

PENSION CONSULTANTS FACE CLAIMS OF CONFLICT OF INTEREST

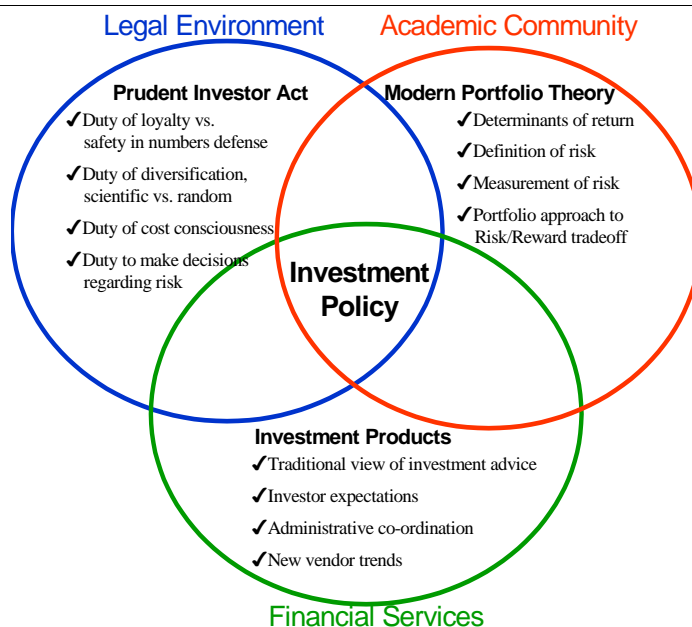
Defined benefit pension plans represent an enormous pool of investment assets. Pensions & Investments magazine reports that, as of September 30, 2003, the top 1,000 largest retirement plans (including both defined benefit and defined contribution plans) held more than \$4.8 trillion. Despite the declining popularity of traditional pension arrangements, defined benefit plans represent 75% of this total, or \$3.6 trillion. The Board of Governors of the Federal Reserve report that in 2002, private company pension assets totaled \$3.7 trillion, while public sector plans held an additional \$2.0 trillion. Consulting firm Milliman USA reports that in 2003, the 100 largest corporate pension plans held \$879 billion in assets, and booked \$143.8 billion in investment gains for the year, a 19.6% rate of return. According to the Financial Services Fact Book, pension plan assets represented 15% of total financial services assets in 2002.

Large Consultants Drive Pension Investment Practices

How are these massive investment pools invested? While each plan has its own management structure and approach, investment consulting firms play a major role in recommending investment managers and setting asset allocation policy for many of these plans. Forbes reports that almost 80% of public sector plans, and 41% of corporate pension funds, use investment consultants. Most of these consultants are large firms, such as Watson Wyatt Worldwide, Frank Russell Company, Mercer Investment Consulting, Wilshire Associates, Segal Advisors and Callan Associates. These large firms are particularly prevalent in the public sector, where consultant selection decisions are frequently based on factors such as the number of similar plans served. For example, Mercer Investment Consulting's public pension clients control a combined \$434 billion—roughly 20% of the aggregate assets for public sector plans.

SEC Investigates Consulting Relationships

Of course, size and market share are not inherently problematic. Many large, dominant companies provide superior service at a reasonable price. However, many financial services insiders question the role played by pension consultants. In December 2003, the Securities Exchange Commission (SEC) began an investigation into the relationship pension funds have with investment consulting firms. The SEC sent information request letters to numerous investment consulting firms to "determine the practice of these consultants." Lori Richards, director of the SEC's office of compliance and investigations told Dow Jones, "We sent the same request for documents to a large cross-section of pension consultants, including some of the largest." Why would the SEC care how pension consultants conduct their business? Some consultants are alleged to have based their client recommendations on the amount of compensation they themselves receive from money



managers, through schemes referred to collectively as "pay to play." The SEC's Richards states: "Allegations of pay to play are very serious and really triggered our interest."

The "Pay to Play" Game

How does a money manager "pay to play" with an investment consultant? Consultants (as far as we know) don't accept bribes. Rather, they offer high priced consulting, conference and data services to money managers. In many cases, the investment consultant's revenues from money managers far exceeds its revenues from plan sponsor clients. For example, Edward Siedle of Benchmark Financial Services, a former SEC securities attorney, reports that Mercer bills one of its top clients, the Chicago Teachers Pension Fund, \$250,000 per year. However, Mercer also holds seminars for the money managers used by the Fund. Siedle reports that Mercer receives up to \$58,000 each from the approximately 40 money managers the Fund uses. If fees from the managers average \$30,000, Mercer's fees from the managers would be almost five times as large as their fee from the Teachers Pension Fund. Despite the large size of these fees, and the possibility for conflicts, many plan sponsors are not aware of these compensation arrangements. When Emmanuel Bargas, investment program manager for the \$240 million Santa Clara Valley Transportation Agency (a Mercer client) was asked by Forbes about Mercer's relationship with money managers, he replied: "We're not aware Mercer is being paid by money managers."

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Other large consulting firms maintain similar arrangements with money managers. For example, San Francisco based Callan Associates is the country's largest pension consultant. Callan's government clients hold \$800 billion in pension assets. According to Donald Trone, director of the Center for Fiduciary Studies, and a former Callan consultant, Callan charges money managers up to \$51,000 each to attend Callan Institute seminars. Trone also reports that managers pay Callan \$40,000 per asset class to calculate their investment performance, and a similar amount for the software necessary to do the measurements. Callan disputes these figures, but refuses to report their version, citing client confidentiality. [Callan's ADV Part II, a disclosure form filed with the SEC, indicates that annual membership fees in the Callan Investment Institute "range from \$16,000 to \$51,500 per organization, depending on the level of membership benefits selected by the member. Callan asserts that money managers participating in its programs "are not entitled to, nor do they receive, any preferential treatment from our fund sponsor consultants."

Current Disclosure Rules Ineffective

Under current law, consultants are permitted to serve both plan sponsor clients, and the money managers that they recommend, provided that they disclose these relationships. Unfortunately, current disclosure is extraordinarily vague. For example, when Bloomberg.com columnist John Wasik asked Callan about its disclosure regarding possible money manager conflicts to the City of San Diego's Employees Retirement System, spokeswoman Deanne Christopolous replied: "Please refer to Form ADV II as it adequately addresses your request." However, the Callan ADV provides little specific information that could help a prospective client evaluate the scope of possible conflicts. For example, the Form indicates that Callan provides money managers with services such as "competitive analyses of an investment management firm's business management and products," which cost "between \$3,000 and \$732,000 per year."

CALLAN'S RELATIONSHIP WITH THE CITY OF SAN DIEGO

The City of San Diego's Employees Retirement System is managed by a board of thirteen trustees. Eight of the trustees are City employees, one is a retired employee, the remaining four trustees are independent of the City.

In 2002, one of the independent trustees, Diann Shipione, began questioning whether Callan's advice to the City's Retirement System

was completely impartial. In June 2002, Ms. Shipione, a vice president of investments with UBS Financial Services, wrote to San Diego Mayor Dick Murphy and Retirement System board member Richard Vortmann, requesting a comprehensive audit of the fund. Ms. Shipione asked for information in numerous areas, including conflict of interest and disclosure policies, risk management, asset allocation and investment strategies. Of particular concern was the relationship between Callan and Alpha Management Inc., a registered broker-dealer affiliate. In 1998, Callan sold Alpha Management to a brokerage subsidiary of Bank of New York. Under the terms of the sale, Bank of New York makes periodic, fixed payments to Callan each year. Noting that some money managers for the San Diego fund were instructed to direct trades to Alpha, Shipione questioned whether Callan maintained an ongoing financial interest in Alpha's trading volume. Ms. Shipione noted that the easiest, simplest, and most untraceable way of paying a consultant is through execution costs and commissions. In 2002, Alpha, a very small firm, ranked eleventh among brokerages used by the San Diego Retirement System, earning \$152,394 in commissions from the System's trades. Mayor Murphy never responded to Shipione's concerns, while her colleague, Vortmann, scolded her for corresponding with the Mayor before raising the issue at a board meeting.

Also in 2002, Ms. Shipione questioned the City's decision to underfund its pension obligations. Due to a combination of underfunding and poor investment performance, the retirement system currently has a \$1.15 billion deficit. This accumulated deficit triggered a lawsuit by retired City employees, claiming that the decision to underfund the Retirement System was illegal, and that members of the retirement board had conflicts of interest. San Diego settled this lawsuit on June 8, 2004, agreeing to contribute a record \$130 million for the fiscal year beginning July 1, and the amount due the plan, as calculated by the System's actuary, in subsequent years.

On February 19, 2004, Callan's president, Ronald D. Peyton, wrote the firm's clients (including the San Diego Retirement System) to update them on the SEC investigation of Callan and other pension consultants. Peyton wrote: "It appears that the heart of this examination is the manner in which consultants are compensated." He added that Callan had provided, "tens of thousands of pages of information and electronic documents" to the SEC. When Ms. Shipione received a copy of Pey-

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*Diann Shipione
Trustee, San Diego
Employees Retirement System*

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Callan president Ronald Peyton

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ton's letter, she noted that the SEC investigation focused on the same issues she had attempted to raise almost two years earlier. She suggested that the issue be discussed publicly at a March 19, 2004 board meeting. However, the issue was only mentioned in passing, after she asked about it. Two days after the board meeting, Shipione wrote to the entire board, demanding that it write its agendas in plain English, publicly discuss critical issues such as the SEC investigation, and fully disclose any conflicts of interest of trustees, staff, attorneys, and consultants.

Callan appears to believe that it is being unfairly persecuted by the SEC investigation and related press coverage (such as the April 19, 2004 Forbes article, "A Bribe By Any Other Name") of its role as a pension advisor. On April 7, 2004, Callan president Peyton wrote to Callan clients responding to the Forbes article, and complaining that Callan detractors such as Benchmark Financial's Edward Seidle were "trying to start a business of investigating consultants." While we agree that some of Seidle's comments can be bombastic (e.g., "We are confident that when disclosure comes, i.e., full and complete disclosure, the fact that the consulting industry has been lying to pension clients will be apparent to all."), we believe that Callan's potential conflicts of interest merit reasonable scrutiny by concerned parties.

*"...[assets] must be managed solely in the interest of the plan, its participants and beneficiaries. No other agendas are appropriate."
Secretary of Labor Elaine Chao*

DEPARTMENT OF LABOR ALSO FOCUSED ON PENSIONS

Supporting the SEC's efforts, the DOL has recently initiated a Fiduciary Education Campaign, focusing attention on pension management. As part of the Campaign, during a June 1 speech at the 49th Annual CEO Summit at Yale, Secretary of Labor Elaine Chao told attendees:

The executive suite needs to focus on pension plan governance itself, especially the responsibility and liability of pension plan fiduciaries.... Under ERISA, retirement plans are not an extension of the corporation... [assets] must be managed solely in the interest of the plan, its participants and beneficiaries. No other agendas are appropriate.

To help fiduciaries better understand their duties, and fulfill their responsibilities, the DOL has released two new booklets, "Meeting Your Fiduciary Responsibilities" and "Understanding Retirement Plan Fees And Expenses." These and other documents are available on the DOL's website at <http://www.dol.gov/ebsa/fiduciaryeducation.html>.

LARGE SETTLEMENT FOR CITY OF NASHVILLE

Press reports describing the San Diego Employees Retirement System tend to portray Diann Shipione as an independent crusader for full and complete disclosure. These reports may well be accurate. However, we are intrigued to note that her employer, UBS Financial Services, was recently involved in a pension consulting conflict of its own.

From 1991 through 1999, the City of Nashville used Paine Webber (subsequently acquired by UBS Financial Services and renamed "UBS PaineWebber" as its sole investment consultant. Under the agreement between Nashville and Paine Webber, Nashville pays no fee for Paine Webber's advice, but instead permits Paine Webber to broker stock trades at a rate of \$0.06/share, until Paine Webber's contracted fee has been earned. The contract further directs the fund's domestic equity investment managers to "place all transactions with Paine Webber unless transactions can be placed through third parties at a lower rate." Accounting firm KPMG reviewed Nashville's trading activity for the fiscal year ending June 30, 1999 and found that 95.8% of domestic equity trades were placed through Paine Webber. Paine Webber's control over trading volume may have stemmed from the fact that Paine Webber did not notify investment managers when their contracted fee had been earned, so that the managers had no way of knowing when they were required to trade through Paine Webber, and when they were free to trade elsewhere. If domestic equity managers had traded at the lowest rate **after** Paine Webber had earned their contracted fee, the fund would have saved an estimated \$305,000 in commissions for the fiscal year ending June 30, 1999 alone.

The KPMG review noted other problems with the Paine Webber relationship. For instance, one of Paine Webber's primary responsibilities was recommending qualified investment managers. As KPMG noted:

The vast majority of trading activity surrounding large cap and small cap domestic equity investments and fixed income investments goes through Paine Webber. In looking at composites of investment manager performance, measured as returns net of investment manager fees as of September 30, 1999, none of the returns met their respective benchmarks over time...Only international equity and emerging market equity managers, representing the portion of the portfolio where trades are not directed through Paine

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Webber, are performing above their MSCI benchmarks over time.

How do underperforming managers keep their jobs? In many cases they don't. KPMG observes:

Since 1991 Paine Webber has recommended that the Board hire 31 investment managers, then subsequently recommended terminating 18 of those managers due to poor performance. This turnover is excessive, and the Board has not questioned Paine Webber's manager selection capabilities.

Of course, while manager turnover is deleterious to the fund's investment performance, it can be quite lucrative for Paine Webber:

The termination of investment managers generates trading activity and commissions.

Given the persistent underperformance of the fund's managers, one wonders why the Nashville Board did not elect to invest at least a portion of the fund's assets in passively managed (indexed) investments. Of course, Paine Webber had a hand in shaping this decision also. As KPMG reports:

In 1996, Paine Webber made a presentation to the Board on passive investing.... In making the presentation, Paine Webber misquoted an investment industry expert in a manner that would have left the Board with the impression that the expert did not recommend passive investing, when in fact, the expert did recommend passive investing in the full quote. Had the Board in 1996 invested the applicable portion of the portfolio in index funds, Metro's pension fund would have earned \$60,000,000 more than it actually earned through December 1999 being invested actively as Paine Webber advised.

KPMG also found that the City's costs for both consulting and investment management were excessive:

The fee Metro was contractually obligated to pay Paine Webber for consulting services for the year ending June 30, 1999 was \$788,747. As a comparison, the mean fees for other similar public funds ranged from \$92,000 to \$163,000 in 1998. However, Paine Webber actually earned a total of \$1,408,773 in commissions for the year ending June 30, 1999 due to the high volume of domestic equity trading through Paine Webber. Similarly, Metro's investment manager fees are higher than fees paid by other similar public funds. A combi-

nation of not aggressively negotiating fees and of not having some portion of the portfolio passively invested in index funds results in Metro's annual investment manager fees being \$2,200,000 more than the average comparable public fund fee.

In UBS's defense, arrangements with the City of Nashville were established years before UBS acquired Paine Webber. UBS agreed to settle Nashville's claims through a payment of \$10 million to Metro's pension trust fund, and the assumption of \$300,000 of Metro's legal fees. Metro Legal Director Karl Dean said UBS Paine Webber worked with the city to avoid a lawsuit and settle the issues identified in the KPMG audit.

Nashville Situation Illustrates Brokerage Firm Conflicts

Although brokerage firms employ numerous savvy investment professionals, using brokerage commissions to provide compensation for purportedly objective investment consulting services introduces numerous possible conflicts of interest. These potential conflicts notwithstanding, a Center for Fiduciary Studies report indicates that Merrill Lynch and Citigroup's Salomon Smith Barney are among the nation's top ten public pension consultants, based on number of clients.

Benchmark's Edward Seidle believes brokerage firms deliver "bad advice for free." To illustrate the potential for conflicts of interest, Seidle made an intriguing offer in a speech at the Florida Police Officers and Firefighters' annual pension trustee school in 2002: "I will pay you a million dollars to be the investment consultant to your pension." Seidle continued: "Conflict of interest ridden advice is bad advice and bad advice, even for free, is never a good deal." He explains that when he made the offer, he had recently completed an investigation of a consultant to a municipal pension fund. The consultant received an annual retainer of about \$300,000 to advise the fund. However, the consultant's total compensation from the fund, including payments from the money managers he recommended, was about \$4 million annually. Serving four pension plans, the consultant earned \$8 million per year, making him the highest compensated broker associated with the wirehouse that employed him. Mr. Seidle concluded that it would be reasonable to pay \$1 million for an account that had the potential to generate \$4 million in annual revenues.

In describing the purpose of his intriguing 2002 offer, Seidle explains:

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"Conflict of interest ridden advice is bad advice and bad advice, even for free, is never a good deal."

*Edward Seidle,
Founder, Benchmark Financial*

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KPMG Audit Report

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I hoped my offer would stun listeners and cause them to think seriously about the economics and conflicts of interest related to the consulting business. While the statements had little impact at the time, it stuck in their minds. Recently as the SEC and others have begun looking into the activities of consultants, people who heard my speech in 2002 tell me they remember my \$1 million offer and now understand what I meant.

Use of broker-affiliated investment consultants is particularly prevalent among Florida pension funds. Merrill Lynch maintains a consulting business in Jacksonville that specializes in recommending money managers to pension funds. Trustees question whether money managers, in turn, direct brokerage business to Merrill. John J. Keane, executive director of the \$900 million Jacksonville Police and Fire Pension Fund has used Merrill's consulting service as a performance monitor for more than twelve years. He comments: "We've heard these issues. One is you have to make trades through Merrill to get on the Merrill Lynch list." Keane notes that his fund does not use Merrill for manager selection, rather, it conducts its own searches through public bulletins that request proposals from firms. Ray Edmondson, executive director of the Florida Public Pension Trustees Association adds: "There's ways of funneling money back to these consultants that nobody knows about. With Merrill, it's to the point where you have to trade through a specific broker before you get on a list for pension funds."

CONFLICTS PUT INDEPENDENTS AT PRICING DISADVANTAGE

Ethical consultants, whose only revenue source is client fees, face significant pricing pressures when competing for business with consultants that generate significant revenues from money managers. Monica Butler, managing director of US consulting at Frank Russell comments: "Of course people want independence. However, are people willing to pay for it?" She notes that Russell concluded twenty years ago "plan sponsors wanted great research more than they wanted independence." Gary Findlay, executive director of the \$4.5 billion Missouri State Employees' Retirement System (MOSERS) notes: "[Plan sponsors] rely heavily on consultants while trying to compensate them on the cheap. You have to pay up for the objectivity and, in the long run, it pays off." Benchmark's Seidle agrees:

"Truly independent consultants who earn nothing other than the disclosed fees paid by pensions are at a competitive disadvantage. They have to compete in terms of disclosed fees with consultants who aren't

even looking to the pension to pay them and can afford to take the assignment for little or nothing. Despite statements in support of independence at consulting firms, pensions generally will not pay a higher disclosed fee to a consultant that has no "pay to play" arrangements.... Consultants should be paid more—substantially more—in disclosed fees. Surreptitious forms of compensation should be eliminated. Disclosure should be mandatory and I believe the Commission [SEC] will propose such a rule in the near future."

MOSERS' Findlay believes that plan sponsors must become more familiar with the types of soft dollar arrangements used by consultants, and should ask probing questions to determine whether the advice they receive is truly independent: "If there is indeed a decline in the availability of consultants who work strictly on a fee for service basis with fee income coming only from plan sponsors, it will become increasingly important for plan sponsors to be diligent in gaining an understanding of the fees that are truly being paid and the consulting biases that may be introduced as a result."

SOME CONSULTANTS CHANGE APPROACH

SEC scrutiny and media focus on possible conflicts of interest has encouraged some consultants to modify their arrangements with money managers, and, in some cases, to reorganize their business structure. For example, each March, consulting firm Watson Wyatt Worldwide sponsors its annual US Global Asset Study (GAS) meeting for consultants and money managers. Historically, money manager participation has been restricted to companies that pay Wyatt an annual membership fee to attend this meeting, and two similar meetings held overseas. However, in 2004, managers that had paid their membership fees were surprised to find that the roster included numerous other non-paying managers. According to PLANSPONSOR.com, the paying managers have asked for, and received, refunds. However, Wyatt reportedly charged managers attendance fees for their European conference held earlier this year. Further, Global Money Management magazine reports that Wyatt has restructured its GAS meeting program, such that managers will pay a fee for each meeting they attend. While the total fee for attending all three meetings will be approximately equal to the prior annual membership fee, managers will no longer pay for meetings that they do not attend.

To reduce perceived conflicts, in March, Wyatt reorganized its consulting operations,

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*Gary Findlay
Executive Director, MOSERS*

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spinning off consultants that primarily service money managers into a new, fifteen person, Boston-based unit called Spring Consulting Group. PLANSPONSOR.com reports that although Spring will operate out of different facilities from Wyatt, the two groups will continue to work together closely.

Similarly, earlier this year, Wilshire Associates separated its consulting division from its funds management division, appointing a new chief executive to lead each unit. Twenty-three year Wilshire veteran Stephen Nesbitt, who had previously headed both groups, left the firm following the reorganization. The Los Angeles Times reports that several state pension funds, including California, Massachusetts, Iowa and Ohio, are reviewing their relationships with Wilshire, following the reorganization, executive departures, and news accounts of an SEC investigation into Wilshire's business practices.

Mercer Investment Consulting is reportedly considering a similar reorganization. Tim Garner, Mercer's Global Head of Investment Consulting admits that the firm is, "pretty sensitized to the fact that there are potential conflicts in what we do. It is not enough to be managing these conflicts; we need to be seen managing these conflicts."

OUR ADVICE TO PLAN SPONSORS

One possible outcome from the SEC investigation and media focus is that some plan sponsors may stop using consultants. In our opinion, such a reaction would be a mistake. Consultants can offer valuable insight into the investment management process, and generally help improve a plan's long-term performance. In fact, under ERISA's prudent expert rule, plan sponsors that lack internal investment expertise may have a fiduciary duty to engage qualified consultants. However, plan sponsors should be more critical of their consulting relationships, and should ask probing questions to identify possible conflicts. In the May 2004 issue of Plan Sponsor magazine, MOSERS' Gary Findlay lists questions for both investment consultants and money managers (see article "A Bribe by Any Other Name Smells As Rotten!").

Wherever possible, plan sponsors should seek out conflict-free consulting relationships. If such a relationship is not possible (e.g., due to pricing constraints or service capabilities), firms organized as true consultants are likely to be less conflicted than brokerage affiliated consulting groups.

Whistleblower Shipione believes that a solution requires new regulations or legislation that will outlaw the most egregious conflicts, while holding conflicted consultants liable for the results of bad advice:

The solutions will have to come in standards applied industry wide. There will need to be some relationships that are simply precluded and perhaps others that can be tolerated, but at a risk to the vendors, not the plan sponsors or System beneficiaries.

Finally, for the time being, plan sponsors should critically review all consultant recommendations, both for possible conflicts of interest, and for general reasonableness. While most pension consultants are ethical and well-intentioned, it is the plan sponsor's responsibility to determine whether the consultant's recommendations are in fact appropriate.

DEPARTMENT OF JUSTICE PROBES PENSION ACTUARIAL PRACTICES

Pensions & Investments magazine reports that the US Department of Justice has launched a broad investigation of pension actuarial consulting firms. Some of these firms, including Watson Wyatt and The Segal Company have investment consulting practices that are under investigation by the SEC. Towers Perrin, Milliman, Aon, and Hewitt also confirmed that they had received a letter from the Department of Justice investigating "anticompetitive agreements or understandings relating to contract terms and conditions among providers of actuarial consulting services." Mercer and Buck declined comment.

The investigation centers on possibly collusive decisions to force pension funds to accept limits or caps on what they would pay in lawsuits alleging substandard actuarial work, or to exempt the firms from any liability.

Sources allege that actuarial firms mandate liability limits because they are co-participants in an insurance pool from which lawsuit damages are paid. In 1987, Wyatt, Buck, Milliman and Towers Perrin established a captive insurance company for malpractice coverage, Professional Consultants Insurance Corp. (PCIC). Buck subsequently withdrew from the co-operative.

Pool participants often audit each others' work in litigation cases. For example, Milliman audited Towers Perrin's work for the \$26 billion Los Angeles County Employees Retirement Association (LACERA). In a 2001 lawsuit, LACERA alleged that Towers' mistakes caused the County to undercontribute \$1.1 billion (\$2 billion, including earnings). LACERA sought over \$2 billion in damages. The suit settled in 2003 for an undisclosed amount.

An unidentified source claimed the insurance pool was dangerous because "the so-called independent auditor is very reluctant to testify because they're in the same pool and share in the losses."

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