STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF EATON

MUNICIPAL EMPLOYEES RETIREMENT SYSTEM OF MICHIGAN ("MERS"), a Michigan public corporation as Trustee and Assignee for Eaton County,

Capital City Lodge No. 141 of the Fraternal Order of Police, Labor Programs, Inc., Command Officers Division of the Eaton County Sheriff Department (the "Command Officers"),

The Police Officers Labor Counsel Non-Supervisory Unit of Eaton County Sheriff Department (the "Deputies"), and,

Capital City Lodge No. 141 of the Fraternal Order of Police, Central Dispatch Supervisory Unit of the Eaton County Sheriff Department (the "Dispatch Supervisors"),

Plaintiff,

vs.

GABRIEL, ROEDER, SMITH & COMPANY, a Michigan corporation,

Defendant.

Case No. 98-1025 CZ
Honorable Thomas S. Eveland
Hon. Allen L. Garbrecht
(Sitting by assignment)

_______________________________________/

Michael J. Hodge (P25146)
Sherry L. Katz-Crank (P40500)
Attorneys for Plaintiff
One Michigan Avenue, Ste. 900
Lansing, Michigan 48933
(517) 487-2070

James F. Hunt (P31208)
Eric S. Goldstein (P45842)
Attorneys for Defendant
1301 W. Long Lake Road, Ste. 250
Troy, Michigan 48098
(248) 641-1800

Michael J. Moquin (P27304)
General Counsel for Plaintiff
447 N. Canal Road
Lansing, Michigan 48917
(517) 622-4401

_______________________________________/

BRIEF *AMICUS CURIAE* OF THE AMERICAN ACADEMY OF ACTUARIES

STATEMENT OF INTEREST

The American Academy of Actuaries (the "Academy") is a not-for-profit professional association incorporated in Illinois with its primary place of business in Washington, D.C. The Academy was established in 1965 to provide a common membership organization for actuaries of all specialties (e.g., property and casualty insurance, health insurance, life insurance and pensions) practicing in the United States. The Academy's membership is approximately 13,500 actuaries nationwide, or 85% of all the actuaries practicing in the United States.[1]

The Academy serves as the actuarial profession's primary vehicle for public policy outreach, communications, and professionalism. To articulate its purpose and guide its activities into the next century, the Academy has adopted the following Mission Statement:

> As the organization representing the entire United States actuarial profession, the American Academy of Actuaries serves the public and the actuarial profession both nationally and internationally through:
>
> a. establishing, maintaining, and enforcing high professional standards of actuarial qualification, practice, and conduct,
>
> b. assisting in the formulation of public policy by providing independent and objective information, analysis, and education, and

---

[1] The Academy has four sister organizations in the United States: the Society of Actuaries and the Casualty Actuarial Society, both of which are responsible for administering the private examination system described in this brief; the Conference of Consulting Actuaries, which provides continuing education and other services to actuaries working as consultants; and the American Society of Pension Actuaries, a membership organization for professionals (including actuaries, attorneys, accountants and plan administrators) who provide services to pension plans under the Employee Retirement Income Security Act, 29 U.S.C. § 1101 *et seq*. ("ERISA"). All of these organizations look to the Academy as the organization with primary responsibility for fostering actuarial professionalism in the United States.

c. in cooperation with other organizations representing actuaries

– representing and advancing the actuarial profession, and

– increasing the public's recognition of the actuarial profession's value.

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

The Academy fulfills its mission with respect to actuarial professionalism in several ways. It maintains the Joint Committee on the Code of Professional Conduct, a committee charged with developing the ethical standards imposed upon member actuaries by the Academy and all of its sister organizations.[2] The Academy is also home to the Actuarial Standards Board, the body responsible for establishing standards of practice to guide actuaries as they perform a wide range of professional services. The Academy, through its Committee on Qualifications, also establishes the *Qualification Standards for Prescribed Statements of Actuarial Opinion*. These *Qualification Standards* require all members of the Academy and its sister organizations who issue statements of actuarial opinion for purposes of compliance with law, regulation, actuarial standards of practice or accounting requirements to have obtained basic education and experience and to obtain ongoing continuing education. Additionally, the Academy supports the Actuarial Board for Counseling and Discipline, the body charged with investigating complaints against actuaries, counseling actuaries in professional practice, and recommending to the membership organizations that actuaries who are found to have breached the *Code of Professional Conduct* be appropriately disciplined.

---

[2] The Academy and its four sister organizations have all adopted the *Code of Professional Conduct*. Members who fail to comply fully with the Code are subject to discipline up to and including expulsion from membership in the organizations.

Thus, the Academy has primary responsibility for setting and enforcing the professional standards of actuaries throughout the United States. In addition to these functions, the Academy maintains numerous committees that focus on various aspects of actuarial professionalism. These committees report to the Academy's Council on Professionalism, an oversight body chaired by a Vice President of the Academy. The Council is responsible for ensuring that the Academy fulfills its responsibility to foster a high level of professionalism among members of the actuarial profession.

To become an actuary, an individual must pass a series of challenging examinations administered by the Casualty Actuarial Society or the Society of Actuaries.[3] These examinations test candidates' knowledge of mathematics, statistics, risk theory, interest theory, finance, insurance, pension, various actuarial methods and techniques, and applicable laws and regulations. *See, e.g., Associateship and Fellowship Catalog*, Society of Actuaries (1999); *see also* Examination Syllabus, Casualty Actuarial Society (1999). The average candidate takes over nine years to complete the examinations, and more than half of the candidates who begin the examination process fail to complete it. Thus, fewer than 19,000 individuals nationwide have been able to achieve membership in the actuarial profession. *See* Directory of Actuarial Memberships (1999).

---

[3] A separate, shorter series of examinations is jointly sponsored by the federal government, the Society of Actuaries and the American Society of Pension Actuaries for actuaries who wish to provide professional services to pension plans that qualify for special tax status under ERISA. *See* Regulations of the Joint Board for the Enrollment of Actuaries, 20 C.F.R. § 901.00 *et seq.* However, the vast majority of actuaries who pass the federal examinations also obtain membership in the Society of Actuaries and the Academy through the profession's private examination process. The American Society of Pension Actuaries also offers a series of examinations that permit candidates to demonstrate highly-specialized knowledge of actuarial methods and techniques as well as the complex legal and regulatory requirements of ERISA.

The Academy takes actuarial professionalism seriously, and with good reason. Actuaries play a key role in maintaining the financial health of the nation's private and governmental pension system, determining plan contributions through selecting and applying a complex series of economic and demographic assumptions and, in some instances, assisting with plan design and administration. Actuaries also play a crucial role in maintaining the solvency of the nation's insurance companies, identifying and quantifying the risks those companies face and setting appropriate reserves to meet the companies' obligations. Indeed, the legislators and regulators of nearly every state, including those in Michigan, rely upon actuaries to certify annually to the adequacy of insurance companies' reserves. *E.g.,* M.C.L.A. 500.834 *et seq.*; M.C.R. 500.881-89; M.C.L.A. 500.438(1).[4] The actuarial certification is a required element of every insurer's annual statement to supervising regulators, and regulators rely upon it as assurance that the insurer's valuation actuary has carefully evaluated whether the insurer's reserves make adequate provision for its liabilities.

Additionally, an increasing number of actuaries are bringing their sophisticated understanding of risk management and finance to banks, securities firms and other financial service providers. To protect the financial stability of all of these institutions and thereby to protect the public, it is essential that actuaries adhere to high standards of conduct, practice and qualification.

---

[4] To be eligible to certify to the reserves of a life or health insurance company in Michigan, an actuary must be a member of the Academy. M.C.R. 500.887. For property and casualty insurance companies, the actuary must be a member of the Academy or of the Casualty Actuarial Society. *Statement of Actuarial Opinion Instructions*.

A determination by this Court that actuaries are not professionals could only be harmful to the reputation of the actuarial profession and detrimental to the professionalism initiatives of the Academy. Such a determination would not only be in our view erroneous, but would unfairly call into question the highly specialized education, skill and knowledge that actuaries bring to their work on behalf of the American public. For this reason, the Academy and its members have a compelling interest in the Court's decision.

ARGUMENT

Before the Court can decide the defendant's motion for summary judgment, it must determine whether actuaries are "professionals" for purposes of Michigan's statute of limitations, M.C.L. 600.5805.[5] In addressing the same issue with respect to accountants, the Michigan Supreme Court concluded that § 5805 applies not only to statutory malpractice actions, but also to suits arising out of common law malpractice claims. *Local 1064, RWDSU AFL-CIO v. Ernst & Young*, 449 Mich. 322, 328, 451 N.W.2d 187 (1995), *citing Sam v. Balardo*, 411 Mich. 405, 308 N.W.2d 142 (1981). In reaching that conclusion, the Supreme Court emphasized that the common law need not be defined solely by reference to Michigan case law. Rather, the Court held that "the traditional nature and origin of the common law make it clear that a consideration of judicial decisions from other jurisdictions is not prohibited here." *Local 1064, supra* at 330, *citing Sam, supra* and 15A C.J.S., Common Law, § 21, pp. 78-79. This Court, therefore, has discretion to look beyond Michigan case law for common law precedent to determine whether actuaries are professionals.

---

[5] The Academy takes no position with respect to the substantive merits of the plaintiffs' claims against the defendant.

Federal case law unarguably answers that question in the affirmative. The clearest statement to that effect appears in *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602 (1993).

The *Concrete Pipe* case arose out of the Multiemployer Pension Plan Amendments Act, 29 U.S.C. § 1401 (the "MPPAA"), an amendment to ERISA. Under the MPPAA, several participating employers can sponsor a single pension plan, permitting employees to receive service credit for work done for any participating employer. *Concrete Pipe,* 508 U.S. at 605-06. When an employer withdraws from the plan, the plan's actuary determines the present value of the plan's vested benefits, selecting and applying a complex series of assumptions (*e.g.*, mortality of covered employees, future investment returns and likelihood of benefits vesting). The actuary then determines the unfunded vested benefits by deducting the value of the plan assets. *Id*. at 609-10, *citing* 29 U.S.C. § 1393 (a)(1) and (3). The withdrawing employer's liability (*i.e.*, the amount needed to meet the employer's portion of the plan's obligations) is assessed based on the actuary's calculations. *Id*. at 610, *citing* 29 U.S.C. § 1391. If the employer disputes the assessment in arbitration, the MPPAA provides that the actuary's determination of the plan's unfunded vested benefits is presumed correct unless the withdrawing employer can demonstrate that the actuarial assumptions and methods used were unreasonable in the aggregate or that the plan's actuary made a significant error in applying those methods or assumptions. *Id*. at 611, *citing* 29 U.S.C. § 1401(a)(3)(B).

In *Concrete Pipe*, a withdrawing employer challenged the presumption that plan actuaries' determinations are correct on due process grounds, arguing, *inter alia*, that actuaries are "hired

guns" who select their assumptions and apply their methods simply to produce the results directed by the plan trustees. The Supreme Court rejected the employer's argument, stating:

> For a variety of reasons, this actuary is not, like the trustees, vulnerable to suggestions of bias or its appearance. Although plan sponsors employ them, *actuaries are trained professionals subject to regulatory standards*. The technical nature of an actuary's assumptions and methods, and the necessity for applying the same assumptions and methods in more than one context, as a practical matter limit the opportunity an actuary might otherwise have to act unfairly toward the withdrawing employer.

508 U.S. at 632 (emphasis added), *citing* 29 U.S.C. § 1241, § 1242; 26 U.S.C. §7701(a)(35). The Court further held that the "reasonableness" of the plan actuary's methodology should be evaluated "by reference to what the actuarial profession considers to be within the scope of professional acceptability in making an unfunded liability calculation," because "the methodology is a subject of *technical judgment within a recognized professional discipline....* " *Id*. at 635 (emphasis added). Finally, the Court held that the presumption that the actuary's determinations are correct does not violate due process:

> The employer merely has a burden to show that an *apparently unbiased professional*, whose obligations tend to moderate any claimed inclination to come down hard on withdrawing employers, has based a calculation on a combination of methods and assumptions that falls outside the range of reasonable actuarial practice. To be sure, the burden may not be so 'mere' when one considers that actuarial practice has been described as more in the nature of an 'actuarial art' than a science, and that the employer's burden covers 'technical actuarial matters with respect to which there are often several equally "correct" choices.' But since imprecision inheres in the choice of actuarial methods and assumptions, the resulting difficulty is simply in the nature of the beast.

Id. at 635-36 (emphasis added) (internal citations omitted).

Thus, the Supreme Court has clearly acknowledged actuarial practice as a "recognized professional discipline," both in its descriptions of the profession and in its holding that the reasonableness of an individual actuary's methods and assumptions should be determined "by reference to what the actuarial profession considers to be within the scope of professional acceptability." *Id*. at 635. That holding is consistent with a malpractice standard of liability (i.e., "failure to exercise that degree of skill, care and diligence exercised by members of the same profession, practicing in the same or similar locality," *Becker v. Meyer Rexall Drug Company*, 141 Mich. App. 481, 484-85, 367 N.W.2d 424 (1985) and cases cited therein). It is not consistent with the lower "reasonable man" standard applied in ordinary negligence suits. *Shirilia v. Barrios*, 58 Mich. App. 721, 725, 228 N.W.2d 595 (1975).

Congress and the lower federal courts have also recognized actuaries as skilled professionals whose work involves the application of expert technical judgment. Among the many tasks performed by actuaries is the determination of employer contributions to adequately fund defined benefit employee benefit plans. When Congress enacted ERISA, it considered and rejected the possibility of imposing uniform methods and assumptions for actuaries to use. Instead, Congress deferred to actuaries' professional judgment, recognizing that there would always be a range of assumptions that would fall within ERISA's "reasonable in the aggregate" standard. "Congress intended to give actuaries some leeway and freedom from second-guessing ... 'any attempt to specify actuarial assumptions and funding methods for pension plans would in effect place these plans in a straitjacket ... and would be likely to result in [unreasonable] cost estimates.'" *Vinson & Elkins v. Commissioner of Internal Revenue*, 7 F.3d 1235, 1238 (5th Cir. 1993), *quoting* H.R. Rep. No. 807, 93d Cong., 2d Sess. 27 (1974) U.S. Code Cong. & Admin.

News 4639, 4670, *reprinted in* 2 Subcomm. on Labor of the Senate Comm. On Labor & Public Welfare, 94th Cong., 2d Sess., *Legislative History of the Employee Retirement Income Security Act of 1974*, at 3115, 3147 (Comm. Print 1976). For this reason, federal courts have declined to "disturb this legislative choice to delegate to actuaries an important role in plan funding decisions ... 'the actuarial assumptions made by actuaries in estimating future pension costs are crucial to the application of minimum funding standards for pension plans.'" *Citrus Valley Estates, Inc. v. Commissioner of Internal Revenue*, 49 F.3d 1410, 1414 (1995), *quoting Wachtell, Lipton, Rosen & Katz v. Commissioner of Internal Revenue*, 26 F.3d 291, 295-96 (2nd Cir. 1994). *Accord*, *Vinson & Elkins*, *supra*; *Rhoades, McKee & Boer v. United States*, 43 F.3d 1071, 1075 (6th Cir. 1995).

Actuaries' application of professional judgment and techniques is not limited to pension practice. As is described above, actuaries also evaluate the liabilities of all types of insurance companies and establish appropriate reserve levels to meet companies' obligations. State legislatures and insurance regulators nationwide rely upon actuaries to certify annually to the adequacy of insurance company reserves. These certifications also require the actuary to select a myriad of assumptions (*e.g.*, investment rate of return, claims made, claims incurred but not reported, etc.) and to employ highly technical methods in their application. Indeed, the Michigan Supreme Court has recognized that actuaries' work for insurers involves a substantial level of professional expertise. "It is well-nigh impossible for the ordinary layman to understand the

intricacies of actuarial accounting." *Hetchler v. American Life Insurance Co.*, 266 Mich. 608, 614; 254 N.W. 221 (1934).[6]

Moreover, the actuarial profession itself demands a high level of professional skill and diligence from its members. The *Code of Professional Conduct* requires actuaries, among other things, to "act honestly," "perform professional services with integrity, skill and care," "perform work only when qualified to do so," and ensure that any professional services performed by them or under their direction "meet applicable standards of practice." Precepts 1-4, *Code of Professional Conduct of the American Academy of Actuaries* (amended 1995). The standards that actuaries must meet are not few; the Actuarial Standards Board has issued almost forty

---

[6] The fact that actuaries are not licensed by the State of Michigan should not be taken as proof that actuaries are not professionals under the common law. M.C.L. 600.5838 establishes a two-year statute of limitations for malpractice suits against any individual who represents himself as a member of a "licensed profession," but the Michigan Supreme Court has already determined that Section 5838 is a statute of accrual, not of definition. *Adkins v. Annapolis Hospital*, 420 Mich. 87, 94, 360 N.W.2d 150 (1984); *accord*, *National Sand v. Nagel Construction*, 182 Mich. App. 327, 340, 451 N.W.2d 618 (1990). Thus, Section 5838 does not bar a determination that actuaries are professionals as a matter of common law.

Moreover, as the Supreme Court of Nebraska has recognized,

> [A] profession is far more than the mere possession of a license to ply a trade ... The definition [of a profession] stresses the long and intensive program of preparation to practice one's chosen occupation traditionally associated only with professions ... To rely solely on the possession of a license distorts the definition, as it would include many occupations which were traditionally not considered to be professions simply because they were licensed.

Tylle v. Zoucha, 226 Neb. 476, 412 N.W.2d 438, 440-41 (1987). The actuarial profession's private examination system and the membership requirements and *Code of Professional Conduct* of the Academy and its sister organizations demand far more of actuaries than a state license would and, as we have demonstrated, legislators, regulators and the public can and do rely upon actuaries' professionalism without the need for further licensing.

separate *Actuarial Standards of Practice* and other publications to guide actuaries in their professional practice, including standards on selection of assumptions, data quality, documentation of work product and actuarial communications that might apply in this case. In addition, actuaries are expected to be familiar with the laws and regulations applicable to their practice, and are prohibited from providing professional services if those services will be used to "violate or evade the law." Precept 9, *Code of Professional Conduct*. Thus, the actuarial profession holds itself to high standards of conduct, qualification and practice, and disciplines individual actuaries who fail to meet those standards.

More than a century ago, in holding that chemists were "professionals" for purposes of immigration law, the United States Supreme Court made the following observations:

> In the New Century Dictionary the definition of the word 'profession' is given, among others, as '[a] vocation in which a professed knowledge of some department of science or learning is used by its practical application to the affairs of others, either in advising, guiding, or teaching them, or in serving their interests or welfare in the practice of an art founded on it. Formerly, theology, law, and medicine were specifically known as "the professions"; but, as the applications of science and learning are extended to other departments of affairs, other vocations also receive the name. The word implies professed attainments in special knowledge, as distinguished from mere skill, — a practical dealing with affairs, as distinguished from mere study or investigation; and an application of such knowledge to uses for others, as a vocation, as distinguished from its pursuit for its own purposes.'

United States v. Laws, 163 U.S. 258, 266 (1896).[7] The Court observed that chemistry "is a science, the knowledge of which is to be acquired only after patient study and practice." *Id*. The same can be said of actuarial science. Actuaries acquire their expertise only through years of

---

[7] A comparable definition is still in common use. *See Black's Law Dictionary* at 1210 (6th Ed. 1990).

study and examination, and apply that expertise not only to the benefit of their immediate clients and employers, but also to the benefit of the public. To deny recognition of actuaries' professional status would not only be factually inaccurate but would unfairly denigrate the contributions that the actuarial profession continually makes to the financial security of American society.

CONCLUSION

For the foregoing reasons, the Academy respectfully requests that the Court include in its ruling on defendant's motion for summary judgment express recognition that actuaries are professionals.

Respectfully submitted,

AMERICAN ACADEMY OF ACTUARIES

BY: ________________________________

Lauren M. Bloom
General Counsel
1100 Seventeenth Street, N.W., 7th Floor
Washington, D.C. 20036
(202) 223-8196

June 25, 1999