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The Actuary as an Expert Witness

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Authors

Jeremy Levitt, FSA, MAAA; Larry Stern, FSA, MAAA

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Introduction

Actuaries play a crucial role in society by assessing risk, ensuring companies maintain financial stability, and providing mathematical insight to decision-makers. Traditional actuarial roles typically entail pricing, reserving, or capital focused roles within the insurance industry. Actuarial experts are often called upon to opine on complex legal disputes, which is governed by various standards of practice and professional codes of conduct. In this whitepaper, we present:

- A definition of what constitutes an expert witness, highlighting the necessary qualifications, specialized knowledge, experience, and the distinction between consulting and testifying experts.
- Governance of actuarial expert testimony, outlining the professional standards and ethical codes, such as ASOPs and the Code of Professional Conduct.
- The responsibilities of actuaries in providing expert testimony, including simplifying complex actuarial issues for courts and adhering to evidentiary rules.
- Examples of common legal disputes where actuaries are called upon, such as insurance pricing, pension disputes, and the cost of insurance adjustments.
- The increasing demand for actuaries as expert witnesses, particularly in insurance and financial litigation.

Definition of an Expert Witness

An expert is an individual posing comprehensive and authoritative knowledge or skill in a specific area. Their expertise is recognized through substantial experience, education, and proven competency in their field. An expert witness is an individual authorized to testify in legal proceedings due to their specialized knowledge, skills, education, or experience in a particular field. Their role is to assist the court (judge and jury) in comprehending complex technical or scientific issues, thereby contributing to informed judicial decisions.

There are two types of expert witnesses:

- **Consulting Expert:** This expert provides insight into the issues and facts pertinent to the dispute but does not testify in court. Their responsibilities include reviewing all discovery materials, advising attorneys on what should be presented to the testifying expert, and offering support through peer review of the testifying expert's work.
- **Testifying Expert:** This expert submits reports to support the party they represent, undergoes deposition by the opposing side, and delivers testimony before a judge and jury.

Governance

Actuarial expert consulting or testifying expertise is governed by numerous standards of practice, such as ASOP 17, as well as the Code of Professional Conduct. An actuary offering expert testimony provides a vital service to their client, the judicial forum, and the public by clarifying complex technical concepts that are often essential for resolving disputes. ASOP 17 supplements the Code of Professional Conduct and is intended to provide specific guidance with respect to the actuary providing expert testimony. The first three Precepts of the Code lay a crucial foundation for actuaries serving as an expert witness:

- **Precept One:** An actuary must conduct themselves with honesty, integrity, and competence, upholding the profession's responsibility to the public.
- **Precept Two:** Actuaries should only perform actuarial services for which they are qualified.
- **Precept Three:** Actuaries shall ensure they perform actuarial services satisfying applicable standards of practice.

The Role of the Actuary as an Expert Witness

An actuary as an expert witness is a person qualified to testify as an expert. The actuary providing testimony in a forum must demonstrate being qualified under the evidentiary rules applicable to the forum. Evidentiary rules determine what evidence can be admissible in a dispute. There are five general rules of evidence that need to be followed: admissible, authentic, complete, reliable, and believable.

The forum may vary depending on the circumstances of the engagement. The forum for oral testimony may be at trial in a court of law, in a hearing for arbitration, or in a deposition outside of court; the forum for written testimony may be by declaration or affidavit.

The primary role of an actuary in most disputes is to educate the court – both judge and jury – by elucidating complex technical issues central to the case. While the responsibility of delivering a favorable verdict rests with the judge and jury, actuaries, with their specialized education, training, and experience, are uniquely equipped to translate intricate insurance concepts into accessible language, helping non-experts grasp the key issues.

Typical Cases Where Actuaries Are Asked to Opine

Appendix 1 of ASOP 17 outlines the various practices where actuaries may be called upon to provide expert testimony. These encompass a wide range of issues, including but not limited to:

- Actuarial present values of retirement or other benefits
- Actuarial values incident to a divorce
- Adequacy or appropriateness of reserves, premium rates, pricing or underwriting procedures, or provision for administrative costs
- Cost impact of claims-made or claims-paid financing
- Cost impact of risk classification systems, tort liability decisions, or legislative/regulatory proposals
- Actuarial reviews of provider reimbursement amounts, provider network adequacy, and contractual provisions for various health care services
- Lost earnings of a decedent or injured person and the actuarial present value of such lost earnings
- Malpractice of an actuary
- Actuarial equivalency or other technical provisions in the design or administration of defined benefit pension plans
- Financial impact on a defined benefit plan of alternative interpretations of, or amendments to, disputed plan provisions
- Value of an insurance company or other entity
- Withdrawal liability assessments under multiemployer benefit plans

Opportunities for Actuaries

Insurance is a legally binding contract between two parties: the insured and the insurer. This agreement is formalized through an insurance policy, which explicitly outlines the obligations of each party. Disputes often arise when one party believes the other has violated the terms of the contract.

Universal life (UL) policies, in particular, can give rise to litigation when insurers increase the cost of insurance (COI) rates or fail to reduce them in accordance with policy terms, leading to potential class action lawsuits by policyholders. The evolution of UL products in the 1980s marked a significant shift in the insurance industry, separating the savings and protection components of traditional whole life policies.

In parallel with the introduction of UL products, reinsurers began pricing UL reinsurance on a YRT basis. Although YRT premiums were non-guaranteed beyond the first year, cedents generally assumed that rates would remain stable, especially after decades of no adjustments.

Over the past two decades, numerous COI and YRT rate adjustments have occurred, sparking a wave of litigation and arbitration. COI disputes have resulted in class action lawsuits by policyholders, while YRT disputes have often led to reinsurance arbitrations. These complex cases have created significant demand for actuaries to serve as expert witnesses, offering lucrative opportunities for experienced professionals in this specialized field of practice.

Conclusion

The role of actuaries as expert witnesses is increasingly critical in resolving complex legal disputes, particularly within the insurance and financial services industries. Armed with specialized knowledge and governed by strict professional standards, actuaries provide indispensable insights that help courts and arbitrators make informed decisions on intricate technical matters. From insurance pricing and pension disputes to cost of insurance adjustments, the expertise of actuaries enhances the legal process by translating complex financial concepts into clear, understandable terms. As legal demands continue to grow, actuaries have a significant opportunity to contribute their skills as expert witnesses, reinforcing their crucial function in both business and society.

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