

MEMO# 2619

March 14, 1991

PENSION PLAN CONSULTANT NOT LIABLE AS FIDUCIARY

March 14, 1991 TO: PENSION MEMBERS NO. 14-91 INVESTMENT ADVISER MEMBERS NO. 12-91 INVESTMENT ADVISER ASSOCIATE MEMBERS NO. 13-91 RE: PENSION PLAN CONSULTANT NOT LIABLE AS FIDUCIARY

_____ The U.S. Court of Appeals for the Seventh Circuit recently held that a pension plan consultant providing actuarial and administrative services cannot be held liable as a fiduciary under ERISA. The case involved a suit by the fiduciaries of a defined benefit pension plan against a large actuarial consulting firm. The plan trustee and employer made allegations that, among other matters, the actuary violated the fiduciary provisions of ERISA by erroneously (1) calculating the present value of plan assets, (2) advising the plan to delay plan termination (until after the October 1987 market break) and (3) completing annual reports. The court dismissed all ERISA claims against the consultant because it did not meet the definition of "fiduciary" under ERISA. The actuarial firm did not exercise any discretionary authority or discretionary control respecting management or administration of the plan or disposition of its assets. The court summarized the decisions of other courts which have refused to fit professionals like accountants or attorneys within the statutory definition of fiduciary when all they have done is advise the trustees of an ERISA plan. The court noted that there is no rule that prevents professionals who render advice to an ERISA plan from becoming fiduciaries. However, it concluded that consultants do not become ERISA fiduciaries when they perform professional functions improperly if they do not otherwise meet the definition of "fiduciary." Finally, the court noted that ERISA does not create a right of action which would allow ERISA beneficiaries to sue professionals who assist plan administrators in the preparation of statutorily required reports. A copy of Pappas v. Buck Consultants is attached. We will keep you informed of related developments. W. Richard Mason Assistant Counsel - Pension Attachment