care of the webcast/Web course set-up and offers a small honorarium for instructors who are chosen to participate. For more information, or to submit your outline of ideas, contact Jane Grimm, Managing Director at (703) 516-9300 x106 or **jgrimm@aspa.org**.

ASPA Web Site Redesign Underway

Over the past several months, ASPA's Technology Committee and the ASPA staff have been working on a redesign of ASPA's Web site. To date, they have created new menus, completed basic formatting, constructed home pages for six major sections, implemented directory level navigation for each section, and have started to complete the static content for various sections. Over the next few months, they will be converting the existing Web pages to the new layout, redesigning the eSeries modules (*i.e.*, "online registration" and "members only" sections), and editing the content of the new site. Once these steps are complete, we will be doing testing, testing, and more testing!

As you can imagine, this is a time consuming process. Chip Chabot, ASPA's Webmaster and Multimedia Manager, has been hard at work. We are excited about the new design and improved functionality and hope to roll out the new design on January 1. If you are interested in checking out the progress of the new site, go to **http://asparedesign.org**.

2003 Los Angeles Benefits Conference

Universal City, California
January 30–31, 2003

Mark Your Calendar! 2003 Los Angeles Benefits Conference. January 30–31, 2003. Hilton Universal City and Towers.

The Los Angeles Benefits Conference (LABC) is a unique conference, featuring high-level government speakers on every session's agenda! The LABC is an essential learning and interactive experience for serious retirement plan professionals.

Topics include:

- Washington Update
- IRS/DOL Q&A Sessions
- Aggressive Tax Practices
- How Do We Protect 401(k) Plan Participants in the Future?

For more information, contact ASPA's Meeting Department at (703) 516-9300 or **meetings@aspa.org**, or visit our Web site at **www.aspa.org**.

ASPA Benefits Councils Calendar of Events

Date	Location	Event	Speakers
December 12	Western PA	One-on-One with the Experts	TBA
December 12	Cleveland	Time and Stress Management	Karl Dustman, Dustman & Associates
February 20	Cleveland	DOL Correction Program	TBA
April 17	Cleveland	Legislative Update	TBA
June 26	Cleveland	Successfully Negotiating with IRS/DOL	TBA

ASPA . . . **Advancing** the Profession. Enhancing the Professional.

2003 Version of QKA Kit Now Available at http://www.aspa.org/qka

You asked for it! The 2003 version of ASPA's Qualified 401(k) Administrator (QKA) kit is now available. Find QKA information, register for exams, order publications, and get all of your questions answered with the click of a button!

You no longer have to search ASPA's Web site or the *Education & Examination Program Catalog* for QKA information and forms—all applicable forms and information can be found in one convenient location. ASPA's QKA kit contains an exam registration form, a publications order form, exam information, deadlines, fees, and a list of the most frequently asked questions about the Qualified 401(k) Administrator (QKA) designation. To download the QKA online kit, visit **http://www.aspa.org/qka**.

Now Available . . . Presentation Tool for Trainers and Managers!

Are you a trainer or manager interested in ASPA's programs and need an easy way to present information about ASPA to others in your company? ASPA recently released a QKA promotional CD-ROM. This CD-ROM is designed specifically for trainers and other key decision makers who want more information about ASPA's QKA [Qualified 401(k) Administrator] credentialing program. As a source of valuable information about QKA, the CD-ROM serves as a comprehensive tool for presenting ASPA's program to others in your company.

The CD-ROM includes an outline of the advantages of the QKA, a program overview with detailed information about the required exams, information about exam administration, frequently asked questions, and testimonials from trainers and QKAs. It is also a source of information about additional designations, the benefits of ASPA membership, and continuing education requirements. Additionally, you can use the CD-ROM to access a Publications Order Form, an Examination Registration Form, and a Deadlines and Fees Schedule.

If you are interested in receiving a CD-ROM, please contact Amy Iliffe at the ASPA office at (703) 516-9300 or e-mail **ailiffe@aspa.org**.

FUN-da-MENTALs

Ever Wonder Why...?

On death and taxes: First, they tell you that you can't take it with you. But then, they charge you for leaving it behind!

Did you even notice that if you put the letters "THE" and "IRS" together, it spells "THEIRS"?

Did you ever wonder why it's called a 1040? It is because for every $50 you earn, you keep $10 and the IRS gets $40!

SIDE FUN

"I'm sorry, but since you only work one day a year, it will take you some time to build up your retirement account."

Pension Poetry

There once was an Actuary named Bob,
Whose worksheets were those of a slob.
He could not re-write
Whatever he'd recite—
And soon he was out of a job.

There was a consultant named Horace
Who was born under the sign of Taurus.
His plans were in the stars—
His numbers were from Mars—
But never would he bore us!

—Stanley Weisleder, MSPA

WORD SCRAMBLE

Unscramble these four puzzles – one letter to each space – to reveal four pension-related words. Answers will be posted on the eASPA portion of ASPA's Web site at **https://router.aspa.org**. Login, go to Members Only>Newsletter, and look near the bottom.

LARGE UTE ○○ _ _ _ _ _ _ ○

CAB LANES _ _ ○○○ _ _ ○

ROVER NUT _ ○ _ _ _ ○ _ _

CUT POEM _ _ _ ○ _ ○○

BONUS: Arrange the circled letters to form the Mystery Answer as suggested by the cartoon.

Mystery Answer:

What is the "○○○○○○○ ○○○○○?"

What the actuary wondered when he walked into the room

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Bulletin Board

EDUCATION

December 31, 2002
Deadline for 2002 Edition Exams for Daily Valuation and PA-1 (A&B)

CONTINUING ED

January 8, 2003
Deadline to Submit ASPA 2001-2002 CE Reporting Form

CONFERENCES

January 30-31, 2003
Los Angeles Benefits Conference
Universal City, CA

Reach the Pinnacle of Success in 2003!

You asked for it! The 2002 event was so successful, we've planned one for 2003!

Do you actively sell, market, support, or influence the sale of 401(k) plans? Do you want to sell **more** plans? Do you want to design **better** plans? Do you want to keep your clients happy **longer**? The **401(k) Sales Summit** is designed to help the best get better! Gain insight into opportunities and meet managers who manage your clients' assets. Topics range from **trends** to **legislative changes** to **economic updates** to **proven sales techniques**, all from the best in the business. The 2002 Summit, nearly 600 strong, was a sellout, so mark you calendar for next year and get ready to reach for your best!

Jan. 22, 2003 Early Bird Deadline!

401(k) Sales Summit

Feb. 27 – Mar. 1, 2003

The Westin Kierland Resort and Spa

Scottsdale, Arizona

Calendar of Events

		ASPA CE Credit
2002		
Dec 4	C-3, C-4, and A-4 exams	*
Dec 31	Deadline for 2002 edition exams for PA-1 (A&B)	**
Dec 31	Deadline for 2002 edition exams for Daily Valuation	***
2003		
Jan 8	Deadline to Submit ASPA 2001–2002 CE Reporting Form	
Jan 30–31	Los Angeles Benefits Conference Universal City, CA	16
Feb 27–Mar 1	401(k) Sales Summit Scottsdale, AZ	15
Mar 1	Grades for fall 2002 exams released	
May 1–2	Great Lakes Area Benefits Conference Chicago, IL	TBD
May 13–14	Mid-Atlantic Benefits Conference Philadelphia, PA	16
June 12–13	Northeast Area Employee Benefits Conference Boston, MA & White Plains, NY	(each) 8
Jul 27–30	Summer Conference Irvine, CA	20
Oct 26–29	Annual Conference Washington, DC	20

* Exam candidates earn 20 hours of ASPA continuing education credit for passing exams, 15 hours of credit for failing an exam with a score of 5 or 6, and no credit for failing with a score lower than 5.

** PA-1A and B exams earn five hours of ASPA continuing education credits each for passing grades.

*** Daily Valuation exams earn 10 hours of ASPA continuing education credits each for passing grade.

Did You Know?

ASPA's first Annual Conference was held October 17–18, 1969 at Purdue University. There were 39 professionals in attendance. One year later, the second Annual Conference was held in Philadelphia and about 120 people attended. Given that over 1,530 retirement plan professionals attended the 2002 ASPA Annual Conference, you can certainly say ASPA has come a long way since those early years!