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NONDISCRIMINATION IN INSURANCE ACT, S. 2477

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HEARING

BEFORE THE

SUBCOMMITTEE ON

AN ANTI-TRUST, MONOPOLY AND BUSINESS RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

NINETY-SIXTH CONGRESS

SECOND SESSION

ON

S. 2477

APRIL 30, 1980

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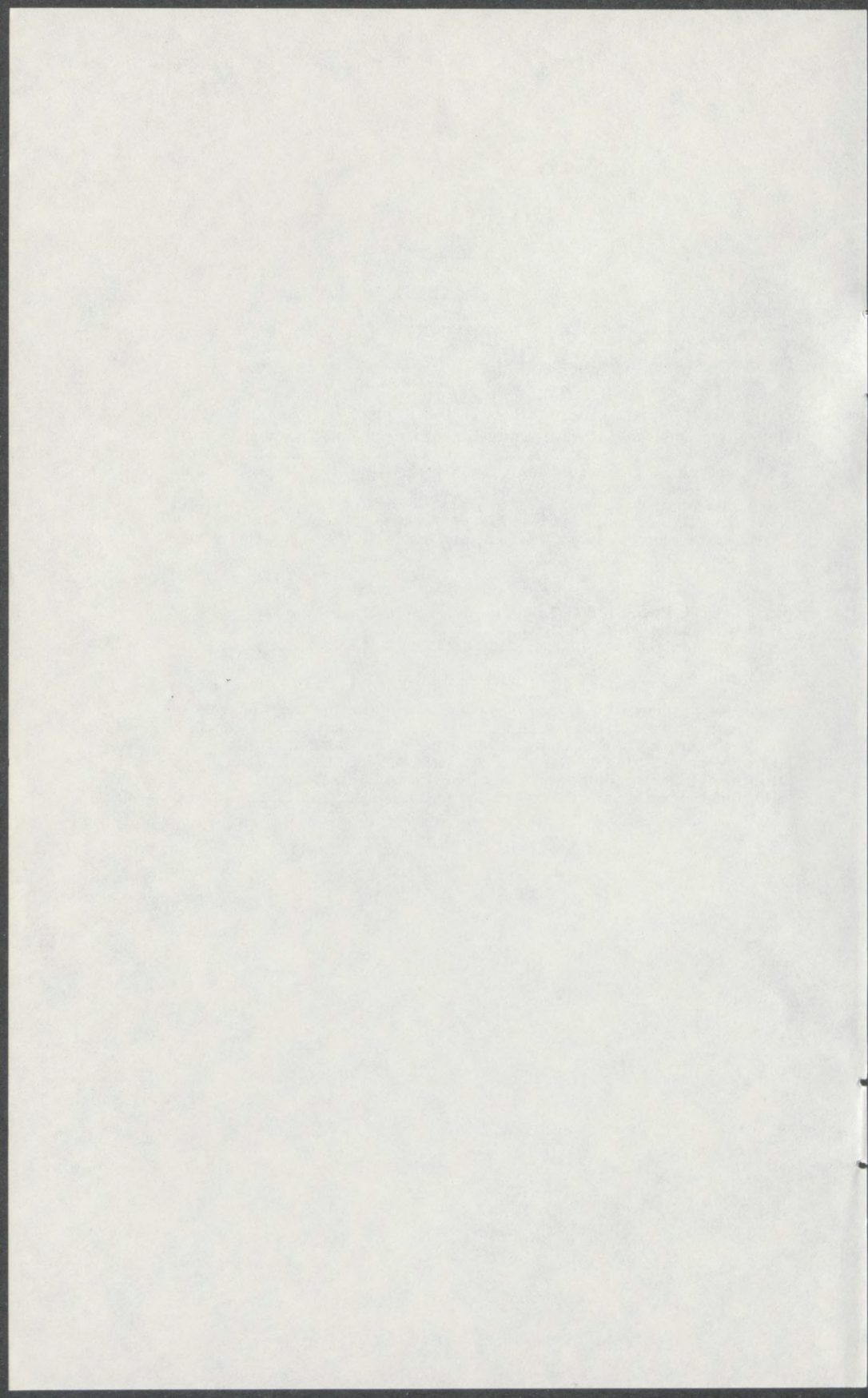
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# NONDISCRIMINATION IN INSURANCE ACT, S. 2477

WEDNESDAY, APRIL 30, 1980

U.S. SENATE,  
SUBCOMMITTEE ON ANTITRUST AND MONOPOLY,  
COMMITTEE ON THE JUDICIARY,  
*Washington, D.C.*

The subcommittee met, pursuant to notice, at 10 a.m., in room 6226, Dirksen Senate Office Building, Senator Howard M. Metzenbaum, chairman of the subcommittee, presiding.

Present: Senator Metzenbaum.

Also present: Stewart Kemp, special counsel; Marilyn Falksen, chief clerk; Peter Chumbris, minority chief counsel; Nick Chumbris, special assistant; and Joseph Lanham, chief minority economist.

## OPENING STATEMENT OF SENATOR METZENBAUM

Senator METZENBAUM. The committee will come to order.

Today the Subcommittee on Antitrust, Monopoly and Business Rights begins hearings to consider S. 2477, the Nondiscrimination in Insurance Act. This bill would prohibit discrimination on the basis of race, color, religion, sex, or national origin in the sale or underwriting or rating of any kind of insurance.

Enactment of S. 2477 would be a major step forward toward the fair treatment of insurance policyholders. There is no good reason why the fundamental civil rights of American citizens should not be protected by Federal law in insurance as they are already in other spheres of life.

I am very pleased to join with my distinguished colleague from Oregon, Senator Hatfield, in sponsoring this legislation.

In the House of Representatives, Congressman John Dingell introduced similar legislation last year. That bill now has 80 cosponsors.

This legislation addresses issues of fundamental fairness. Increasingly, American society has disfavored stereotyping individuals on the basis of broad group characteristics. Categorization on the basis of race, color, religion, and national origin is already illegal for most purposes.

The courts have scrutinized the use of sex-based distinctions more and more closely. Increasingly, a heavy burden has been placed on the use of sex as a permissible classification in numerous contexts.

The Chair notes rather proudly the fact that 27 years ago I introduced a bill having to do with discrimination on the basis of race, color, creed or national origin, the first FEPC bill introduced into the Ohio General Assembly. That was considered very radical legislation at the time.



Of course, that law and so many others have passed since that time, that to those who are opponents and adversaries, let me point out that what might appear to be a little bit difficult or a concept not readily acceptable, that too will pass and legislation of this kind will become law whether it be today, this month, next year or the year after.

Many persons in the insurance industry claim that the use of sex as a classification is just an actuarial question. If statistics show an aggregate difference by sex, they say, leave it to the actuaries to set the prices.

I disagree. To disadvantage an entire class of persons as a result of an immutable characteristic over which they have no control raises fundamental questions of public policy. Issues of such magnitude should be decided by the public's elected representatives, not left to technical experts employed by insurance companies.

It is essential in a society premised on the principle of individual liberty that persons be treated on the basis of their individual conduct and characteristics.

Some concern has been voiced about the impact of this legislation on State insurance regulation. As I have said on other occasions, I favor State insurance regulation. This bill would support, not undermine, effective regulation by the States.

It creates no Federal agency or enforcement mechanism. Not a single bureaucrat would spring into being as a result of this bill.

In any State which enacts a nondiscrimination law paralleling the Federal standards, there would be no Federal involvement.

In other States a private right of action in Federal court would be established, subject to exhaustion of State administrative remedies.

The U.S. Attorney General would be authorized to file a civil action in a Federal court if a pattern or practice of discrimination is found.

But the underlying principle is that discrimination on the basis of race, color, religion, national origin, and sex be effectively prohibited.

I am very pleased this morning that we have witnesses representing major constituencies affected by this bill. I am particularly pleased to welcome first my distinguished colleague, Senator Mark Hatfield. He has provided such able leadership in so many areas in the U.S. Senate. He appears before us today as the principal author of this legislation, legislation which I am very proud to cosponsor.

I am happy to welcome you, Senator Hatfield.

#### STATEMENT OF SENATOR HATFIELD

Senator HATFIELD. Thank you very much, Mr. Chairman.

Senator Metzenbaum, it is a great honor to be before your subcommittee, and especially in a cosponsorship role on this particular bill.

Mr. Chairman, it is clear that much progress has been made in the past few decades in combating sex discrimination in American society.

Laws such as the Civil Rights Act of 1964, the Equal Employment Opportunity Act, and the Equal Pay Act have helped promote the concept of equal rights and opportunities in law, as well as in attitude.

Despite this progress, however, significant gaps remain. Perhaps none is so large and pervasive as that discrimination which occurs in the insurance marketplace.



It is not difficult to determine why this industry is one of the last bastions of an increasingly unacceptable policy. For insurance coverage, to the average consumer, has traditionally been a complicated, if not tedious, topic.

Insurance policies have often been unreadable, promoting still further the concept that insurance-making must be left to the experts.

As it well should, I am not questioning the need for the expertise offered by the professionals in this field. I personally depend upon them myself. I am merely pointing out an atmosphere which has encouraged the consumer to place his faith and trust in the hands of the insurance professional, allowing him or her to determine the risks, establish and interpret the policies.

This atmosphere has enabled the insurance industry to capitalize on the ignorance of the public in one area particularly—that of fairness in classifying its policyholders.

I regret that the trust placed in the industry has not been justified here. For over the past generation, insurance companies have increasingly relied on gender to impose higher rates or lower benefits on women.

I would like to re-emphasize the importance of a national policy which Senator Metzenbaum has so well pointed out in his opening statement.

This concept has been appropriately reaffirmed over the past 20 years: That discrimination on the basis of race, color, religion, sex or national origin is unfair and unlawful.

Again, in the proposed Nondiscrimination in Insurance Act which we discuss this morning, that policy is stated. As it should be; for it is fundamentally unfair to stereotype individuals on these bases.

Different and unequal treatment of like individuals cannot be tolerated in the employment sector. Neither can it be tolerated in the insurance marketplace.

In the abstract, continuation of discriminatory policies in insurance is discouraging. But in its practical ramifications, it is even more distressing. For in an era in which over 40 percent of the work force are women—and some 60 percent of those women work out of economic need—denial of access to insurance at fair rates can have severe economic consequences.

For example, today there are reported to be 7.7 million single-parent families headed by women. These families are wholly dependent on females for financial support.

Yet, the availability and scope of insurance for them are minimized and the rates often maximized because of their sex. This policy can effectively prohibit women from achieving the basic insulation from financial loss which is the benefit of insurance.

This is only one example of the effects of a sex-based classification in insurance. I would like to briefly cite a few others as they occur in various types of insurance.

In disability, many types of insurance benefits available to men are not available to women. While coverage has improved over the past few years, in some States, disability coverage is not available to women on any terms, at any price.



In other States where it is available, its cost is significantly greater. In health, waiting periods are usually much longer for women, and benefit periods shorter.

According to a report on sex discrimination in insurance prepared by the Women's Equity Action League, it is not uncommon to find that, despite higher premiums paid by women, the benefits they receive are much lower. Pregnancy coverage, despite its centrality to women's insurance needs, is often unavailable.

In life insurance, coverage for women is often limited in scope and availability. Certain options, commonly available to men, have been restricted to women. The insurance industry argues that sex discrimination in life insurance is justified because "women as a group have longer life expectancy than men as a group."

Mr. Chairman, this argument is perhaps the most commonly used as an argument against S. 2477. I believe it is worth discussing here.

First of all, let's take that statistic. I think when we talk about averages, we have to recognize how these can be distorted.

For instance, the idea that on the average women live longer than men is in the aggregate correct. But let me remind the committee this morning, that 84 percent of the women live as long as the men in individual cases, and therefore the distortion occurs really among 16 percent and not amongst the majority.

It must be understood that there is no objection to basing a life insurance policy on longevity. However, if sex is the only criterion used to determine longevity, it is clearly unfair and relatively unreliable.

Instead of merging sex with all the other criteria affecting life expectancy, the industry has chosen to concentrate exclusively on it. The industry has virtually ignored other, more accurate classification criteria, such as smoking habits, family health history, physical condition, recreational, and occupational activities.

I am sure that others testifying today will elaborate on recent court decisions which bolster the argument against such discrimination.

Last year, the Supreme Court, in the so-called *Manhart* decision, ruled it unlawful to treat "individuals as simply components of a racial, religious, sexual, or national class."

While this ruling applies only to employer-operated insurance plans, S. 2477 expands the prohibition to private and individual plans, as well.

The insurance industry has claimed that some 19 States have already adopted a model regulation of the National Association of Insurance Commissioners which supposedly accomplished the same objective as S. 2477.

Thus, the need for Federal legislation is eliminated, according to the industry. I do wish this were the case.

However, it is my clear understanding that this model regulation does not touch on the aspects of disparate rates and benefits—merely availability and scope.

Even this incomplete regulation was watered down further by several of the 19 States which eventually adopted it.

I hope this subcommittee would further investigate this issue, Mr. Chairman. For if it is discovered that the States are indeed doing their



job with respect to offering fair and just insurance policies and rates, and enforcing such, I would have no hesitancy to withdraw my support for this legislation.

S. 2477 is designed to encourage the States to adopt nondiscriminatory policies. I believe it is important to stress here that the Non-discrimination in Insurance Act will in no way remove authority from the States to regulate the insurance industry.

No Federal mechanism for administration or enforcement is established, as you already stated, and no bureaucracy will spring forth as a result of this bill.

Classification by sex is clearly not a business necessity, as some parts of the insurance industry would have us believe. It was adopted by the industry only 30 years ago as a convenient, though incomplete, method of classifying risks.

While it may require minor cost adjustments in some policies and practices, such an argument cannot be used as a defense for discrimination.

I am hopeful that it will not require the pressure of the courts, of civil rights and women's groups, and of public opinion to convince the industry to treat its policyholders without discrimination on the basis of sex.

As evidenced by your witness list today, Mr. Chairman, we have the support of a significant number and type of groups representing the public, including the American Association of University Women, the AFL-CIO, the National Federation of Business and Professional Women, as well as the Leadership Conference on Civil Rights, composed of some 150 civil rights organizations.

We will use that support to help assure that a policy adopted by Congress some 16 years ago will also be applied in the insurance marketplace.

Senator METZENBAUM. Thank you very much, Senator Hatfield, for a very clear and strong statement in support of your legislative proposal.

With respect to the matter of effective State enforcement, a question that concerns you as well as me, it is my understanding and we will see to it that CRS makes some study in that area in order to have some relevant and up-to-date data available.

But let me ask you this question. If the States are doing an adequate job and if there are effective nondiscriminatory procedures coming about by reason of insurance industry actions and effective State regulation in this area, then isn't it the fact that by the passage of your bill, no harm would be done because there would be no violations to be concerned about?

Senator HATFIELD. That is correct.

I suppose it becomes really a philosophical question more than a pragmatic one. I would personally like the idea that the industry itself as a private organization would correct this problem, not requiring either State or Federal action.

My second preference would be that the States would undertake to do this rather than waiting for the Federal Government to fill the vacuum.



So, I come from that philosophical commitment. But having seen this failure on the part of the industry to move with any solidarity on this problem, and to see the States likewise exercise rather dilatory caution, I feel that it is an important action for the Federal Government to take, not as a club so much as a tutoring tool to encourage the action by the States.

As you point out, if the States or the industry, out of the kind of pressure that this might bring to bear, should accelerate their action and take the necessary steps, then of course, this would have no meaning, either in terms of its enactment, or frankly, other than just an encouragement tool, in terms of its introduction.

Senator METZENBAUM. Why do you think sex discrimination is a greater problem today than it was 10 or 20 years ago?

Senator HATFIELD. Do I believe it is?

Senator METZENBAUM. Yes.

Senator HATFIELD. Well, I think we have addressed the more public areas of discrimination, the more obvious areas in enactment of civil rights legislation, beginning with the act of 1964, as I have indicated.

But I think what we are doing now or what we see now are some of the subtleties that have almost become inculturated in our country that need a focus.

As I indicated in my testimony, this discrimination is relatively new in the industry. Yet, and it is there, very realistically it is there.

So, there are still these pockets or these areas, very subtle areas in some cases, very highly camouflaged areas where this discrimination still is maintained.

Mr. Chairman, I feel that discrimination and civil rights is not a one-act of the Congress. I think it is a continuing role that must be played by Government to monitor and to ferret out those areas which continue to be characterized by discrimination.

I feel that is why it is important to have civil rights groups alerting the public and ever being vigilant to these more subtle types of discrimination that do not surface as easily as some of the ones we have fought over the years like areas of public accommodation or voting rights, in those areas which had become so historically high profile.

But I think discrimination still exists, yes, to answer your question. I don't know how to make a quantitative analysis of it, but I do know it still exists.

Senator METZENBAUM. Are you familiar with any major insurance plans that presently provide sex-neutral benefits in rates?

Senator HATFIELD. Yes. Mr. Chairman, I am happy to say that the Federal Government has led the way in removing these areas of discrimination in insurance or these practices.

I am also happy to say that one of the largest groups, TIAA CREF, beginning this year will remove such past discriminatory practices that they have had in their insurance.

Three States have removed such discrimination on the basis of sex in the area of auto insurance. In that experience, we have found that the insurance rates for young men have slightly decreased. The insurance rates for young women have slightly increased.



There will be modification in rates, I am sure, but I don't think they will be of any great proportion.

So, there are these trends. I think the *Manhart* case of course, was a narrowly based case the Supreme Court ruled on about employer-provided insurance. But again, it pointed the way.

I am not speaking as a lawyer. I would be presumptuous to do that, but according to the legal counsel that I have had in reading that Supreme Court case, the logic they based their decision on would have to be applied to other areas of insurance if cases came to the court challenging the discriminatory practices.

That is why I feel that these are inevitable trends. I would be hopeful that the insurance industry would see the handwriting on the wall and give leadership rather than trying to stop the inevitable direction and change that is coming about.

Senator METZENBAUM. I have one last question. Some insurers say that there is no need for Federal legislation prohibiting discrimination as a basis of race, color, religion, or national origin.

They say that these criteria are not used and therefore not needed in this bill. How do you respond to that?

Senator HATFIELD. Who says this, did you say?

Senator METZENBAUM. The insurers. The industry. They claim that we don't need Federal legislation in that area because they don't use those criteria. Therefore, we need not legislate in that area.

Senator HATFIELD. It seems to me that they are trying to camouflage the sex discrimination against women that is widely practiced in the whole list of these other segments of our society.

I am not here this morning suggesting that the insurance industry is discriminating on the basis of race, color or creed. I am here this morning to say that the insurance industry is discriminating in its rate policy as it relates to sex.

As you know, in the civil rights movement, sex was one of the last of the segments of our population to be included. We had been battling the cause of civil rights primarily on the basis of race, color or creed. In more recent times, we have added sex as a further evidence or further need to remove such practices of discrimination. Age has also become a more recent addition to that list.

There are others who would like to add further to that list, but this morning, I would like to keep the focus on the purpose of your and my bill, and the evidence that we I believe have been able to produce and will be able to continue to produce throughout this and other hearings as it relates to sex discrimination.

I am not charging the industry with any other discrimination. You know, I have talked to individual members of the industry. I don't really sense that there is a hardline attitude.

The industry that I have dealt with over the years has been, I think, a very progressive industry. I think this is again one of those things that probably happened when 30 years ago, they were sitting around in a boardroom of some kind and they were trying to brainstorm out some way to classify to get better understanding of the information they were getting from their actuaries and they came up with this idea.

I don't frankly feel that there is a mentality of discrimination. I don't think there is a cultural or industrial kind of attitude of discrimination. I have not sensed that in the industry.



I think they have been led by their own in-house experts, the actuaries, who I don't think give a full and a clear picture.

But, second, if they did give a complete picture, that is still no basis nor does it give the industry a right to discriminate when we have so clearly stated public policy as we have in many instances about discrimination and the cause of civil rights.

I think this is the trend of the Nation. I think the industry is willing to move along with it, but I think they need a little encouragement. I hope this bill is that encouragement.

Senator METZENBAUM. Thank you very much, Senator Hatfield. We hope to be able to move this bill with some dispatch.

Senator HATFIELD. Thank you, Mr. Chairman.

#### PREPARED STATEMENT OF SENATOR MARK HATFIELD

It is clear that much progress has been made in the past few decades in combatting sex discrimination in American society. Laws such as the Civil Rights Act of 1964, the Equal Employment Opportunity Act and the Equal Pay Act have helped promote the concept of equal rights and opportunities in law, as well as in attitude. Despite this progress, however, significant gaps remain. Perhaps none is so large and pervasive as that discrimination which occurs in the insurance marketplace.

It is not difficult to determine why this industry is one of the last bastions of an increasingly unacceptable policy. For insurance coverage, to the average consumer, has traditionally been a complicated, if not tedious, topic. Insurance policies have often been unreadable, promoting still further the concept that insurance-making must be left to the experts. As it well should. I am not questioning the need for the expertise offered by the professionals in this field. I am merely pointing out an atmosphere which has encouraged the consumer to place his faith and trust in the hands of the insurance professional, allowing him or her to determine the risks, establish and interpret the policies. This atmosphere has enabled the insurance industry to capitalize on the ignorance of the public in one area particularly—that of fairness in classifying its policyholders. I regret that the trust placed in the industry has not been justified here. For over the past generation, insurance companies have increasingly relied on gender to impose higher rates or lower benefits on women.

I would like to re-emphasize the importance of national policy which Senator Metzenbaum has so well pointed out in his opening statement. This concept has been appropriately reaffirmed over the past 20 years: that discrimination on the basis of race, color, religion, sex or national origin is unfair and unlawful. Again, in the proposed Nondiscrimination in Insurance Act which we discuss this morning, that policy is stated. As it should be for it is fundamentally unfair to stereotype individuals on these bases. Different and unequal treatment of like individuals cannot be tolerated in the employment sector. Neither can it be tolerated in the insurance marketplace.

In the abstract, continuation of discriminatory policies in insurance is discouraging. But in its practical ramifications, it is even more distressing. For in an era in which over 40 percent of the workforce is women—and some 60 percent of those women work out of economic need—denial of access to insurance at fair rates can have severe economic consequences.

For example, today there are reported to be 7.7 million single-parent families headed by women. These families are wholly dependent on females for financial support. Yet, the availability and scope of insurance for them are minimized and the rates often maximized because of their sex. This policy can effectively prohibit women from achieving the basic insulation from financial loss which is the benefit of insurance.

This is only one example of the effects of a sex-based classification in insurance. I would like to briefly cite a few others as they occur in various types of insurance:

In disability, many types of insurance benefits available to men are not available to women. While coverage has improved over the past few years, in some



states, disability coverage is not available to women on any terms, at any price. In other states where it is available, its cost is significantly greater.

In health, waiting periods are usually much longer for women, and benefit periods shorter. According to a report on sex discrimination in insurance prepared by the Women's Equity Action League, it is not uncommon to find that, despite higher premiums paid by women, the benefits they receive are much lower. Pregnancy coverage, despite its centrality to women's insurance needs, is often unavailable.

In life insurance, coverage for women is often limited in scope and availability. Certain options, commonly available to men, have been restricted to women. The insurance industry argues that sex discrimination in life insurance is justified because "women as a group have longer life expectancy than men as a group." Mr. Chairman, this argument is perhaps the most commonly used as an argument against S. 2477. I believe it is worth discussing here.

The same justification for differential rates can be made for discrimination against blacks because white persons as a group have a longer life expectancy than black persons as a group. However, such discrimination is now, and should be, totally rejected.

It must be understood that there is no objection to basing a life insurance policy on longevity. However, if sex is the only criterion used to determine longevity, it is clearly unfair and relatively unreliable. Instead of merging sex with all the other criteria effecting life expectancy, the industry has chosen to concentrate exclusively on it. The industry has virtually ignored other, more accurate classification criteria, such as smoking habits, family health history, physical condition, recreational and occupational activities.

I am sure that others testifying today will elaborate on recent court decisions which bolster the argument against such discrimination. Last year, the Supreme Court, in the so-called *Manhart* decision, ruled it unlawful to treat "individuals as simply components of a racial, religious, sexual or national class". While this ruling applies only to employer-operated insurance plans, S. 2477 expands the prohibition to private and individual plans, as well.

The insurance industry has claimed that some 19 states have already adopted a model regulation of the National Association of Insurance Commissioners which supposedly accomplished the same objective as S. 2477. Thus, the need for Federal legislation is eliminated, according to the industry. I do wish this was the case.

However, it is my clear understanding that this model regulation does not touch on the aspects of disparate rates and benefits—merely availability and scope. Even this incomplete regulation was watered-down further by several of the 19 States which eventually adopted it. I hope this subcommittee would further investigate this issue, Mr. Chairman. For if it is discovered that the states are indeed doing their job with respect to offering fair and just insurance policies and rates, and enforcing such, I would have no hesitancy to withdraw my support for this legislation.

S. 2477 is designed to encourage the states to adopt nondiscriminatory policies. I believe it is important to stress here that the Nondiscrimination in Insurance Act will in no way remove authority from the states to regulate the insurance industry. No federal mechanism for administration or enforcement is established, and not one bureaucrat would spring into being as a result of this bill.

Classification by sex is clearly not a business necessity, as some parts of the insurance industry would have us believe. It was adopted by the industry only 30 years ago as a convenient, though incomplete, method of classifying risks. While it may require minor cost adjustments in some policies and practices, such an argument cannot be used as a defense for discrimination.

I am hopeful that it will not require the pressure of the Courts, of civil rights and women's groups, and of public opinion to convince the insurance industry to treat its policyholders without discrimination on the basis of sex. As evidenced by your witness list today, Mr. Chairman, we have the support of a significant number and type of groups representing the public, including the American Association of University Women, the AFL-CIO, the National Federation of Business and Professional Women, as well as the Leadership Conference on Civil Rights, composed of some 150 civil rights organizations.

We will use that support to help assure that a policy adopted by Congress some 16 years ago will also be applied in the insurance marketplace.



Senator METZENBAUM. Our next witness is Dr. Quincalee Brown, executive director, American Association of University Women.

**STATEMENT OF DR. QUINCALEE BROWN, EXECUTIVE DIRECTOR,  
AMERICAN ASSOCIATION OF UNIVERSITY WOMEN**

Senator METZENBAUM. Dr. Brown, I want to apologize to you. I have just been summoned to another hearing. If you don't feel offense—if you do, I will change the procedure—I would like to ask you to go forward with your statement. The staff will continue the hearing. We do have some questions for you. I hope to be back in about 10 or 15 minutes.

We are delighted to have you with us this morning. Please do not feel in any way offended. I will certainly study your statement carefully.

Dr. BROWN. I understand.

Senator METZENBAUM. Thank you.

Mr. KEMP. Dr. Brown, you may proceed with your statement.

Dr. BROWN. The American Association of University Women, a national organization with over 190,000 members, is proud of its 99-year commitment to equality and human rights.

In this spirit, we strongly urge passage of the Nondiscrimination in Insurance Act, S. 2477.

Members of the business community are rallying against what they casually term "unisex insurance." Evoking the absurd images of unisex washrooms and other alleged byproducts of equality, the phrase "unisex insurance" belies the soundness of the proposed legislation.

Senate Bill 2477 is designed to prohibit insurance companies from discriminating against customers on the basis of race, color, religion, sex, or national origin.

Quite simply, it represents another step toward economic and social justice.

Time and time again, this Legislature has felt compelled to address the fundamental question of fairness to individuals affected by discriminatory classifications.

In passing the Civil Rights Act of 1964, Congress affirmed the importance of individual rights. That act precludes treating people as if they are mere components of a racial, religious, sexual, or national grouping.

For example, a tall woman applying for a police officer's job which has a strict height requirement may not be refused employment simply because women, on the average, are too short for such positions—just one example of the breadth of protection afforded by the act.

This basic principle, that individuals deserve fair, unbiased treatment, is the cornerstone of our democracy and the essence of our freedom.

The same thoughtful scrutiny that you have given to employment, housing, and credit laws must be given to the insurance practices of today. This you can do through the Nondiscrimination in Insurance Act of 1980.



Today, women are entering the work force at a rate of almost 2 million each year. Over 50 percent of all women are employed or are currently seeking jobs. Who are these working women?

Fifty-three percent are mothers with children of school age or younger.

Fifty-six percent are married with husbands present.

Twenty-seven percent of those have husbands who earn less than \$13,000 a year.

Twenty-five percent are never married.

Another 20 percent are widowed, separated, or divorced.

Fourteen percent of all families, or one in every seven, is headed by a woman.

The economic realities of today demand that women work, not for pin money, but to support their families; not for surplus second incomes, but to help break even in the race against inflation. These women, like men, are dependent on fringe benefits to buffer their paychecks against rising costs.

Insurance is an absolute necessity to help workers hedge against troubled times and to see their families through loss of income due to accident, illness, and death.

Yet women, who are already confronted with such financial barriers as earning 59 cents for every dollar earned by men, are further penalized because of their sex and are continuously denied the right to a secure and insured tomorrow.

The business of insurance is, in part, the business of classification. Inherent in the process of spreading losses is the practice of grouping individuals according to the risk they pose. The coverage you can get, the types of benefits you are offered, and the rates you are charged will depend on how the insurance company chooses to categorize you.

Unfortunately, women, as a group, are routinely and systematically denied coverage, offered few benefits and charged excessive rates for the policies they receive.

For example, women who work at home are unable to purchase disability insurance, while such insurance is available to men with identical jobs and risk factors.

The prevalence of such discrimination is not denied by the industry; rather, it is justified as a time-honored practice.

In fact, one insurance company advertises its product by asking the reader to pick the \$25,000-a-year executive with inadequate insurance from a crowd waiting for a commuter train. The one woman in the picture is the obvious answer. The company, of course, is suggesting that women need only wake up to the attractiveness of insurance to avail themselves of its benefits.

I suggest that women are waking up, but we are awakening to the need for change in an industry which, for too long, has denied us equal protection.

According to Kenneth Viet, vice president for life products of Aetna Life and Casualty Co., insurance companies try to price their products "to make each group pay its own way."

Women, however, consistently find themselves paying in more ways than one: companies not only refuse to make insurance available to



women with the same provisions as they offer men—they often withhold the product from women altogether.

When purchasing coverage, men and women may be charged different rates based on statistical experience, or women may be charged higher rates based on no experience at all. Such practices do not occur in isolation, but are pervasive throughout the industry and in all forms of insurance. Let me cite some specifics.

#### HEALTH INSURANCE

In purchasing health insurance, women, like most customers, seek protection against the high cost of medical care. Unlike most customers, however, insurance coverage is unavailable or inadequate for one of our most basic medical needs: motherhood.

For example, a study by the Health Insurance Institute discovered that 56.4 percent of all new health insurance group policies excluded any coverage for maternity.

A Michigan survey revealed that commercial health insurance plans offering coverage provided only 38 to 44 percent of medical costs for maternity.

A Pennsylvania study reported that some insurance companies were using 16-year-old hospital rates to set the maximum limit for current maternity coverage.

If over half of the new health policies exclude maternity altogether if the minority of plans that do provide coverage meet less than half the actual costs, and if the insurance rates applied by companies are both obsolete and blind to inflation, what price is motherhood today?

As a result of discriminatory practices, women find themselves bearing the full costs of reproduction for society, curious treatment by an industry whose primary function is to spread costs fairly.

#### DISABILITY INSURANCE

Under disability insurance, as with health insurance, working women are unable to purchase adequate protection against the disabling effects of maternity.

Pointing to the so-called voluntary and predictable nature of pregnancy (and related conditions such as miscarriage), insurance companies rationalize such discriminatory treatment of women.

These same companies, however, routinely provide coverage for male-specific risks, such as vasectomies and prostatectomies, as well as other voluntary conditions, including sports injuries, cosmetic surgery, and hair transplants.

These inequities are not confined to maternity benefits; indeed, they pose an all-too-familiar barrier against women seeking income security in all forms of disability coverage.

For example, in 10 out of 13 companies surveyed in Pennsylvania, premium rates were found to be consistently higher for women than for men who carried identical or better coverage.

In New York, a study reported that women were charged as much as 150 percent higher rates than men in the same job classification.

In Colorado, a 45- to 115-percent rate differential between the sexes was discovered, as well as the practice of singling out professional



women and classifying them in lower job categories with higher insurance rates.

But, for some women, rate discrimination is a remote problem; these women face the more fundamental obstacle of total exclusion from disability coverage. They are the part-time employees working without the fringe benefits and protections attached to full-time salaried positions.

They are the waitresses and the domestic aides, whose male counterparts often enjoy disability coverage while they do not.

Most importantly, they are the homemakers, working without wages, yet providing valuable services of child care, housecleaning, and cooking—services which would cost more than \$17,000 a year to replace.

#### LIFE INSURANCE AND PENSION BENEFITS

In purchasing life insurance and pension benefits, women face the most explicit form of discrimination. On the grounds that women as a group live longer than men, insurance companies compute rates and benefits almost exclusively on the basis of sex, overlooking other more relevant criteria such as smoking and occupation and drinking habits.

For example, under defined contribution pension plans, sex-based tables are often used to compute the amount of monthly annuity.

Even though a man and a woman are the same age and have the same amount of money in their pension accounts, the woman will receive a smaller monthly annuity because, theoretically, her total amount will have to be spread over a longer period of time.

Thus penalized for their longevity, all women receive lesser monthly benefits than men regardless of their individual life expectancies.

In recent court decisions, such generalizations have been persuasively challenged, in terms of both statistical and legal merit.

A 1978 Supreme Court decision, citing title VII, squarely rejected differential treatment under employer-operated pension plans.

Private insurers offering other policies, however, remain outside the scope of the decision and can freely rely on classifications based on sex.

Ironically, where sex-based ratings might cut in their favor, women are victims of a "cash-22," paying life insurance premiums based on a limited 3-year setback, despite the fact that statistically they outlive their male counterparts by 6 to 9 years.

Furthermore, women are often denied equal access to equal benefits. For example, under some life insurance policies:

A married woman can purchase coverage up to, but not exceeding the amount of coverage held by her husband, a limit rarely applied in reverse, despite the size of each spouse's income.

A disabled woman, seeking the customary waiver of premium option, bears the burden of proving a "definite need" for the waiver, unlike other classes of insureds.

A working woman, in a high-risk classification, may be denied the waiver of premium option altogether or may pay higher prices than men in the same high-risk grouping.

Few satisfactory explanations are offered for these inherently unfair practices—the singling out of pregnancy as an uninsurable con-



dition, the arbitrary classification of women as higher disability risks, and the disproportionate and discriminatory emphasis on sex as the sole determinant of life expectancy.

The pattern that emerges is not one of equity for customers, but of convenience for insurers, who find it easier and cheaper to apply broad sex-based standards.

Such standards, however, are often based on outmoded assumptions and inappropriate generalizations about the value of a woman's work and her need for financial security.

To sanction the inequities of current insurance practices is to relegate women to inferior economic and legal status. For you to overlook the changing demographics in the home and on the job is to perpetuate the myth of the dependent female.

For you to continue to allow the exclusion of women from a growing industry is, quite frankly, to ignore good business sense.

For today, women represent a great potential market for smart companies looking to the future: in life insurance coverage alone, growth is up 90 percent from \$200 billion in 1970 to \$380 billion in 1976, due largely to the increased numbers of female buyers. And that is with only half of all women in the labor force.

The Labor Department now estimates that by 1990, 95 percent of America's women will be in the paid labor market. Surely our insurance companies are aware of the great potential that offers them.

To date, piecemeal efforts have been made to eliminate discrimination in insurance practices. Model regulations, proposed by the National Association of Insurance Commissioners, have been adopted in whole or in part by several States.

Unfortunately, these bandaid solutions have done little to alleviate what remains a glaring gap in our record of civil rights achievements.

Now the 1980's are upon us; legislation enacted today will set the tone for a new and promising decade. In considering passage of the proposed Nondiscrimination in Insurance Act, this distinguished committee is showing the leadership and foresight that represents our hope for tomorrow.

This bill has no price tag; it forms no new agency; it promulgates no new rule. Rather, it incorporates and adapts a piece of our constitutional wisdom that says each individual deserves fair and equal treatment.

Women—working, mothering, saving, and investing—have a right and a responsibility to secure their financial futures through the purchase of insurance, fairly and equitably offered.

Thank you.

Senator METZENBAUM. Thank you very much, Dr. Brown. I am glad I am able to return in time to inquire of you concerning some of the points you make.

If my question has already been covered by your statement, it will be for obvious reasons, because I wasn't here to hear it.

Dr. Brown, how has the role of women in the economy changed in the past decade?

Dr. BROWN. Well, economists have said that the greatest phenomenon of our times, including all of them, is the return of women to the paid labor market.



As I stated, we have seen women returning to the labor market at the rate of almost 2 million per year. It is at a point now where over one-half of all women are working.

It is interesting to note that in the mid 1970's, the Labor Department estimated that by the early 1980's, 1982, about one-half of all women would be in the labor market. They were very conservative. That happened in 1978.

They are now estimating that 95 percent of all women of working age, between 60 and 64, will be in the paid labor market within 10 years, by 1990.

Senator METZENBAUM. Between 60 and 64?

Dr. BROWN. Between 16 and 64. I am sorry. The working age of women, 95 percent would be in the paid labor market in 10 years. You see the significant change in the role of women as workers in our economy.

When Senator Hatfield was talking about the 1950's being the time that the insurance industry decided to base their classifications on sex, it was certainly a time when few women were in the labor force, a very small percentage.

In the interceding years, we have seen that role change so dramatically because of economic reasons, economic pressures, and just the changing role of women in general, and the awareness of the advantages of having security and income and insurance and financial security on their own.

So, it is an irrevocable change. You will never see women going back home in the same way we knew that in the fifty's and prior to that point in time. Our economy will not allow it.

I have heard economists say that the seventy's was the decade that we sent women to work in order to maintain family income, and the eighty's may well be the decade that you have to send your teenagers to work in order to maintain family income.

So, I think the changes are obvious. Women as increasingly responsible workers and as people who, as has been pointed out by both Senator Hatfield and me, are responsible for families, since one out of every seven families in America is headed by a women, have got to have insurance to protect them in the same way that men have insurance to protect them.

Senator METZENBAUM. What are the consequences of a woman not having comprehensive disability insurance?

Dr. BROWN. Well, the assumption has been that women who are working for pin money, if they would be disabled, would rely on their husband's income to take care of them. Statistics that I went through pointed out that there are vast percentages of women who do not have husbands to take care of them.

Twenty-five percent of all women in this country right now have never married. The other 40-some percent that are separated, divorced or have husbands who are not present, so that is just no longer true. A woman who is disabled is going to have to depend on herself, large numbers of women are going to have to depend on themselves for disability coverage to protect themselves and their families.

So that the assumption that might have been true 30 years ago, that a husband's income could take care of a disabled wife, simply is no



longer true, plus the fact—and it is interesting to note, that current economists estimate that to replace the value of the woman who is a homemaker, the woman who is now in the home, caring for two children, if you had to purchase her services on the open market would cost the average family about \$17,000 a year.

For many men who are working at full-time jobs, to have to put out that kind of money for child care, for housekeeping and for all the other kinds of services that women in the home provide is a great expectation.

So that to not insure the homemaker for disability can work great hardships on the family and to not insure the woman who is on her own for disability can be absolutely devastating to her and her family.

Senator METZENBAUM. Insurers point to actuarial tables showing greater longevity for females than males. Why don't you agree that such differences justify rate differentials by sex?

Dr. BROWN. Well, that would be fine, if it were true. Unfortunately, as Senator Hatfield pointed out, if you take the population as a whole, it is really only about—I heard specifics that said 14 percent, he said 16 percent. I will compromise and say even 15—15 percent of all women actually do live longer than males.

Other studies have shown though, in fact, even more recent studies, for example, show that occupation is more likely to be a significant factor.

Let me cite some specifics. For example, the Metropolitan Life Insurance Co., in comparing longevity based on sex and occupation revealed that the longevity of a female attorney corresponded more closely to the longevity of a male attorney than it did with other women.

So that in this case, occupation was more a factor of longevity than was sex.

In another study that was done by cancer experts, they found out in comparing the mortality rate of smokers and nonsmokers that smoking males and smoking females had a much closer life expectancy than did nonsmoking males and females.

So in that case, your health habits, smoking habits, were more closely linked to your longevity than were sex based statistics.

So that while 14 percent of all women do live longer than men, and if you generalize those statistics, you can say women live longer than men.

I think there are other criteria that we have discovered, such as occupation, family health history, smoking and drinking habits, that are more accurate than sex.

Senator METZENBAUM. Do you have any thoughts as to how pregnancy should be treated in a health disability plan?

Dr. BROWN. Well, it strikes me that if we say that motherhood is one of the important functions that women fulfill in this society, we should allow women the opportunity to have motherhood counted as a physical ailment and a physical disability just exactly like any other physical ailment or disability.

In passing the Pregnancy Disability Act the Congress recognized the fact that in employment women should not be discriminated against because they become mothers.



If you assume this is a role that society wishes women to continue to play, and since we really can't do away with the fact that women are going to bear children, and it is probably to our society's advantage that women spend some time caring for those children, the fact that you discriminate against women on the basis of maternity and pregnancy strikes me as blatantly unfair.

If we say that is a need that our entire society has, then it strikes me that that is a kind of coverage that could be borne by all of society.

Senator METZENBAUM. Do you have any views with respect to the adequacy of State regulation in this area of discrimination?

Dr. BROWN. I am not very good on State regulation in this area, but from what I have read, very few States have been willing to enact regulations that would take care of discrimination on the basis of sex.

Senator METZENBAUM. Let me ask you, do you have a large membership?

Dr. BROWN. Yes.

Senator METZENBAUM. I am not sure that I have received any mail on the subject from the professorial grouping, university women, college women. You would include all women graduates; is that it?

Dr. BROWN. Yes; women who have graduated from a university.

Senator METZENBAUM. Does your membership really have an interest and concern on this subject or do you think it is just something that the executive board decided they ought to support?

Dr. BROWN. Oh, no. I think women all across the country have an interest in this, not only university women. If you like, I will try to make certain that you do receive some mail. [Laughter.]

Senator METZENBAUM. No. The thrust of my question was not that I receive the mail, but that the other members of the subcommittee and the overall committee receive it. I think it would be helpful to support it.

Dr. BROWN. It certainly is not an issue that relates only to women who are members of our association. Certainly, we are across the country interested in issues of insurance and fairness and equality. This effects all women.

Senator METZENBAUM. I think Members of Congress do like to know how their constituents feel. I would urge upon you that if it is truly a feeling of the membership, certainly no group or constituency would be better able to sit down and address a communication. I think it would be helpful and important.

Dr. BROWN. Thank you.

Senator METZENBAUM. Thank you.

Mr. CHUMBRIS. Mr. Chairman, may we reserve the right to submit questions.

Senator METZENBAUM. With respect to all of the witnesses, there may be questions from other members of the subcommittee today. If so, they will be submitted in writing, and the questions, as well as the answers, will be included in the record.

Mr. CHUMBRIS. Thank you.

Senator METZENBAUM. Thank you.

Dr. BROWN. Thank you.

[See appendix for additional material submitted by Dr. Brown.]

[The prepared statement of Dr. Brown follows:]



## PREPARED STATEMENT OF DR. QUINCALEE BROWN

The American Association of University Women, a national organization with over 190,000 members is proud of its 99-year commitment to equality and human rights. In this spirit, we strongly urge passage of the Nondiscrimination in Insurance Act, S. 2477.

*An issue of fairness*

Members of the business community are rallying against what they casually term "unisex insurance." Evoking the absurd images of unisex washrooms and other alleged by-products of equality, the phrase "unisex insurance" belies the soundness of the proposed legislation. Senate Bill 2477 is designed to prohibit insurance companies from discriminating against customers on the basis of race, color, religion, sex, or national origin. Quite simply it represents another step towards economic and social justice.

Time and again, this legislature has felt compelled to address the fundamental question of fairness to individuals affected by discriminatory classifications. In passing the Civil Rights Act of 1964, Congress affirmed the importance of individual rights. That Act precludes treating people as if they are mere components of a racial, religious, sexual, or national grouping. For example, a tall woman applying for a police officer's job which has a strict height requirement may not be refused employment simply because women, on the average, are too short for such positions—just one example of the breadth of protection afforded by the Act.

This basic principle, that individuals deserve fair, unbiased treatment, is the cornerstone of our democracy and the essence of our freedom. The same thoughtful scrutiny that you have given to employment, housing, and credit laws must be given to the insurance practices of today. This you can do through the Nondiscrimination in Insurance Act of 1980.

*Women working for security*

Today, women are entering the work force at a rate of almost 2 million each year. Over 50 percent of all women are employed or are currently seeking jobs. Who are these working women?

53 percent are mothers with children of school age or younger; 56 percent are married with husbands present; 27 percent of those have husbands who earn less than \$13,000 a year; 25 percent are never married; and another 20 percent are widowed, separated or divorced; 14 percent of all families, or one in every 7, is headed by a woman.

The economic realities of today demand that women work, not for pin money, but to support their families; not for surplus second incomes, but to help break even in the race against inflation. These women, like men, are dependent on fringe benefits to buffer their paychecks against rising costs. Insurance is an absolute necessity to help workers hedge against troubled times and to see their families through loss of income due to accident, illness, and death. Yet women, who are already confronted with such financial barriers as earning 59 cents for every dollar earned by men, are further penalized of their sex and are continuously denied the right to a secure and insured tomorrow.

*Denial of equal protection*

The business of insurance is, in part, the business of classification. Inherent in the process of spreading losses is the practice of grouping individuals according to the risk they pose. The coverage you can get, the types of benefits you are offered, and rates you are charged will depend on how the insurance company chooses to categorize you.

Unfortunately, women, as a group, are routinely and systematically denied coverage, offered few benefits and charged excessive rates for the policies they receive. For example, women who work at home are unable to purchase disability insurance, while such insurance is available to men with identical jobs and risk factors. The prevalence of such discrimination is not denied by the industry; rather, it is justified as a time-honored practice. In fact, one insurance company advertises its product by asking the reader to pick the \$25,000-a-year executive with inadequate insurance from a crowd waiting for a commuter train. The one woman in the picture is the obvious answer. The company, of course, is suggesting that women need only wake up to the attractiveness of insurance to avail themselves of its benefits. I suggest that women are waking up, but we are



awakening to the need for change in an industry which, for too long, has denied us equal protection.

#### *An industrywide problem*

According to Kenneth Viet, Vice President for Life Products of Aetna Life and Casualty Co., insurance companies try to price their products "to make each group pay its own way." Women, however, consistently find themselves paying in more ways than one: companies not only refuse to make insurance available to women with the same provisions as they offer men—they often withhold the product from women altogether. When purchasing coverage, men and women may be charged a different rate based on statistical experience, or women may be charged higher rates based on no experience at all. Such practices do not occur in isolation, but are pervasive throughout the industry and in all forms of insurance. Let me cite some specifics:

#### *Health insurance*

In purchasing health insurance, women, like most customers, seek protection against the high cost of medical care. Unlike most customers, however, insurance coverage is unavailable or inadequate for one of our most basic medical needs: motherhood.

For example: a study by the Health Insurance Institute discovered that 56.4 percent of all new health insurance group policies excluded any coverage for maternity; a Michigan survey revealed that commercial health insurance plans offering coverage provided only 39-44 percent of medical costs for maternity; and a Pennsylvania study reported that some insurance companies were using 16-year-old hospital rates to set the maximum limit for current maternity coverage.

If over half of the new health policies exclude maternity altogether, if the minority of plans that do provide coverage meet less than half the actual costs, and if the insurance rates applied by companies are both obsolete and blind to inflation, what price is motherhood today? As a result of discriminatory practices, women find themselves bearing the full costs of reproduction for society, curious treatment by an industry whose primary function is to spread costs fairly.

#### *Disability insurance*

Under disability insurance, as with health insurance, working women are unable to purchase adequate protection against the disabling effects of maternity. Pointing to the so-called voluntary and predictable nature of pregnancy (and related conditions such as miscarriage), insurance companies rationalize such discriminatory treatment of women. These same companies, however, routinely provide coverage for male-specific risks, such as vasectomies and prostatectomies, as well as other voluntary conditions, including sports injuries, cosmetic surgery, and hair transplants.

These inequities are not confined to maternity benefits: indeed, they pose an all-too-familiar barrier against women seeking income security in all forms of disability coverage.

For example: in 10 out of 13 companies surveyed in Pennsylvania, premium rates were found to be consistently higher for women than for men who carried identical or better coverage; in New York, a study reported that women were charged as much as 150 percent higher rates than men in the same job classification; and in Colorado, a 45 percent to 115 percent rate differential between the sexes was discovered, as well as the practice of singling out professional women and classifying them in lower job categories with higher insurance rates.

But, for some women, rate discrimination is a remote problem: these women face the more fundamental obstacle of total exclusion from disability coverage. They are the part-time employees working without the fringe benefits and protections attached to full-time salaried positions. They are the waitresses and the domestic aides, whose male counterparts often enjoy disability coverage while they do not. Most importantly, they are the homemakers, working without wages, yet providing the valuable services of child care, housecleaning, and cooking—services which would cost more than \$17,000 to replace.

#### *Life insurance and pension benefits*

In purchasing life insurance and pension benefits, women face the most explicit form of discrimination. On the grounds that women as a group live longer than



men, insurance companies compute rates and benefits almost exclusively on the basis of sex, overlooking other relevant criteria such as smoking and drinking habits. For example, under defined contribution pension plans, sex-based tables are often used to compute the amount of monthly annuity. Even though a man and a woman are the same age and have the same amount of money in their pension accounts, the woman will receive a smaller monthly annuity because, theoretically, her total amount will have to be spread over a longer period of time. Thus penalized for their longevity, all women receive lesser monthly retirement benefits than men regardless of their individual life expectancies. In recent court decisions, such generalizations have been persuasively challenged, in terms of both statistical and legal merit: a 1978 Supreme Court decision, citing Title VII, squarely rejected differential treatment under employer-operated pension plans. Private insurers offering other policies, however, remain outside the scope of the decision and can freely rely on classifications based on sex.

Ironically, where sex-based ratings might cut in their favor, women are victims of a "Catch 22," paying life insurance premiums based on a limited three-year setback, despite the fact that statistically they outlive their male counterparts by six to nine years. Furthermore, women are often denied equal access to equal benefits. For example, under some life insurance policies: a married woman can purchase coverage up to, but not exceeding the amount of coverage held by her husband, a limit rarely applied in reverse, despite the size of each spouse's income; a disabled woman, seeking the customary waiver of premium option, bears the burden of proving a "definite need" for the waiver, unlike any other class of insureds and a working woman, in a high-risk classification, may be denied the waiver of premium option altogether or may pay higher prices than men in the same high-risk grouping.

Few satisfactory explanations are offered for these inherently unfair practices—the singling out of pregnancy as an uninsurable condition, the arbitrary classification of women as higher disability risks, and the disproportionate and discriminatory emphasis on sex as the sole determinant of life expectancy. The pattern that emerges is not one of equity for customers, but of convenience for insurers, who find it easier and cheaper to apply broad sex-based standards. Such standards, however, are often based on outmoded assumptions and inappropriate generalizations about the value of a woman's work and her need for financial security.

### *A time for change*

To sanction the inequities of current insurance practices is to relegate women to inferior economic and legal status. For you to overlook the changing demographics in the home and on the job is to perpetuate the myth of the dependent female. For you to continue to allow the exclusion of women from a growing industry is, quite frankly, to ignore good business sense. For today, women represent a great potential market for smart companies looking to the future: in life insurance coverage alone, growth is up 90 percent from \$200 billion in 1970 to \$380 billion in 1976, due to the increased numbers of female buyers. And that is with only half of all women in the labor force. The Labor Department now estimates that by 1990, 95 percent of America's women will be in the paid labor market. Surely our insurance companies are aware of the great potential that offers them.

To date, piecemeal efforts have been made to eliminate discrimination in insurance practices. Model regulations, proposed by the National Association of Insurance Commissioners, have been adopted in whole or in part by several states. Unfortunately, these bandaid solutions have done little to alleviate what remains a glaring gap in our record of civil rights achievements.

Now, the '80s are upon us; legislation enacted today will set the tone for a new and promising decade. In considering passage of the proposed Nondiscrimination in Insurance Act, this distinguished Committee is showing the leadership and foresight that represents our hope for tomorrow. This bill has no price tag; it forms no new agency; it promulgates no new rule. Rather, it incorporates and adapts a piece of our Constitutional wisdom that says each individual deserves fair and equal treatment. Women—working, mothering, saving, and investing—have a right and a responsibility to secure their financial futures through the purchase of insurance, fairly and equitably offered.

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Senator METZENBAUM. Now my old friend, Joe Rauh, speaking for the Leadership Conference on Civil Rights.



We are happy to have you with us this morning. You have been a leader over a period of many years in speaking out for nondiscriminatory practices, for civil rights, for civil liberties. It is only logical that you should be here this morning.

I am happy to welcome you. I hope that you will be as successful in your support of this legislation as you have been in connection with many other pieces of legislation having to do with civil rights in this country.

#### STATEMENT OF JOSEPH L. RAUH, JR., LEADERSHIP CONFERENCE ON CIVIL RIGHTS

Mr. RAUH. Thank you, Mr. Chairman. You certainly have been a wonderful supporter of civil rights throughout your whole life. Everyone who is familiar with this field recognizes your preeminence in it.

My name is Joseph L. Rauh, Jr. I am counsel to the Leadership Conference on Civil Rights, a coalition of 145 national organizations, representing blacks, Hispanics, and Asian-Americans, labor, major religious groups, women, the handicapped, minority businesses, and professions, established over 30 years ago, the conference speaks for a substantial majority of our population, and comprises the most broadly based coalition in the Nation committed to the goal of equality in a free plural democratic society.

I guess I should start with an apology.

Senator METZENBAUM. Just before that, could you be good enough to submit for the record, the total list of the organizations who are part of the Leadership Conference?

Mr. RAUH. I probably might have it here, because it is on the back of our stationery. Possibly Mr. Marvin Kaplan, who is the director of the Leadership Conference and is sitting over there, may have a piece of stationery with it, Mr. Chairman.

[Material referred to above appears in the appendix.]

Senator METZENBAUM. Thank you.

Mr. RAUH. We had a little mix-up in preparing our testimony and I don't have it in writing. I hope I may be permitted, as the Judiciary Committee has often permitted me, to speak from notes.

Senator METZENBAUM. I think it violates the rules, but by unanimous consent of all my fellow members, we will permit you to proceed, provided you are not too long.

Mr. RAUH. It will not be, sir. It will be short.

The Leadership Conference on Civil Rights backs the thrust of this bill with great vigor and support. We have worked for the civil rights bills since 1957, 1960, 1964, 1965, and 1968.

We have created a climate in this country, a policy of this country against discrimination. We would have hoped that this policy would have been accepted by all industries. We don't like statutes for statutes sake. We like statutes for what they can accomplish.

What we have here is in perfect line with the previous statutes that have been adopted. We urge its enactment.

I would hope that the insurance industry would stop the practices without more. There is no reason why an industry now, understanding the national policy, shouldn't work to end discriminatory practices.

I have noticed in many industries, in employment, some of the worst discriminators 20 years ago, are now the best on affirmative action.



In other words, what has happened is, there is a new climate in this country. I would hope that the insurance industry would want to join with that climate. If they don't, there is no choice but this statute.

Coming to the statute itself, Mr. Chairman, we have no problems whatever with the first seven sections. Our problem lies with the remedies and enforcement, and it is not in any sense of a criticism that I say this. It is in the sense of wanting to be helpful.

We have found in the Leadership Conference that some administrative remedy is necessary for enforcement of civil rights. You have that, for example, with employment, with the Equal Employment Opportunity Commission.

Now contrast that to the 1968 statute on housing. We had no enforcement mechanism, no administrative mechanism, and as a result, we are back in front of Congress.

Right now the House Judiciary Committee has reported out a bill to create some administrative mechanism for housing discrimination. This is before the Senate Subcommittee of the Senate Judiciary Committee on which the chairman serves.

So that what we have is an understanding that when you create a bill with no administrative remedies, enforcement is more difficult.

Indeed, the housing bill is now a bipartisan bill in the House. We have obtained an agreement by the Democratic Members and the Republican Members, Congressman McClory and Congressman Railsback as the leaders, to have an administrative remedy put into that bill, even though we didn't get that in 1968, when it was first enacted.

The way I would put it is this: We would be anxious for a bill that states principles. We are just suggesting to you that it would be advisable to consider administrative alternatives to what we have here.

Our experience with States' enforcement has not been as good as with Federal enforcement.

Our experience with judicial enforcement has not been as good as with administrative enforcement.

This is not to say we are not 100 percent behind getting a bill. If we were sitting in a room and we were told that this bill is the bill or else, I think some of us would probably be pushovers.

But the fact is, we are here giving testimony and advice. Our feeling is that we should try to find some more, somewhat I would say stronger enforcement through both Federal participation and through Federal administrative participation.

I recognize, Mr. Chairman, the climate. I recognize the advantage of being able to say there is not one more bureaucrat going on to the Federal payroll.

Senator METZENBAUM. It is so comforting to say.

Mr. RAUH. I recognize it and I am not at all unsympathetic to it in the climate. I guess I have to state our experience in the Leadership Conference as one that prefers and believes Federal action and administrative action does work better.

I don't want to end on that note. I want to end on the positive note which is that we deeply appreciate the actions of Senator Hatfield and the chairman here in trying to get us a bill to stop the discrimination.

There is the discrimination against women which is clear and which has been so well-presented by Dr. Brown, and so well presented by the



Senators themselves. But I wouldn't say there is no race discrimination. There appears still to be some racial discrimination in housing, auto insurance, health insurance, and also some in the underwriting of other forms.

So, while I want to say to the insurance industry that I believe the racial discrimination has lessened, I certainly couldn't subscribe to the proposition that there is no racial discrimination at this time.

On that note, that there is discrimination on sex and race bases, we strongly support the bill and hope we can work with the committee in getting a bill that can be enacted.

Thank you, sir.

Senator METZENBAUM. We appreciate the support of the Leadership Conference on Civil Rights. The point that you make with reference to enforcement is a point that is not an unfamiliar one.

In 1949, I had the privilege of putting through the Ohio General Assembly, as a State senator, a bill that again was in the whole atmosphere about bureaucrats, too many bureaucrats, too much regulation. It is not a new thought to America. We have been hollering about bureaucrats since the first one was ever created.

In that legislation, we made it illegal to overcharge with respect to retail installment sales, a question of too high finance charges, no limit, kickbacks to dealers, padded insurance bills as a part of the package of the financing of the automobile or appliances and the insurance.

At that time, I too had that problem and did provide a piece of legislation that added no bureaucrats and provided for individual action as the sole remedy.

I am happy to say to you that absent some changes that we have been able to effect in the legislature, that achieved the objective that was sought.

I believe that is the ultimate question. That is, can you achieve the objective sought? Here we are dealing with responsible members of the economic world, insurance companies. It is my feeling that if we can enact a piece of legislation without any regulatory procedures, without any bureaucracy, and yet provide that there is a remedy if there is a violation, and that is the right of the individual to go into court or the right of the Attorney General to go into court, that the insurance industry is so responsible that that segment of it that continues to discriminate would immediately change those policies.

So, I feel very comfortable with that aspect of it. If we are able to pick up some support in the Halls of Congress by not having any new bureaucracy or administrative procedures, then I think the objective we have sought will have been successfully achieved.

I think there are other problems with respect to passing the bill, but I think we have eliminated one of the major ones. I hope we have.

Mr. RAUH. I certainly understand and respect that position. Indeed, I do agree that the mere passage of the bill that makes these practices unlawful will get the cooperation of a majority. One always get the acquiescence in the law of the majority. The problem is going to be with those who don't.

On that point, I would like to say, Mr. Chairman, that the 1978 case, the city of Los Angeles Department of Water against Manhart, lays



the basis for the insurance industry doing away with its major violations which we have heard this morning.

That case says as flatly as any case could, that you can't make female employees make larger contributions to a pension fund than male employees, that you can't discriminate, that you can't use statistical tables, that you can't have it by class, and you have to have it by individual.

I would have hoped after reading that case that the industry would have stopped classifying by sex. There was nothing left of the right to classify by sex after the Supreme Court got done by that case. Of course it didn't apply to everything. No one case can apply to the whole field. That is the importance of legislation because legislation can apply to a whole field. The Supreme Court case applies to one.

But the principle of that case, that we deal in this country with individuals and not with classes, was so clearly enunciated that I would have thought the industry would have accepted that. I still hope they will accept it. But I would say that I have a great deal of sympathy for what the chairman said. I would prefer the other, but I certainly don't want to get where we are going to oppose this bill if it could be passed tomorrow. We would support it tomorrow, and we might try to get some administrative remedies, but we certainly wouldn't let it slow down this bill one bit.

Senator METZENBAUM. Thank you very much. I don't really have any additional questions. If we do, I, as well as the other members of the subcommittee will feel free to submit them in writing.

Mr. RAUH. Certainly, sir.

Senator METZENBAUM. Thank you.

Now we were to hear from Althea Simmon, director, Washington Bureau, NAACP. We are advised that she, as well as Stephen Koplan, legislative representative of the AFL-CIO, will both, on behalf of their respective organizations, submit written statements for the record and they will be included in the record.

[Statement referred to above appears in the appendix.]

Senator METZENBAUM. Our last witness is Barbara J. Lautzenheiser, representing the American Council of Life Insurance and the Health Insurance Association of America.

Ms. Lautzenheiser, I am very happy to have you with us this morning. I am particularly pleased to have you with us this morning because very few people have more letters in their name than I do. You do, and that pleases me to no end.

Will you please introduce those who are accompanying you as well.

Ms. LAUTZENHEISER. Yes, sir; I will.

It is unusual to find people with long last names. I have you by quite a ways, haven't I?

I congratulate you for pronouncing my last name correctly. That is quite an accomplishment.

Senator METZENBAUM. Well, when you have Metzenbaum, you can deal with Lautzenheiser.

Ms. LAUTZENHEISER. That is true.



# **PANEL OF INSURANCE REPRESENTATIVES:**

**STATEMENT OF BARBARA J. LAUTZENHEISER, AMERICAN COUNCIL OF LIFE INSURANCE AND HEALTH INSURANCE ASSOCIATION OF AMERICA; THOMAS GILLOOLY, ASSOCIATE GENERAL COUNSEL, HIAA; AND RICHARD MINCK, EXECUTIVE VICE PRESIDENT, ACLI**

Ms. LAUTZENHEISER. My name is Barbara Lautzenheiser. I am a fellow of the Society of Actuaries, a member of the American Academy of Actuaries, and senior vice president of the Phoenix Mutual Life Insurance Co.

I have worked in an actuarial capacity for 20 years, and have been heavily involved in sex discrimination issues in insurance in the last 8 of those 20 years.

I am appearing on behalf of the American Council of Life Insurance and the Health Insurance Association of America.

The ACLI consists of 506 insurance companies which have 95 percent of the life insurance in force in legal reserve life insurance companies in the United States.

The HIAA's 325 members write over 85 percent of the health insurance written by insurance companies in the United States.

With me are Thomas Gillooly, associate general counsel of the HIAA, and Richard Minck, executive vice president of the ACLI.

I would like to state that I am going to summarize the written testimony that I have previously submitted to this committee.

First, I would like to begin with stating that we do not differentiate in rates or in the availability of coverage on the basis of race, color, religion, or national origin.

Therefore, we see no reason to enact a Federal statute to prohibit what no one does, has any reason to do or wants to do.

In any event, such practices are already prohibited as unfair discrimination by existing State Unfair Trade Practices Act.

I believe Senator Hatfield, this morning, agreed that race, color, religion, or national origin are not major issues in this bill.

In contrast, we do charge different rates for women and men, just as we do for people of different ages. The reason is the same in both cases, different costs.

We are not prejudiced against men or older people, As the Supreme Court observed in the *Manhart* case, "As a class, women live longer than men."

Therefore, because of costs that are higher, we charge men higher rates for life insurance to cover the larger number of claims, just as we charge older people higher premiums than younger people.

These distinctions are a sound basis for conducting our business. They are in compliance with State laws prohibiting unfair discrimination.

Enacting a statute to prohibit them would have serious adverse effects on life and health insurance companies and, more importantly, on their customers.



Some of the statements given as reasons to support the enactment of S. 2477 show a serious misunderstanding of how companies actually conduct their business.

For this reason, we thought it might be helpful to the subcommittee if we attempted to correct some of these misstatements.

In introducing the bill, it was stated that:

"Sex discrimination in availability, conditions, and benefits offered to customers is widespread."

That "life insurance for women is often limited in scope and availability."

And, "in disability, many types of insurance benefits available to men are not available to women. In only a few States is disability coverage available to women on any terms at any price."

All these statements are untrue. Life insurance is equally available to women and men.

In health and disability insurance, the model regulation to eliminate unfair sex discrimination, adopted by the National Association of Insurance Commissioners, in 1975, prohibits these practices.

This regulation, or a comparable one, has been adopted in 19 States and, in addition, 14 States have statutes which prohibit unfair discrimination because of sex.

This means that insurers are specifically prohibited from discrimination in conditions, availability, and benefits of policies in these States.

In any event, every State has an Unfair Trade Practices Act which prohibits unfair discrimination.

A second area of misstatement made in introducing the bill is "industry has chosen to ignore other more accurate classification criteria, such as smoking habits, family health history, physical condition, recreational occupational activities."

This statement is simply wrong. Anyone who has ever applied for a policy is well aware that insurers do use precisely these criteria in classifying persons for purposes of determining life and health insurance rates.

It was also stated that sex-based rating is clearly not a business necessity and that prohibiting such practices would require only minor adjustments in rates.

In a voluntary insurance market, as in any other voluntary market, prices must be based on costs. Any requirement that rates not be based on cost, that is, that equal rates be charged for unequal risks, is unfair to existing and to future insureds, and would substantially distort market relationships.

If made applicable to existing policies and contracts involving obligations extending over several decades, it would require extensive, complex and costly adjustments to all in-force policies.

Senator METZENBAUM. Ms. Lautzenheiser.

Ms. LAUTZENHEISER. Yes.

Senator METZENBAUM. Let me ask you a few questions. Do you want to read your entire statement or do you want to summarize part of it?

Do you mind if I interrupt you for questions? Or do you want me to wait until the conclusion?



Ms. LAUTZENHEISER. I am summarizing the statement rather than reading the entire statement.

Senator METZENBAUM. Oh. Very well. I thought I was following the verbiage of the statement.

Ms. LAUTZENHEISER. Well, some of it is summary and some of it is verbiage.

Senator METZENBAUM. Very well. Proceed as it is convenient for you.

Ms. LAUTZENHEISER. Thank you.

Senator METZENBAUM. What about my interrupting you for questions?

Ms. LAUTZENHEISER. Certainly. That is fine.

Senator METZENBAUM. Then I want to ask you a question. You talked of a number of States that had adopted the model regulation. I want to ask you whether it isn't a fact that a large number of States eliminated the operative words with respect to discrimination and changed the model regulation to accommodate to their own situation as they felt it ought to be.

The model regulation itself has not actually been enacted in that many States, except as modified.

Ms. LAUTZENHEISER. The model regulation and the substance of the model regulation has been adopted in all States, or in those States I have indicated. There are specific words sometimes changed.

Senator METZENBAUM. Yes.

Ms. LAUTZENHEISER. I would like to get back to the basic——

Senator METZENBAUM. Yes.

Mr. MINCK. Senator, just to amplify on that. The text of the statement I think pointed out that this regulation is something that supplements the Unfair Trade Practices Act. There is clarifying language as to what the Unfair Trade Practices Act specifically requires in this area. That law is on the books in 50 States.

We believe it applies regardless of the particular wording of the regulation adopted. We don't think it is vitiated by any changes made to the wording of the model regulation.

Senator METZENBAUM. The Unfair Trade Practices Act provides adequate protection and nothing more is needed; is that your point?

Mr. MINCK. I think the point is that if you change a few words in writing a regulation interpreting the Unfair Trade Practices Act, you haven't really changed the Unfair Trade Practices Act and its effect.

Mr. GILLOOLY. I think that the Unfair Trade Practices Act, Senator, provides a statutory basis for the prohibition is a model regulation that specifically implements this statute with respect to sex discrimination.

It is also important to bear in mind that once a few of the bellwether States, it doesn't really have to be 19, adopt these regulations, they have a pervasive effect upon the industry, because the industry really can't live by doing business on one basis, in a few States, and on another basis in other States.

So, with respect to the great bulk of insurers, once the bellwether States of New York, Ohio, Pennsylvania, California, States such as this, adopted the Unfair Trade Practices Act, and the model regulation, they considered at that time this issue of rating with respect to



sex, and decided that availability of coverage with respect to sex would be mandated, this substantially concluded the question, in our opinion.

Nevertheless, the NAIC still has this issue under consideration that has been raised here this morning, by Senator Hatfield and others, and that is with respect to rating based on sex.

Senator METZENBAUM. Let me just ask you a question on that point. Doesn't the Unfair Trade Practices Act prohibit unfair discrimination, which includes sex discrimination, but that really does not cover adequately the question of sex discrimination, because the insurance industry argues that the discrimination is fair.

Mr. GILLOOLY. In this respect, we supported the adoption of specific regulations prohibiting sex discrimination under the Unfair Trade Practices Act.

I think any commissioner, even without this regulation, if he saw any of the several forms of discrimination that are specified in the bill, could have a company into his office and could order them to discontinue such practices and take appropriate action.

I think the presence of the Unfair Trade Practices Act has eliminated, as Senator Hatfield said, all these other forms of discrimination.

Senator METZENBAUM. If there is no discrimination because these State regulations and the Unfair Trade Practices Act prohibit discrimination, then what is the problem with enacting this?

That is like saying I would be willing to vote for a bill to prohibit any Member of the Senate over 100 or under 20. You know, it won't make any difference.

Mr. GILLOOLY. Well, as Barbara Lautzenheiser is explaining, Senator, there is a major problem with respect to saying that sex-based rating distinctions are unfair discrimination.

We do not concede this single point.

Ms. LAUTZENHEISER. The difficulty, again to repeat Mr. Gillooly's remarks, it is a practical matter that most companies are licensed in many of the States. Once these States in which they write most of the business do pass the laws, it is prohibitive costwise, to develop any kind of contract for different States.

So, it does become uniform.

Also, the difficulty here in sex discrimination is not in the availability of coverage. Coverage is available to either sex, as well as all as to people meeting the other prohibited criteria. It is in the area of rates because of the impact of costs, in a voluntary market system. Moreover we are talking about products that have unlimited amounts. You can buy insurance for unlimited amount if you can show insurable interest. In these circumstances, a cost that is not accurate creates unsoundness over the many years.

Yet another misstatement is that insurance companies have relied on gender to impose higher rates for lower benefits on certain persons "even though the majority of individuals affected may be no different in terms of potential for loss than their counterparts of the opposite sex."

This statement is contrary to fact. Differences in mortality and morbidity between the sexes occur in all statistics available—for the general population, insured population, for all cultures and all ages.



Mortality statistics have been kept over 200 years and consistently show female mortality substantially below male mortality. Appendix II covers this in more detail.

Yet another area of misstatement, appearing in the questions and answers, was in regard to the U.S. Supreme Court decision in the *Manhart* case. The questions and answers state "The Court squarely rejected the insurance industry's argument that group discriminatory treatment as to insurance rates and pension benefits can be justified on the basis of actuarial tables."

Instead the Supreme Court clearly limited its decision to employee contributions to an employer-operated pension fund and not to insurance contracts.

I believe Senator Hatfield also pointed that out this morning. The Court said:

Although we conclude that the Department's practice violated Title VII, we do not suggest that the statute was intended to revolutionize the insurance and pension industries.

All that is at issue today is a requirement that men and women make unequal contributions to an employer-operated pension fund.

Senator METZENBAUM. Let me just followup on that statement a little bit.

Ms. LAUTZENHEISER. Yes.

Senator METZENBAUM. We know that the Court rejected unequal contributions to an employer-operated pension.

Now, tell me how you distinguish that from an unequal rate being charged to men and women for insurance. I have difficulty with this rationale.

Ms. LAUTZENHEISER. The Court, again, had a very narrow construction. It was talking about the self-insured, employer-operated plan. It is not talking about a voluntary market system.

It was also talking in regard to a pension plan where the amount of the benefit or a function of salary or function of years of service with a limited amount, and again, this is why they stressed, they did not intend to revolutionize the insurance industry's practices with regard to rates; a very different thing.

Senator METZENBAUM. I understand that, but I don't understand the distinction. I have difficulty in getting over that gap where 10 men and 10 women work for an employer that has an employer-operated pension fund and the women pay something different than the men.

The Court says that is discriminatory and violates title VII.

Now, how do you distinguish that from those same 20 people participating in a nonemployer insurance program for the same company, and paying different rates for men and women?

Ms. LAUTZENHEISER. First of all, it would not be 10, it would be many people.

Senator METZENBAUM. I don't care about the numbers, Ms. Lautzenheiser.

Ms. LAUTZENHEISER. Well, but that is the difficult thing. We are talking about—

Senator METZENBAUM. Well, make it 1,000 men and 1,000 women, if you are more comfortable with that. I used that only as an example. I don't think that is important at all.



Ms. LAUTZENHEISER. The employer-related plan, again is a much more stable group. We do not know what the U.S. Supreme Court would have said had they been coming out with a decision based on the industry, as opposed to this particular case. It was a very narrowly constructed case.

Mr. MINCK. Senator, I spent some time working on the *Manhart* case. The Court specifically looked at the question of would it be fair to have a plan whereby the employer put in equal contributions for men and women employees that accumulated to whatever amount it accumulated to, and then the employees went out in the open market and bought whatever annuities they could buy with that same lump sum.

They specifically said that would be fair; that that was not being prohibited by their case.

Senator METZENBAUM. If they had each put in equal amounts?

Mr. MINCK. If they and the employer had each put in equal amounts, the money had accumulated and at the time they had hit retirement, they each had equal lump sums.

They then went out into the open market and bought annuities at the going rates and got different amounts of monthly payment, the Court said that would be perfectly fair. They distinguished between that situation and the employees having different take-home pay because of unequal employee contributions.

Senator METZENBAUM. Well, what you are saying is that if it happens at the time the employee leaves the company and they buy the annuity, you are saying the decision said that buying something that didn't give equal rights or equal value for the same dollars, that that would be fair, but that participating in the employer-operated pension funds was a discriminatory practice under title VII of the law.

I am still having great difficulty in following your argument that that case is not applicable, at least by implication—I don't think it does directly. If it totally solved the problem, there wouldn't be the Hatfield-Metzenbaum bill before the Senate committee at the moment.

But, I don't think it does totally solve it. But we certainly think the bill stands for the proposition that the Court looked favorably upon the concept of nondiscriminatory practices, vis-a-vis women, in connection with pension plans and their benefits.

Mr. MINCK. I think that again, the problem is if you look at what is happening in the situation where the Court specifically could bless the action, the employees, when they reach retirement, would have lump sums of exactly equal value.

The annuities they would purchase with it would also be of exactly equal economic value. The monthly payment might differ.

Just as for example, if you look at two groups of employees, one of whom retired at age 60 and one retired at age 65 with equal lump sums. They might buy annuities that would provide different monthly payments, but they would be of equal value in that they were of equal cost.

Senator METZENBAUM. I understand that.

Ms. LAUTZENHEISER. The Supreme Court recognized that.

Senator METZENBAUM. Well, why don't you proceed. If you can't shorten your 17 pages, I am afraid we will be here until 3 o'clock this afternoon.

Ms. LAUTZENHEISER. I will.



In introducing the bill, the sponsor states that its passage would be a significant step forward toward greater equity in the pricing of insurance protection.

Presumably, greater equity means insurance would be available at fair rates, which the bill seeks to bring about by requiring rates identical for women and men.

It is important to understand that unless all people applying for insurance have about the same cost of risk, a single set of rates cannot be fair.

Fairness requires that each class of risk be charged rates appropriate to the costs arising from the risks.

It is no accident that the State Unfair Trade Practices Acts prohibit rating practices that are unfairly discriminatory.

Discrimination in insurance ratemaking is essential if rates are to be equitable to reflect fairly an insured's probable future loss that it cost.

Competitive pressures in the private voluntary insurance market oblige insurers to distinguish higher and lower risks and lead to fair pricing.

For insurers to be able to set fair prices, they must be permitted to classify insureds for rating purposes according to the cost, based upon relevant information, including mortality and morbidity experience by sex.

We do not oppose State legislation or regulation prohibiting arbitrary and unfair discrimination among members of the same class who share an equal expectation of loss or an equal cost.

Nor do we oppose the adoption of legislation or regulation prohibiting sex discrimination based solely on sex with respect to availability of coverage.

What is of concern is the fact that S. 2477 would declare several ongoing and essential insurance practices to be unlawful, including sex-distinct mortality and morbidity actuarial tables.

In essence, the bill would remove one of the primary pricing tools used by insurance companies, that is, pricing based on cost.

A basic premise underlying the bill seems to be that sex-based distinctions in insurance are not equitable and are contrary to public policy.

There are two possible kinds of sex-based distinctions in insurance. One kind is availability. We have already agreed that insurance should be made available to persons of either sex.

Hence, there is no need for the legislation in that regard.

The second is distinction in rates. Insurers must be able to make such distinctions if they are to treat policyholders fairly.

In determining equitable life insurance rates, an insurance company should treat each individual applicant not according to how long all people expect to live on the average, but rather according to the cost determined from a group of people sharing that person's characteristics which indicate probable expected mortality of that individual.

That is what insurance companies currently do. A similar principle is followed in health insurance.

There is a line of argument advanced by some who accept the mortality rates experienced by men and women, but who maintain that it is nevertheless unfair to charge different premium rates for women who buy annuities from those charged for men.



They argue that despite the fact that women live longer, on the average, than do men, that fact can be viewed in terms of only a relatively small portion, about 16 percent, of the women living for a good deal longer than some of their male counterparts, with the rest of the women living for about the same length of time as the rest of the men.

This view of the overall picture is then used to argue that women should not be penalized because a few of them will live longer than a few of the men.

This argument, known as the "overlap theory," overlooks the fact that premium rates for annuities, as for life or health insurance, must be adequate to pay the benefits promised to a group each representing the same general risk characteristics.

The fact is simply that more money is required to pay a group of women aged 65 a specific number of dollars each month as long as they live than is required to pay the same monthly amount to a corresponding group of men aged 65.

The same is true for a group of women aged 60 as compared to a corresponding group of women aged 65.

There, rates and costs vary by age and by sex.

Overlap theorists tell us nothing new about mortality rates experienced by women that is not already known and used by insurance companies. It is just that what they tell us is not relevant.

The actual future lifetime of an annuitant cannot be known when an annuity is purchased. It is not possible to match a particular man with a particular woman and charge them the same rate because they will both die in the same year.

We do not know when a particular person will die. Thus, the "overlap theory" cannot lead to a sound basis for pricing.

If S. 2477 were enacted, it would prevent life and health insurers from establishing rates based on costs. It would have significant undesirable effects. It would prevent life and health insurers from establishing rates based on costs.

Insurance would become disproportionately cheap for some and expensive for others. Since life insurance rates for women based on costs are cheaper than rates for men of the same age, the bill would require an increase in life rates for women, and a decrease of life rates for men.

For the typical women buying life insurance this would result in a premium increase of 10 percent or more. The increased rate might reduce the amount of life insurance purchased by women, at least in the United States.

Since foreign or offshore or Canadian insurance companies could continue to price risks according to costs, and would conceivably advertise that fact, American women might find it attractive to buy life insurance outside the United States.

The result would be hardships of various kinds: For women who bought from a foreign insurer, the inconveniences of negotiating an insurance purchase outside the United States; for women who bought in the United States, the necessity of paying a higher rate than was justified by their expected mortality costs; and for women who, because of the higher price, did not buy at all, or who bought less life insurance than they otherwise would purchase, the lack of adequate insurance coverage.



We would anticipate similar effects with regard to other kinds of insurance.

The effects of the retroactivity feature of S. 2477 could be even more severe. Life and health insurers would be forced to equalize the rates and benefits of existing policies and contracts which involve obligations stretching over many decades.

Again, let us look at individual life insurance for an example of what we would anticipate would happen.

While it is difficult to determine exactly what would be permitted if S. 2477 were enacted, let us assume that it would permit insurers to reset premium rates at levels somewhere between the rates for men and the rates for women.

This would mean an increase for women who had purchased life insurance contracts with guaranteed rates.

A rate increase of the magnitude that would be necessary to produce the average rate for policies on the lives of women and men will be sure to produce complaints from the affected policyholders, who had every right to assume that insurance companies would carry out their contracts. Legal proceedings could be initiated, and numerous policies canceled.

Although the bill as introduced appears to permit the increasing of premium rates on existing policies, it permits that only "if clearly necessary to comply with the nondiscrimination requirements of this act."

The threat of litigation over this condition might effectively prevent companies from trying to adjust the rates upward on their women insureds' policies.

If women's rates were not adjusted upward, the men's rates on existing policies would have to be adjusted downward to the level of women's rates.

Again, since life policies on men constitute over 80 percent of the business in force, such a large reduction in present and future income of life insurance companies would substantially impair their financial strength and the ability to carry out long-term obligations.

Thus far we have considered only the insurance company losses which would be incurred in the form of lower premium receipts.

Added to these losses would be the increased administrative expense arising from the changes. Countless records would have to be changed, and computer programs would have to be changed.

A changeover process of this complexity and magnitude would involve substantial time and costs. These costs would have to be passed on to the policyholders. The result would be to magnify the impact on women and men owning existing policies.

There is also a serious constitutional defect inherent in the retroactive features of S. 2477. This is discussed in appendix IV of our statement.

The bill also requires that any insurance policy which provides benefits for disability or medical expense include benefits for disability or medical expense arising from normal pregnancies. Such a requirement would be highly inappropriate.

First, health insurance is designed to protect against unforeseen illness or accident since such events can lead to financial losses that cannot be budgeted for or predicted.

Health policies currently pay for expenses connected with illness arising from complications of pregnancy, that is, unforeseen expenses.



The point is that families can anticipate the expenses of normal pregnancies, and it is cheaper for them to provide for these expenses directly rather than to pay a premium to a company which must cover not only these medical expenses, but also the insurer's operating expenses.

A requirement that all health insurance policies include coverage for normal maternity would discriminate unfairly against persons of either sex who did not need or want to buy the coverage.

We see no reason why anyone should have to pay for coverage which they do not need or want.

In summary, the life and health insurance business is a progressive one. Nearly all applications for insurance are acceptable, at standard rates.

Life and health insurers constantly make changes to promote and to improve their products and services and to refine rating classes to achieve fair and equitable rates.

The business is comprehensively regulated by the respective States to insure that its rates are not unfairly discriminatory.

The National Association of Insurance Commissioners' model regulation to eliminate unfair sex discrimination is a tool which States regulators can and do use to prohibit insurers from discriminating against women in conditions, availability of coverage and benefits of policies.

In addition, the characteristics of race, color, religion, and national origin are not used by life and health insurers in determining availability of coverage or premium rates.

Therefore, there is no reason for enactment of legislation in these areas.

The one area where S. 2477 would make a difference is in its prohibition against the use of sex as a characteristic in determining premium rates.

Differences between the sexes in mortality and morbidity are real and substantial and must be taken into account if life and health insurance rates are to be fair and equitable.

Combining data for the sexes will not change the fact that the mortality differences exist, hence the cost differences exist.

The enactment of S. 2477 would prevent us from setting fair and competitive rates based on costs.

In a voluntary market system, both the seller and the buyer, that is, both the insurer and the insured, must agree to the transaction.

If pricing based on costs is prohibited, the result could be elimination of the availability of coverage for all markets at the appropriate cost.

Thus, it could lead to substantial disruption of insurance markets and to increased costs and complexities to the detriment of both companies and the insuring public, that is, enactment of S. 2477 could be counterproductive.

For these reasons, we are strongly opposed to the enactment of S. 2477. We would be happy to try to answer any questions you may have.

Senator METZENBAUM. Thank you very much, Ms. Lautzenheiser.

May I ask, what are the most recent mortality tables that you have available with reference to the question of mortality for females and males?



Ms. LAUTZENHEISER. The mortality tables that are used in the pricing of insurance contracts and annuity contracts are based upon the actual mortality experience, in most instances, of the company that is doing the pricing.

There are legal requirements to provide guaranteed benefits at a minimum that are based on statutory law, but the actual pricing is done according to most current data generally of insurance companies, if they have it available.

Senator METZENBAUM. My question to you is, what are the overall general statistics that are available to you that we may have available to this subcommittee, concerning life expectancy of women as compared to men? How recent are they?

Ms. LAUTZENHEISER. The ones that are based upon the actual law, and actually are combined data for all companies, are the 1958 tables, Commissioner Standard Ordinary.

However, there are new tables being proposed. We do have new tables based on that data.

Mr. MINCK. Yes. Each year, the Society of Actuaries publishes mortality experience, separate, by sex, based on industry studies.

So, the most recent data we would have is a year or so old.

Senator METZENBAUM. What do they show?

Mr. MINCK. They show that the differences in mortality between sexes have been increasing. Since, I guess, 1900.

Senator METZENBAUM. What do the 1979 statistics show?

Mr. MINCK. They show that for most ages, the mortality experience for women is about 60 percent of what men experience. At some ages, the spread is greater. It varies by age. It is not a single uniform relationship at all ages.

Senator METZENBAUM. Is there an overall comparison statistic available?

Ms. LAUTZENHEISER. That is the 60 percent.

Mr. MINCK. The 60 percent is a good approximation.

Senator METZENBAUM. Will you submit that data for the record please?

Ms. LAUTZENHEISER. Yes.

Mr. MINCK. Yes.

Senator METZENBAUM. Isn't it a fact that many of the statistics that you presently use are based upon a world that has totally changed since those statistics came into being, that change being that more and more women are now in the workplace, that the number of industrial accidents has declined as well as industrial stress, and human stress—is there not some indication that that has had some impact?

Ms. LAUTZENHEISER. The impact that has happened on the socioeconomic conditions have been equalizing between the sexes is that the mortality differentials have in fact been widening.

I think you will find in my testimony, that it is indicated there that the life expectancy for males at age 65, in 1900, was 11.5, and for females, was 12.2, where there was only about a 6-percent difference.

By 1976, that difference had increased to 31 percent, and the statistics since then are even more.

Now this is even general population data. This is not insured population data.



Senator METZENBAUM. We would like you to provide us for the record, information on that subject that is as recent as possible. I think it would be helpful.

Ms. LAUTZENHEISER. Yes.

[Material requested above appears in the appendix.]

Senator METZENBAUM. You have stated that because mortality figures for males and females differ, it is unfair to charge them the same rate for life insurance and annuities.

Do you have any assurances that all individual members of each sex conform with a generalization about the sex?

Ms. LAUTZENHEISER. The point again is, that you attempt in an insurance area, where you are talking about finding a way to pay a very large benefit for a small premium, and basing these on groupings, your intent is to place that individual person in the particular mortality rate that best fits the individual characteristics of that person.

Combining tables between males and females actually takes the person further from the cost of the individual rather than making it clear.

The sex-distinct tables actually make a person's mortality rate charged closer to their individual mortality.

Senator METZENBAUM. Yes. I understand that point. That is the thrust of your testimony. What I am saying is, what assurance do you have that all individual members of each sex conform to the generalization, all males in one category, all females in another?

Isn't that an unfair and inappropriate categorization?

Ms. LAUTZENHEISER. How do you determine when a person, an individual person is going to die. If in fact you could in any way determine when individuals whether males or females, 20 years old, or 65 years old, we would not need insurance. We could merely fund to that point in time.

Senator METZENBAUM. I understand that. The question is whether or not the categorization, males, females, total ratings for one group, a different rating for another, whether that is fair to all of the members of that particular category, whether it is an inappropriate categorization?

Mr. MINCK. Senator, I think you have to measure fairness from what you can know at the time you underwrite the individual when the male or female applies for coverage.

I don't think you can test fairness by observing when the particular individual in fact happens to die, say 10 or 20 years from the time of application for coverage.

Ms. Lautzenheiser pointed out that you have the same problem with age.

If you take a group of people who are 25 years old and a group who are 40, some of the people who are 40 will live longer than some of the people who are 25. You can't be sure that you will not have charged a lower premium for the individual, who was age 25, and lived a short period of time than you charged an individual aged 40, who, in fact, lived a longer period.

But when you started, from all you know about the risk characteristics of the individual, you were treating him or her as fairly as possible.



Mr. GILLOOLY. Senator, I think it is important for you to know that this precise question that you are asking about now is under study by the National Association of Insurance Commissioners at this time.

Both you and Senator Hatfield have made it clear that you don't intend to supersede State regulation of insurance or you would do so only with extreme reluctance.

It seems to us that it would be inappropriate for the Congress to anticipate the result of that study which is currently underway.

If our actuaries can't be relied on exclusively by the public, the insurance departments have technicians and actuaries of their own.

These people and a committee called the Technical Advisory Committee, chaired by Mr. Becker of the State of Texas, and consistency of a wide variety of the best technical experts in the State insurance departments, have this issue under study.

Senator METZENBAUM. Since when?

Mr. GILLOOLY. It was referred to them in December.

Senator METZENBAUM. What is your guess as to their timetable?

Mr. GILLOOLY. I really don't know. I know there will be a report on it at the June meeting.

Senator METZENBAUM. From your experience with the National Association of Insurance Commissioners and the committees that they appoint, have you not found that they move in elephantine procedures, that they are slower than the proverbial molasses, and that they don't really have much time to give to these very weighty questions?

I have heard a lot of things that the NAIC is doing. I hope I live long enough for all of them to be concluded, because they certainly don't move very rapidly.

Mr. GILLOOLY. As a former West Virginia insurance commissioner, I think at times the system bears watching. I believe that is the basis upon which the McCarran Act is set up. I understand that you are doing part of that right now.

However, I do think this is a sincere effort on their part and that it would be instructive to all of us to have their opinion.

Senator METZENBAUM. My staff tells me that the NAIC has actually refused to implement the recommendations of its own task force to end sex discrimination in automobile insurance; is that correct?

Mr. GILLOOLY. Well, I assume you will hear from the casualty insurance people. We work the other side of the house. I would really rather that they speak for themselves.

Senator METZENBAUM. Let me ask you, you were going to submit some tables, do you use the same mortality tables for annuities as those that you use for life insurance?

Mr. MINCK. No, sir.

Senator METZENBAUM. Isn't that unbelievably unfair? How can you justify that? I didn't even know that was the case until my staff just told me that. I must say that that, to me, is shocking. How can you possibly justify that? People die differently if they have life insurance policies or annuities?

Mr. MINCK. No; the point is that mortality tables are used for many different purposes, one of which is to establish minimum liabilities to be held by insurance companies in order to insure solvency.



You have different reasons for selecting a mortality table for that purpose from the reasons for selecting a mortality table to set premium rates.

We also base each mortality table on experience of a group of people insured on a common basis. The mortality rates you see for annuities are based on experience of annuitants.

The mortality rates you see used for life insurance are based on the mortality experience of people insured for life.

Most of the important mortality rates for life insurance are in the ages from about 25 to 60. That is where most of the insurance protection is concentrated.

Most of the important mortality rates for annuities are from ages 65 to 100.

You have very different groups of people involved, and as I say, there are at least four different reasons for using mortality tables, each of which would suggest a different basis for establishing the level of mortality rates.

You have different mortality tables for pricing than you do for determining liabilities, for example.

SENATOR METZENBAUM. Mr. Minck, I am not really an expert on insurance, but I am as much an expert on dying as you are. In any particular group of people, the mortality rate ought to be the same no matter how you slice it.

Now you are saying to me that you pull out the annuitants. When do you pull them out? At the time they buy the policy or when they go on the annuity?

MR. MINCK. The mortality studies will include people who are receiving annuity payments.

SENATOR METZENBAUM. So that therefore, you are only taking those who are now at the annuity age in order to determine the life expectancy?

You start with those who will go on annuity; is that what you are saying? That that is the mortality table you use as compared to people who buy life insurance policies?

I must confess, I am just shocked.

MS. LAUTZENHEISER. Senator, I think the difference has to do with the way people buy the coverage. As Mr. Minck has pointed out, the statistics are based on the actual contracts that are issued.

People who buy annuities do not do so to guarantee payments for the rest of their life if they feel ill. If there is in any way that they feel they are in poor health, they will not buy an annuity.

So that group of people purchasing annuities actually do have longer life expectancy than people who buy insurance.

People who buy insurance are anticipating a possible death, and some even anticipate possible early death. That is the kind of selection that is done by the applicant and the reason criteria on physical health, occupation, and so forth are taken.

They are purchased by different people with different purposes. It does actually affect the mortality of the group of people who choose annuities or life insurance because they have made the selection. They have done that.



Senator METZENBAUM. What is the difference in the mortality rate say at 60, and pick any other age comparable, for those who buy annuities, compared to those who buy life insurance policies?

Ms. LAUTZENHEISER. I would have to go back to the tables.

Mr. MINCK. I think we would have to look at that, Senator. There is not a great deal of life insurance purchased at age 60. That is where the great bulk of the annuity purchases occur. But we can provide current rates, if there is a sufficient volume of business.

Senator METZENBAUM. Are there three different mortality tables used, one, those set by law; two, those set by insurance companies to protect life insurance procurement; three; those set by life insurance companies with respect to annuity procurement, or are there more than those three that are used?

Mr. MINCK. There are the mortality tables kept by the Federal Government and the Bureau of Census for various purposes, and the mortality tables produced by the Social Security Administration.

Senator METZENBAUM. Are those generally higher than yours or lower?

Mr. MINCK. In some cases, one way; in some cases, or the other. General population statistics will show higher mortality rates generally than insured population statistics—the general population includes people on their death bed and in all sorts of health situations.

Senator METZENBAUM. I would like the record to have in full, as much as you may make available to us in connection with annuities, actuarial tables.

I will instruct the staff to obtain such other data as is available for that purpose so that a comparison can be made for one and all to see.

I will further instruct the staff that, if it is possible to make comparisons in the record, then you will do that in order to indicate the differences that exist in providing such explanation as possible.

Mr. CHUMBRIS. Mr. Chairman.

Senator METZENBAUM. Mr. Chumbris.

Mr. CHUMBRIS. Thank you, Mr. Chairman.

Dr. Brown and Mrs. Lautzenheiser both have made excellent statements on their point of view. I believe that neither one of them had the benefit of the other statement.

May I suggest that after reading the statements, their respective statements, we give each of them the privilege of rebutting any particular point that the other witness may have made?

In that way, we will have a complete record and give the Senators the opportunity to judge their testimony in full.

It would seem to me that their positions are at variance. We don't usually make this request. I think it is the first time we have ever made it. I think it may be helpful.

Senator METZENBAUM. I have no objection to Ms. Lautzenheiser's providing some commentary with respect to Dr. Brown's testimony and vice versa.

Isn't it true that women are penalized much more in annuity prices than they are benefited with respect to life insurance procurement?

[See appendix for material referred to above.]

Mr. MINCK. I think the general differences are between 10 and 20 percent, Senator.



Senator METZENBAUM. Could you provide us with some specific data on those comparisons?

Mr. MINCK. Yes, sir.

Senator METZENBAUM. Thank you.

Has the life insurance industry constructed a complete female mortality table based entirely on female lives?

Ms. LAUTZENHEISER. Yes; they have.

Senator METZENBAUM. Are women's rates determined from setbacks applied to the male tables?

Ms. LAUTZENHEISER. This is again one of the difficulties in the different uses that Richard Minck was speaking of. There are legal requirements that the setbacks used to establish minimum reserves on nonforfeiture benefits be no more currently than 3 years, although proposed legislation would change that to 6.

But those are for setting of minimum values in a contract. An insurance company pricing their product actually uses the distinct mortality tables between the sexes and those kind of distinct mortality tables are also going to be proposed for the States to use in setting the minimum values.

Mr. MINCK. Senator, to amplify, minimum values are benefits payable in the event that a policy lapses, that is either cash or paid up insurance.

Each State has a law setting minimum figures for any policy. Those minimums are defined by using an interest rate and a mortality table.

It is a convenient way of defining it. Otherwise you would have to put something like 125 pages of values in the statute. But it doesn't have any significance beyond that.

Senator METZENBAUM. I am not sure I am particularly addressing my concerns to the question of lapsed values, cash values.

Mr. MINCK. But that is where the 3-year-age setback is used. If you could use a larger age setback you would have a lower set of minimum cash values that you could pay.

Senator METZENBAUM. But my question really was are women's rates determined from setbacks applied to the male tables. That is either a yes or no answer.

Ms. LAUTZENHEISER. In most major insurance companies, that answer is no. They use the separate distinct mortality tables between males and females for both the pricing of the product and in dividends.

Senator METZENBAUM. What percentage of the companies would you say just use a relative figure, a figure related to the male table and don't use separate female figures?

Ms. LAUTZENHEISER. I am sorry. I could not tell you that.

Senator METZENBAUM. But there are some?

Ms. LAUTZENHEISER. There are limited numbers.

Senator METZENBAUM. In those cases there could be a considerable inequity in rates?

Ms. LAUTZENHEISER. It depends upon the dividend structure for that contract as well.

Senator METZENBAUM. I think that is a tangential point you are raising. I think it has no relevance. I really say to you that is one you reached up into the air and pulled out.

Ms. LAUTZENHEISER. No, sir.



Senator METZENBAUM. Because all you are saying there is, "Well, we try to give some special dividend consideration." As a matter of fact, it is almost impossible for anybody, any policyholder to find out what the actual dividend policy of the company is.

If we are going to get into the subject of your dividend policy, I would be very happy to have an entire day of hearing on that subject. I think if there is any place in the entire insurance industry where people have an inability to find out what their company is doing, whether it is a stock company with a participating right or whether it is a mutual company, you just can't find the answer.

It is a mysterious kind of operation. So when you tell me that we take that into consideration in making the dividend policy, I say, I don't buy that at all.

Furthermore, I am not at all convinced that I have that kind of confidence in the executives of the companies to give fair treatment to the women, because probably you are one of the exceptions in a high position with insurance companies.

Ms. LAUTZENHEISER. All I was saying, sir, was that the price of a life insurance contract in a mutual life insurance company is a function of both the premium and the dividend.

Senator METZENBAUM. Well, I understand that. But that isn't what your answer was. Your answer is, we take that into consideration in the dividend policy.

I say, nobody knows what the dividend policy is. Maybe you do, but if you do you are one of a select few in the entire United States. There aren't many who can find out what the real dividend policy is of mutual companies or of participating stock insurance companies.

[Pause.]

Senator METZENBAUM. You made the point in your testimony, and I underlined it, if the bill were to pass, women would wind up paying more for insurance.

Since women have a longer life expectancy, would you please give me the rationale for that?

Ms. LAUTZENHEISER. With women having a longer life expectancy, their insurance costs are in fact now below the insurance costs for males.

If a combined mortality table were to be used, the women would have to subsidize the higher mortality rate for the males. Hence, their life insurance costs would be higher.

Senator METZENBAUM. But their rates would go down in health and accident insurance. It would go down in disability insurance and would go down—

Ms. LAUTZENHEISER. They would go down in health and accident insurance and disability insurance at ages below 50. They would go higher at ages above 50. There are actually lower morbidity statistics for women on both health and disability above age 50 or 60, somewhere in that age range.

Senator METZENBAUM. Do you believe that discrimination by sex as to availability of coverage is appropriate?

Ms. LAUTZENHEISER. We do not currently discriminate by sex in availability of coverage and do not believe it is appropriate to do so; that is correct.



Senator METZENBAUM. The subcommittee members, as well as I, may have some additional questions. I appreciate your testimony and appreciate Mr. Minck's and Mr. Gillooly's testimony as well. It is nice having all three of you before us.

How many of you represent the revolving door principle? I gather you do, Mr. Gillooly. Were you with one of the insurance departments before, Ms. Lautzenheiser?

Ms. LAUTZENHEISER. No, I have not been. I have been in an insurance company throughout my career.

Senator METZENBAUM. How about you, Mr. Minck?

Mr. MINCK. I worked only for the Prudential Insurance Co., outside of the U.S. Army.

Senator METZENBAUM. I was just curious. It has no special relevance to this hearing.

Thank you very much. The hearing stands adjourned.

[The prepared statement of Ms. Lautzenheiser follows:]

PREPARED STATEMENT OF BARBARA J. LAUTZENHEISER

My name is Barbara Lautzenheiser. I am a Fellow of the Society of Actuaries, a member of the American Academy of Actuaries, and senior vice president of the Phoenix Mutual Life Insurance Company. I have worked in an actuarial capacity for 20 years and have been heavily involved in sex discrimination issues in insurance for the last eight of those 20 years.

I am appearing on behalf of the member companies of the American Council of Life Insurance and the Health Insurance Association of America. The ACLI consists of 506 insurance companies which have 95 percent of the life insurance in force in legal reserve life insurance companies in the United States. The HIAA's 325 members write over 85 percent of the health insurance written by insurance companies in the United States. With me are Thomas Gillooly, Associate General Counsel of the HIAA, and Richard Minck, Executive Vice President of ACLI.

First, we do not differentiate in premium rates or in availability of coverage on the basis of race, color, or religion or national origin. To do so would be contrary to both public policy and to general ethics. Moreover, there would be no sound way to distinguish people on the basis of any of these factors in such fashion as to constitute a reliable predictor of mortality or morbidity results. Therefore, we see no reason to enact a Federal statute to prohibit an activity that on one does or has any reason to want to do; in any event, existing state laws would prohibit such activity.

In contrast, we do charge different premium rates for women and men, just as we do for people of different ages. The reason is the same in both instances. We are not prejudiced against men or older people. As the Supreme Court observed in the first sentence of its decision in the *Manhart* case, "As a class, women live longer than men." Therefore, we charge men higher premium rates for life insurance to cover the larger number of claims they produce as a class, just as we charge older people higher premiums than younger people. These distinctions are a sound basis for conducting our business; they are in compliance with state laws prohibiting unfair discrimination. Enacting a statute to prohibit them would have very seriously adverse effects on life and health insurance companies and, most importantly, on their customers.

MISSTATEMENTS OF FACT MADE WITH THE INTRODUCTION OF S. 2477

Some of the statements given as reasons to support the enactment of S. 2477 show a serious misunderstanding of how our companies actually conduct their business currently. For this reason, we think it might help the Subcommittee in its deliberations if we attempt to correct some of these misstatements.

In introducing the bill, it was stated that:

(1) "sex discrimination in availability, conditions, and benefits offered to customers is widespread,"

(2) "life insurance coverage for women is often limited in scope and availability," and



(3) "in disability, many types of insurance benefits available to men are not available to women. In only a few states is disability coverage available to women on any terms at any price."

All are untrue. Life insurance is equally available to women and men. In health and disability insurance, the Model Regulation To Eliminate Unfair Sex Discrimination, adopted by the National Association of Insurance Commissioners (NAIC) in 1975 specifically prohibits these practices. (See Appendix I.) This regulation, or comparable regulations, have been adopted in nineteen states and in addition fourteen states have statutes which prohibit unfair discrimination because of sex. This means that insurers are specifically prohibited from discriminating against women or men in conditions, availability and benefits of policies in these states. In any event, every state has an Unfair Trade Practices Act which prohibits unfair discrimination.

A second area of misstatement made in introducing the bill is "industry has chosen to ignore other more accurate classification criteria, such as smoking habits, family health history, physical condition, recreational and occupational activities." This statement is simply wrong. Anyone who has ever applied for a policy is well aware that insurers do use precisely these criteria in classifying persons for purposes of determining life and health insurance premium rates.

It was stated in the questions and answers accompanying the introduction of S. 2477 that sex-based rating is clearly not a business necessity and that prohibiting such practices would require only minor adjustments in rates. In a voluntary insurance market, as in any other voluntary market, prices must be based on costs. Any requirements that rates not be based on cost (i.e., equal rates be charged for unequal risks) is inherently unfair to existing and future insureds, and in addition would substantially distort market relationships. If made applicable to existing policies and contracts which involve obligations extending over several decades, it would require extensive, unimaginably complex and costly adjustments to all in-force policies, i.e., millions of policies.

Yet another misstatement is that insurance companies have relied on gender to impose higher rates or lower benefits on certain persons "even though the majority of individuals affected may be no different in terms of potential for loss than their counterparts of the opposite sex". This statement is completely contrary to fact. Differences in mortality and morbidity between the sexes occur in all statistics available—for the general population, for the insured population, for all cultures, and all ages. Mortality statistics have been kept for over 200 years and consistently show female mortality substantially below male mortality. Appendix II covers this point in more detail.

Yet another area of misstatement, appearing in the questions and answers, was in regard to the United States Supreme Court decision in the *Manhart* case. The questions and answers state "The Court squarely rejected the insurance industry's argument that group discriminatory treatment as to insurance rates and pension benefits can be justified on the basis of actuarial tables..."

Instead the Supreme Court clearly limited its decision to employee contributions to an employer-operated pension plan and not to insurance contracts. In fact, the Court said

"Although we conclude that the Department's practice violated Title VII, we do not suggest that the statute was intended to revolutionize the insurance and pension industries. All that is at issue today is a requirement that men and women make unequal contributions to an employer-operated pension fund."

In introducing the bill, the sponsor states that its passage would be a significant step forward toward greater equity in the pricing of insurance protection. Presumably, greater equity means that insurance will be available at fair rates, which S. 2477 seeks to bring about by requiring that rates be identical for women and men. It is important to understand that unless all people applying for insurance have about the same cost of risk (i.e., probability of loss), a single set of premium rates cannot be fair. Fairness requires that each class of risk be charged rates appropriate to the costs arising from the class.

#### POSITION OF ASSOCIATIONS ON INSURANCE RATEMAKING AND AVAILABILITY

It is no accident that the state Unfair Trade Practices Acts prohibit insurance rating practices that are unfairly discriminatory. Discrimination in insurance ratemaking is essential if rates are to be equitable so as to reflect fairly an insured's probable future loss (i.e., cost). Competitive pressures in the private voluntary insurance market oblige insurers to distinguish between better



and poorer risks and lead to fair pricing. For insurers to be able to set fair prices, they must be permitted to classify insureds for rating purposes according to expected risk of loss (i.e., cost) based upon relevant information, including mortality and morbidity experience by sex.

S. 2477 would prohibit any differentiation on the basis of race, color, religion, sex, or national origin in the sale, issuance, underwriting or rating of any insurance policy or contract. Race, color, religion, and national origin are not among the classification criteria used by life and health insurers in determining the availability of coverage or the level of premium rates. There is no need for federal legislation prohibiting classification on the basis of these criteria especially since they are already prohibited as unfair discrimination by the state Unfair Trade Practices Acts.

We do not oppose state legislation or regulation prohibiting arbitrary and unfair discrimination among members of the same class of risk who share an equal expectation of loss (i.e., an equal cost). Nor do we oppose the adoption of legislation or regulation prohibiting discrimination based solely on sex with respect to availability of coverage.

What is of concern is the fact that S. 2477 would declare several ongoing and essential insurance practices to be unlawful, including using sex-distinct mortality and morbidity actuarial tables, life expectancy charts, disability or loss statistics or any other sex-distinct table as a basis for any discriminatory action. In essence, the bill would remove one of the primary pricing tools used by insurance companies (i.e., pricing based on cost).

#### WHY SEX IS A CHARACTERISTIC USED IN DETERMINING LIFE AND HEALTH INSURANCE PREMIUM RATES

A basic premise underlying S. 2477 seems to be that sex-based distinctions in insurance are not equitable and are contrary to social policy. There are two possible kinds of sex-based distinctions in insurance. One kind would involve the availability of coverages. We have already agreed that insurance coverages should be made available without regard to sex (or to race, color, religion or national origin). Moreover, as we have previously pointed out, state laws and regulations prohibit such practices. Since distinctions with regard to the availability of insurance are not now being made on the basis of these factors, there is no need for new legislation with regard to distinctions in availability. Our testimony will concentrate on the other type of distinction: distinction in premium rates. Insurers must be able to make such distinction if they are to treat policyholders fairly.

In determining equitable life insurance premium rates, an insurance company should treat each individual applicant not according to how long all people expect to live on the average but rather according to the cost determined from a group of people sharing that person's characteristics which indicate probable expected mortality of that individual. That, in fact, is what life insurance companies currently do. A similar principle is followed in health insurance.

In making an estimate of the cost of risk for a particular individual, an insurance company must take many characteristics into account. Typically, those characteristics include age, sex, state of health, occupation, avocations, economic situation, and certain aspects of life style such as use of alcohol, tobacco or drugs. All these characteristics may have an impact on mortality rates. Their use in setting premium rates for life insurance is for that reason and for no other reason.

A reasonable question to ask is how we know that sex is a characteristic which correlates with life expectancy. Evidence may be found in the differences in mortality rates between women and men in all cultures, at all ages, in both the general population and among insureds. There is a scientific basis for the differences. Appendix II to our testimony presents the observed data and the scientific basis in some detail.

Insurance costs, unlike any other industry's costs, are based on the physical attributes of the item insured. Fire insurance costs are based on the physical characteristics of the building, i.e., whether it is wooden or brick, not who owns the building, female or male. Similarly, life and health insurance costs are based on the physical characteristics of the body insured. Females and males have different physical characteristics, different biochemistry and consequently different mortality and morbidity. It is what the sexes own, not who owns it, nor the



stereotype of female and male, that determines the different costs between the sexes.

The questions and answers relating to S. 2477 state that other characteristics are "more directly related, on a causal basis, to life expectancy than sex." Causality is not a prerequisite to a valid classification system, but there is evidence of causality based on sex. Perinatal mortality rates (i.e., stillbirths occurring beyond the 20th week after conception and deaths in the first week of infancy) show a 20 percent higher mortality rate for males than for females. Such differences cannot be explained by other than biological differences. Geneticists too feel these differences are biological, stemming from different chromosome structures of the two sexes. Recent medical research has found some of the mortality differences between the sexes to be due to the different levels of production of prostaglandins between the sexes. All of these point to a biological basis for mortality differences between the sexes.

And the differences in mortality between the sexes are widening as the socioeconomic differences are narrowing. In 1900, life expectancy for males at 65 was 11.5 years and for females it was 12.2, or about a 6 percent difference. By 1976, the male life expectancy at age 65 had increased to 13.7 years while the female life expectancy had increased to 18.0—31 percent greater.

Both the introductory comments and the questions and answers relating to S. 2477 referred to the differences in mortality between blacks and whites and the rejection of the use of those differences. Those differences coincide with socioeconomic conditions. As the socioeconomic gap between the races has reduced, the differences in mortality have narrowed—not widened as they have in the case of the sexes. In fact, tables from the National Center for Health Statistics indicate the life expectancy of a white male age 65 and a nonwhite male age 65 are exactly equal. However, the difference between a male age 65 and a female age 65 is four years if white and three years if nonwhite. The financial impact of a decision to ignore the difference by race, even before socioeconomic equalization eliminated it, was relatively slight since blacks constitute only 13 percent of the population. Females are over 50 percent of the population.

With regard to health insurance, the New York Insurance Department's Study, "Disability Income Insurance Cost Differentials Between Men and Women," referred to in the introductory comments as revealing that "women were charged as much as 150 percent higher rates than men in the same job classifications" also stated that "sex is a major additional factor affecting the cost of disability income insurance" and no surrogate for sex as a rating characteristic was found. When differences in other criteria such as occupation were eliminated, sex was still found to be a valid characteristic leading to different costs between the sexes.

Most of the characteristics used in determining premium rates for life insurance are also used in determining premium rates for health insurance. In the case of annuities, on the other hand, the characteristics which are typically used are limited to age and sex. The reason for this is that most persons who buy annuities are in relatively good health. There is very little demand for annuities from persons in ill health. As for occupation, the annuitant is typically retired, and any accident hazard associated with former occupation is no longer present.

There is a line of argument which has been advanced by some who accept that mortality rates experienced by women do differ from those experienced by men, but who maintain that it is nevertheless unfair to charge different premium rates for women who buy annuities from those charged for men. The argument points out that despite the fact that women live longer, on the average, than do men, that fact can be viewed in terms of only a relatively small portion (about 16 percent) of the women living for a good deal longer than some of their male counterparts, with the rest of the women living for about the same length of time as the rest of the men. This view of the overall picture is then used to argue that women should not be penalized because a few of them will live longer than a few of the men.

This argument, which is known as the "overlap theory", overlooks the fact that premium rates for annuities, as for life or health insurance, must be adequate to pay the benefits promised to a group each representing the same general risk characteristics. The fact is simply that more money is required to pay a group of women aged 65 a specific number of dollars each month as long as they live than



is required to pay the same monthly amount to a corresponding group of men aged 65. The same is true for a group of women aged 60 as compared to a corresponding group of women aged 65. Therefore, rates vary by age and by sex. Overlap theorists tell us nothing new about mortality rates experienced by women that is not already known and used by insurance companies. It is just that what they tell us is not relevant. The actual future lifetime of an annuitant cannot be known when an annuity is purchased. It is not possible to match a particular man with a particular woman and charge them the same rate because they will both die in the same year. Thus, the "overlap theory" cannot lead to a sound basis for pricing insurance. We explain this in detail in Appendix III of our testimony.

In this regard, we note that the manner in which question 5 of the Questions and Answers Relating to the Hatfield-Metzenbaum Proposal is answered may imply that the Teachers Insurance and Annuity Association and College Retirement Equities Fund supported the "overlap theory" in their brief filed before the Supreme Court in *Los Angeles Department of Water and Power v. Manhart*. This is definitely not the case as is indicated by TIAA-CREF's argument on page 25 of their brief as follows:

"Some proponents of 'unisex' have suggested that such a scheme should be mandated because the ages of death of men and women aged 65 may be matched and an 'overlap' of approximately 80 percent will arise. Not only is any such comparison a misleading use of statistics because (a) it fails to match all of the members of the two groups in the order in which they die (and retirement benefits cease) and (b) it ignores the cumulative payments made to all the members of each group to that point, but it really establishes nothing more than any two groups in different risk classifications may be 'overlapped.'"

#### UNDESIRABLE EFFECTS OF ENACTING S. 2477

If S. 2477 were enacted, it would prevent life and health insurers from establishing rates based on costs. Instead, insurance would become disproportionately cheap for some and disproportionately expensive for others. Since life insurance premium rates for women based on cost are cheaper than the premium rates for men of the same age and underwriting class, the bill would require an increase in life insurance premium rates for women and a decrease in the life insurance premium rates for men to enable life insurers to collect the same total premium income to cover their claims and expenses. Since about 80 percent of new life insurance sales are to men, women's premium rates would have to be increased by 80 percent of the difference between premium rates for women and men. For the typical woman buying life insurance, this would result in a premium increase of 10 percent or more. The increased premium rates might reduce the amount of life insurance purchased by women—at least from U.S. companies. Since foreign (e.g., Canadian or "offshore") insurance companies could continue to price risks according to expected loss (i.e., costs), and would conceivably advertise that fact, American women might find it attractive to buy life insurance outside the U.S. life insurance market.

The result would be hardships of various kinds: for women who bought from a foreign insurer, the inconvenience of negotiating an insurance purchase outside the United States; for women who bought in the United States, the necessity of paying a premium rate higher than was justified by their expected mortality costs; and for women who, because of the higher price, did not buy at all, or who bought less life insurance than they otherwise would purchase, the lack of adequate insurance coverage. We would anticipate similar effects with regard to other products sold by life and health insurers, depending upon the degree and the direction in which the expected risk of loss, and hence cost, varies by sex.

#### ADVERSE EFFECTS OF APPLYING S. 2477 TO EXISTING POLICIES

Thus far we have not discussed the retroactive feature of S. 2477. The effects of the retroactivity could be even more severe than the effects of prospective application.

Life and health insurers would be forced to equalize the premium rates and benefits of existing policies and contracts which involve obligations stretching over many decades. Here again, let us look at individual life insurance for an example of what we anticipate would happen.



While it is difficult to determine exactly what would be permitted if S. 2477 were enacted, let us assume that it would permit insurers to reset premium rates at levels somewhere between the rates for men and the rates for women. This would mean an increase for women who had purchased life insurance contracts with guaranteed rates. A premium rate increase of the magnitude that would be necessary to produce the average rate for policies on the lives of women and men will be sure to produce complaints from the affected policyholders, who had every right to assume that insurance companies would carry out their contracts. Legal proceedings might be initiated, and numerous policies cancelled.

Although the bill as introduced appears to permit the increasing of premium rates on existing policies, it permits it only "if clearly necessary to comply with the nondiscrimination requirements of this Act". The threat of litigation over this condition might effectively prevent companies from trying to adjust the premium rates upward on their women insured's policies.

If women's life insurance rates were not adjusted upward, then men's life insurance rates on existing policies would have to be adjusted downward to the level of women's rates. Since life insurance policies on men constitute over 80 percent of the business in force, such a large reduction in present and future premium income would substantially impair life insurers' financial strength and their ability to carry out their long-term obligations.

Thus far we have considered only the insurance company losses which would be incurred in the form of lower premium receipts. Added to those losses would be the increased administrative expense arising from the changes. Countless records would have to be changed, and computer programs would have to be altered, to switch over to the new premium rates, cash and other nonforfeiture values, life income settlement factors and dividend scales. A changeover process of this complexity and magnitude would involve substantial time and costs. These costs would have to be passed on to the policyholders. The result would be to magnify the impact on women and men owning existing policies.

The serious constitutional defect inherent in the retroactive features of S. 2477 is discussed in Appendix IV.

#### S. 2477 WOULD REQUIRE SOME PERSONS TO PURCHASE COVERAGE THEY DO NOT NEED OR WANT

Sections 6(2) and 7(a) of S. 2477 would require that any insurance policy which provides benefits for disability or for medical expense include benefits for disabilities or medical expense arising from normal pregnancies. Such a requirement would be highly inappropriate.

First, we observe that health insurance is designed to protect against unforeseen illness or accident since such events can lead to financial losses that cannot be budgeted for or predicted. Health insurance policies currently pay for expenses connected with illness arising from complications of pregnancy (i.e., unforeseen expenses). The point is that families can anticipate the expenses of normal pregnancies, and it is cheaper for them to provide for these expenses directly rather than to pay a premium to an insurance company which must cover not only these medical expenses but also the insurer's operating expenses.

A requirement that all health insurance policies include coverage for normal maternity would discriminate unfairly against persons of either sex who do not need or want the coverage. We see no reason why anyone should have to pay for coverage which they do not need or want.

We do not oppose requirements that complications of pregnancy (as distinguished from normal pregnancy) be covered on the same basis as other illness. Such a requirement is included in the NAIC Model Regulation to Eliminate Unfair Sex Discrimination, which to our knowledge is being complied with in all states. The NAIC Model Regulation, on the other hand, explicitly does not require coverage of normal maternity.

#### CONCLUSION

The life and health insurance business is a progressive one. Close to 100 percent of applications for insurance are acceptable, characteristically at standard rates. Life and health insurers constantly make changes to promote and to improve their products and services and to refine rating classes to achieve fair and equitable rates. The business is comprehensively regulated by the respective



states to assure that its rates are not unfairly discriminatory. The National Association of Insurance Commissioners' Model Regulation To Eliminate Unfair Sex Discrimination is a tool which state regulators can and do use to prohibit insurers from discriminating against women in conditions, availability of coverage and benefits of policies. In addition, the characteristics of race, color, religion and national origin are not used by life and health insurers in determining availability of coverage or premium rates. Therefore, there is no reason for enactment of legislation in these areas.

The one area where S. 2477 would make a difference is in its prohibition against the use of sex as a characteristic in determining premium rates. Differences between the sexes in mortality and morbidity are real and substantial and must be taken into account if life and health insurance rates are to be fair and equitable. Combining data for the sexes will not change the fact that the mortality differences exist, hence the cost differences exists. The enactment of S. 2477 would prevent insurers from setting fair and competitive rates based on costs. In a voluntary market system, both the seller and the buyer, i.e., both the insurer and the insured, must agree to the transaction. If pricing based on costs is prohibited, the result could be elimination of the availability of coverage for all markets at the appropriate cost. Thus, it could lead to substantial disruption of insurance markets and to increased costs and complexities to the detriment of both companies and the insurance public (i.e., enactment of S. 2477 could be counterproductive). For these reasons, we are strongly opposed to the enactment of S. 2477. We would be happy to try to answer any questions you may have.

Attachments.



NAIC MODEL REGULATION TO ELIMINATE  
UNFAIR SEX DISCRIMINATION

(As Amended and Adopted by the NAIC)

Preamble:

This model regulation responds to conditions within the insurance industry and among regulatory authorities which have allowed the development of unequal treatment of males and females and treatment which varies according to marital status in the sale of insurance. Reasonably exhaustive research has been conducted by several states in an effort to identify the nature of such unequal treatment. These studies have disclosed a pattern of activities which can conveniently be divided into two categories. The first relates to the availability of equal coverage and the second is the comparability of the rates charged for that coverage.

The primary area of difficulty arises in the health and disability lines of insurance where the morbidity tables which are currently in use and current company experience reflect a higher utilization of benefits by female insureds. As a result, many companies restrict the types and amounts of coverage which are available to females and charge rates for females which exceed male rates for identical coverage. Life insurance and annuity rates reflect lower mortality rates for females although the adequacy of the rate differentials are subject to question since general population mortality studies produce larger differences in male and female mortality than is generally assumed by either the life insurance industry or regulatory authorities in their development of reserves, cash values and premium rates. Many life insurance companies have also been found to apply restrictions to the availability of coverage to females which do not apply to males.

The automobile insurance business is characterized by a rating system which produces higher rates for males and unmarried individuals. Higher rates for these classes of insureds result from higher claim levels. Availability of automobile insurance with some companies is also affected by marital status. The premium rates charged for homeowner and property insurance do not vary by sex although a single or divorced female may encounter more difficulty in obtaining coverage than a male in similar circumstances.

Although discriminatory practices have been identified in both the premium rates and availability of insurance, an appropriate objective is to determine which of these practices constitute an unfair discrimination and to adopt regulations which prohibit those practices. Since there is apparently no segment of the public or the insurance industry which is prepared to dispute the right of females to have equal access to insurance, it is desirable to adopt a regulation which enforces this standard of equality. This model regulation is designed to accomplish that purpose as it relates to contract language and underwriting practices.

On the other hand however, since the business of insurance is built upon the ability of the insurance company to evaluate risk and assign a price tag to that risk, any attempt to tamper with the pricing mechanism of the insurance business must be approached with great care. The subjects of premium rates and availability of coverage have been determined to be separate issues which can be dealt with more effectively if handled separately. As a result, the NAIC Task Force on Unfair Sex Discrimination has chosen to propose this model regulation for adoption as the first step in a two stage program. The second stage will involve the review of rating systems which are currently in use in an attempt to determine the validity of assumptions, statistics and actuarial methods which have been routinely accepted in the past.

Several states, including Pennsylvania, New York, New Jersey and Oregon, have adopted regulations similar to this model with little or no opposition. The major insurance industry trade associations have actually taken a public position of not opposing adoption of such regulations and many insurance companies are presently in the process of voluntarily removing all sex related restrictions in their contract language and underwriting rules. This model regulation, however, is necessary to assure that this standard is adhered to by the entire industry.

One subject which is a recurring topic of interest in the research which has been conducted is that of pregnancy related covering in health insurance contracts. Since normal pregnancy is not a sickness or injury as a result of an accident and can generally be planned or avoided, the NAIC Task Force has not subscribed to the theory that such coverage should be mandated in all health insurance contracts in the name of equal availability of coverage. Such action is beyond the scope of the authority of this regulation and if the subject is to be addressed, it should be included in the NAIC Health Insurance Minimum Standards Regulation. This model regulation does, however, contain language which may either be retained in this regulation or transferred to the Minimum Standards Regulation, whichever is most convenient in a particular jurisdiction. That language relates to mandatory coverage of pregnancy complications and the restriction of coverage for



the genital organs of one sex only. Restrictions on these areas of coverage have been deemed to be tantamount to unfair sex discrimination since they apply to sickness or injury which affects only one sex.

This regulation may appropriately be promulgated pursuant to the authority of the Insurance Trade Practices Act either under the unfair discrimination section or as a regulation identifying a previously undefined unfair trade practice.

1. Purpose:

The purpose of this regulation is to eliminate the act of denying benefits or coverage on the basis of sex or marital status in the terms and conditions of insurance contracts and in the underwriting criteria of insurance carriers.

2. Authority:

This regulation is issued pursuant to (variable authority of each state - promulgation of this regulation under the State's Unfair Trade Practices Act is considered to be the most viable source of authority).

3. Definition:

Contracts - any insurance policy, plan, or binder, including any rider or endorsement thereto offered by an insurer.

Insurer - any insurance company, association, reciprocal or inter-insurance exchange, nonprofit hospital plan, nonprofit professional health service plan, health maintenance organization, fraternal benefit society or beneficial association.

4. Applicability and Scope:

This regulation shall apply to all contracts delivered or issued for delivery in this state by an insurer on or after the effective date of this regulation and to all existing group contracts which are amended on or after the effective date of this regulation.

5. Effective Date:

This regulation shall be effective on (insert the date of adoption or promulgation).

6. Availability Requirements:

Availability of any insurance contract shall not be denied to an insured or prospective insured on the basis of sex or marital status of the insured or prospective insured. The amount of benefits payable, or any term, conditions or type of coverage shall not be restricted, modified, excluded, or reduced on the basis of the sex or marital status of the insured or prospective insured except to the extent the amount of benefits, term, conditions or type of coverage vary as a result of the application of rate differentials permitted under the (insert name of state) Insurance Code. However, nothing in this regulation shall prohibit an insurer from taking marital status into account for the purpose of defining persons eligible for dependents benefits. \* Specific examples of practices prohibited by this regulation include but are not limited to the following:

- a. Denying coverage to females gainfully employed at home, employed part-time or employed by relatives when coverage is offered to males similarly employed.
- b. Denying policy riders to females when the riders are available to males.
- c. Denying maternity benefits to insureds or prospective insureds purchasing an individual contract when comparable family coverage contracts offer maternity benefits.
- d. Denying, under group contracts, dependent coverage to husbands of female employees, when dependent coverage is available to wives of male employees.

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\* Sentence as amended by the (C1) Subcommittee.



- e. Denying disability income contracts to employed women when coverage is offered to men similarly employed.
- f. Treating complications of pregnancy differently from any other illness or sickness under the contract.
- g. Restricting, reducing, modifying, or excluding benefits relating to coverage involving the genital organs of only one sex.
- h. Offering lower maximum monthly benefits to women than to men who are in the same classification under a disability income contract.
- i. Offering more restrictive benefit periods and more restrictive definitions of disability to women than to men in the same classifications under a disability income contract.
- j. Establishing different conditions by sex under which the policyholder may exercise benefit options contained in the contract.
- k. Limiting the amount of coverage an insured or prospective insured may purchase based upon the insured's or prospective insured's marital status unless such limitation is for the purpose of defining persons eligible for dependents benefits.

Note: Although the above examples are oriented toward unfairly discriminatory practices in the accident and sickness disability incomes and life insurance lines, this model regulation is appropriate for use in prohibiting the use of sex or marital status as the sole base either to deny coverage or to offer differential coverage in all lines of insurance.

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## THE VALIDITY OF SEX AS A CLASSIFIER

As we stated in the main body of our testimony, women live longer than men in virtually every part of the world, under a wide variety of economic and social conditions. Mortality rates are lower among women than men in most age groups in most countries. In the United States and all other economically advanced nations, women's mortality rates are lower in all age groups. Even before birth, more male fetuses than female fetuses fail to survive.

Biological and hereditary research demonstrates that there is a substantial scientific explanation for the differences between female and male life expectancy and morbidity. The existence of two x chromosomes in the females, as opposed to one in the males, results in the female being able to compensate for any wayward recessive genes in one of her x chromosomes, which the males' y chromosome cannot do. Also, the much greater rate of production of prostaglandins in males than in females can explain the greater mortality and morbidity of males due to heart disease, stroke, and the like.

Most significant for life and health insurance purposes is the fact that women's mortality is lower than men's in all age groups among persons insured for life insurance and annuities, and that women's morbidity rates are higher than men's at ages up to around age 50 and lower than men's at older ages, among persons insured for disability or medical expense benefits.



Among individuals insured in the standard class for individual life insurance, overall female mortality has consistently been very close to 60 percent of male mortality. That means that among the female insureds there have been only 60 percent as many deaths each year as would have occurred if they had died at the rates which have been observed among male insureds. It is important to note that these standard-class insureds are persons in whom the insurance companies did not find, at time of issue, characteristics such as poor health or hazardous occupation which made them relatively higher risks in the insurers' judgment. Accordingly, the 60 percent ratio is reasonably free of extraneous influences. Among annuitants under both individual and group annuity contracts the female mortality has been equivalent to that of males approximately five years younger.

In health insurance there is more variation by age in the difference between female and male claim costs. For all the important coverages the female claim costs have been higher than the male costs at ages below about 50. At the higher ages, under some coverages, the direction of higher claim costs reverses. The most exhaustive recent study of morbidity experience by sex was done by the New York Insurance Department, which published its findings in 1976. The Department found that sex is a significant factor influencing disability insurance claim costs. The Department subsequently issued guidelines for reflecting the sex differential equitably in determining premium rates for individual disability income insurance.



It has been pointed out, correctly, that insurers did not differentiate life insurance premium rates by sex during a period of a few decades ending in the 1950's. The reasons why it was possible not to use sex differentials during those years were: (1) the mortality differential was significantly smaller then than it is now; (2) premium rates were not differentiated by policy size in those years, and the smaller policies bought by women were costing the companies more administrative expense per \$1,000 of insurance, which offset the mortality advantage for women; and (3) fewer women bought life insurance then than now, and there was less justification, in terms of administrative cost, to have separate premium rates. The situation is quite different today with respect to all these factors. Companies have been able to establish a more refined rate structure which has been in effect for the last quarter century and has enabled women to pay appropriately lower premium rates for life insurance than men have paid.



## OVERLAP THEORY

In the main body of our testimony we mentioned a line of argument which has become known as the overlap theory. This argument has been advanced by some proponents of legislation requiring unisex actuarial tables, such as Professor Barbara Bergmann. The argument begins by pointing out that it is possible to match approximately 83 percent of males and females as to the years of age in which they die; that is, if a group of 100,000 males, age 65, and a group of 100,000 females, age 65, were used as a test sample, when all of the members of the two groups had died, it would be found that approximately 83,000 of the females had died at the same ages as approximately 83,000 of the males. Thus, because 17 percent of the females live longer than a corresponding percentage of the males, it is supposedly unfair to penalize the other 83 percent of the females, who can be paired with males as to age at death, by charging females higher annuity premiums.

It should be noted at the outset that the Bergmann study arbitrarily selected the year of death as the basis for pairing males and females. This is no more appropriate than pairing by one of the many other possible methods, such as by order of death. Thus, if the first woman who dies is paired against the first man who dies, and this process of consecutive pairing is followed, by the end of the third year no male will be matched against a female who died at the same age. In fact, continuing



this process to age 110 for males and age 115 for females leads to pairings over most of the period with the male age at death being five years lower than the age at death of the corresponding female.

The logical fallacy and economic irrelevance of the year of death pairing approach is obvious when this is viewed in terms of actual dollars. If a company (or a government) were to issue annuities of \$1,000 per year to each of 100,000 men and 100,000 women experiencing the mortality rates referred to in the Bergmann study, it would have to make payments of \$100,000,000 in the first year to each group. In the fifth year the payments to the male annuitants would have dropped to \$90,329,000, while those to the female annuitants would amount to \$94,053,000, and in the tenth year annuity payments would have been \$73,657,000 to males, and \$83,328,000 to females. Over the course of fifty years, an aggregate of \$1.561 billion would have been paid to male annuitants and \$1.926 billion to females. The females, as a group, would have received \$365 million -- 23 percent -- more than the males.

Looked at from another perspective, if benefits of \$1,000 per year were to be paid to each of 100,000 males beginning at age 65 from a fund earning 5 percent, after taxes and all expenses, such a fund would have to be \$1,040,000,000. The corresponding fund needed for female annuitants would amount to \$1,194,000,000.



Alternatively, a fund equal to that used to provide \$1,000 a month to male annuitants could provide \$870 per month to female annuitants. If female annuitants were to draw \$1,000 per month from this last fund rather than \$870 per month, it would be exhausted after 18 years. For those females surviving beyond that period and receiving no further payments, the overlap theory would provide cold comfort.

Professor Robert J. Myers, formerly Chief Actuary for the Social Security Administration for 23 years, and Professor Emeritus of Actuarial Science at Temple University, criticized the overlap theory in a 1977 article in Civil Rights Digest, a publication of the U. S. Commission on Civil Rights.

He noted that, while the years of death of 84 percent of men and women coincide, the 16 percent of unmatched men would have an average age at death of approximately 70 years, and the average age at death of the unmatched women would be approximately 88. He then illustrated the absurdity of the overlap analysis by observing that if the years of death of members of a group of 1,000 men at age 65 are matched with the years of death of a group of men aged 60, there will be an overlap of approximately 85 percent. Thus, under that theory, it presumably would be improper or unfair to utilize mortality tables based on age in setting insurance premiums. Of course, the logical result of following this mode of analysis is to dispense with any actuarial analysis at all; a result which would be at odds with a voluntary private insurance business.



## APPENDIX IV

Aside from actuarial and other considerations, S. 2477 raises a serious constitutional question.

Article 1, Section 10 of the U.S. Constitution denies to the states the power to pass any "law impairing the obligation of contracts." This prohibition has been found to apply equally to the Congress through operation of the due process clause contained in the 5th Amendment to the Constitution. See Kogan v. Schulte, 61 F.Supp.604 (1945); Continental Illinois Nat'l Bank v. Chicago, Rock Island & Pacific Ry. Co., 294 U.S. 648 (1934); Union Pacific Ry. Co. v. U.S., 99 U.S.700 (1878); U.S. Trust Co. of N.Y. v. New Jersey, 431 U.S.1.

The power of the Government to promote the general welfare or some important social purpose has sometimes been determined to be more important than individual contract rights. The factors which support the exercise of this power, such as emergencies or where contract rights are impaired collaterally or incidentally to the enactment of a statute, are not present here, however.

The United States Supreme Court gave a clear reaffirmation of the original intent of the "impairment of contracts clause" recently in Allied Structural Steel Company v. Spannaus (438 U.S. 234; 98 S.Ct.2716) (1978). A state statute changing the state's pension law was held to be void because it nullified the express terms of preexisting pension contract obligations and imposed a completely unexpected liability on the plaintiff corporation (the plan contributor for its employees) in potentially disabling



amounts, without any showing that such a severe disruption of contract obligations was necessary to meet an important social purpose.

The holding in Allied and other cited cases gives strong reason to believe that S. 2477 is fatally flawed because it disrupts millions of insurance contracts currently in force without demonstrating that such disruption itself would cure any social ill.



[Whereupon, at 11:59 a.m., the hearing was adjourned, subject to the call of the Chair.]



## APPENDIX

### PREPARED STATEMENT SUBMITTED BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS

The AFL-CIO is pleased to support S. 2477, the Nondiscrimination in Insurance Act.

The insurance industry is one of the largest and most important parts of the financial sector. In 1976, it collected \$130 billion in premiums and controlled \$434 billion in assets. In 1978, it was reported that the industry was made up of about 4,700 companies. Historically, it has been divided into two segments. One is a group of companies writing life, health, disability, and annuity (pensions) insurance. Generally, this is referred to as the life and health insurance side of the business. The other side, so-called property and liability companies, writes such lines as auto, homeowners, workers' compensation, and marine insurance. In a functional sense, the industry has come together. Today, there are multiple line companies and groups of companies which together write all lines of insurance.

S. 2477 is designed to eliminate the invidious concept of stereotyping people for insurance purposes on the basis of race, color, religion, sex or national origin. Its prohibitions are patterned after existing civil rights laws relating to discrimination in the areas of employment, housing and credit. We are encouraged that the Chairman of this Subcommittee, an original sponsor of this proposal, has seen fit to schedule prompt hearings. Similar legislation, H.R. 100, is pending in the House and has already attracted about 80 cosponsors. Clearly, these are proposals whose time has come. It is our hope that these bills will move quickly and successfully through the legislative process before Congress adjourns.

S. 2477 prohibits discrimination by insurance companies in connection with the terms, conditions, rates, benefits or requirements of the insurance policies which they offer for sale. It would specifically prohibit the use of statistical tables of mortality, life expectancy, morbidity, disability, or disability termination as a basis for discrimination by insurers. For example, it would end the currently prevalent practice among insurance companies of using separate mortality tables for men and women. Insurance companies using such separate mortality tables charge different amounts for men and women for providing the same levels of benefits, or provide different levels of benefits to men and women for the same charge, in connection with those types of insurance where mortality rates are a significant factor (for example, life insurance and annuities).

The industry would be well-advised to applaud and support this legislative effort. In this way, it could make a positive contribution toward reforms that are long overdue and are soon to be effected.

By judicial process, discrimination in the industry has already been successfully attacked. For example, in 1978 the Supreme Court squarely rejected the argument that group discriminatory treatment can be justified on the basis of actuarial tables supposedly evidencing that women as a group live longer than men. The case involved an employer-operated pension plan that required women to make greater payments than men to the pension fund. The U.S. Supreme Court found that the prohibitions against employment discrimination (Title VII of the 1964 Civil Rights Act) "precludes treatment of individuals as simply components of a racial, religious, sexual, or national class." The Court pointed out that "there is no assurance that any individual woman (or man) will actually fit the generalization."

Discriminatory practices exist also in disability, health, and life insurance contracts. The problems are well documented in a 1978 publication issued by the United States Commission on Civil Rights entitled, *Consultation on Discrimination Against Minorities and Women in Pensions and Health, Life, and Disability Insurance*.



S. 2477 provides the Attorney General of the United States with authority to bring a civil action in any United States district court whenever he has reason to believe that a pattern or practice of discrimination exists. However, primary responsibility for individual cases of discrimination rests with the States. Since the Department of Justice already has pattern or practice jurisdiction under other civil rights laws, the present bill will not require significant additional federal resource commitments.

S. 2477 represents a significant positive step toward ending the long-continued and greivous practice by insurers of discriminating against insured persons, or other beneficiaries, or against applicants for insurance, on the basis of race, color, religion, sex, or national origin. The AFL-CIO is pleased to add its support for the passage of this important legislation.



STATEMENT  
OF THE  
NATIONAL ASSOCIATION OF INDEPENDENT INSURERS  
BEFORE THE  
SUBCOMMITTEE ON ANTITRUST AND MONOPOLY  
IN RE S-2477  
NONDISCRIMINATION IN INSURANCE COST

The National Association of Independent Insurers is a voluntary trade association of over 450 property/casualty insurance companies of all sizes and all types -- stock and non-stock, agency and non-agency. Since its founding in 1945, NAII has been dedicated to fostering healthy competition in rates, coverages and services under sound state regulation.

The record of more than thirty years of healthy competition and continued growth by our industry under state regulation dictates that we must oppose any unwarranted federal intervention in the regulation of insurance, such as that proposed by S-2477.

Our principal reasons for that position are:

- 1) Enactment of S-2477 is unneeded and unwarranted because the state insurance regulatory systems have proven fully



responsive to the public needs. The property/casualty industry has been meeting its responsibilities in the marketplace by expanding overall capacity, affording a broad choice of prices, products and services for the consumer, maintaining adequate financial stability and jointly guaranteeing availability of insurance to all consumers who cannot readily obtain it in the voluntary market.

- 2) S-2477, if enacted, will result in erosion of the competitive environment in the insurance industry and an unwanted levy of additional costs on the more responsible segment of the insurance buying public.

Our remarks, of necessity, must be confined to an overview rather than specific responses, but we believe such will be sufficient to include commentary on all of the issues raised.

The insurance laws of the various states generally prohibit the use of race, color, religion or national origin as a criteria for classification. Further, the rating laws prohibit unfair discrimination. Therefore, our opposition to S-2477 is essentially to the elimination of sex as a rating criteria for classification purposes.



The insurance industry is unique in American business today because it is not only closely regulated like public utilities, but it is highly competitive -- not a legal monopoly. Insurers must price their product within the confines of a rigorous competitive market and, unlike a public utility, are not guaranteed a return on their investment. In addition, insurers do not price their product like other businesses with full knowledge of its cost. This factor is unknown at the time the product is sold and, therefore, must be predicted as accurately as possible, but always subject to the competitive environment in which the business lives. If this "sooth-saying" is inaccurate, a company could fail.

In today's economy with inflation running rampant, the pricing of auto insurance is made twice as difficult due to the services provided -- legal defenses, medical and wage loss benefits, auto repairs -- all subject to the problems of the economy and, in many instances, even more so because the rate of inflation in hospital and medical costs and auto repair parts has been subjected to pressures far in excess of the normal rate of inflation.

Thus, accuracy in pricing the insurance product today is two times as difficult as it was in the past, but it is twice as important to the public



in view of the cost spiral. Yet pricing techniques today, in spite of the wealth of experience underlying them, are under constant political attack because of so-called discriminatory pricing practices.

Let us look briefly at those techniques, particularly in the area of classifications. Classification criteria in use today were not chosen arbitrarily. About thirty years ago, when modern rating principles were being developed, insurers used their experience and educated judgment to pick out factors which they believed would identify differences in risk. Age, sex and marital status were among them. These dividing lines are no more arbitrary than any of the boundary lines used every day in society. For instance, no one can vote, drink, drive or serve in the armed forces until he or she reaches a certain age. Congressional districts, city limits and sewer districts are marked out by rigid lines on a map. Income tax brackets depend on a difference of a few dollars. The only justification for any of these dividing lines is that we apply our best judgment, make our choices as experiments and wait for the results to see if we chose well.

Insurance classifications have stood the test of time exceedingly well. Down through the years, statistics have been compiled for these classi-



fications that have proven their accuracy. Today, the classifications based on age, sex and marital status overwhelmingly support the differences in premiums which are currently being charged for these classifications.

NAII has developed nationwide loss statistics on age, sex and marital status. These statistics show that drivers under age 25 produce more than twice as many losses as adult drivers. In fact, single male drivers under age 25 who either own or are principal operators of a car produce almost three times as many losses as adult drivers. The data regarding loss differences between the sexes shows that losses for females (under age 25) are 29% less than losses for male drivers. (Rate differentials on sex disappear as age increases because differences in losses disappear.) Statistics regarding marital status show that losses for average young married male drivers are only 30% more than those of an adult driver. However, losses for the average young single male driver are 145% more than those of an adult driver. Similarly, statistics show that the losses of the average young married male driver are 16% less than those of a young unmarried female motorist.



Insurance companies continue to experiment with classifications. Some companies have selected different ages to group youthful and adult drivers, or have grouped youthful drivers in various age brackets. At one time a major rating organization actually varied its youthful driver rates by the year.

It's interesting to note that critics of risk classification never or rarely attack the statistical foundation of classifying drivers. Their point of attack is the social philosophy that underlies classification. They say it is socially unacceptable and wrong to discriminate by price between high-risk and ordinary policyholders. Insurers respond that to do otherwise would subsidize a minority at the expense of the majority, which, in a democracy, is socially unacceptable and wrong.

If sex and marital status were eliminated as classification criteria, rates for young female drivers would have to increase 29% in order to subsidize the losses of young males. Similarly, rates for young married males would have to increase 68% in order to subsidize the losses of young single males.

What is really at stake then is not the classification system, which is accurate and supported by years of data, but who is truly representing



the will of the majority. Classification critics maintain that despite proof that a minority of insureds are high risk and should pay more, they should be given a break as a noble social gesture; and if everyone else has to pay a little more, that is acceptable. But insurers believe that those who have to do the paying have not been told clearly what the price is and, when they find out, they will not go along.

By using classifications, the insurance industry has been allowed to equitably distribute costs among insureds so that those with the greatest potential of loss are paying their fair share and those with the less likelihood of loss are paying less. The elimination of age, sex and marital status would force insurers to disregard a large body of established factual knowledge about loss costs and would result in gross discrimination against the vast majority of automobile insurance buyers. It would also make it much more difficult for certain categories of motorists to obtain auto insurance in the voluntary insurance market.

Automobile insurance is a highly competitive product. As and when different criteria for classifications become justified, companies will use their initiative to develop better criteria and introduce improved systems which will benefit the insurance buying public.

This voluntary competitive system is far better, more flexible and fairer than one that is bottomed on socio-political schemes that ignore economic realities.



## Submission of Joseph L. Rauh

## Leadership Conference on Civil Rights

## PARTICIPATING ORGANIZATIONS

Actors Equity  
 African Methodist Episcopal Church  
 African Methodist Episcopal Zion Church  
 Alpha Kappa Alpha Sorority, Inc.  
 Alpha Phi Alpha Fraternity, Inc.  
 Amalgamated Clothing and Textile Workers Union of America  
 American Baptist Churches, U.S.A.—National Ministries  
 American Civil Liberties Union  
 American Coalition of Citizens with Disabilities, Inc.  
 American Council of the Blind  
 American Ethical Union  
 American Federation of Government Employees  
 American Federation of Labor—Congress of Industrial Organizations  
 American Federation of State, County & Municipal Employees  
 American Federation of Teachers  
 American Jewish Committee  
 American Jewish Congress  
 American Postal Workers Union  
 American Veterans Committee  
 Americans for Democratic Action  
 Anti-Defamation League of B'nai B'rith  
 A. Philip Randolph Institute  
 Asociacion Nacional Pro Personas Mayores  
 B'nai B'rith Women  
 Building & Construction Trades Department—AFL-CIO  
 Center for Community Change  
 Center for National Policy Review  
 Church of the Brethren—World Ministries Commission  
 Church Women United  
 Citizens Lobby for Freedom & Fair Play  
 Communication Workers of America  
 Congress of Italian-American Organizations, Inc.  
 Delta Sigma Theta Sorority  
 Division of Homeland Ministries—Christian Church (Disciples of Christ)  
 Episcopal Church—Public Affairs Office  
 Federation of Organizations for Professional Women  
 Friends Committee on National Legislation  
 Frontiers International, Inc.  
 Frontlash  
 Hadassah  
 Hotel and Restaurant Employees and Bartenders International Union  
 Improved Benevolent & Protective Order of Elks of the World  
 Industrial Union Department—AFL-CIO  
 International Association of Machinists and Aerospace Workers  
 International Ladies' Garment Workers' Union of America  
 International Molders & Allied Workers Union  
 International Union of Electrical, Radio & Machine Workers  
 International Union of Operating Engineers  
 Iota Phi Lambda Sorority, Inc.  
 Japanese American Citizens League  
 Jewish Labor Committee  
 Jewish War Veterans  
 Kappa Alpha Psi Fraternity  
 Labor Council for Latin American Advancement  
 Labor Zionist Alliance  
 League for Industrial Democracy  
 League of Women Voters of the United States  
 Lutheran Church in America—Division for Mission in North America  
 NAACP Legal Defense and Education Fund, Inc.  
 National Alliance of Postal & Federal Employees  
 National Alliance of Postal & Federal Employees—National Women's Auxiliary  
 National Association for the Advancement of Colored People  
 National Association of Colored Women's Clubs, Inc.  
 National Association of Community Health Centers  
 National Association of Human Rights Workers  
 National Association of Market Developers  
 National Association of Negro Business & Professional Women's Clubs, Inc.  
 National Association of Real Estate Brokers, Inc.  
 National Association of Social Workers  
 National Association of University Women  
 National Baptist Convention, U.S.A.  
 National Bar Association  
 National Beauty Culturists' League, Inc.  
 National Business League  
 National Catholic Conference for Interracial Justice  
 National Coalition of Cuban Americans  
 National Conference of Black Mayors, Inc.  
 National Conference of Catholic Charities  
 National Conference of Christians and Jews, Inc.  
 National Council of Catholic Women  
 National Council of Churches—Division of Church & Society  
 National Council of Jewish Women  
 National Council of La Raza  
 National Council of Negro Women  
 National Council of Senior Citizens, Inc.  
 National Dental Association  
 National Education Association  
 National Farmers Union  
 National Federation of Settlements & Neighborhood Centers  
 National Federation of Temple Sisterhoods  
 National Funeral Directors and Morticians Association  
 National Hispanic Housing Coalition, Inc.  
 National Jewish Community Relations Advisory Council  
 National Jewish Welfare Board  
 National Legal Aid & Defender Association  
 National Low Income Housing Coalition  
 National Neighbors  
 National Newspaper Publishers Association  
 National Office for Black Catholics  
 National Organization for Women  
 National Post Office Mail Handlers, Watchmen, Messengers & Group Leaders  
 National Rural Housing Coalition  
 National Sorority of Phi Delta Kappa, Inc.  
 National Urban League  
 National Women's Political Caucus  
 Newspaper Guild  
 Oil, Chemical & Atomic Workers International Union  
 Omega Psi Phi Fraternity, Inc.  
 Opportunities Industrialization Center—Government Relations Services (OIG)  
 Organization of Chinese Americans, Inc.  
 Pacific/Asian Coalition  
 Phi Beta Sigma Fraternity, Inc.  
 Pioneer Women—American Affairs  
 Potomac Institute  
 Presbyterian Interracial Council  
 Project Equality, Inc.  
 Recruitment and Training Program  
 Retail, Wholesale & Department Store Union  
 Rural America  
 Sigma Gamma Rho Sorority, Inc.  
 Southern Christian Leadership Conference  
 Synagogue Council of America  
 Transport Workers Union of America  
 Union of American Hebrew Congregations  
 Unitarian Universalist Association  
 Unitarian Universalists for Black and White Action  
 United Automobile, Aerospace & Agricultural Implement Workers of America  
 United Church of Christ—Committee for Racial Justice Now  
 United Church of Christ—Office for Church in Society  
 United Farm Workers of America  
 United Food and Commercial Workers International Union  
 United Hebrew Trades  
 United Methodist Church—Board of Church and Society  
 United Methodist Church—Board of Global Ministries  
 Women's Division  
 United Mine Workers of America  
 United Presbyterian Church—Unit on Church & Race  
 United Rubber, Cork, Linoleum & Plastic Workers of America  
 U.S. Catholic Conference—Division of Urban Affairs  
 United States Youth Council  
 United Steelworkers of America  
 United Synagogue of America  
 Voter Education Project, Inc.  
 Washington Research Project  
 Women's Equity Action League  
 Workmen's Circle  
 Young Men's Christian Association of the USA, National Board  
 Young Women's Christian Association of the USA, National Board  
 Zeta Phi Beta Sorority, Inc.

also: *lawyers Committee for Civil Rights Under Law*



ADDITIONAL SUBMISSIONS OF DR. QUINCALEE BROWN

APPENDIX TO:

STATEMENT IN SUPPORT OF  
THE NONDISCRIMINATION IN INSURANCE ACT  
S.2477

Submitted to the  
Senate Subcommittee on Antitrust,  
Monopoly, and Business Rights  
April 30, 1980

by

Dr. Quincalee Brown, Executive Director  
American Association of University Women

on behalf of

AMERICAN ASSOCIATION OF UNIVERSITY WOMEN  
WOMEN'S EQUITY ACTION LEAGUE



APPENDIXArticles and Cases

City of Los Angeles, Department of Water and Power v. Marie Manhart, 435 U.S. 702, 55 L Ed 2d 657, 98 S Ct 1370 (April 25, 1978)

"Economic Responsibilities of Working Women", U.S. Department of Labor Publication, September 1979

"Ending Insurance Discrimination" by Representative John Dingell, Focus, July 1979

"Insurance Fact Sheet", National Women's Conference Official Briefing Book

"Insuring Women: Separate and Unequal Policies" by Ann O'Shea, Working Women, October 1979

"Working Women: Joys and Sorrows", U.S. News and World Report Special, January 15, 1970

"Working Women Hotline", Working Women, May 1980.

Papers

"An Overview Report: Discrimination in the Insurance Marketplace, et al", by Dr. Herbert S. Denenberg, Former Pennsylvania Insurance Commissioner, prepared for the U.S. Commission on Civil Rights

"Discrimination in Insurance" by Lois G. Williams, Acting Counsel for Appellate Litigation, Office of the Solicitor, U.S. Department of Labor, prepared for the U.S. Commission on Civil Rights

"Sex Discrimination in Insurance: A Guide for Women" by Naomi Naierman, Ruth Brannon, and Beverly Wahl, a publication of Women's Equity Action League



[435 US 702]  
CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER, et  
al., Petitioners,

v

MARIE MANHART et al.

435 US 702, 55 L Ed 2d 657, 98 S Ct 1370

[No. 76-1810]

Argued January 18, 1978. Decided April 25, 1978.

SUMMARY

Based on a study of mortality tables and its own experience, the Los Angeles Department of Water and Power determined that its female employees would, as a class, outlive its male employees. Accordingly, the Department required its female employees to make significantly larger pension fund contributions than the males, with the result that each female employee took home less pay than a male earning the same salary. A class action suit was brought in the United States District Court for the Central District of California on behalf of all women employed or formerly employed by the Department, seeking an injunction and restitution of excess contributions to the plan. While the action was pending, California enacted a law prohibiting municipal agencies from requiring higher pension fund contributions from female employees, and the Department amended its plan to draw no distinction in contributions or benefits on the basis of sex. The District Court held that the prior contribution differential violated § 703(a)(1) of Title VII of the Civil Rights Act of 1964 (42 USC § 2000e-2(a)(1)), which prohibits an employer from discriminating against "any individual" on the basis of sex with respect to compensation, terms, conditions, or privileges of employment. The District Court further ordered a refund of all excess contributions made by the females before the plan's amendment. The United States Court of Appeals for the Ninth Circuit affirmed (653 F2d 581).

On certiorari, the United States Supreme Court vacated the Court of Appeals' judgment and remanded the case. In an opinion by STEVENS, J., joined by STEWART, WHITE, and POWELL, JJ., joined in part (as to holding (1) below) by MARSHALL, J., and joined in part (as to holding 2), by BURGER, Ch. J., and BLACKMUN and REHNQUIST, JJ., it was held that (1) even though



women as a class lived longer than men, the Department's practice of requiring female employees to make larger contributions to its pension plan than its male employees violated § 703(a)(1), since (a) the salary differential could not be justified on the ground that larger pension benefits were provided to women as a class, fairness to particular individuals rather than fairness to classes being the appropriate focus when applying § 703(a)(1), (b) the differential was not based on a factor "other than sex" so as to come within the statutory exception for such differential in the Equal Pay Act (29 USCS § 206(d)), and therefore was not protected under § 703(h) of Title VII (42 USCS § 2000e-2(h)), which permits compensation differentials based on sex authorized under the Equal Pay Act, (c) the differential represented treatment of a person in a manner which, but for the person's sex, would be different; and (2) the class of female employees was not entitled to retroactive relief under § 706(g) of Title VII (42 USCS § 2000e-5(g)), which permits a Federal District Court to grant retroactive relief if "appropriate," the presumption in favor of such relief having been overcome since (a) until the decision in the case at bar, the administrators of the pension fund could have justifiably assumed that the program was lawful, (b) there was no reason to believe that the threat of a backpay award was needed to cause other administrators to amend like practices, (c) changes in rules affecting insurance and pension plans could have a drastic impact on the economy, and (d) retroactive liability could devastate a pension fund, forcing administrators to meet unchanged obligations with diminished assets.

BLACKMUN, J., concurring in part and concurring in the judgment, expressed the view that the decision in the case at bar could not be reconciled with the court's earlier decisions in *General Electric Co. v. Gilbert* (1976) 429 US 125, 50 L Ed 2d 343, 97 S Ct 401, and *Geduldig v. Aiello* (1974) 417 US 484, 41 L Ed 2d 256, 94 S Ct 2485, thus making the recognition of those cases as continuing precedent somewhat questionable.

BURGER, Ch. J., joined by REHNQUIST, J., concurring in part and dissenting in part, expressed the view that (1) it was only rational to permit employers to rely on statistically sound and proven disparities in longevity between men and women if they were to operate economically workable group pension programs, and (2) the Department's practice fell squarely under the exemption for compensation differentials based on a factor other than sex provided by the Equal Pay Act, and incorporated into Title VII of the Civil Rights Act of 1964 by § 703(h) of that Act.

MARSHALL, J., concurring in part and dissenting in part, expressed the view that Title VII of the Civil Rights Act prohibited the employer's practice of requiring female employees to make larger contributions to the pension fund than male employees, and retroactive relief should have been awarded to the female employees in order that they be "made whole" through a refund of money illegally withheld from their paychecks.



LOS ANGELES DEPT. OF W. & P. v MANIART  
435 US 702, 65 L. Ed 2d 667, 98 S Ct 1370

HEADNOTES

Classified to U. S. Supreme Court Digest, Lawyers' Edition

**Civil Rights § 7.5 — pension plan — unequal contributions — sex-based differential**

1a-1d. Even though women as a class live longer than men, a public employer's practice of requiring its female employees to make larger contributions to its pension plan than its male em-

ployees, resulting in a differential in take-home pay between men and women, violates § 703(a)(1) of Title VII of the Civil Rights Act of 1964 (42 USCS § 2000e-2(a)(1)), which prohibits an employer from discriminating against "any individual" on the basis of sex with respect to compensation, terms, conditions,

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15 Am Jur 2d, Civil Rights §§ 169, 444  
5 Am Jur Pl & Pr Forms (Rev), Civil Rights, Forms 61, 65; 16  
Am Jur Pl & Pr Forms (Rev), Labor and Labor Relations,  
Forms 321 et seq.  
21 Am Jur Trials 1, Employment Discrimination Action  
Under Federal Civil Rights Acts  
42 USCS §§ 2000e-2(a)(1), 2000e-5(g)  
FRES, Job Discrimination §§ 410, 4:60  
US L Ed Digest, Civil Rights §§ 7.5, 12.5  
ALR Digests, Civil Rights §§ 1.3, 20  
L Ed Index to Annos, Labor and Employment; Sex  
ALR Quick Index, Discrimination; Sex Discrimination  
Federal Quick Index, Fair Employment Practices; Sex Dis-  
crimination

**ANNOTATION REFERENCES**

Racial discrimination in labor and employment. 28 L Ed 2d 928.  
Sex discrimination. 27 L Ed 2d 935.  
Employer's height or weight requirement as unlawful employment practice  
violation of Title VII of Civil Rights Act of 1964 (42 USCS §§ 2000e et seq.). 29  
ALR Fed 792.  
Validity, construction, and application of provisions of Title VII of Civil Rights  
Act of 1964 (42 USCS §§ 2000e et seq.) and implementing regulations, making  
religious discrimination in employment unlawful. 22 ALR Fed 580.  
Award of backpay suit under Title VII of Civil Rights Act of 1964, as amended  
by Equal Employment Opportunity Act of 1972 (42 USCS §§ 2000e et seq.), for  
discriminatory employment practices. 21 ALR Fed 472.  
Construction and application of provisions of Title VII of Civil Rights Act of  
1974 (42 USCS §§ 2000e et seq.) making sex discrimination in employment unlaw-  
ful. 12 ALR Fed 15.  
Construction and application of provisions of Equal Pay Act of 1963 (29 USCS  
§ 206(d)) prohibiting wage discrimination on basis of sex. 7 ALR Fed 707.  
Fair employment statutes designed to eliminate racial, religious, or national  
origin discrimination in private employment. 44 ALR2d 1133.



or privileges of employment, since (1) the salary differential cannot be justified on the ground that larger pension benefits are provided to women as a class, fairness as to particular individuals rather than fairness to classes being the appropriate focus when applying § 703(a)(1), (2) the differential is not based on a factor "other than sex" so as to come within the statutory exception for such differentials in the Equal Pay Act (29 USCS §§ 206(d)), and therefore is not protected under § 703(h) of Title VII (42 USCS § 2000e-2(h)), which permits compensation differentials based on sex authorized under the Equal Pay Act, and (3) the differential represents treatment of a person in a manner, which, but for the person's sex, would be different. (Burger and Rehnquist, JJ., dissented from this holding.)

**Civil Rights § 7.5 — employment decisions — sex discrimination**

2. Under Title VII of the Civil Rights Act of 1964 (42 USCS §§ 2000e et seq.), which requires equal employment opportunities, employment decisions cannot be predicated on mere stereotyped impressions about the characteristics of males or females; myths and purely habitual assumptions about a woman's inability to perform certain kinds of work are not acceptable reasons for refusing to employ qualified individuals, or for paying them less.

**Civil Rights § 7.5 — employment decisions — generalizations**

3. Under § 703(a)(1) of the Civil Rights Act of 1964 (42 USCS § 2000e-2(a)(1)), which precludes employers from treating individuals as simply components of a racial, religious, sexual, or national class, even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply.

**Civil Rights § 7.5 — sex discrimination — height requirement**

4. Under § 703(a)(1) of the Civil Rights Act of 1964 (42 USCS § 2000e-2(a)(1)),

criminating against any individual on the basis of sex with respect to composition, terms, conditions, or privileges of employment, a tall woman may not be refused employment if height is required for a job merely because, on the average, women are too short.

**Civil Rights § 7.5 — employment discrimination — group insurance coverage**

5. With regard to Title VII of the Civil Rights Act of 1964 (42 USCS §§ 2000e et seq.), which requires equal employment opportunities, there is no special definition of discrimination in the context of employee group insurance coverage.

**Civil Rights § 7.5 — gender-neutral pension plan — disproportionate impact — male employees**

6a, 6b. Even though women as a class live longer than men, a gender-neutral pension plan requiring equal contributions from both male and female employees does not violate either the Equal Pay Act (29 USCS § 206(d)), which prohibits wage discrimination based on sex, or Title VII of the Civil Rights Act of 1964, (42 USCS §§ 2000e et seq.), which requires equal employment opportunities, despite its disproportionately heavy impact on male employees, since (1) each retiree's total pension benefits are ultimately determined by actual life span, any differential in benefits paid to men and women in the aggregate thus being based on a factor "other than sex," immune from challenge under the Equal Pay Act, and (2) with regard to Title VII, even a completely neutral practice will inevitably have some disproportionate impact on one group or another, assuming that disparate impact analysis applies to fringe benefits.

**Civil Rights § 7.5 — pension benefits — compensation**

7a, 7b. For the purposes of Title VII of the Civil Rights Act of 1964 (42 USCS §§ 2000e et seq.), which requires equal employment opportunities, benefits paid under a public employer's pension plan,



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maintain them, are "compensation" as that term is used in the Act.

**Civil Rights § 7.5 — pension plan — sex-based differentials**

8a, 8b. A public employer's practice of requiring its female employees to make larger contributions to its pension plan than its male employees violates § 703(a)(1) of the Civil Rights Act of 1964 (42 USCS § 2000e-2(a)(1)), which prohibits an employer from discriminating against any individual on the basis of sex with respect to compensation, terms, conditions, or privileges of employment, regardless of whether the contribution differential is based on a sound and well recognized business practice.

**Civil Rights § 7.5 — Civil Rights Act — Equal Pay Act = ~~scope~~**

9a, 9b. Title VII of the Civil Rights Act of 1964 (42 USCS §§ 2000e et seq.), which requires equal employment opportunities, and the Equal Pay Act (29 USCS § 206(d)), which prohibits wage discrimination based on sex, govern relations between employees and their employer, not between employees and third parties.

**Civil Rights § 7.5 — benefit plan — funding**

10a, 10b. Funding requirements for an establishment's benefit plan may be determined by considering the composition of the entire work force without violating either § 703(a)(1) of Title VII of the Civil Rights Act of 1964 (42 USCS § 2000e-2(a)(1)), which bans employment discrimination against an individual because of such individual's sex, or the Equal Pay Act (29 USCS § 206(d)), which generally prohibits discrimination within any establishment by paying wages to employees of one sex at a rate less than

that at which employees of the opposite sex are paid for equal work.

**Civil Rights § 12.5 — pension plan — unequal contributions — retroactive liability**

11. A class of female employees and female retirees who were required by their public employer to make larger contributions than male employees to a pension plan, resulting in a differential in take-home pay between men and women—such practice being in violation of § 703(a)(1) of Title VII of the Civil Rights Act of 1964 (42 USCS § 2000e-2(a)(1)), which prohibits an employer from discriminating against any individual on the basis of sex with respect to compensation, terms, conditions, or privileges of employment—is not entitled to recover excess contributions or retroactive relief under § 706(g) of the Act (42 USCS § 2000e-5(g)), which permits a Federal District Court to grant such relief if "appropriate," the presumption in favor of such relief being overcome since (1) until the decision in the case at bar, the administrators of the pension fund could justifiably have assumed that the program was lawful, (2) there was no reason to believe that the threat of a backpay award was needed to cause other administrators to amend like practices, (3) changes in rules affecting insurance or pension plans could have a drastic impact on the economy, and (4) retroactive liability could devastate a pension fund, forcing administrators to meet unchanged obligations with diminished assets. (Marshall, J., dissented from this holding.)

**Equity § 87 — remedies — flexibility**

12a, 12b. Equitable remedies may be flexible but they still must be founded on principle.

**SYLLABUS BY REPORTER OF DECISIONS**

This suit was filed as a class action on behalf of present or former female employees of petitioner Los Angeles Department of Water and Power, alleging that the Department's requirement that female employees make larger contributions to its pension fund than male em-

ployees violated § 703(a)(1) of Title VII of the Civil Rights Act of 1964, which, inter alia, makes it unlawful for an employer to discriminate against any individual because of such individual's sex. The Department's pension plan was based on



mortality tables and its own experience showing that female employees had greater longevity than male employees and that the cost of a pension for the average female retiree was greater than for the average male retiree because more monthly payments had to be made to the female. The District Court held that the contribution differential violated § 703(a)(1), and ordered a refund of all excess contributions antedating an amendment to the Department's pension plan, made while this suit was pending, that eliminated sexual distinctions in the plan's contributions and benefits. The Court of Appeals affirmed. *Held*:

1. The challenged differential in the Department's former pension plan violated § 703(a)(1).

(a) The differential was discriminatory in its "treatment of a person in a manner which but for that person's sex would be different." The statute, which focuses on fairness to individuals rather than fairness to classes, precludes treating individuals as simply components of a group such as the sexual class here. Even though it is true that women as a class outlive men, that generalization cannot justify disqualifying an individual to whom it does not apply. There is no reason, moreover, to believe that Congress intended a special definition of discrimination in the context of employee group insurance, since in that context it is common and not considered unfair to treat different classes of risks as though they were the same.

(b) Though the Department contends that the different contributions exacted from men and women were based on the factor of longevity rather than sex and thus constituted a statutory exemption authorized for a "differential based on any other factor other than sex," there is no evidence that any factor other than the employee's sex accounted for the differential here.

(c) This case is readily distinguishable from *General Electric Co. v. Gilbert*, 420 US 125, 50 L Ed 2d 343, 97 S Ct 401, for here the pension plan discriminates on the basis of sex, whereas the plan in *Gilbert* discriminated on the basis of a special physical disability.

2. It was inappropriate for the District Court to allow a retroactive monetary recovery in this case.

(a) Though a presumption favors retroactive relief where a Title VII violation has been committed, *Albamarle Paper Co. v. Moody*, 422 US 406, 45 L Ed 2d 280, 95 S Ct 2362, the appropriateness of such relief in an individual case must be assessed. Here the District Court gave insufficient attention to the equitable nature of Title VII remedies. This was the first litigation challenging pension fund contribution differences based on valid actuarial tables, which the fund administrators may well have assumed justified the differential, and the resulting prohibition against sex-differentiated employee contributions constituted a marked departure from past practice.

(b) In view of the grave consequences that drastic changes in legal rules can have on pension funds, such rules should not be given retroactive effect unless plainly commanded by legislative action. 553 F2d 581, vacated and remanded.

Stevens, J., delivered the opinion of the Court, in which Stewart, White, and Powell, JJ., joined, in all but Part IV of which Marshall, J., joined, and in Part IV of which Burger, C. J., and Blackmun and Rehnquist, JJ., joined. Blackmun, J., filed an opinion concurring in part and concurring in the judgment. Burger, C. J., filed an opinion concurring in part and dissenting in part, in which Rehnquist, J., joined. Marshall, J., filed an opinion concurring in part and dissenting in part. Brennan, J., took no part in the consideration or decision of the case.

#### APPEARANCES OF COUNSEL

David J. Ollphant argued the cause for petitioners.

Robert M. Dohrmann argued the cause for respondents.

Briefs of Counsel, p 962, *infra*.



## LOS ANGELES DEPT. OF W. &amp; P. v MANIART

435 US 702, 55 L. Ed. 2d 657, 98 S Ct 1370

## OPINION OF THE COURT

[435 US 704]

Mr. Justice Stevens delivered the opinion of the Court.

[1a] As a class, women live longer than men. For this reason, the Los Angeles Department of Water and Power required its female employees to make larger contributions to its pension fund than its male employees. We granted certiorari to decide whether this practice discriminated against individual female employees because of their sex in violation of § 703(a)(1) of the Civil Rights Act of 1964, as amended.<sup>1</sup>

For many years the Department<sup>2</sup> has administered retirement,

[435 US 705]

disability, and death-benefit programs for its employees. Upon retirement each employee is eligible for a monthly retirement benefit computed as a fraction of his or her salary multiplied by years of service.<sup>3</sup> The monthly benefits for men and women of the same age, seniority, and salary are equal. Benefits are funded entirely by contributions from the employees and the Department, augmented by the income earned on those contributions. No

private insurance company is involved in the administration or payment of benefits.

Based on a study of mortality tables and its own experience, the Department determined that its 2,000 female employees, on the average, will live a few years longer than its 10,000 male employees. The cost of a pension for the average retired female is greater than for the average male retiree because more monthly payments must be made to the average woman. The Department therefore required female employees to make monthly contributions to the fund which were 14.84% higher than the contributions required of comparable male employees.<sup>4</sup> Because employee contributions were withheld from paychecks, a female employee took home less pay than a male employee earning the same salary.<sup>5</sup>

Since the effective date of the Equal Employment Opportunity

[435 US 706]

Act of 1972,<sup>6</sup> the Department has been an employer within the meaning of Title VII of the Civil Rights Act of 1964. See 42 USC § 2000e (1970 ed Supp V) [42 USC §

1. The action provides:

"It shall be an unlawful employment practice for an employer--

"(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . " 78 Stat 265, 42 USC § 2000e-2(a)(1) [42 USC § 2000e-2(a)(1)].

2. In addition to the Department itself, the petitioners include members of the Board of Commissioners of the Department and members of the plan's Board of Administration.

3. The plan itself is not in the record. In its brief the Department states that the plan

provides for several kinds of pension benefits at the employee's option, and that the most common is a formula pension equal to 2% of the average monthly salary paid during the last year of employment times the number of years of employment. The benefit is guaranteed for life.

4. The Department contributes an amount equal to 110% of all employee contributions.

5. The significance of the disparity is illustrated by the record of one woman whose contributions to the fund (including interest on the amount withheld each month) amounted to \$18,171.40; a similarly situated male would have contributed only \$12,843.63.

6. 86 Stat. 1031, 1032, 1033, 1034, 1035, 1036, 1037, 1038, 1039, 1040, 1041, 1042, 1043, 1044, 1045, 1046, 1047, 1048, 1049, 1050, 1051, 1052, 1053, 1054, 1055, 1056, 1057, 1058, 1059, 1060, 1061, 1062, 1063, 1064, 1065, 1066, 1067, 1068, 1069, 1070, 1071, 1072, 1073, 1074, 1075, 1076, 1077, 1078, 1079, 1080, 1081, 1082, 1083, 1084, 1085, 1086, 1087, 1088, 1089, 1090, 1091, 1092, 1093, 1094, 1095, 1096, 1097, 1098, 1099, 1100, 1101, 1102, 1103, 1104, 1105, 1106, 1107, 1108, 1109, 1110, 1111, 1112, 1113, 1114, 1115, 1116, 1117, 1118, 1119, 1120, 1121, 1122, 1123, 1124, 1125, 1126, 1127, 1128, 1129, 1130, 1131, 1132, 1133, 1134, 1135, 1136, 1137, 1138, 1139, 1140, 1141, 1142, 1143, 1144, 1145, 1146, 1147, 1148, 1149, 1150, 1151, 1152, 1153, 1154, 1155, 1156, 1157, 1158, 1159, 1160, 1161, 1162, 1163, 1164, 1165, 1166, 1167, 1168, 1169, 1170, 1171, 1172, 1173, 1174, 1175, 1176, 1177, 1178, 1179, 1180, 1181, 1182, 1183, 1184, 1185, 1186, 1187, 1188, 1189, 1190, 1191, 1192, 1193, 1194, 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§ 2000e]. In 1973, respondents<sup>7</sup> brought this suit in the United States District Court for the Central District of California on behalf of a class of women employed or formerly employed by the Department. They prayed for an injunction and restitution of excess contributions.

While this action was pending, the California Legislature enacted a law prohibiting certain municipal agencies from requiring female employees to make higher pension fund contributions than males.<sup>8</sup> The Department therefore amended its plan, effective January 1, 1975. The current plan draws no distinction, either in contributions or in benefits, on the basis of sex. On a motion for summary judgment, the District Court held that the contribution differential violated § 703(a)(1) and ordered a refund of all excess contributions made before the amendment of the plan.<sup>9</sup> The United States Court of Appeals for the Ninth Circuit affirmed.<sup>10</sup>

The Department and various amici curiae contend that: (1) the differential in take-home pay between men and women was not discrimination within the meaning of § 703(a)(1) because it was offset by a difference in the value of the pen-

sion benefits provided to the two classes of employees; (2) the differential was based on a factor "other than sex"

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within the meaning of the Equal Pay Act of 1963 and was therefore protected by the so-called Bennett Amendment;<sup>11</sup> (3) the rationale of *General Electric Co. v. Gilbert*, 429 US 125, 50 L Ed 2d 343, 97 S Ct 401, requires reversal; and (4) in any event, the retroactive monetary recovery is unjustified. We consider these contentions in turn.

# I

There are both real and fictional differences between women and men. It is true that the average man is taller than the average woman; it is not true that the average woman driver is more accident prone than the average man.<sup>12</sup> Before the Civil Rights Act of 1964 was enacted, an employer could fashion his personnel policies on the basis of assumptions about the differences between men and women, whether or not the assumptions were valid.

[1b, 2] It is now well recognized that employment decisions cannot be predicated on mere "stereotyped" impressions about the characteristics

7. In addition to five individual plaintiffs, respondents include the Individuals' union, the International Brotherhood of Electrical Workers, Local Union No. 18.

8. See Cal Govt Code Ann § 7500 (West Supp 1978).

9. The court had earlier granted a preliminary injunction. 387 F Supp 980 (1975).

10. 553 F2d 581 (1976). Two weeks after the Ninth Circuit decision, this Court decided *General Electric Co. v. Gilbert*, 429 US 125, 50

1. Ed 2d 343, 97 S Ct 401. In response to a petition for rehearing, a majority of the Ninth Circuit panel concluded that its original decision did not conflict with *Gilbert*. 553 F2d, at 592 (1977). Judge Kilkenny dissented. *Id.*, at 594.

11. See nn 22 and 23, *infra*.

12. See *Developments in the Law, Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv L Rev 1109, 1174 (1971).



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of males or females.<sup>13</sup> Myths and purely habitual assumptions about a woman's inability to perform certain kinds of work are no longer acceptable reasons for refusing to employ qualified individuals, or for paying them less. This case does not, however, involve a fictional difference between men and women. It involves a generalization that the parties accept as unquestionably true: Women, as a class, do live longer than men. The Department treated its women employees differently from its men employees because the two

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classes are in fact different. It is equally true, however, that all individuals in the respective classes do not share the characteristic that differentiates the average class representatives. Many women do not live as long as the average man and many men outlive the average woman. The question, therefore, is whether the existence or nonexistence of "discrimination" is to be determined by comparison of class characteristics or individual characteristics. A "stereotyped" answer to that question may not be the same as the answer that the language and purpose of the statute command.

[3, 4] The statute makes it unlawful "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 USC § 2000e-

2(a)(1) [42 USCS § 2000e-2(a)(1)] (emphasis added). The statute's focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual, or national class. If height is required for a job, a tall woman may not be refused employment merely because, on the average, women are too short. Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply.

That proposition is of critical importance in this case because there is no assurance that any individual woman working for the Department will actually fit the generalization on which the Department's policy is based. Many of those individuals will not live as long as the average man. While they were working, those individuals received smaller paychecks because of their sex, but they will receive no compensating advantage when they retire.

It is true, of course, that while contributions are being collected from the employees, the Department cannot know which individuals will predecease the average woman. Therefore, unless women in a class are assessed an extra charge, they will be subsidized, to some extent, by the class of male

[435 US 709]

employees.<sup>14</sup> It follows, according to the Department, that fairness to its class of male

13. "In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes. Section 703(a)(1) subjects to scrutiny and eliminates such irrational impediments to job opportunities and enjoyment which have plagued women in the past." *Sprogis v United Air*

14. The size of the subsidy involved in this case is open to doubt, because the Department's plan provides for survivors' benefits. Since female spouses of male employees are likely to have greater life expectancies than the male spouses of female employees, whatever benefits men lose in "primary" coverage for themselves, they may regain in "secondary" coverage for their wives.



employees justifies the extra assessment against all of its female employees.

But the question of fairness to various classes affected by the statute is essentially a matter of policy for the legislature to address. Congress has decided that classifications based on sex, like those based on national origin or race, are unlawful. Actuarial studies could unquestionably identify differences in life expectancy based on race or national origin, as well as sex.<sup>15</sup> But a statute that was designed to make race irrelevant in the employment market, see *Griggs v. Duke Power Co.* 401 US 424, 436, 28 L. Ed. 2d 158, 91 S. Ct. 849, could not reasonably be construed to permit a take-home-pay differential based on a racial classification.<sup>16</sup>

Even if the statutory language were less clear, the basic policy of the statute requires that we focus on fairness to individuals rather than fairness to classes. Practices that classify employees in terms of religion, race, or sex tend to preserve traditional assumptions about groups rather than thoughtful scrutiny of individuals. The generalization involved in this case illustrates the point. Separate mortality tables are easily interpreted as reflecting innate differences between the sexes;

but a significant part of the longevity

[435 US 710]

differential may be explained by the social fact that men are heavier smokers than women.<sup>17</sup>

[5, 6a] Finally, there is no reason to believe that Congress intended a special definition of discrimination in the context of employee group insurance coverage. It is true that insurance is concerned with events that are individually unpredictable, but that is characteristic of many employment decisions. Individual risks, like individual performance, may not be predicted by resort to classifications proscribed by Title VII. Indeed, the fact that this case involves a group insurance program highlights a basic flaw in the Department's fairness argument. For when insurance risks are grouped, the better risks always subsidize the poorer risks. Healthy persons subsidize medical benefits for the less healthy; unmarried workers subsidize the pensions of married workers;<sup>18</sup> persons who eat, drink, or smoke to excess may subsidize pension benefits for persons whose habits are more temperate. Treating different classes of risks as though they were the same for purposes of group insurance is a common practice which has never been considered

15. For example, the life expectancy of a white baby in 1973 was 72.2 years; a non-white baby could expect to live 65.9 years, a difference of 6.3 years. See Public Health Service, IIA Vital Statistics of the United States 1973, Table 5-3.

16. Fortifying this conclusion is the fact that some States have banned higher life insurance rates for blacks since the 19th century. See generally M. James, *The Metropolitan Life: A Study in Business Growth* 338-

17. See R. Retherford, *The Changing Sex Differential in Mortality* 71-82 (1976). Other social causes, such as drinking or eating habits—perhaps even the lingering effects of past employment discrimination—may also affect the mortality differential.

18. A study of life expectancy in the United States for 1949-1951 showed that 20-year-old men could expect to live to 60.6 years of age if they were divorced. If married, they could expect to reach 70.9 years of age, a difference



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inherently unfair. To insure the flabby and the fit as though they were equivalent risks may be more common than treating men and women alike;<sup>19</sup> but nothing more than habit makes one "subsidy" seem less fair than the other.<sup>20</sup>

[435 US 711]

[1c] An employment practice that requires 2,000 individuals to contribute more money into a fund than 10,000 other employees simply because each of them is a woman, rather than a man, is in direct conflict with both the language and the policy of the Act. Such a practice does not pass the simple test of whether the evidence shows "treatment of a person in a manner which but for that person's sex would be different."<sup>21</sup> It constitutes discrimi-

nation and is unlawful unless exempted by the Equal Pay Act of 1963 or some other affirmative justification.

## II

[1d, 7a] Shortly before the enactment of Title VII in 1964, Senator Bennett proposed an amendment providing that a compensation differential based on sex would not be unlawful if it was authorized by the Equal Pay Act, which had been passed a year earlier.<sup>22</sup> The Equal Pay Act requires employers to pay

[435 US 712]

members of both sexes the same wages for equivalent work, except when the differential is pursuant to one of four specified exceptions.<sup>23</sup>

19. The record indicates, however, that the Department has funded its death-benefit plan by equal contributions from male and female employees. A death benefit—unlike a pension benefit—has less value for persons with longer life expectancies. Under the Department's concept of fairness, then, this neutral funding of death benefits is unfair to women as a class.

20. [6b] A variation on the Department's fairness theme is the suggestion that a gender-neutral pension plan would itself violate Title VII because of its disproportionately heavy impact on male employees. Cf. *Griggs v Duke Power Co.*, 401 US 424, 28 L Ed 2d 158, 91 S Ct 840. This suggestion has no force in the sex discrimination context because each retiree's total pension benefits are ultimately determined by his actual life span; any differential in benefits paid to men and women in the aggregate is thus "based on [a] factor other than sex," and consequently immune from challenge under the Equal Pay Act, 29 USC § 206(d) [29 USCS § 206(d)]; cf. n 24, *infra*. Even under Title VII itself—assuming disparate impact analysis applies to fringe benefits, cf. *Nashville Gas Co. v Satty*, 434 US 136, 144-145, 54 L Ed 2d 356, 98 S Ct 347—the male employees would not prevail. Even a completely neutral practice will inevitably have some disproportionate impact on one group or another. *Griggs* does not imply, and this Court has never held, that discrimination must always be inferred from such consequences.

21. Developments in the Law, *supra*, n 12, at 1170; see also *Spragis v United Air Lines, Inc.*, 444 F.2d, at 1205 (Stevens, J., dissenting).

22. The Bennett Amendment became part of § 703(h), which provides in part:

"It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(b) of the Fair Labor Standards Act of 1938, as amended (29 USC § 206(d) [29 USCS § 206(d)])." 78 Stat 287, 42 USC § 2000e-2(h) [42 USCS § 2000e-2(h)].

23. [7b] The Equal Pay Act provides, in part:

"No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity



The Department contends that the fourth exception applies here. That exception authorizes a "differential based on any other factor other than sex."

The Department argues that the different contributions exacted from men and women were based on the factor of longevity rather than sex. It is plain, however, that any individual's life expectancy is based on a number of factors, of which sex is only one. The record contains no evidence that any factor other than the employee's sex was taken into account in calculating the 14.84% differential between the respective contributions by men and women. We agree with Judge Duniway's observation that one cannot "say that an

[435 US 713]

actuarial distinction based entirely on sex is based on any other factor other than sex." Sex is exactly what it is based on." 563 F2d 681, 688 (1978).

We are also unpersuaded by the Department's reliance on a colloquy between Senator Randolph and Senator Humphrey during the debate on the Civil Rights Act of 1964. Commenting on the Bennett Amendment, Senator Humphrey expressed his understanding that it would allow many differences in the treatment of men and women under industrial benefit plans, including earlier retirement options for women.<sup>25</sup>

[435 US 714]

Though he did not address differen-

ers, because of the difference in their average life spans. It is this sort of disparity—and not an explicitly gender-based differential—that the Equal Pay Act intended to authorize.

25. "MR. RANDOLPH. Mr. President, I wish to ask of the Senator from Minnesota [Mr. Humphrey], who is the effective manager of the pending bill, a clarifying question on the provisions of title VII. "I have in mind that the social security system, in certain respects, treats men and women differently. For example, widows' benefits are paid automatically; but a widower qualifies only if he is disabled or if he was actually supported by his deceased wife. Also, the wife of a retired employee entitled to social security receives an additional old age benefit; but the husband of such an employee does not. These differences in treatment as I recall, are of long standing.

24. The Department's argument is specious because its contribution schedule distinguished only imperfectly between long-lived and short-lived employees, while distinguishing precisely between male and female employees. In contrast, an entirely gender-neutral system of contributions and benefits would result in differing retirement benefits precisely "based on" longevity, for retirees with long lives would always receive more money than comparable employees with short lives. Such a plan would also distinguish in a crude way between male and female pension-

"Am I correct, I ask the Senator from Minnesota, in assuming that similar differences of treatment in industrial benefit plans, including earlier retirement options for women, may continue in operation under this bill, if it becomes law?

"MR. HUMPHREY. Yes. That point was made unmistakably clear earlier today by the adoption of the Bennett amendment; so there can be no doubt about it." 110 Cong Rec 13663-13664 (1964).



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ces in employee contributions based on sex, Senator Humphrey apparently assumed that the 1964 Act would have little, if any, impact on existing pension plans. His statement cannot, however, fairly be made the sole guide to interpreting the Equal Pay Act, which had been adopted a year earlier; and it is the 1963 statute, with its exceptions, on which the Department ultimately relies. We conclude that Senator Humphrey's isolated comment on the Senate floor cannot change the effect of the plain language of the statute itself."

## III

The Department argues that reversal is required by *General Electric Co. v Gilbert*, 429 US 125, 50 L Ed 2d 343, 97 S Ct 401. We are satisfied,

[435 US 715]

20. The administrative constructions of this provision took in two directions. The Wage and Hour Administrator, who is charged with enforcing the Equal Pay Act, has never expressly approved different employee contribution rates, but he has said that either equal employer contributions or equal benefits will satisfy the Act. 29 CFR § 800.116(d) (1977). At the same time, he has stated that a wage differential based on differences in the average costs of employing men and women is not based on a "factor other than sex." 29 CFR § 800.161 (1977). The Administrator's reasons for the second ruling are illuminating: "To group employees solely on the basis of sex for purposes of comparison of costs necessarily rests on the assumption that the sex factor alone may justify the wage differential—an assumption plainly contrary to the terms and purpose of the Equal Pay Act. Wage differentials so based would serve only to perpetuate and promote the very discrimination at which the Act is directed, because in any grouping by sex of the employees to which the cost data relates, the group cost experience is necessarily assessed against an individual of one sex without regard to whether it costs an employer more or less to employ such individual than a particular individual of the opposite

however, that neither the holding nor the reasoning of *Gilbert* is controlling.

In *Gilbert* the Court held that the exclusion of pregnancy from an employer's disability benefit plan did not constitute sex discrimination within the meaning of Title VII. Relying on the reasoning in *Geduldig v Aiello*, 417 US 484, 41 L Ed 2d 256, 94 S Ct 2485, the Court first held that the General Electric plan did not involve "discrimination based upon gender as such." The two groups of potential recipients which that case concerned were pregnant women and nonpregnant persons. "While the first group is exclusively female, the second includes members of both sexes." 429 US, at 135, 50 L Ed 2d 343, 97 S Ct 401. In contrast, each of the two groups of employees involved in this case is composed entirely and exclu-

requiring equal skill, effort, and responsibility." *Ibid*.

To the extent that they conflict, we find that the reasoning of § 800.161 has more "power to persuade" than the *lipa dixit* of § 800.116. Cf. *Skidmore v Swift & Co.*, 323 US 134, 140, 69 L Ed 124, 65 S Ct 161.

27. Quoting from the *Geduldig* opinion, the Court stated:

"[T]his case is thus a far cry from cases like *Reed v Reed*, 404 US 71, [30 L Ed 2d 225, 92 S Ct 251] (1971), and *Frontiero v Richardson*, 411 US 677, [36 L Ed 2d 583, 93 S Ct 1764] (1973), involving discrimination based upon gender as such. The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities." 429 US, at 134, 50 L Ed 2d 343, 97 S Ct 401.

After further quotation, the Court added:

"The quoted language from *Geduldig* leaves no doubt that our reason for rejecting appellee's equal protection claim in that case was that the exclusion of pregnancy from coverage under California's disability-benefits plan was



sively of members of the same sex. On its face, this plan discriminates on the basis of sex whereas the General Electric plan discriminated on the basis of a special physical disability.

In *Gilbert* the Court did note that the plan as actually administered had provided more favorable benefits to women as a class than to men as a class.<sup>28</sup> This evidence supported the conclusion that not only had plaintiffs failed to establish a prima facie case by proving that the plan was discriminatory

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on its face, but they had also failed to prove any discriminatory effect.<sup>29</sup>

In this case, however, the Department argues that the absence of a discriminatory effect on women as a class justifies an employment practice which, on its face, discriminated against individual employees because of their sex. But even if the

Department's actuarial evidence is sufficient to prevent plaintiffs from establishing a prima facie case on the theory that the effect of the practice on women as a class was discriminatory, that evidence does not defeat the claim that the practice, on its face, discriminated against every individual woman employed by the Department.<sup>30</sup>

[8a] In essence, the Department is arguing that the prima facie showing of discrimination based on evidence of different contributions for the respective sexes is rebutted by its demonstration that there is a like difference in the cost of providing benefits for the respective classes. That argument might prevail if Title VII contained a cost-justification defense comparable to the affirmative defense available in a price discrimination

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suit.<sup>31</sup> But neither Congress nor the courts have recognized such a defense under Title VII.<sup>32</sup>

28. See *id.*, at 130-131, n 9, 60 L. Ed. 2d 343, 378 (1971).

29. As the Court recently noted in *Nashville Gas Co. v. City*, 434 U.S. at 144, 64 L. Ed. 2d 350, 39 B.L.R. 347, the *Gilbert* holding "did not depend on this evidence." Rather, the holding rested on the plaintiff's failure to prove either facial discrimination or discriminatory effect.

30. Some amici suggest that the Department's discrimination is justified by business necessity. They argue that, if no gender distinction is drawn, many male employees will withdraw from the plan, or even the Department, because they can get a better pension plan in the private market. But the Department has long required equal contributions to its death-benefit plan, see n 19, *supra*, and since 1975 it has required equal contributions to its pension plan. Yet the Department points to no "adverse selection" by the affected employees, presumably because an employee who wants to leave the plan must also leave his job, and few workers will quit be-

price on the open market. In short, there has been no showing that sex distinctions are reasonably necessary to the normal operation of the Department's retirement plan.

31. [8b] See 15 U.S.C. § 1301 (1970 ed.) [16 U.S.C. § 1301]. Under the Robinson-Patman Act, proof of cost differences justifies otherwise illegal price discrimination; it does not negate the existence of the discrimination itself. See *FTC v. Morton Salt Co.*, 334 U.S. 37, 44-45, 92 L. Ed. 1190, 68 S. Ct. 822, 1 ALR2d 260. So here, even if the contribution differential were based on a sound and well-recognized business practice, it would nevertheless be discriminatory, and the defendant would be forced to assert an affirmative defense to escape liability.

32. Defenses under Title VII and the Equal Pay Act are considerably narrower. See, e.g., n 30, *supra*. A broad cost-differential defense was proposed and rejected when the Equal Pay Act became law. Representative Findley offered an amendment to the Equal Pay Act that would have expressly authorized a wage



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[9a, 10a] Although we conclude that the Department's practice violated Title VII, we do not suggest that the statute was intended to revolutionize the insurance and pension industries. All that is at issue today is a requirement that men and women make unequal contributions to an employer-operated pension fund. Nothing in our holding implies that it would be unlawful for an employer to set aside equal retirement contributions for each employee and let each retiree purchase the largest benefit which his or her accumulated contributions could command

[435 US 718]

in the open market.<sup>33</sup> Nor does it call into question the insurance industry practice of considering the composition of an employer's work force in determining the probable cost of a retirement or death benefit plan.<sup>34</sup> Finally, we recognize that in a case of this kind it may be

necessary to take special care in fashioning appropriate relief.

## IV

The Department challenges the District Court's award of retroactive relief to the entire class of female employees and retirees. Title VII does not require a district court to grant any retroactive relief. A court that finds unlawful discrimination "may enjoin [the discrimination] . . . and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement . . . with or without back pay . . . or any other equitable relief as the court deems appropriate." 42 USC § 2000e-5(g) (1970 ed Supp V) [42 USCS § 2000e-5(g)].

[435 US 719]

To the point of redundancy, the statute stresses that retroactive relief "may" be awarded if it is "appropriate."

of the opposite sex." 100 Cong. Rec. 9217 (1963). He pointed out that the employment of women might be more costly because of such matters as higher turnover and state laws restricting women's hours. Id., at 9200. The Equal Pay Act's supporters responded that any cost differences could be handled by factoring on the factors other than sex which actually caused the differences, such as absence or number of hours worked. The amendment was rejected as largely redundant for that reason. Id., at 9217.

The Senate Report, on the other hand, does seem to assume that the statute may recognize a very limited cost defense, based on "all of the elements of the employment costs of both men and women." S. Rep. No. 176, 88th Cong., 1st Sess., 4 (1963). It is difficult to find language in the statute supporting even this limited defense; in any event, no defense based on the total cost of employing men and women was attempted in this case.

33. [9b] Title VII and the Equal Pay Act primarily govern relations between employees and their employer, not between employees and third parties. We do not suggest, of course, that an employer can avoid his re-

programs to corporate shells. Title VII applies to "any agent" of a covered employer, 42 USC § 2000e(b) (1970 ed Supp. V) [42 USCS § 2000e(b)], and the Equal Pay Act applies to "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 USC § 206(d) [29 USCS § 206(d)]. In this case, for example, the Department could not deny that the administrative board was its agent after it successfully argued that the two were so inseparable that both shared the city's immunity from suit under 42 USC § 1983 [42 USCS § 1983].

34. [10b] Title VII bans discrimination against an "individual" because of "such individual's" sex. 42 USC § 2000e-2(a)(1) [42 USCS § 2000e-2(a)(1)]. The Equal Pay Act prohibits discrimination "within any establishment," and discrimination is defined as "paying wages to employees . . . at a rate less than the rate at which [the employer] pays wages to employees of the opposite sex" for equal work. 29 USC § 206(d)(1) [29 USCS § 206(d)(1)]. Neither of these provisions makes it unlawful to determine the funding requirements for an establishment's benefit plan by considering



In *Albemarle Paper Co. v. Moody*, 422 US 405, 45 L Ed 2d 280, 95 S Ct 2362, the Court reviewed the scope of a district court's discretion to fashion appropriate remedies for a Title VII violation and concluded that "backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." *Id.*, at 421, 45 L Ed 2d 280, 95 S Ct 2362. Applying that standard, the Court ruled that an award of backpay should not be conditioned on a showing of bad faith. *Id.*, at 422-423, 45 L Ed 2d 280, 95 S Ct 2362. But the *Albemarle* Court also held that backpay was not to be awarded automatically in every case.<sup>35</sup>

[11] The *Albemarle* presumption

35. Specifically, the Court held that a defendant prejudiced by his reliance on a plaintiff's initial waiver of any backpay claims could be absolved of backpay liability by a district court. 424 US, at 424, 45 L Ed 2d 280, 95 S Ct 2362. The Court reserved the question whether reliance of a different kind—on state "protective" laws requiring sex differentiation—would also have a defendant from liability. *Id.*, at 423 n 18, 45 L Ed 2d 280, 95 S Ct 2362.

36. According to the District Court, the defendant's liability for contributions did not begin until April 5, 1972, the day the Equal Employment Opportunity Commission issued an interpretation casting doubt on some varieties of pension fund discrimination. See 37 Fed Reg 6836 (1972). Even assuming that the EEOC's decision should have put the defendants on notice that they were acting illegally, the date chosen by the District Court was too early. The court should have taken into account the difficulty of amending a major pension plan, a task that cannot be accomplished overnight. Moreover, it should not have given conclusive weight to the EEOC guideline. See *General Electric Co. v. Gilbert*, 429 US, at 141, 50 L Ed 2d 343, 97 S Ct 401. The Wage and Hour Administrator, whose rulings also provide a defense in sex discrimination cases, 29 USC § 259 (29 USCS § 2591, refused to follow

in favor of retroactive liability can seldom be overcome, but it does not make meaningless the district courts' duty to determine that such relief is appropriate. For several reasons, we conclude that the District Court gave insufficient attention to the equitable nature of Title VII remedies.<sup>36</sup> Although we now have no doubt about

[435 US 720]

the application of the statute in this case, we must recognize that conscientious and intelligent administrators of pension funds, who did not have the benefit of the extensive briefs and arguments presented to us, may well have assumed that a program like the Department's was entirely lawful. The courts had been silent on the question, and the administrative agencies had conflicting views.<sup>37</sup> The Department's failure to act more

Further doubt about the District Court's equitable sensitivity to the impact of a refund order is raised by the court's decision to award the full difference between the contributions made by male employees and those made by female employees. This may give the victims of the discrimination more than their due. If an undifferentiated actuarial table had been employed in 1972, women employees would no doubt have been lower than they were, but they would not have been as low as the contributions actually made by men in that period. The District Court should at least have considered ordering a refund of only the difference between contributions made by women and the contributions they would have made under an actuarially sound and nondiscriminatory plan.

37. As noted earlier, n 26, *supra*, the position of the Wage and Hour Administrator has been somewhat confusing. His general rule rejected differences in average cost as a defense, but his more specific rule lent some support to the Department's view by simply requiring an employer to equalize either his contributions or employee benefits. Compare 29 CFR § 800.151 (1977) with § 800.116(d). The EEOC requires equal benefits. See 29 CFR §§ 1604.9(e) and (f) (1977). Two other agencies with responsibility for equal opportunity in



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swiftly is a sign, not of its recalcitrance, but of the problem's complexity. As commentators have noted, pension administrators could reasonably have thought it unfair—or even illegal—to make male employees shoulder more than their "actuarial share" of the pension burden.<sup>38</sup> There is no

[435 US 721]

reason to believe that the threat of a backpay award is needed to cause other administrators to amend their practices to conform to this decision.

Nor can we ignore the potential impact which changes in rules affecting insurance and pension plans may have on the economy. Fifty million Americans participate in retirement plans other than Social Security. The assets held in trust for these employees are vast and growing—more than \$400 billion was reserved for retirement benefits at the end of 1976 and reserves are increasing by almost \$50 billion a year.<sup>39</sup>

These plans, like other forms of insurance, depend on the accumulation of large sums to cover contingencies. The amounts set aside are determined by a painstaking assessment of the insurer's likely liability. Risks that the insurer foresees will be included in the calculation of liability, and the rates or contributions charged will reflect that calculation. The occurrence of major unforeseen contingencies, however, jeopardizes the insurer's solvency and, ultimately, the insureds' benefits. Drastic changes in the legal rules governing pension and insurance funds, like other unforeseen events, can have this effect. Consequently, the rules that apply to these funds should not be applied retroactively unless the legislature has plainly commanded that result.<sup>40</sup> The EEOC

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itself has recognized that the administrators of retirement plans must be given time to adjust gradually to Title VII's demands.<sup>41</sup>

Administrator's position. See 41 CFR § 40.20.3(c) (1977) (Office of Federal Contract Compliance); 45 CFR § 80.606(k)(2) (1976) (Department of Health, Education, and Welfare. See also 40 Fed Reg 24135 (1975) (HEW).

38. "If an employer establishes a pension plan, the charges of discrimination will be reversed: If he chooses a money purchase formula, women can complain that they receive less per month. While the employer and the insurance company are quick to point out that women as a group actually receive more when equal contributions are made—because of the long-term effect of compound interest—women employees still complain of discrimination. If the employer chooses the defined benefit formula, his male employees can allege discrimination because he contributes more for women as a group than for men as a group. The employer is in a dilemma: he is damned in the discrimination context no matter what he does." Note, Sex Discrimination and Sex-Based Mortality Tables, 53 BU L Rev 624, 633-634 (1973) (footnotes omitted).

39. American Council of Life Insurance

40. In 1974, Congress underlined the importance of making only gradual and prospective changes in the rules that govern pension plans. In that year, Congress passed a bill regulating employee retirement programs, Employee Retirement Income Security Act of 1974, 96 Stat 829. The bill paid careful attention to the problem of retroactivity. It set a wide variety of effective dates for different provisions of the new law; some of the rules will not be fully effective until 1984, a decade after the law was enacted. See, e.g., in 1970 ed Supp V of 29 USC, § 1061(a) (Sept. 2, 1974) [29 USC § 1061(a)]; § 1031(b)(1) (Jan. 1, 1975); § 1086(b) (Dec. 31, 1975); § 1114(c)(4) (June 30, 1977); § 1381(c)(1) (Jan. 1, 1978); § 1061(c) (Dec. 31, 1980); § 1114(c) (June 30, 1984).

41. In February 1968, the EEOC issued guidelines disapproving differences in male and female retirement ages. In September of the same year, EEOC's general counsel gave an opinion that retirement plans could set gradual schedules for complying with the guidelines and that the judgment of the EEOC



Courts have also shown sensitivity to the special dangers of retroactive Title VII awards in this field. See *Rosen v Public Serv. Elec. & Gas Co.*, 328 F Supp 464, 466-468 (NJ 1971).

[12a] There can be no doubt that the prohibition against sex-differentiated employee contributions represents a marked departure from past practice. Although Title VII was enacted in 1964, this is apparently the first litigation challenging contribution differences based on valid actuarial tables. Retroactive liability could be devastating for a pension fund.<sup>42</sup> The

[435 US 723]

harm would fall in large part on innocent third parties. If, as the courts below apparently contemplated, the plaintiffs' contributions are recovered from the pension fund,<sup>43</sup> the administrators of the fund will be forced to meet un-

changed obligations with diminished assets.<sup>44</sup> If the reserve proves inadequate, either the expectations of all retired employees will be disappointed or current employees will be forced to pay not only for their own future security but also for the unanticipated reduction in the contributions of past employees.

Without qualifying the force of the *Albemarle* presumption in favor of retroactive relief, we conclude that it was error to grant such relief in this case. Accordingly, although we agree with the Court of Appeals' analysis of the statute, we vacate its judgment and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Mr. Justice Brennan took no part in the consideration or decision of this case.

carry considerable weight." See *Chastang v Flynn & Emrich Co.* 541 F2d 1040, 1045 (CA4 1976).

42. [12b] The plaintiffs assert that the award in this case would not be crippling to these defendants, because it is limited to contributions between 1972 and 1975. But we cannot base a ruling on the facts of this case alone. As this Court noted in *Albemarle Paper Co. v Moody*, 422 US 405, 45 L. Ed. 2d 280, 95 S. Ct. 2362, equitable remedies may be flexible but they still must be founded on principle. "Important national goals would be frustrated by a regime of discretion that 'produce[d] different results for breaches of duty in situations that cannot be differentiated in policy.'" *Id.*, at 417, 45 L. Ed. 2d 280, 95 S. Ct. 2362. Employers are not liable for improper contributions made more than two years before a charge was filed with the EEOC. 42 USC § 2000e-5(g) (1970 ed Supp V) [42 USCS § 2000e-5(g)]. But it is not unusual for cases to remain within the EEOC for years after a charge is filed, see, e.g., *Occidental Life Ins. Co. v EEOC*, 432 US 355, 53 L. Ed. 2d 402, 97 S. Ct. 2447 (3 years, 2 months), and that delay is

but a prologue to the time inevitably consumed in civil litigation.

43. The Court of Appeals plainly expected the plan to pay the award, for it noted that imposing retroactive liability "might leave the plan somewhat under-funded." 553 F.2d, at 892. After making this observation, the Court of Appeals suggested a series of possible solutions to the problem—the benefits of all retired workers could be lowered, the burden on current employees could be increased, or the Department could decide to contribute enough to offset the plan's unexpected loss. *Ibid.*

44. Two commentators urging the illegality of gender-based pension plans noted the danger of "staggering damage awards," and they proposed as one cure the exercise of judicial "discretion [to] refuse a back-pay award because of the hardship it would work on an employer who had acted in good faith . . ." *Bernstein & Williams, Title VII and the Problem of Sex Classifications in Pension Programs*, 74 Colum. L. Rev. 1203, 1226, 1227 (1974).



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## SEPARATE OPINIONS

Mr. Justice Blackmun, concurring in part and concurring in the judgment.

Mr. Justice Stewart wrote the opinion for the Court in *Geduldig v. Aiello*, 417 US 484, 41 L. Ed. 2d 256, 94 S. Ct. 2485 (1974), and joined the Court's opinion in *General Electric Co. v. Gilbert*, 429 US 125, 50 L. Ed. 2d 343, 97 S. Ct. 401

[435 US 724]

(1976). Mr. Justice White and Mr. Justice Powell joined both *Geduldig* and *General Electric*. Mr. Justice Stevens, who writes the opinion for the Court in the present case, dissented in *General Electric*. 429 US, at 160, 50 L. Ed. 2d 343, 97 S. Ct. 401. Mr. Justice Marshall, who joins the Court's opinion in large part here, joined the dissent in both *Geduldig* and *General Electric*. 417 US, at 497, 41 L. Ed. 2d 256, 94 S. Ct. 2485; 429 US, at 146, 50 L. Ed. 2d 343, 97 S. Ct. 401. My own discomfort with the latter case was apparent, I believe, from my separate concurrence there. *Ibid*.

These "lineups" surely are not without significance. The participation of my Brothers Stewart, White, and Powell in today's majority opinion *should* be a sign that the decision in this case is not in tension with *Geduldig* and *General Electric* and, indeed, is wholly consistent with them. I am not at all sure that this is so; the votes of Mr. Justice Marshall and Mr. Justice Stevens would indicate quite the contrary.

Given the decisions in *Geduldig* and *General Electric*—the one constitutional, the other statutory—the present case just cannot be an easy one for the Court. I might have thought that those decisions would have required the Court to conclude

that the critical difference in the Department's pension payments was based on life expectancy, a nonstigmatizing factor that demonstrably differentiates females from males and that is not measurable on an individual basis. I might have thought, too, that there is nothing arbitrary, irrational, or "discriminatory" about recognizing the objective and accepted (see ante, at 704, 707, and 722, 55 L. Ed. 2d, at 663, 665, 674) disparity in female-male life expectancies in computing rates for retirement plans. Moreover, it is unrealistic to attempt to force, as the Court does, an individualized analysis upon what is basically an insurance context. Unlike the possibility, for example, of properly testing job applicants for qualifications before employment, there is simply no way to determine in advance when a particular employee will die.

The Court's rationale, of course, is that Congress, by Title VII of the Civil Rights Act of 1964, as amended, intended to

[435 US 725]

eliminate, with certain exceptions, "race, color, religion, sex, or national origin." 42 USC § 2000e-2(a)(1) [42 USCS § 2000e-2(a)(1)], as factors upon which employers may act. A program such as the one challenged here does exacerbate gender consciousness. But the program under consideration in *General Electric* did exactly the same thing and yet was upheld against challenge.

The Court's distinction between the present case and *General Electric* that the permitted classes there were "pregnant women and nonpregnant persons," both female and male, ante, at 715, 55 L. Ed. 2d, at 669—seems to me to be just too



easy.\* It is probably the only distinction that can be drawn. For me, it does not serve to distinguish the case on any principled basis. I therefore must conclude that today's decision cuts back on General Electric, and inferentially on *Geduldig*, the reasoning of which was adopted there, 429 US, at 133-136, 50 L Ed 2d 343, 97 S Ct 401, and, indeed, makes the recognition of those cases as continuing precedent somewhat questionable. I do not say that this is necessarily bad. If that is what Congress has chosen to do by Title VII—as the Court today with such assurance asserts—so be it. I feel, however, that we should meet the posture of the earlier cases head on and not by thin rationalization that seeks to distinguish but fails in its quest.

I therefore join only Part IV of the Court's opinion, and concur in its judgment.

Mr. Chief Justice Burger, with whom Mr. Justice Rehnquist joins, concurring in part and dissenting in part.

I join Part IV of the Court's opinion; as to Parts I, II, and III, I dissent.

Gender-based actuarial tables have been in use since at least

[435 US 720]

1843,<sup>1</sup>

and their statistical validity has been repeatedly verified.<sup>2</sup> The vast life insurance, annuity, and pension

plan industry is based on these tables. As the Court recognizes, ante, at 707, 55 L Ed 2d, at 665, it is a fact that "women, as a class, do live longer than men." It is equally true that employers cannot know in advance when individual members of the classes will die. Ante, at 708, 55 L Ed 2d, at 665. Yet, if they are to operate economically workable group pension programs, it is only rational to permit them to rely on statistically sound and proven disparities in longevity between men and women. Indeed, it seems to me irrational to assume Congress intended to outlaw use of the fact that, for whatever reasons or combination of reasons, women as a class outlive men.

The Court's conclusion that the language of the civil rights statute is clear, admitting of no advertence to the legislative history, such as there was, is not soundly based. An effect upon pension plans so revolutionary and discriminatory—this time favorable to women at the expense of men—should not be read into the statute without either a clear statement of that intent in the statute, or some reliable indication in the legislative history that this was Congress' purpose. The Court's casual dismissal of Senator Humphrey's apparent assumption that the "Act would have little, if any, impact on existing pension plans," ante, at 714, 55 L Ed 2d, at 669, is to dismiss a significant manifestation of what impact on industrial benefit plans was

\* It is of interest that Mr. Justice Stevens, in his dissent in *General Electric*, strongly protested the very distinction he now must make for the Court.

"It is not accurate to describe the program as dividing 'potential recipients into two groups—pregnant women and nonpregnant persons.' . . . The classification is between persons who face a risk of pregnancy and

those who do not." 429 US, at 161-162, n 5, 50 L Ed 2d 343, 97 S Ct 401.

1. See H. Moir, *Sources and Characteristics of the Principal Mortality Tables 10, 14* (1919).

2. See, e. g., United Nations, 1970 *Demographic Yearbook 710-790* (1971).



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contemplated. It is reasonably clear there was no intention to abrogate an employer's right, in this narrow and limited context, to treat women differently from men in the face of historical reliance on mortality experience statistics. Cf. ante, at 713 n 25, 65 L Ed 2d, at 668.

The reality of differences in human mortality is what mortality experience tables reflect. The difference is the added

[435 US 727]

longevity of women. All the reasons why women statistically outlive men are not clear. But categorizing people on the basis of sex, the one acknowledged immutable difference between men and women, is to take into account all of the unknown reasons, whether biologically or culturally based, or both, which give women a significantly greater life expectancy than men. It is therefore true as the Court says, "that any individual's life expectancy is based on a number of factors, of which sex is only one." Ante, at 712, 65 L Ed 2d, at 668. But it is not true that by seizing upon the only constant, "measurable" factor, no others were taken into account. All other factors, whether known but variable—or unknown—are the elements which automatically account for the actuarial disparity. And all are accounted for when the constant factor is used as a basis for determining the costs and benefits of a group pension plan.

Here, of course, petitioners are discriminating in take-home pay between men and women. Cf. *General Electric Co. v Gilbert*, 429 US 125, 50 L Ed 2d 343, 97 S Ct 401 (1976); *Nashville Gas Co. v Satty*, 434 US 136, 54 L Ed 2d 356, 98 S Ct 347 (1977). The practice of petitioners, however, falls squarely under the

Pay Act of 1963, 29 USC § 206(d) [29 USCS § 206(d)], incorporated into Title VII by the so-called Bennett Amendment, 78 Stat 257, now USC § 2000e-2(h) [42 USCS § 2000e-2(h)]. That exemption tells us that an employer may not discriminate between employees on the basis of sex by paying one sex lesser compensation than the other "except where such payment is made pursuant to . . . a differential based on any other factor other than sex . . ." The "other factor other than sex" is longevity; sex is the umbrella-constant under which all of the elements leading to differences in longevity are grouped and assimilated, and the only objective feature upon which an employer—or anyone else, including insurance companies—may reliably base a cost differential for the "risk" being insured.

This is in no sense a failure to treat women as "individuals" in violation of the statute, as the Court holds. It is to treat

[435 US 728]

them as individuals as it is possible to do in the face of the unknowable length of each individual life. Individually, every woman has the same statistical possibility of outliving men. This is the essence of basing decisions on reliable statistics when individual determinations are infeasible or, as here, impossible.

Of course, women cannot be disqualified from, for example, heavy labor just because the generality of women are thought not as strong as men—a proposition which perhaps may sometime be statistically demonstrable, but will remain individually refutable. When, however, it is impossible to tailor a program such as a pension plan to the individual,



of reliable statistical facts to the individual, for whom the facts cannot be disproved until long after planning, funding, and operating the program have been undertaken.

I find it anomalous, if not contradictory, that the Court's opinion tells us, in effect, ante, at 717-718, and n 33, 55 L Ed 2d, at 671, that the holding is not really a barrier to responding to the complaints of men employees, as a group. The Court states that employers may give their employees precisely the same dollar amount and require them to secure their own annuities directly from an insurer, who, of course, is under no compulsion to ignore 135 years of accumulated, recorded longevity experience.<sup>3</sup>

Mr. Justice Marshall, concurring in part and dissenting in part.

I agree that Title VII of the Civil Rights Act of 1964, as amended, forbids petitioners' practice of requiring female employees to make larger contributions to a pension fund than  
[436 U.S. 720]  
do male employees. I therefore join all of the Court's opinion except Part IV.

I also agree with the Court's statement in Part IV that, once a Title VII violation is found, *Albemarle Paper Co. v Moody*, 422 US 405, 45 L Ed 2d 280, 95 S Ct 2362 (1975), establishes a "presumption in favor of retroactive liability" and that this presumption "can seldom be overcome." Ante, at 719, 55 L Ed 2d, at 672. But I do not agree that the presumption should be deemed overcome in this case, especially since

the relief was granted by the District Court in the exercise of its discretion and was upheld by the Court of Appeals. I would affirm the decision below and therefore cannot join Part IV of the Court's opinion or the Court's judgment.

In *Albemarle Paper Co. v Moody*, supra, this Court made clear that, subject to the presumption in favor of retroactive relief, the District Court retains its "traditional" equitable discretion "to locate 'a just result,'" with appellate review limited to determining "whether the District Court was 'clearly erroneous' in its factual findings and whether it 'abused' its . . . discretion." 422 US, at 424, 45 L Ed 2d 280, 95 S Ct 2362. See also Fed Rule Civ Proc 52(a) (district court findings "shall not be set aside unless clearly erroneous"); *Zenith Radio Corp. v Hazeltine Research, Inc.* 395 US 100, 123, 23 L Ed 2d 129, 89 S Ct 1662 (1969). The Court here does not assert that any findings of the District Court were clearly erroneous, nor does it conclude that there was any abuse of discretion. Instead, it states merely that the District Court gave "insufficient attention" to certain factors in striking the equitable balance. Ante, at 710, 55 L Ed 2d, at 672.

The first such factor mentioned by the Court relates to the "complexity" of the issue presented here, which may have led some pension fund administrators to assume that "a program like the Department's was entirely lawful," and that the alternative of equal contributions was perhaps unlawful because of a

3. This case, of course, has nothing to do with discrimination because of race, color, religion, or national origin, cf. ante, at 709

qualification the Bennett Amendment permitted by its incorporation of the Equal Pay Act pertained only to claims of discrimination



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perceived "unfairness" to men. Ante, at 720, 55 L. Ed. 2d, at 672. The District Court found, however, that petitioners "should have been placed on notice" of the illegality of requiring larger

[435 US 730]

contributions from women on April 5, 1972, when the Equal Employment Opportunity Commission amended its regulations to make this illegality clear. The retroactive relief ordered by the District Court ran from April 5, 1972, through December 31, 1974, after which date petitioners changed to an equal contribution program. See ante, at 706, 55 L. Ed. 2d, at 664. Even if the April 1972 beginning date were too early, as the Court contends, ante, at 719 n. 36, 55 L. Ed. 2d, at 672,<sup>1</sup> during the nearly three-year period involved there surely was some point at which "conscientious and intelligent administrators," ante, at 720, 55 L. Ed. 2d, at 672, should have responded to the EEOC's guidelines. Yet the Court

today denies all retroactive relief, without even knowing whether petitioners made any efforts to ascertain their particular plan's legality.

The other major factor relied on by the Court involves "the potential impact . . . on the economy" that might result from

[435 US 731]

retroactive changes in "the rules" applying to pension and insurance funds. According to the Court, such changes could "jeopardiz[e] [an] insurer's solvency and, ultimately, the insureds' benefits." Ante, at 721, 55 L. Ed. 2d, at 673. As with the first factor, however, little reference is made by the Court to the situation in this case. No claim is made by either petitioners or the Court that the relief granted here would in any way have threatened the plan's solvency, or indeed that risks of this nature were not "foreseeable" and thus "included in the calculation of liability" and reflected in "the rates or contributions charged," *ibid.*<sup>2</sup> No one has

1. The District Court quoted the following from EEOC regulations:

"It shall not be a defense under Title [VII] to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other." 29 CFR § 1604.10(c). 387 F. Supp. 980, 981 (C.D. Cal. 1975).

See also 29 CFR § 1604.9(b) (1977) (employer may not "discriminate between men and women with regard to fringe benefits") (also adopted Apr. 5, 1972); § 1604.9(d) (employer's pension plan may not "differentiate in benefits on the basis of sex") (adopted Apr. 5, 1972).

2. The Court also contends that respondents were not entitled to a refund of the full difference between the contributions that they made and the contributions made by similarly situated men, but rather only to the difference between their contributions "and the contributions they would have made under an actuarially sound and nondiscriminatory plan." Ante, at 720, n. 36, 55 L. Ed. 2d, at 672. This point, like the question of the appropriate date discussed in text, was not raised by

petitioners and would in any event argue for some reduction in the retroactive relief awarded, not for a complete denial of such relief. On its merits, moreover, the District Court's decision to place the women employees on an equal footing with their male co-workers surely was not unreasonable, the alternative suggested by the Court would still have left the women with higher pension payments than similarly situated men for the relevant period.

3. When respondents filed their charge with the EEOC in June 1973, petitioners were put on notice of the possibility of retroactive relief being awarded. At that point they could have—and, for all we know, may have—acted to ensure that the outcome of the litigation did not affect the viability of the plan by, for example, escrowing amounts to cover the contingency of losing to respondents. A prudent pension plan administrator, however certain of his legal position, could not reasonably have ignored such a contingency.

Thus, while the Court is correct that years of litigation may ensue after a charge is filed



suggested, moreover, that the relatively modest award at issue—involving a small percentage of the amounts withheld from respondents' paychecks for pension purposes over a 33-month period, see 553 F2d 581, 592 (CA9 1976)—could in any way be considered "devastating," ante, at 722, 55 L Ed 2d, at 674. And if a "devastating" award were made

[435 US 732]

in some future case, this Court would have ample opportunity to strike it down at that time.

The necessarily speculative character of the Court's analysis in Part IV is underscored by its suggestion that the retroactive relief in this case would have led to a reduction in the benefits paid to retirees or an increase in the contributions paid by current employees. Ante, at 722-723, 55 L Ed 2d, at 674. It states that taking the award out of the pension fund was "apparently contemplated" by the courts below, ante, at 723, 55 L Ed 2d, at 674, but the District Court gave no indication of where it thought the recovery would come from. The Court of Appeals listed a number of ultimate sources of the money here involved, including increased employer contributions to the fund or one lump sum payment from the Department. 553 F2d, at 592. Indeed, the Department itself contemplated that the money for the award would come from city revenues, Pet for Cert 30-31, with the

Department thereby paying for this Title VII award in the same way that it would have to pay any ordinary backpay award arising from its discriminatory practices. Hence the possibility of "harm" falling on "innocent" retirees or employees, ante, at 723, 55 L Ed 2d, at 674, is here largely chimerical.

There are thus several factors mentioned by the Court that might be important in some other case but that appear to provide little cause for concern in the case presently before us. To the extent that the Court believes that these factors were not adequately considered when the award of retroactive relief was made, moreover, surely the proper course would be a remand to the District Court for further findings and a new equitable assessment of the appropriate remedy. When the District Court was found to have abused its discretion by denying backpay in *Albemarle*, this Court did not take it upon itself to formulate an award; it remanded to the District Court for this purpose. 422 US, at 424, 436, 45 L Ed 2d 280, 95 S Ct 2362. There is no more reason for the Court here to deny all retroactive relief on its own; once the relevant legal considerations are established, the

[435 US 733]

task of finding the facts and applying the law to those facts is best left to the District Court, particularly when an equitable

with the EEOC, this fact is largely irrelevant to the Court's concern about "major unforeseen contingencies," such as an award of retroactive relief adversely affecting the financial integrity of the pension plan. Ante, at 721, 722, n 42, 55 L Ed 2d, at 673, 674. And it is hardly likely that a retroactive award for the period prior to the filing of the EEOC charge would be "devastating" for the plan,

years. Ante, at 722, and n 42, 55 L Ed 2d, at 674; see 42 USC § 2000e-5(g) (1970 ed Supp V) [42 USC § 2000e-5(g)]. In the instant case the period from when the award began to run until the charge was filed with the EEOC was just over one year, from April 1972 to June 1973. Even the liability for this period, moreover, at most would have involved only a small percentage of the contributions made by

as stated in text infra.



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search for a "just result" is involved, *id.*, at 424, 45 L Ed 2d 280, 95 S Ct 2362.

In this case, however, I do not believe that a remand is necessary. The District Court considered the question of when petitioners could be charged with knowledge of the state of the law, *see supra*, at 729-730, 55 L Ed 2d, at 679, and petitioners do not challenge the particular date selected or claim that they needed time to adjust their plan. As discussed above, moreover, no claim is made that the Department's or the plan's solvency would have been threatened, and it appears unlikely that either retirees or employees would have paid any part of the award. There is every indication, in short, that the factors which the Court thinks might be important in some hypothetical case are of no concern to the petitioners who would have had to pay the award in this case.

The Court today reaffirms "the force of the Albemarle presumption in favor of retroactive relief," *ante*, at 723, 55 L Ed 2d, at 674, yet fails

to give effect to the principal reason why the presumption exists. In *Albemarle* we emphasized that a "central" purpose of Title VII is "making persons whole for injuries suffered through past discrimination." 422 US, at 421, 45 L Ed 2d 280, 95 S Ct 2362; *see id.*, at 418, 422, 45 L Ed 2d 280, 95 S Ct 2362. Respondents in this case cannot be "made whole" unless they receive a refund of the money that was illegally withheld from their paychecks by petitioners. Their claim to these funds is more compelling than is the claim in many backpay situations, where the person discriminated against receives payment for a period when he or she was not working. Here, as the Court of Appeals observed, respondents "actually earned the amount in question, but then had it taken from them in violation of Title VII." 553 F.2d, at 592. In view of the strength of respondents' "restitution"-like claim, *ibid.*, and in view of the statute's "central" make-whole purpose, *Albemarle*, 422 US, at 421, 45 L Ed 2d 280, 95 S Ct 2362, I would affirm the judgment of the Court of Appeals.



NOV 14 1978

U.S. Department of Labor

Office of the Secretary  
Women's Bureau  
Washington, D.C. 20210

## ECONOMIC RESPONSIBILITIES OF WORKING WOMEN

In 1978, while the Nation was still emerging from the 1974-75 economic recession, women continued to join the work force in increasing numbers. An average of some 42 million women were in the labor force (working or looking for work) during the year. Of this number, almost 39.9 million were employed either part- or full-time. During the decade 1968 to 1978, some 18 million additional jobs were created in new or expanded industries. These new jobs provided employment opportunities for more than 11 million women and more than 7 million men.

Women work for the same reasons men do—most importantly, to provide for the welfare of themselves, their families, or others. Over 40 percent of the women in the labor force in 1978 had never married, or were widowed, divorced, or separated. Most of the 10.2 million women workers who were never married were working to support themselves, and some had to support others as well. Nearly all of the 8.0 million women workers who were widowed, divorced, or separated from their husbands—particularly the women with children—were working for compelling economic reasons. In addition, the 4.1 million married women workers whose husbands had incomes below \$7,000 in 1977 almost certainly worked because of economic need. Finally, about 3.1 million women would be added if we take into account those women whose husbands had incomes between \$7,000 and \$10,000.<sup>1/</sup> In all, nearly two-thirds of the women in the labor force in 1978 worked to support themselves and their families, or to supplement low family incomes. Of course, all working women contribute to the well-being of themselves and their families.

Among the 5.6 million women of minority races <sup>2/</sup> who were in the labor force in March 1978, more than half (58 percent) had never married, or were widowed, divorced, or separated from their husbands. About 1 out of 8 (12 percent) was a wife whose husband's 1977 income was below \$7,000. About four-fifths of the minority women workers had never married, or were widowed, divorced, or separated, or had husbands earning \$10,000 or less.

<sup>1/</sup> The Bureau of Labor Statistics estimate for a low standard of living for an urban family of four was \$10,481 in autumn 1977.

<sup>2/</sup> The term minority races refers to all races other than white. Blacks constitute about 90 percent of persons other than white in the United States. Spanish-origin persons are generally included in the white population—about 93 percent of the Spanish-origin population is white.



The marital status of women workers in March 1978 was as follows:

| Marital status            | All women         |                      | Women of minority races |                      |
|---------------------------|-------------------|----------------------|-------------------------|----------------------|
|                           | Number            | Percent distribution | Number                  | Percent distribution |
| Total                     | <u>40,971,000</u> | <u>100.0</u>         | <u>5,556,000</u>        | <u>100.0</u>         |
| Never married             | 10,222,000        | 24.9                 | 1,610,000               | 29.0                 |
| Married (husband present) | <u>22,789,000</u> | <u>55.6</u>          | <u>2,357,000</u>        | <u>42.4</u>          |
| Husband's 1977 income:    |                   |                      |                         |                      |
| Under \$7,000             | 4,082,000         | 10.0                 | 691,000                 | 12.4                 |
| \$7,000 to \$9,999        | 3,088,000         | 7.5                  | 446,000                 | 8.0                  |
| \$10,000 to \$12,999      | 3,904,000         | 9.5                  | 429,000                 | 7.7                  |
| \$13,000 to \$14,999      | 2,213,000         | 5.4                  | 184,000                 | 3.3                  |
| \$15,000 to \$19,999      | 4,872,000         | 11.9                 | 375,000                 | 6.7                  |
| \$20,000 and over         | 4,630,000         | 11.3                 | 232,000                 | 4.2                  |
| Other marital status      | <u>7,960,000</u>  | <u>19.4</u>          | <u>1,589,000</u>        | <u>28.6</u>          |
| Married (husband absent)  | 1,802,000         | 4.4                  | 635,000                 | 11.4                 |
| Widowed                   | 2,269,000         | 5.5                  | 357,000                 | 6.4                  |
| Divorced                  | 3,888,000         | 9.5                  | 597,000                 | 10.7                 |
|                           |                   | <u>14.4</u>          |                         |                      |

**Women heads of families.**—Of the 57.2 million families in March 1978, women headed 8.2 million of them. About 4.9 million, or 59 percent, of the women family heads were in the labor force, and more than three-fourths of these workers were the only earners in their families. More than 1 out of 10 women in the labor force was head of a family. Among the 2.4 million minority women heading families in March 1978, 56 percent were in the labor force. More than 2 out of 5 minority women workers headed a family.

About one-third of the families headed by women had incomes below the poverty level in 1977.<sup>3/</sup> This was true for about half of all minority families headed by women. Female-headed poor families represented 49 percent of all poor families. For those families headed by women who worked during 1977, however, about 1 out of 5 (1 out of 3 minority families) had an income below the poverty level. Among families headed by women who worked year-round in full-time jobs, 5 percent (11 percent of minority families) were poor.

<sup>3/</sup> The low-income or poverty level is based on the Bureau of the Census definition of poverty, adjusted annually in accordance with changes in the Department of Labor's Consumer Price Index. Classified as poor in 1977 were those nonfarm households where total money income was less than \$3,075 for an unrelated individual; \$3,951 for a couple; and \$6,191 for a family of four. (The poverty level for farm families is set at 85 percent of the corresponding level for nonfarm families.)



Mothers with husband present.--Of the 22.8 million married women (husband present) who were in the labor force in March 1978, 12.5 million had children under 18 years of age. About 5.5 million mothers were working to supplement low family incomes. Included were 1.7 million mothers whose spouses had 1977 incomes below \$7,000 and 1.6 million whose spouses had incomes between \$7,000 and \$10,000.

Among the 1.6 million minority women who were working wives and mothers in March 1978, about 45 percent had husbands whose 1977 incomes were below \$10,000. Of these mothers, 383,000 had spouses with incomes below \$7,000 and 318,000 had spouses with incomes from \$7,000 to \$10,000.

Wives whose husbands are unemployed or unable to work.--In the 47.4 million husband-wife families, there were 1.3 million husbands (some 163,000 minority husbands) who were unemployed in March 1978, although they were in the labor force and actively looking for work, and 8.6 million husbands (nearly 708,000 minority husbands) who were not in the labor force. Some 729,000 wives of unemployed husbands and 1.8 million wives whose husbands were not in the labor force were working or seeking work. Many of these women were the sole support of their families.

Women whose husbands are employed in low-wage occupations.--In March 1978 there were 570,000 married working women whose husbands were farm workers; another 929,000 had husbands who were nonfarm laborers; and 1.2 million had husbands employed in service occupations. The median wage or salary income of men in these occupations was low in 1977--\$7,002 for farm laborers and supervisors; \$2,829 for farmers and farm managers; \$10,826 for nonfarm laborers; and \$10,354 for service workers (except private household).

Many wives were employed in the same low-wage occupations. There were 195,000 wives employed as nonfarm laborers, with a median wage or salary income of \$7,433 in 1977, and 3.4 million employed as service workers (except private household), with a median wage or salary which was much less than that of men, at \$6,431.

Working wives' contribution to family income.--The money contribution of working wives is of crucial importance when it raises family income above the low-income level. About 5 percent of all husband-wife families had incomes below \$7,000 in 1977 when the wife was a worker; 18 percent, when she was not. There is a similar impact of wives' earnings among families with incomes below \$10,000. When the wife was in the labor force, about 11 percent of all husband-wife families had incomes below \$10,000, but when she was not, nearly 3 times as many families (30 percent) had incomes below this amount.

Among all wives who worked during 1978, the median contribution was more than one-fourth of the total family income; among those who worked year round full time, it was nearly two-fifths. About 2.9 million wives, or 12 percent of all wives who worked, contributed half or more of the family income.



Wives' Contribution to Family Income,  
by Work Experience, March 1978

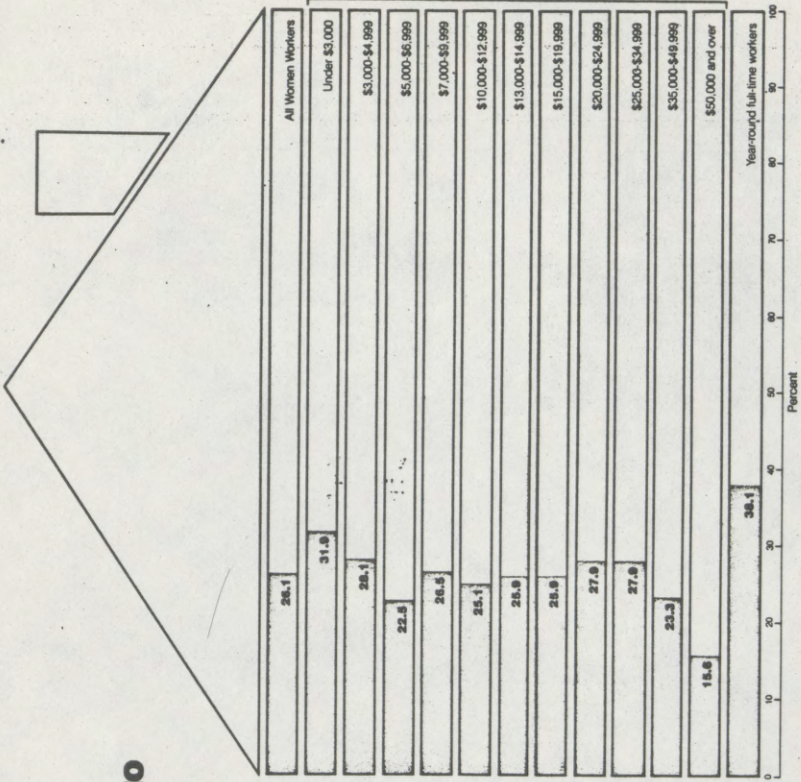
| Work experience         | Number     | Median<br>percent<br>contri-<br>bution | Number<br>contrib-<br>uting half<br>or more | Percent<br>contrib-<br>uting half<br>or more |
|-------------------------|------------|----------------------------------------|---------------------------------------------|----------------------------------------------|
| Total wives             | 24,839,000 | 26.1                                   | 2,935,000                                   | 11.8                                         |
| Worked full time:       |            |                                        |                                             |                                              |
| 50 to 52 weeks          | 20,039,000 | 38.2                                   | 2,274,000                                   | 11.3                                         |
| 27 to 49 weeks          | 3,290,000  | 29.8                                   | 387,000                                     | 11.8                                         |
| 1 to 26 weeks <u>or</u> |            |                                        |                                             |                                              |
| 1 to 52 weeks part time | 10,924,000 | 11.1                                   | 274,000                                     | 2.5                                          |

Source: U.S. Department of Commerce, Bureau of the Census, and U.S. Department of Labor, Bureau of Labor Statistics.

September 1979



# **Contribution of Wives' Earnings to Family Income**



Source: U.S. Department of Labor, Bureau of Labor Statistics







## "ENDING INSURANCE DISCRIMINATION"

John Dingell (D Mich.)

Dingell is author of a bill introduced in the current session of Congress to ban race and sex discrimination in insurance.

The business of insurance is rife with discrimination—against blacks in almost every policy category—and against both men and women in different ways in life insurance, annuities, and health and disability insurance.

The insurance industry, in fact, has in the past been openly discriminated against blacks on the grounds that they had higher mortality rates, were more irresponsible or negligent, or were otherwise economically burdensome to insure. The industry no longer makes such arguments, but nevertheless, continues to discriminate against blacks in more subtle ways.

For instance, a report given to the U.S. Commission on Civil Rights in February, 1979, from seven midwestern state advisory committees, examined industry policies as they affect property insurance. The report documented the fact that insurance for property in inner cities is increasingly difficult to obtain. Minorities are most affected by this, the report said, because of their concentration within the urban centers of the nation's large metropolitan areas. The study pointed out that the urban riots of the 1950's affected insurance companies' decisions to restrict or withdraw coverage for property in inner cities, but it noted, too, that "insurance unavailability plagued several cities for many years even before the 1950's."

The study cited 1967 data from the National Advisory Panel on Insurance which showed that 30 percent of residents and 40 percent of businessmen in the poverty areas of six cities had serious problems in obtaining insurance. Among those who were uninsured, over 50 percent of the homeowners and 35 percent of the businessmen said insurance was unavailable.

The Civil Rights Commission study described practices which make it difficult for inhabitants of certain areas of cities to get insurance while residents of other areas have no such problems as "geographical discrimination" or "redlining." The latter phrase refers to a company's allegedly marking in red pencil areas on city maps where they will not write insurance.

The Commission report cited a number of "redlining" activities currently practiced by some insurance companies. These include:

- Locating agents only in certain areas of cities;
- Refusing, limiting, or varying insurance availability solely because of age of a building, or due to subjective judgments that certain areas are "deteriorating" or "changing";
- Refusing, limiting, or varying insurance availability due to subjective perceptions of "adverse factors" such as the race or sex of an applicant or the racial composition of the geographic area in which the risk is located;

- Requiring inspections in certain locations within a state but not within other locations;
- Informally instructing or formally requiring agents to avoid certain areas; and
- Varying underwriting practices solely by ZIP code.

The report went on to note that "redlining" practices contribute to the decline of neighborhoods. "Once an area starts to deteriorate, or is perceived as deteriorating, a self-fulfilling prophecy occurs. A healthy community begins to deteriorate and one which may have had only marginal problems soon finds it has major ones. Whether the initial withdrawal or limitation of insurance is based on 'sound business practices' or amounts to blatant arbitrary discrimination and redlining matters little after a trend is established."

### Sex Discrimination

Sex discrimination in the industry is still blatant and widespread.

The industry argues that sex discrimination is justified because "women as a group have longer life expectancy than men as a group." The same justification can be made for discrimination against blacks because white persons as a group have a longer life expectancy than black persons as a group. Such discrimination on the basis of race has been outlawed by many states, and so should such discrimination on the basis of sex.

The industry's argument is based on a distortion of the "average" man.

The fact is that most men and women can be paired at death. For example, the Teachers Insurance and Annuity Association and College Retirement Equities Fund (TIAACREF) filed figures in a recent case before the Supreme Court (Los Angeles Dept. of Water and Power v. Manhart) concerning the survival experience of 100,000 males and 100,000 females retiring at age 65. TIAACREF's figures showed that 85,193 women had the same death age as 85,193 men; 13,807 more males than females died at ages 66-80; and 13,807 more females than males died at ages 81-100.

Thus, because less than 14 percent of the women did not match the death ages of the men, all women receive lesser monthly retirement benefits than all the men, and all men receive more monthly retirement benefits than all the women.

A reverse type of discrimination occurs in life insurance lump-sum payments. Because less than 14 percent of the men did not match the death ages of the women, all men pay higher premiums for life insurance than women and in those cases where the men elected joint and survivor benefit plans, the men suffered a greater reduction in their annuities than all women who elected the same plan.

The insurance industry computes life insurance and annuity rates and benefits almost exclusively on the basis of sex and disregards other more accurate classification criteria, such as smoking habits, physical condition, geographic location, family health history, and recreational and occupational activities.



### Recent Court Cases

Recent court actions involving suits by employees and retirees against employers have ruled that Title VII of the Civil Rights Act of 1964, which prohibits sex discrimination in employment, prevents the use of sex based differentials in the rates and benefits under annuity and pension plans, including those operated or supported by insurance companies for employers. On April 25, 1978, the U.S. Supreme Court in the *Manhart* case squarely rejected the insurance industry's argument that group discriminatory treatment as to insurance rates and pension benefits can be justified on the basis of actuarial tables indicating longer life expectancy for a group (all females, or white persons) than for another group (all males, or black persons).

The case involved an employer operated pension plan which required women to make greater payments than men to the pension fund; The Court said that the Title VII prohibition against sex discrimination focuses on "the individual," and, therefore, "precludes treatment of individuals as simply components of a racial, religious, sexual, or national class."

The court said that even a true generalization about the class of an individual would be insufficient reason for treating the person differently because "there is no assurance that any individual woman [or man] will actually fit the generalization." In other words, the justices said, even if women as a group do live longer than men as a group, many women do not outlive men and many men actually do outlive women.

Other decisions in lower federal courts have followed the Supreme Court's position on this subject. At the state level, the Indiana Supreme Court has ruled that the state agency which administers the teachers' retirement fund violated both federal and state constitutional guarantees of equal protection when it used a male mortality table to calculate larger monthly annuity payments for male retirees and the same table, with a five year setback, to calculate smaller monthly annuity payments for female retirees.

These judicial decisions which are beginning to crack the barriers of discrimination based on race, color, religion, or national origin are important and praiseworthy. But, they cannot effectively treat the problem uniformly or comprehensively. This can be done only through national legislation and by changes in state laws and regulations.

### Federal and State Action

In the present session of Congress, I introduced H.R. 100 to prohibit race and sex discrimination in insurance. My bill would not prevent state law from doing the job. Indeed, my bill recognizes the primacy of state law by providing that any complaints that an insurer has committed an unlawful discriminatory act based on race, color, religion, sex or national origin must first be filed with the appropriate state agency, if the state has an anti-discrimination law and an agency to enforce it. Only if the state does not have such a law or agency, or fails to resolve the complaint, will any Federal agency or court have any role in resolving the matter. But the

presence of a Federal law will mean that a state agency can proceed to eliminate such kinds of discrimination without any fear that its action may result in insurance companies moving to another state which allows such discrimination. That is because the Federal law will make the principle of nondiscrimination uniform for insurers in all the states.

States, it must be noted, have already made some commendable efforts toward ending discrimination in insurance. The National Association of Insurance Commissioners (NAIC), made up of heads of state and territorial insurance commissions, last November issued a comprehensive report recommending enactment of legislation to ban the use of sex and marital status as classification factors in auto insurance.

The report said that recent studies raise serious questions about the validity of such factors. It cited the following reasons for such questions:

- They fail the important test of controllability; that is, sex and marital status classifications present almost no practical opportunities for control of auto accidents.
- They have very little relationship to the test of causality; that is, the connection between the rating factor and the loss potential—since the implied behavioral relationships "rely on questionable social stereotypes."
- Third, they substantially fail the test of social acceptability, as shown by a recent opinion survey conducted for the Aetna Life and Casualty Insurance Company, which revealed that "fewer than 14 percent of the people surveyed believed that sex or marital status were acceptable rating criteria."

Only in one test—that of stability and ease of verification—did sex and marital status receive high marks as rating factors.

Therefore, the NAIC report says "as rating characteristics, sex and marital status are seriously lacking in justification and are subject to strong public opposition and should therefore be prohibited as classification factors" in automobile insurance.

It is significant that two major government agencies interpret existing laws and executive orders which prohibit race and sex discrimination in employment as also prohibiting sex differentiation among employees in connection with pensions, and insurance which are employment fringe benefits. This has been the clear-cut position of the Equal Employment Opportunity Commission (EEOC) since at least 1972 in its administration of Title VII provisions of the Civil Rights Act. Moreover, the Department of Labor last year announced that it intends to adopt the same position.

Making the nondiscrimination rule applicable to all insurance, whether or not employment related, would not harm the insurance industry. It can easily develop non-sex based rules and payments by adjustments to reflect the mortality and disability experience of the total population rather than separately for men and women. Indeed, the very purpose of insurance is to spread risks, not to impose discriminations not warranted by the individual's own circumstances.



FROM NATIONAL WOMEN'S CONFERENCE OFFICIAL BRIEFING BOOK 11/77

## INSURANCE

## FACT SHEET

## Group Coverage

Insurance which is provided through employers is commonly group coverage and is part of an employee benefits or "fringe" benefits package. Health, disability, life insurance and pensions are typical kinds of employee benefits purchased from insurance companies. Discrimination against women in employer provided insurance is found in coverage and benefits. For example, health and disability insurance often excludes or restricts maternity and gynecological treatment by refusing to cover single women or by limiting the maximum benefits. Coverage for abortion services is also often excluded. Women workers may also lack access to group life insurance options, while men workers do not.

Worker's compensation, unemployment compensation and social security are also employee benefits, but they are required by law (worker's compensation is not required in some States); and are government regulated. Thus, these employee benefits will not be discussed in the context of this Fact Sheet.

Discrimination can be erased in employee benefits through enforcement of Federal and State employment discrimination laws. Title VII of the Civil Rights Act of 1964, enforced by the Equal Employment Opportunity Commission, has the most beneficial requirements in terms of employee benefit discrimination. Guidelines on sex discrimination published by the Equal Employment Opportunity Commission specifically prohibit different treatment and unequal benefits. The coverage of maternity in health and disability plans has been a principal concern under Title VII. EEOC guidelines require coverage of maternity as other temporary disabilities. The exclusion of maternity was held to be permissible by the Supreme Court in *General Electric Co. v. Gilbert*, 97 S. Ct. 401 (1976), where the Court overruled six courts of appeals decisions, giving no deference to EEOC guidelines.

Bills have been filed in Congress to amend Title VII to prohibit discrimination on the basis of pregnancy in temporary disability plans, hospitalization benefits, and leave programs available through employment. Hearings have been held in the House on H.R. 5055 and in the Senate on S. 995. Favorable action has been taken in the Senate.

Other Federal guidelines are also applicable to employee benefits, as in those under the Equal Pay Act (affecting all employers in commerce) and Executive Order 11246 (affecting Federal contractors), but they permit unequal benefits and do not require that pregnancy-related disabilities be treated like all other disabilities.

Cost is a very important factor in providing employee benefits and in fact some employers and insurance companies argue that it is a key factor in addressing discrimination against women. Employers and insurance companies assume that the costs of health insurance, pensions and temporary disability insurance are greater for women employees than for men employees, although we have been unable to locate any data on actual costs for anything except temporary disability insurance.

It is very likely that the actual average cost of a typical package of employee benefits for female employees is less than the actual average cost for male employees because of the following factors:

- health insurance typically includes provision for family coverage and employed women have fewer children than women not in the labor force.[1] Employed women also have fewer health problems than women not in the labor force.[2]
- actual costs of worker's compensation by sex of employees must be much less for women than men as women have many fewer accidents, on the job, as well as off the job.[3]



- pension costs for women must be less than costs for men in many plans in that the more rapid rate of turnover of women and their shorter job tenure[4] cause the pension plan contributions made on women's behalf to be returned to the "fund." Additionally, any pension formula that includes as a factor the employee's salary during the last years of employment or the average salary for a short number of highest paid years compensates disproportionately employees who have a wide difference between entering and leaving salaries (a male pattern of employment). In many companies the clerical, custodial and middle management employees are contributing disproportionately to executives' pensions.

## Pensions

A special note is needed on pension schemes as both women workers and homemakers suffer from discrimination. That is, women are less likely to earn pension rights because women may not work continuously throughout their lives, and breaks in employment typically cancel pension credits. In addition, the industries employing large numbers of women do not tend to provide pensions.

Women who do work all their lives draw much smaller pensions than men because benefits are payable on the basis of salary earned. The latest figures which compare yearly median income for men and women show women with \$970, men with \$2,080 from private pension plans.[5]

Although the working woman suffers in the pension system, the woman at home lives in an even more precarious position with respect to pension benefits. Workers who wish to divest spouses of any survivor benefits may do so without the participation of the spouse. A homemaker who assumes that benefits will continue after her husband's death may be shocked to realize he didn't make arrangements for her. Even more shocking is the dilemma of the homemaker whose husband agreed to a survivor benefit but who passed away prior to retirement. The homemaker in this situation is likely to have no rights to earned pension benefits.

Aside from the systemic discrimination noted above, women are treated differently than men when they are eligible to receive benefits under certain pension plans. In defined contribution plans, women are paid lower periodic benefits based on a 5-9 year longer life expectancy than men are paid even if they have paid equal amounts into the plan. The justification offered by the industry for this practice is that women live longer than men and therefore total benefits, projected over their expected lifetimes, will equal men's total benefits.\*

Women argue that an individual woman should not be penalized by receiving lower monthly benefits because her class (women) has a longer life expectancy.

## Individual Coverage

Individual (non-group) insurance, privately purchased, is subject to discriminatory practices in availability, benefits and rates. That is, women do not have equal opportunity to buy insurance, to receive comparable benefits and coverage, and their sex is commonly used for purposes of assessing them as a risk and determining the premium (the fee for the insurance). Common practices which women face are:

- the refusal to insure homemakers for disability insurance
- the assignment of high risk, and thus high premiums, for individually purchased health insurance
- life insurance premiums for women which do not fully take into account her longer life expectancy[6]
- restricted access to automobile and property and casualty insurance for divorced and separated women



Insurance discrimination in individual coverage is very difficult to erase for at least two reasons:

- 1) insurance is essentially a state-regulated industry, and actions taken to eliminate sex discrimination must take place on a state by state basis. [7] This is a painfully slow process for those who seek industry-wide change.
- 2) insurance companies' policies and practices are based on discrimination between risks. In order to cover the losses of the few, many must purchase insurance and pay premiums. Companies insure "good" risks easily, and charge extra to insure "bad" risks or avoid them altogether. Sex is one of the factors that insurance companies currently use to classify risk. Far too often women have been considered "bad" risks, and have access to coverage and rates accordingly. Although insurance companies have ceased treating blacks as a class, they are not willing to cease treating women as a class.

Women's groups in some States have formed coalitions and task forces to confront insurance discrimination. In some States, too, commissioners of insurance have joined in and even taken the lead in efforts to eliminate discriminatory practices. Reports which have been published as a result of such efforts are a valuable resource in understanding insurance industry discrimination, whether it be group or non-group.

### Sex-Based Distinctions in Group and Individual Insurance

Underlying much of the discrimination that women face in insurance is the issue of whether or not insurance companies should be allowed to use sex as a classification factor in assigning risk categories, in determining premiums and benefits and in collecting data on the insured population.

State reports mentioned earlier, which delve deeply into all types of insurance stop just short of advocating classification systems that do not separate by sex. For the most part, it is alternatively recommended that recent, actuarially sound, data be used to justify premiums and rates, rather than the decades-old, notoriously outmoded data that companies now use. [8]

Some investigators, as evidenced in the Michigan Insurance Commissioners Task Force Report, decline to define as discriminatory "neutral practices which had a heavier impact on women" [9] and continued to describe this with examples:

- 1) where differential rates apply to men and women based on actual experiences and
- 2) where differential annuity and pension benefits are paid based on actuarial data justifying the differential. [10]

But others do not equivocate and state as has Professor Carol Goldberg of the UCLA School of Law:

"Sex discrimination involves a characteristic to which people are born and over which they have no control. ... I would argue that so long as there is some alternative method for establishing rates that reasonably reflect the risk there is no compelling interest for classifying on the basis of sex." [11]

Insurance companies actively work to maintain their prerogative of classifying by sex, however, arguing that:

"There's a positive value in maintaining private insurance as an integral part of the nation's private economic system on a reasonably flexible basis without forcing it artificially to meet every social goal of the moment. This is particularly so until the evidence is stronger that such goals have been articulated through duly enacted laws." [12]



Insurance companies argue that sex-segregated classifications are required because otherwise men would "subsidize" women in health, disability and pension lines of insurance while women's experience would show they "subsidize" men in life insurance.

Whether or not one agrees with the data upon which insurance companies base opinions, it is certainly true that insurers have always allowed one segment of the population to "subsidize" another. Indeed, factors other than sex—education, occupation, and environment, for example—show equally promising "subsidizing" capability.

Race has also been used as a factor to classify risks, although State law, regulation and custom now forbids this. It is interesting to note that the industry justified race as a classification factor on the same grounds that it presently defends sex: that is, that race as a factor was not discrimination because it was "dictated entirely by actuarial findings." [13]

Women argue that it is no longer acceptable to classify risk on the basis of sex and that no justification, be it economic or otherwise, is reason to treat women as a class rather than as individuals.

The Equal Employment Opportunity Commission Guidelines on Discrimination Because of Sex, 29 CFR Sec. 1604.9, require that equal benefits be provided without regard to sex. Courts have addressed the issue in recent years and either upheld the EEOC position or held unequal pension benefits violative of the equal protection clause of the Fourteenth Amendment. [14]

Resolution of sex based distinctions in insurance will depend upon further court action, however, unless Congress chooses to legislate against sex based tables.

#### FOOTNOTES

- [ \* ] It might also be noted that there are no data on comparative life expectancies of men and women who have been employed outside the home most of their lives.
- [ 1 ] U.S. Department of Labor, *Working Women: A Chartbook* (Washington, D.C., 1975), p. 30.
- [ 2 ] U.S. Department of Health, Education and Welfare, National Center for Health Statistics, "Days of Bed Disability Per Person Per Year, 1975" shows 10.4 days for women in the home, 5.2 for women employed.
- [ 3 ] U.S. Department of Health, Education and Welfare, National Center for Health Statistics, "Days Lost from Work Due to Job Injury, 1971-72," shows an overall comparison of 126.5 days per year for men, 103.6 for women.
- [ 4 ] U.S. Department of Labor, *op. cit.*
- [ 5 ] W. W. Kolodrubetz, "Private Retirement Benefits and Relationship to Earnings: Survey of New Beneficiaries," *Social Security Bulletin* (May 1975).
- [ 6 ] It is noted that in pension plans which pay benefits based on sex that women's full 6-9 year difference will be used to her disadvantage in adjusting benefit levels.
- [ 7 ] The McCarran-Ferguson Act (S. 340 (1945), 15 U.S.C., Section 1012) specifically exempts insurance from federal law and leaves regulation to the states.
- [ 8 ] Insurance companies presently use the 1958 Commissioner's Standard Ordinary (CSO) Mortality Table. Daniel Case, of the American Council of Life Insurance, in testimony before the Florida State Council of Life Insurance Commissioner's Task Force on Insurance Practices as They Affect Women, August 9, 1976.
- [ 9 ] "Women's Task Force Report to the Michigan Commissioner of Insurance on Sex Discrimination in Insurance" (Michigan Department of Commerce, Lansing, June 2, 1975), p. 2.
- [ 10 ] *Ibid.*



- [11] Professor Carol Goldberg, UCLA School of Law, in testimony before the California Assembly Committee on Finance, Insurance, and Commerce at a Public Hearing on "Discrimination in Insurance," October 13 & 14, 1976.
- [12] Thomas J. Gillooly, "The Developing Issue of Sex Discrimination in Insurance--An Overview," paper presented to the Association of Life Insurance Counsel, May 6, 1974.
- [13] James Marquis, *The Metropolitan Life: A Study in Business Growth* (New York: Viking Press, 1947), pp. 338-39.
- [14] Please see, e.g., *Robertson v. Indiana*, supra, *aff'd sub nom. Reilly v. Robertson* (Sup. Ct. Ind. No. 376 592, February 22, 1977); *Henderson v. State of Oregon*, 11 FEP Cases 1218 (Ore. 1975); *Manhart v. City of Los Angeles*, 387 F. Supp. 980 (C.D. Cal., 1975), *aff'd* (9th Cir., Nov. 23, 1976).



INSURING WOMEN: SEPARATE AND UNEQUAL POLICIES  
(By Ann O'Shea)

Charging that "the business of insurance is rife with discrimination," Congressman John Dingell (D, Michigan) introduced his nondiscrimination-in-insurance bill (HR 1361) on Oct. 13, 1978. If passed, the bill will cause a virtual revolution in the insurance industry, particularly for women, since discrimination based on sex is the most pervasive and flagrant form of unequal treatment in insurance.

Discrimination affects not only the rates women pay for insurance, but whether certain kinds of insurance are even available to women and the terms and conditions under which any insurance is available. Classification by gender has been the industry standard, a traditional method of determining risk. For most types of insurance, females almost always are considered to be higher risks than their male counterparts.

Last year, the US Civil Rights Commission held hearings on discrimination in insurance. Here are some of the inequities facing women in disability, health, life and pension insurance that were detailed in the hearings.

## DISABILITY INSURANCE

Until 1972, the California Insurance Code permitted insurance companies to refuse disability payments for injuries resulting from "war, suicide, hallucinatory drugs and organic peculiar to females." California was not alone and, in fact, was one of the few states where any type of disability coverage was available to women—on any terms, at any price. Disability discrimination applied to both group employment and private policies and was racialized on the grounds that women were dependent on men and any income they might earn was not crucial to them or their families. Since 50 percent of all women today work and more than 60 percent of those women do so because they are single, divorced, widowed or separated or in order to raise their family income to \$10,000 a year, that contention no longer has an actual leg to stand on.

Even when disability insurance was available to women, coverage for any disabling effects of pregnancy or pregnancy-related conditions was excluded, almost universally. Pregnancy, the insurance industry contended, was a condition that was "voluntary and unique to women," and thus women alone should bear the burden. The Supreme Court upheld the constitutionality of such restrictions, ruling that "exclusion of pregnancy [from disability plans] is not gender-based discrimination," since men were not covered for the risks of pregnancy either. Yet these same exclusionary policies included benefits for hysterectomies, circumcisions and prostatectomies.

Last year Congress amended the 1964 Civil Rights Act's prohibition against sex discrimination in employment to include discrimination on the basis of pregnancy or pregnancy-related (except abortion) conditions. That amendment was an enormous step forward for women, but as far as insurance is concerned, it affects only employment group policies, not private group or individual policies.

The amendment does not eliminate other inequities found in the conditions and costs of disability insurance. For example, disability insurance for all insured persons is subject to three time variables: (1) the waiting period, the length of time for which an individual is not covered before he or she can collect benefits; (2) the benefit period, the maximum time for which the insured is paid benefits; and (3) the benefit period, the time for which the insured is deemed completely unable to perform the duties of his or her chosen occupation. (Once the basic period has expired, the insured must prove that he or she is unable to perform the functions of any job in order to continue to collect for the remainder benefit period.)

According to a report published by the Women's Equity Action League, prepared by Naomi Naisman and Ruth Brannon, health analysts for AFT Associates, a consulting firm based in Cambridge, Massachusetts, waiting periods are usually much longer for women than for men, while benefit periods are almost universally shorter for women. The length of the benefit period is supposed to be determined according to the risk inherent in the insured's occupation: Men in the least-hazardous occupations can obtain policies providing ten-year benefit periods, women in the same occupations usually are limited to two-year periods. And, while women in the most-hazardous jobs are excluded from coverage entirely, similarly employed men are covered for two years. Thus, women in the least-hazardous occupations are limited to the same coverage available to men in the most-hazardous jobs or are excluded altogether. The reason seems to be that the insurance industry explicitly views women workers as childers and possible cheats. Until 1973, North American Reinsurance Company's underwritten manual expressed the common assumption that "if a woman has disability coverage, the temptation exists to replace her earnings with an insurance income once work leaves her attractiveness."

Furthermore, while the basic period for men is generally five years, it is only two years for women. Barbara Shain, a New York City Liberties Union described the result of the discrepancy this way: "After two years a female neurosurgeon with 'falling eyelids' would be expected to perform the duties of a chambermaid, while a similar male would receive coverage for five years."

On a basic disability plan, according to the Malesman-Brannon report, men can receive benefits equal to two-thirds of their salary, up to \$1,000 a month; women are often restricted to a maximum of \$600 per month. Yet women often are charged 150 percent more for the same or less coverage.

As with disability insurance, health-insurance policies more often than not exclude pregnancy from coverage. According to a 1975 Health Insurance Institute study, 56.4 percent of all new health-insurance group policies do not include maternity benefits. Despite the fact that there are important public policy reasons for providing both disability and health insurance coverage for pregnancy, the insurance industry claims that if pregnancy were included in either health or disability policies, the cost of insurance would be prohibitive. Yet the Citizens Advisory Council on the Status of Women reported that a large unidentified insurance company has determined that if employer group coverage included pregnancy in both medical and disability insurance policies, the premium payable by a group with 40 percent of its members being female would be increased by only 10 percent.

Not only are women unlikely to collect maternity benefits, they are not likely to collect insurance for the medical costs of sterilization, contraception or other birth-control measures, and many policies exclude any gynecological disorders from coverage. Health insurance, even without maternity benefits, is virtually without exception substantially more expensive for women than for men, on grounds that women use more health services than men. Statistics bear this out (maternity care accounts for most of the extra use), but there is also data that suggest that, overall, men's claims may be more expensive than women's.

Higher premiums can affect more than women's pocketbooks. Some major insurance companies increase their group health premiums if the benefits on women represent 10 percent or more of the total benefits. That of practice does not serve as an inducement to the employment of women.

## LIFE AND PENSION INSURANCE

Life insurance is a form of personal insurance for which women pay less than men. But even here, as described in various articles that follow, there are various options that make it difficult for women to obtain the same benefits as men. Premiums for women are based upon a three-year actuarial table, which means that women pay the same rate as men who are three years younger than they, because women are expected to live longer than men. But since women, on the average, live six to nine years longer than men, if strict actuarial tables were followed, their premiums would be based on at least a six-year actuarial table.

The other side of the life-insurance coin shows up in pension and annuity plans. Because the average woman lives longer than the average man, she either must contribute more than men to her pension plans prior to retirement or receive lower monthly benefits after retirement. The insurance industry insists that it all comes out even in the end, since the average woman will live longer to collect than the average man. Representative Dingell describes this rationalization as a "distortion of the 'average' woman and 'average' man."

The Congressman's point was demonstrated in a recent Supreme Court case, *EEOC v. American Water and Power Co. v. Menard*, in which the insurance company argued figures showing that female survival experience in order to justify the rationale for requiring female employees to make greater contributions to their pension plans to the pension plan. The figures indicated that of 100,000 men and 100,000 women retiring at age 65, 13,807 more men than females died between the ages of 65 and 80. But, as Dingell points out, the insurance company's figures also show that 81,193 men had the same death age as 86,193 women—that is, over 65 percent of the women could be paired at death age with over 65 percent of the men. But because less than 14 percent of the women lived longer than the men, all women receive lower monthly and lower lifetime retirement benefits than all the men. The Supreme Court ruled in the *Menard* case that this unequal treatment violated Title VII of the 1964 Civil Rights Act, which "prohibits treatment of individuals as simply components of a . . . sexual class," since "there is no assurance that any individual woman . . . will actually fit the generalization."

As Dingell noted when he introduced his bill, the very purpose of insurance is to spread risks. And although insurance policies, to be fair, must discriminate between groups that are subject to greater risks and those that present smaller risks, the insurance industry traditionally has discriminated across the board by use of gender. In addition, with women automatically covered to be greater risks than men. Other factors such as smoking and drinking habits, general health, family medical history, occupational and recreational activities and so on, have been disregarded in favor of discrimination on the basis of sex.

Computing rates, benefits and risks on the basis of gender is a simple and convenient method for the insurance companies. There is only one easy-to-asertain variable the insurer has to take into account rather than several variables. Although convenient for insurance companies, this method results in gross inequities in the treatment of women.

Dingell's bill, if it becomes law, will eliminate discrimination on the basis of sex in the rates charged, the availability of a wide variety of types of coverage and the benefits conferred. The bill is expected to receive considerable opposition from the insurance industry, one of the most powerful lobby groups in Washington. It won't be a cakewalk, but the bill's supporters are confident that sex discrimination in insurance can be stamped out.

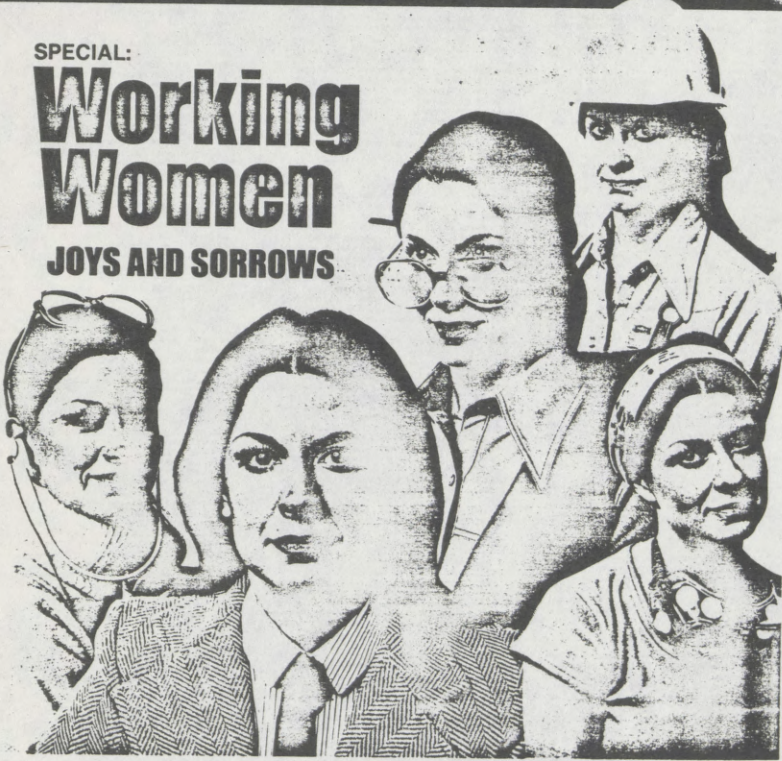


# U.S. NEWS & WORLD REPORT

SPECIAL:

## Working Women

JOYS AND SORROWS



*Reprinted from "U.S. News & World Report"*



## SPECIAL SECTION

# Working Women

## JOYS AND SORROWS



**They have left the home and taken jobs in numbers once unimagined. In the process, females have shattered traditional barriers against them in many occupations. But the road to full acceptance remains a long one.**

Women are swelling the work force at a rate of almost 2 million every year—a phenomenon that is beginning to transform everyday life in the United States.

From astronaut to zoologist, nearly every occupation has been invaded by women, who are pouring into the job market almost twice as fast as men. More than half the country's 84 million women, including a majority of mothers with school-age children, now work or seek jobs.

So dramatic is the shift from homemaking to careers that Eli Ginzberg, head of the National Commission for Manpower Policy, describes it as "bigger than the atomic bomb or nuclear power."

Ginzberg predicts that the desire of women for jobs ultimately may alter the lives of every American: "It changes the relationship of men to women; it changes the relationship of mothers to children. And the future of the suburbs may also be in doubt."

The working woman appears to be playing a key role in a wave of social change that includes return of middle-class families to the cities, fewer children, later marriages, more divorces and longer life expectancy.

For the working woman herself, a job means independence, a sense of accomplishment and—most important—money. Economists say that married women are working primarily to keep families from falling behind in the race with inflation. In 1977, the median yearly income for families with a working wife was \$22,128—or \$3,061 more than families with only a male wage earner.

Yet amid this prosperity, many women are unhappy about the pace of their economic progress. Evidence is plentiful that the average working woman does not hold an equal place with men in the American economy. Women still earn less than men. At the latest count, male high-school dropouts earned, on the average, \$1,604 more a year than women college graduates.

**Stereotype still there.** What's more, a woman in the work force is more likely to be unemployed and less likely to qualify for a pension than a man. Nor have women escaped the stereotype of "women's work." Nearly 80 percent of all working women still are employed in the traditional clerical, sales, service or light factory jobs.

These statistics suggest that many women continue to be victims of job discrimination. The first big legal breakthrough toward enforcing sexual equality in the workplace occurred only six years ago, when American Telephone & Telegraph settled a government complaint by agreeing to

promote more women within its ranks. "It's still more acceptable for an employer to say, 'We don't want her because she is female' than it is to say, 'We don't want him or her because they are black,'" says Ruth B. Ekstrom, a research scientist at Educational Testing Service.

More than just job discrimination is involved. Many working women simply lack the education, training or desire to qualify for higher-paying jobs. The lack of preparation is sometimes ascribed to the "Cinderella syndrome"—the belief by women that they always will be supported by men. "Somehow it seems almost subversive to educate girls for financial independence," says employment counselor Mary Ellen Verheyden-Hilliard. "We often actively encourage them to plan for a life of dependency, which will have disastrous results."

Surveys show that young women generally underestimate how much their future livelihoods will depend upon jobs of their own. Yet 1 of 7 families is headed by a woman, often living below the poverty level. As many as 3 million employed women are described as "displaced homemakers"—persons who found themselves unprepared to earn a living after a divorce or the death of their husbands.

Since the AT&T settlement, government, industry and unions have given more attention to the problems of women workers. President Carter, who campaigned actively for women's rights, has chosen women for 38 percent of his appointments to federal jobs paying \$26,222 or more. He also has backed a crackdown on job discrimination against women and has encouraged the government to develop new programs to prepare women for high-paying jobs normally held by men.

In 1963, Betty Friedan, author of *The Feminine Mystique*, sounded a call for women's equality in the workplace when she wrote: "The only way for a woman, as for a man, to find herself, to know herself as a person, is by creative work of her own." Few then expected that by 1979 women would be serving routinely in the cabinet, attending the military academies, sailing with the Navy, managing corporations or climbing telephone poles for AT&T.

### Women's Work: the Traditional Jobs

The earnings of women workers in the 20th century still seem to be determined by the Old Testament rule, as outlined in Leviticus 27:3-4: "A male between 20 and 60 years old shall be valued at 50 silver shekels. . . . If it is a female, she shall be valued at 30 shekels."

In 1977 among full-time workers, median earnings for women totaled \$8,618, just 58.9 percent of the \$14,626 median earned by men. This spread has not improved since enactment of a 1963 law that guaranteed women "equal pay for equal work."

The basic reason for the gap is occupational segregation. Most men are employed in higher-paying occupations;





most women work in lower-paying jobs. The Conference Board, a business-research organization, reports that three fourths of all working women are employed in services, finance, insurance, real estate, retail trades and light factory work—what sociologists call the “girls’ ghetto.” Men, meanwhile, dominate construction, mining, transportation and heavy manufacturing.

Even in industries where women hold a majority of the jobs, they are seldom bosses. In banking, the Conference Board found that women hold more than 80 percent of the clerical jobs and less than 20 percent of the managerial positions. The story is similar in the federal government, the largest employer of women. They hold 76 percent of the lowest-paying federal jobs, but only 3.2 percent of those paying more than \$42,000 a year.

**More comfortable.** Although women now can aspire realistically to lucrative jobs, many still feel more comfortable in traditionally female tasks. Typical is Lee Trexler, 30, a waitress in Los Angeles. She declined an opportunity to help manage the restaurant where she works. Her reason: “I want to stay and work with the public.”

Yet women such as Trexler, who supports a disabled husband, are not working entirely for fun. She notes: “I think some people still think a man works because he has to and a woman works for an ‘extra’ income.”

These days, women in the “pink collar,” or typically female jobs such as waitress, nurse and clerical worker, are questioning why their services have been awarded so little monetary value—why nurses earn only half as much as bus drivers, why flight attendants are paid less than the men who scrub the airplanes, why office workers don’t earn as much as janitors.

Has women’s work simply been undervalued? Barbara Bergmann, an economist at the University of Maryland, notes that pay declines when male occupations are taken over by women. As an example, she cites what she considers the drop in economic status of bank tellers in comparison with other banking occupations.

Women in predominantly female jobs now seek more pay and better status for the work they perform. Their rallying cry: “Equal pay for work of equal value.” In Chicago, Boston, San Francisco and other major cities across the country, women office workers have organized local groups to press their cause. In Boston, members of one such organization, “9 to 5,” affiliated with a large union. The National Commission on Working Women was founded by labor and industry to upgrade the status of pink-collar jobs.

“It’s high time that clerical work is valued for what it’s worth,” says Janice Blood, spokeswoman for about 13 such groups of urban office workers. “There are so many accidental clerical workers—women with college degrees who feel they should be able to do anything they want.”

Corporations gradually are becoming more sympathetic

to ambitions of women. Some firms offer job posting, counseling and training to open new jobs for women. McGraw-Hill conducts noontime seminars that inform female employees of job opportunities within the publishing company.

Government has played a big role, too. The Equal Employment Opportunity Commission, which enforces the Civil Rights Act of 1964, banning sex as well as race discrimination, has charged hundreds of companies with bias against women and has negotiated numerous affirmative-action plans to train and advance females to better jobs. The Labor Department, invoking a presidential order banning sex bias by federal contractors, recently negotiated with Chase Manhattan Bank a \$3-million-dollar agreement that has been viewed as an affirmative-action model for women in the banking industry.

But the campaign for “equal pay for work of equal value” has not been warmly received by courts, which are reluctant to step into the arena of evaluating dissimilar jobs. The EEOC has attempted—so far unsuccessfully—to convince judges across the nation that women with pink-collar jobs are chronically underpaid in relation to men. In one such case, the U.S. Court of Appeals for the Eighth Circuit denied the EEOC’s argument that office workers at the University of Northern Iowa should be paid as much as maintenance men.

#### Nontraditional Jobs: New Breakthroughs

Charlotte Thomas married young, declined to attend college and discovered at age 21, with three children to raise, that the only job she could get was as a waitress in a diner. “At this point, I realized how poorly prepared I was to find a job,” says the woman, now age 34 and divorced.

Today, Thomas earns \$8 an hour stamping out small auto parts at the Ford Motor Company’s plant in Woodhaven, Mich. She is part of a growing cadre of women showing up in occupations once considered off limits—construction worker, airline pilot, police officer, locomotive engineer, coal miner, firefighter, military officer and astronaut.

Women traditionally have not been found performing these well-paid tasks. In 1977, women comprised one fifth of 1 percent of the nation’s electricians and heavy-equipment operators. Five years ago, women numbered only 1,000 of the 200,000 coal miners; there are now 5,000.

Money is the lure of these male-dominated jobs. Thomas earned about \$20,000 in 1977—much more than she could have expected in her days as a waitress. But with the money comes hard, dirty work. She operates a punch press, stacks parts weighing up to 30 pounds and communicates by sign language over the din of the factory.

“When I drove to the bank with my first paycheck,” she recalls, “I couldn’t even get my hands around the steering wheel of the car because they were so sore.”

The difficulties encountered by women in blue-collar



## U.S. News &amp; World Report

occupations sometimes are formidable. Work clothes are too big. Toilets are scarce. Pregnancy usually means a loss of earnings. Moreover, the women complain of harassment by men on the job. Barbara Ann Spears, 24, a carpenter's apprentice earning \$7.53 an hour in San Francisco, says that most of the male workers ask why she is not at home.

In the past year, the government has started to require affirmative action for women on federally assisted construction projects. By 1981, the work force on such construction jobs must be 7 percent female. Many local programs now use federal funds to train women for the skilled trades.

Employers' attitudes are changing, too. Their new mood was reflected in the recent advice of the Associated Builders and Contractors to its member companies: "Contractors may think that there aren't many women who want jobs in

the construction industry, but they're wrong. And only by giving them a chance will anyone find out what their true potential in construction will be."

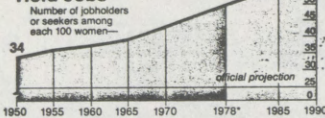
### At the Top: Professionals and Managers

A few working women have made it to the top. They are an elite group—owners of businesses, members of corporate boards of directors, managers of large firms, heads of government agencies, doctors, lawyers and dentists.

Their numbers are expanding. The management-consulting firm of Heidrick & Struggles, Inc., says the number of women corporate officers in the 1,300 largest companies rose to 416 in 1978—a one-year increase of 28 percent. All told, 6 percent of the nation's working women are managers and administrators. Ten percent are professionals.

## Portrait of Women's New Role in Employment

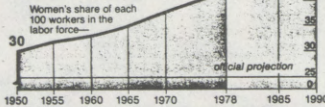
### More and More Hold Jobs



All told, 41,802,000 women—the most ever—are now in the labor market, a total that is forecast to top 54 million in 1990.

\*January-November average

### A Growing Share Of All Workers



Thus, the nation's work force, which was two-thirds male less than 20 years ago, is fast approaching the day when it will be 50-50, half male and half female.

Note: 1978, January-November average.

### Who the Working Women Are

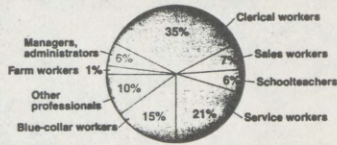
Among the approximately 38 million women in nonfarm jobs—

| Race                                                                                                                                                                          | Marital status                                                                               |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------|
| White ..... 87.2%                                                                                                                                                             | Single ..... 19.0%                                                                           |
| Black ..... 12.7%                                                                                                                                                             | Married ..... 55.4%                                                                          |
|                                                                                                                                                                               | Divorced, separated, widowed ... 24.6%                                                       |
| <b>Mothers</b><br>Of all women, including those on farms, with children of school age or younger—<br>Mothers at or seeking jobs ... 53%<br>Mothers not in labor force ... 47% | <b>In addition,</b><br>millions of other women work at home or in volunteer tasks each year. |

Note: Totals, except when noted, are based on civilian labor force and civilian population outside institutions. Labor force includes only those aged 16 and older.

### Where Women Are Employed

Share of all working women—



| Occupation                                  | Women employees |
|---------------------------------------------|-----------------|
| Accountants                                 | 239,000         |
| Computer specialists                        | 86,000          |
| Engineers                                   | 34,000          |
| Lawyers, judges                             | 44,000          |
| Librarians                                  | 166,000         |
| Life, physical scientists                   | 43,000          |
| Personnel, labor-relations workers          | 161,000         |
| Physicians, dentists, related practitioners | 77,000          |
| Nurses, dietitians, therapists              | 1,192,000       |
| Health technologists, technicians           | 330,000         |
| Religious workers                           | 45,000          |
| Social, recreational workers                | 270,000         |
| Teachers                                    | 2,323,000       |
| Technicians                                 | 170,000         |
| Writers, artists, entertainers              | 405,000         |
| Other professionals                         | 249,000         |
| Managers, administrators                    | 2,151,000       |
| Retail-sales clerks                         | 1,630,000       |
| Other sales workers                         | 848,000         |
| Bookkeepers, cashiers                       | 2,707,000       |
| Secretaries                                 | 3,390,000       |
| Typists                                     | 969,000         |
| Other clerical workers                      | 5,649,000       |
| Machine operators                           | 4,096,000       |
| Transport operators                         | 236,000         |
| Other blue-collar workers                   | 1,021,000       |
| Farmers, farm workers                       | 474,000         |
| Food-service workers                        | 2,806,000       |
| Health-service workers                      | 1,558,000       |
| Household domestics                         | 1,123,000       |
| Other service workers                       | 2,191,000       |
| Total                                       | 36,685,000      |

Note: 1977 average. Details may not add to totals because of rounding.



Women are entering professional schools in record numbers. The Labor Department predicts that they will comprise 18 percent of all professionals by 1985. About 10,000 are studying engineering—10 times as many as in 1970.

As women move into top-echelon jobs, they open the way for others. About 400 of the nation's leading career women met in New York City last October to establish an "old-girl network"—a buddy system to help each other get ahead as men have done in some fields for decades.

The National Federation of Business and Professional Women's Clubs reports a dramatic increase in groups formed by career women. A Los Angeles group, Women in Business, got so many applicants that it now restricts membership to women with "a high level of achievement."

Career women feel more comfortable in their roles, too.

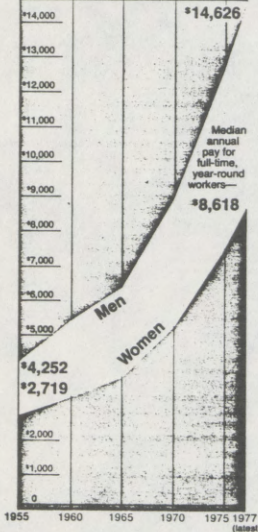
"It's always been very easy for a man to sit down and have a drink with an officer," says Mary A. Wrenn, managing director of Merrill Lynch White Weld Capital Markets Group on Wall Street. "Women are now able to do it, too."

Women in this category generally have fewer professional complaints than those in the stenographic pool. Some are downright ebullient—like Rebecca A. Doyle, president of the title-insurance agency she founded in 1972 in Clearwater, Fla. "I'm working for myself," she says. "It's not really a job; it's a way of life." Adds Dodi Jones, a district manager for installation and repair at Southwestern Bell Telephone Company in Houston: "Some men in upper management say they would rather have a woman working for them. I think we're treated fairly."

Not everyone agrees with Jones. Ekstrom, of the Edu-



### In Pay An Earnings Gap



The typical woman employee, therefore, was paid 58.9 percent of what the typical male worker earned in 1977, down from 63.9 percent in 1955.

### Occupation for Occupation, Women Earn Less...

Though laws require equal pay for equal work by men and women, average pay for women still runs far below that of men in most fields, largely because of lack of seniority by women and their concentration in lower-paying tasks. What the latest official figures show for median annual earnings by full-time, year-round workers:

|                                       | Women    | Men      |
|---------------------------------------|----------|----------|
| Professional, technical workers ..... | \$11,072 | \$16,939 |
| Managers and administrators .....     | \$ 9,804 | \$16,674 |
| Sales workers .....                   | \$ 6,272 | \$14,586 |
| Retail-sales workers .....            | \$ 5,584 | \$10,285 |
| Clerical workers .....                | \$ 4,128 | \$12,943 |
| Craft workers .....                   | \$ 7,765 | \$13,638 |
| Operatives .....                      | \$ 6,649 | \$11,588 |
| Service workers .....                 | \$ 5,840 | \$10,036 |
| Nonfarm laborers .....                | \$ 7,613 | \$10,104 |
| Household domestics .....             | \$ 2,570 | N.A.     |
| N.A.—not available                    |          |          |

### ...But in Many Fields, They're Catching Up

These average salaries were offered to candidates for bachelors' degrees in 1976, according to the National Science Foundation:

|                                             | Women    | Men      |
|---------------------------------------------|----------|----------|
| <b>Business</b> .....                       |          |          |
| Accounting .....                            | \$12,252 | \$12,204 |
| General business .....                      | \$10,320 | \$10,512 |
| Marketing .....                             | \$ 9,768 | \$10,236 |
| <b>Humanities and social sciences</b> ..... |          |          |
| Humanities .....                            | \$ 8,916 | \$ 9,792 |
| Social sciences .....                       | \$ 9,240 | \$10,392 |
| <b>Engineering</b> .....                    |          |          |
| Aeronautical .....                          | \$14,136 | \$13,824 |
| Chemical .....                              | \$15,396 | \$15,336 |
| Civil .....                                 | \$13,836 | \$13,248 |
| Electrical .....                            | \$14,100 | \$13,848 |
| Industrial .....                            | \$13,968 | \$13,544 |
| Mechanical .....                            | \$14,712 | \$14,340 |
| Metallurgical .....                         | \$14,520 | \$14,544 |
| <b>Sciences</b> .....                       |          |          |
| Agricultural .....                          | \$ 9,912 | \$10,272 |
| Biological .....                            | \$ 9,540 | \$ 9,840 |
| Chemical .....                              | \$12,624 | \$12,132 |
| Computer science .....                      | \$12,540 | \$12,420 |
| Health professions .....                    | \$ 9,900 | \$10,596 |
| Mathematics .....                           | \$11,784 | \$11,904 |
| Other physical and earth sciences .....     | \$12,516 | \$12,636 |

Source: U.S. Dept. of Labor and Commerce; National Science Foundation



## Homemaking vs. Employment— How 3 Made Their Choices

BALTIMORE

Unlike their mothers, homemakers today cannot escape the pressures that are driving so many women into the work force.

Ann Harkness of Oxon Hill, Md., encounters the social pressure at parties when people remark: "Oh, you stay home. What do you do all day?"

Jody Tadder of Towson, Md., discovers that her friends have been dropping out of the League of Women Voters to go to work. And Sondra Levy of Baltimore found a job out of necessity when her 21-year marriage ended in separation.

Just a few years ago, all three of these Maryland women were homemakers. Today, only one remains at home full time. Their stories are typical of the reasons why some homemakers go to work while others spurn outside jobs.

A good living. Harkness, a homemaker with two children, feels privileged that she does not have to work. Her husband Elmer makes a good living as a printing salesman. She estimates that 90 percent of her women neighbors are working.

"I always knew I wanted to get married and not work," says Harkness, who wed at age 18. "I grew up with a mother who had to work. I missed the security of a family unit. I have a much better relationship with my children."

Divorce or widowhood is a big fear for homemakers such as Harkness. "I've thought about it many times," she says. "I don't know what I would do. I'm not a skilled worker."

Like Harkness, Levy married young and never worked. Thus she was unprepared to support herself when her marriage broke up three years ago. She left the three children with their father, sold her engagement ring for cash and took a retail-sales job for \$2.90 an hour.

"Marriage and family still are the basis of my value system," says Levy, who now counsels other displaced homemakers. "Looking back, I wish I had done something to train myself for working."

As a full-time homemaker, Ann Harkness is a rarity on her block.



Tadder recognized this problem in 1974, when her husband was wounded by an intruder. "I realized that someday I might need to be the breadwinner," she says. "It could happen as fast as that."

Thus Tadder, a League of Women Voters officer, enrolled in a Goucher College program to convert her volunteer experience into management training. She notes: "I wanted the challenge. I was depressed. There is a level in volunteer work where the satisfaction stops."

tional Testing Service, says discrimination against career women has simply become "covert, not overt." She offers the following examples of how men and women are evaluated differently in managerial positions: "He is aggressive; she is pushy. He is careful about details; she is picky. He follows through; she doesn't know when to quit. He isn't afraid to say what he thinks; she is opinionated. He exercises authority; she is tyrannical."

And career women still face peculiar difficulties. Transfers often must be declined because the husband cannot move. Some men resent having a woman boss. Women professionals often are expected to double as secretaries.

Mary E. Berkley, an administrative officer for the National Labor Relations Board in Washington, D.C., says she is still haunted by her first position with the NLRB as a secretary. "In a pinch," she says, "I am often expected to type and take shorthand."

Some competent women also shy away from jobs, such as sales executive, that would put them on the corporate ladder. Others encounter hostility from an older woman in the firm—a "queen bee" is what they're called—who resents competition from other women.

But women appear to be as reliable and productive as men. Government research reflects little difference in absentee or turnover rates of men and women, and a study by the Survey Research Center of Ann Arbor, Mich., finds that women take fewer coffee breaks.

### A Big Market for Businessmen

Money talks, and the 254 billion dollars that women earn from jobs each year is attracting the attention of advertisers. Many who once directed their messages at the businessman are taking aim at the businesswoman.

United Airlines figures women comprise 18 percent of its business passengers, compared with 4 percent in 1974 and a fraction too tiny to measure in 1970. "Because she's our fastest-growing market segment, it's important for us to appeal to her directly," says Fred Heckel, United's vice president of advertising and promotion. That's why television ads show a fashionably dressed woman with a briefcase checking in and boarding a United flight.

Hotels direct both ads and services toward the woman business traveler. Such amenities as shower caps, skirt hangers and clotheslines can often be found. Western International Hotels began offering 24-hour room service after finding that businesswomen in particular did not like eating alone in hotel restaurants late at night.

Working women also are sought as clients by financial firms. Equitable Life Assurance Society of the U.S. asks the reader to pick the \$25,000-a-year executive with inadequate life insurance from a crowd waiting for a commuter train. The one woman in the picture is the obvious answer.

For all this attention, however, society remains ambivalent about its working women. Although half of the nation's women are employed, the typical American woman is not perceived as a wage earner. "Society is not overly tolerant of the working woman's demand for full equality," notes C. Glyn Williams, economics professor at the University of South Carolina.

By 1990, the Labor Department estimates, there could be as many as 54.3 million women workers in the United States—or 12.5 million more than today. "I don't think there is a ghost of a chance of reversing the influx," says economist Ginzberg.

Most experts are reluctant to forecast the progress of women workers over the next decade. But Alexis Herman, director of the Women's Bureau at the Labor Department, predicts working women ultimately will achieve full equality. She says: "We'll realize it in our generation." □



WW  
REPORTSI was  
refused car  
insurance.  
Is this  
legal?

I recently called a local insurance company and asked to insure my car. I am 39 years old, live in Alabama, have been married for five years, always worked, have owned a home and always insured my own car in my name. The agent told me that he could not insure me because (1) I was a woman, and (2) my husband was overseas in the service. I tried to inform the agent that I did not think it was legal to refuse me insurance because I was a woman, but he said, "In Alabama, that law does not apply." I went elsewhere in the area and got insurance in my name without any problem. I reported my experience to the state insurance commission but was told the first company could refuse to insure me. I'm stumped. Is this legal?

Yes, I'm afraid it is legal!

"An insurance policy protects its holder in case of financial loss due to death, accident, disability or theft. The holder pays premiums and is promised that a predetermined sum will be forthcoming should misfortune occur. Women, like men, want easily obtainable, affordable, comprehensive coverage. Unlike men, many women have found that this has been denied them. Reports made between 1974 and 1976 by state commissions in Pennsylvania, New York, Iowa, Michigan, California, North Carolina and Arkansas shared the conclusion that unfair sex discrimination does exist among insurance companies. . . . The McCarran-

Ferguson Act of 1945 specifically exempted the insurance industry from federal law—thus leaving regulations up to the states. In other words, the federal laws which prohibit or control classification by sex do not pertain to the insurance industry."

## CONSUMER CLOUT

This information, from *Women's Action Almanac* gives you an idea of just what women are up against when obtaining insurance—whether it is for health, life or property. Since we often are without legal clout we must use our consumer clout. We can start by shopping around for companies that have developed more equitable policies. As you discovered, there was another company in your area that provided coverage in your own name as you had requested.

Even more important, you should check to find out if your car-insurance costs are the same as for a man with a similar driving record, car, age, etc. In addition, you may want to write to those insurance companies you found to be fair and equitable, applauding their efforts. Also, write to those companies you found to be discriminatory, pointing out that not only are their policies unfair but, more important to them, this bad business practice is causing them to lose customers.

For further information on insurance practices in your state, contact the Alabama Women's Commission, No. 9 Office Park Circle, Room 106, Birmingham, AL 35223, or the Alabama Attorney General's Office, Consumer Protection, 138 Adams Avenue, Montgomery, AL 36104.

## LEGAL RECOURSE

On a national level, efforts to change insurance-industry practices through legislation or court suits have met with little success. Legal recourse to discrimination in insurance policies can be achieved through ratification of the Equal Rights Amendment. The ERA would end sex-based classification except in cases of unique physical difference causing higher risk (such as preg-

nancy). For more detailed information, *Sex Discrimination in Insurance*, by Naomi Naerman, Ruth Brannon and Beverly Wahl, provides an excellent overview of insurance-company discrimination and of the federal legislation, judicial reviews and state regulations that have challenged the industry. (Available from Women's Equity Action League, 805 15 Street NW, Washington, DC 20005.)

## FOR MORE INFORMATION

Readers who would like more information about their state insurance laws should contact their state commission on the status of women. You can find a list of the commissions along with other local resources, such as women's centers and career counseling centers, in *Women's Action Almanac*, a new publication by the Women's Action Alliance (William Morrow and Co., \$7.95). The almanac is designed to do in print and in one place what the Women's Action Alliance does every day: provide answers to questions on women's issues and programs as well as providing background information on such issues as affirmative action, child care, flexible work schedules, health and sex roles. It also includes a directory of national women's organizations.

You can order the *Women's Action Almanac* from the Women's Action Alliance, 370 Lexington Avenue, New York, NY 10017. Send \$7.95 plus 80 cents postage/handling. **WW**

BY WANDA WOOTEN  
WOMEN'S ACTION ALLIANCE

Let's hear from you! In our **HOTLINE** column, the *Women's Action Alliance*, the national center on women's issues and programs, will advise you on your work-related problems. Send questions to: *Women's Action Alliance HOTLINE*, c/o *Working Woman*, 600 Madison Avenue, New York, NY 10022.



# COMMISSION ON DISCRIMINATION IN THE INSURANCE MARKETPLACE AND IN THE INSURANCE BUSINESS—WITH PRIMARY EMPHASIS ON LIFE, HEALTH, DISABILITY AND PENSIONS

## AN OVERVIEW REPORT: DISCRIMINATION IN THE INSURANCE MARKETPLACE AND IN THE INSURANCE BUSINESS—WITH PRIMARY EMPHASIS ON LIFE, HEALTH, DISABILITY AND PENSIONS.

A paper prepared for the United States  
Commission on Civil Rights

BY  
DR. HERBERT S. DENENBERG  
FORMER PENNSYLVANIA INSURANCE COMMISSIONER



An Overview Report:

Discrimination in the Insurance Marketplace and  
in the Insurance Business--  
With Primary Emphasis on Life, Health,  
Disability and Pensions.

by

Dr. Herbert S. Denenberg  
Former Pennsylvania Insurance Commissioner

for

U.S. Commission on Civil Rights  
Monday, April 24, 1978  
7:30 P.M.

Department of Agriculture Auditorium  
Independence Avenue, Between 12th and 14th, S.W.  
Washington, D.C.



A conference to discuss ethnic, racial and sex discrimination in the insurance marketplace and in the insurance business is bound to have direct, immediate and beneficial impact.

This is so because of the nature of the insurance business and its characteristic response to change, pressure for change and need for change.

This nature is not readily apparent from an examination of the cold statistics, numbers and indexes of the business. It is a matter of character and personality, not physical measurements or quantitative test results; it is a qualitative matter, not the height, weight, or red blood count of the business.

But this qualitative analysis is central to both the definition of discrimination and the prescriptions for its solution.

#### Some Characteristics of the Insurance Business

##### Ultra-Conservative and Slow to Respond.

Both those in and out of the business concede its response to changing conditions and emerging problems is incredibly slow. Those who know the business and those who even love it are content to smile when the question of the insurance industry's speed of response to any kind of problem is broached.

Perhaps this is explained in part by the very nature of the business. Insurance must be certain, and solvency is the first obligation of the insurer.

Insurance that is not certain is not insurance at all. Insurance, both in conception and psychology, is the opposite of gambling, and those who run the business are conservative and slow to move, even to a fault.

As a result, the industry often finds itself resisting change and ignoring opportunity, even when in its clear best interests.



Its attitude toward the insurance of women is an obvious example. Women represent one of the great growth prospects for the life insurance industry, combining the enormous need for protection with financial wherewithal and willingness to buy. But women, the emerging majority, were long neglected and openly discriminated against, in an obvious, outrageous and unconscionable fashion. This has only recently begun to be reversed in dramatic fashion.

Now, more and more insurance companies are eyeing the women's market with the covetous eye it has long deserved. Yet, the insurance industry response came only after pressure was exerted by women's groups, by government agencies and by public opinion.

The insurance industry had to be pressured into taking a position that could only bring it profit.

Other such examples could be cited at great length and in embarrassing detail to the industry. My favorite involves the insurance industry attitude toward readability of insurance policies.

I know from first hand negotiations with major segments of the industry that they found the idea of a readable insurance policy abhorrent, revolutionary and impractical. In the early 1970's, while Insurance Commissioner of Pennsylvania, I told the industry it would have to write policies that were readable. The idea was resisted and initially rejected and opposed by the industry.

In the years since then, the insurance industry has discovered both operational and public relations advantages to having insurance policies which both its officers, agents and the public can understand.

Now, at long last, it accepts that grand idea that insurance policies need not be less readable than Einstein's "Theory of Relativity."



So those who would bring change to the industry should be prepared to be patient and persistent. It is no exaggeration to say that thirty-three angels accompanied by a brass band and reforms straight from the divinity, would have a long slow sale with the insurance industry as the recipient.

The industry seems to firmly believe that, except in the most unusual circumstances, nothing should be done for the first time.

Conservativeness Permits the Continuation of the Illogical and Inhumane.

This ultra-conservativeness is perhaps one reason that the insurance industry, in many ways a remarkably enlightened and public-spirited group, has permitted practices and various kinds of discrimination to persist that would be abhorrent to almost any civilized man.

A good example of such a practice is the newborn infant exclusion which until recently was commonly found in family health insurance policies. This exclusion denied coverage to the newborn infant for medical expenses for a specified period of time, usually 7 to 30 days, immediately after birth.

This is a time when the newborn infant may be in need of medical care, and was hardly in a position to assert that right on his own. Yet the existence of this exclusion was commonplace, and it has mainly been eradicated by legislation only in the past several years.

The American Academy of Pediatrics, which led the battle against this especially inexcusable barbarism, now reports that 48 states have now adopted legislation providing health insurance coverage for newborns from the moment of birth in family policies.

Some policies with this exclusion are still in force, and it is not hard to find exclusions and other practices which seem equally indefensible.



Some of these inappropriate and even inhumane insurance practices are likely to persist unless there is organized and disciplined pressure applied to change them.

A Responder and Not an Initiator.

The insurance industry typically responds to problems rather than initiates changes on its own. This tendency was summarized well by Mr. John C. Maynard, an actuary, during a 1976 panel of the Society of Actuaries on the subject, "Consumer/Consumerist Trends and Their Actuarial Implications."

He said: "The whole subject has so many implications for actuaries that it is hard to know where to stop. I only hope that as time goes on, actuaries will not only react to questions in the consumer field, but they will be initiators."

The same might be said for the main employers of actuaries, the insurance industry. On questions, such as those before this conference, the insurance industry is not likely to initiate all the measures that are in order, and unless some other group formulates comprehensive solutions, they are not likely to be forthcoming with reasonable speed.

In some of my preparation for this meeting, it became obvious to me that the insurance industry could not be relied on to provide long overdue answers to some of the problems of ethnic, racial, and sex discrimination we now face.

This attitude was exemplified by a letter to me dated April 8, 1978 from one of the largest life insurers in the United States. It states: "I can assure you that this company took appropriate action when the concerns of ethnic, racial and sex discrimination were first expressed years ago. All policies, rates, advertising and promotional material as well as marketing and underwriting practices were reviewed. When there were questions, changes were made to eliminate the potential for such discrimination."



Two points of interest. The company did nothing on its own until outsiders expressed concern. Second, a quick review of the published material of this company indicates it has not yet corrected the obvious problems of sex discrimination. ✓

An Industry Overweighted With the Technical, Complex and Abstruse.

The insurance industry is often not able to initiate responses to the legitimate demands of its policyholders and the larger public. Even its attempts to do so are severely handicapped by its tendency to make the simple complex and the complex hopelessly indecipherable.

Ralph Nader, in testimony before Congress, has explained part of this complexity as an attempt to hide facts from the public. He said: "The industry's contrived complexity, secrecy and public relations have fulfilled a strongly supplementary and camouflage function." ✓

I would be somewhat more sympathetic to the motive of the industry, being convinced that it does not have the mental prowess to so brilliantly befuddle and confuse the situation out of deliberate intent. Much of the industry is hypnotized by its own jargon and retarded by its own gobbledygook.

So serious is its communications problems that it is sometimes even unable to get out its own sales message. One of its problems in selling cash value life insurance is its own inability, and the inability of its agents and brokers, to properly explain the product to the consumer.

As a result, dialogue with the industry is difficult and communication of insurance information to the public is likewise handicapped. Even when it is in the best interests of the insurance industry, it is often unable to get its message home.

Consequently, it takes some third parties, consumer groups and government agencies, to initiate meaningful dialogue and to get a message through to the public.



The Organization Man and the Establishment Personified.

Digby Baltzell, a University of Pennsylvania sociologist, wrote a book called The Protestant Establishment (Vintage, 1963). Mr. Baltzell, who himself started out as an insurance man, is now considered an expert on class and authority, told me he has always viewed the home offices of the industry as the perfect picture of what he calls "The Protestant Establishment." Needless to say that Establishment is also white.

Although that picture may be changing rapidly, anyone who attempts to understand the composition and conduct of this industry would do well to heed Mr. Baltzell's description. Major segments of the industry have historically not been welcome havens for minorities of all sorts -- racial and religious -- and that historical reality still leaves a significant imprint on statistics and attitudes.

The industry, dominated by organization and establishment types, has not always welcomed those whose race, religion or ideas differed, and this may further explain its inflexibility in responding to change.

The composition of the industry's agents and brokers has been more heterogeneous than that of the home office. Mr. Baltzell has likened the agents and brokers to a sort of House of Representatives of the insurance industry.

✕ Both government statistics and other sources of information suggest that the insurance industry still has a long way to go in hiring minorities of all kinds and in hiring women.

Anyone with any familiarity with the business knows that blacks are not often found at important meetings and conventions. And a statistic which I ✕ chanced upon suggests women are rarely used in top slots by the industry.



I counted the number of women appearing in Who's Who in Insurance for 1978. I could only find about 33 women out of a total of close to 5000 names. Thus less than one percent of the top people in the insurance industry were women, according to that measure from Who's Who in Insurance. My hunch is that a similar analysis would also produce about the same type of results for other minorities, to the extent it could be done by name and biographical background. An Industry That Doesn't Know as Much as You Think It Does.

There's a tendency to believe that the insurance industry can produce any kind of statistic requested and that it has an actuarial snapshot of every imaginable number and statistic.

Experience shows quite the opposite is sometimes true. Problem after problem involving the insurance industry suggests that it often does not have the facts on which it is freely making its judgments. Two recent examples are the controversies involving products liability and malpractice, but examples are legion from all aspects of the business.

Perhaps one incident will make the point as well as anything. I called the Society of Actuaries to find out how many women and how many blacks were members. The actuaries are, of course, the mathematicians and statisticians of the insurance industry. They are the very symbol of statistical omniscience. Yet, the Society was unable to tell me how many women or blacks were among its membership. I was told to ask my question six months hence when work on their computer is completed.

Many of the questions this conference is concerned with turn on conclusions that are not always convincingly supported by insurance company statistics.

Usually it takes prodding from the outside to make the insurance industry critically revise its statistical base of operations. Some of that revision is already underway in response to pressure from women's groups and others.



What They Don't Know, You Pay For.

You've heard the old saying, "What you don't know won't hurt you." Well, what the insurance industry doesn't know does hurt you. The reason is that insurance companies cover their lack of knowledge of future loss experience with an extra cushion of premium to make sure they come out all right.

✓ A good example of this is the case of coverage on women. Some companies say they haven't sold enough insurance to women to get a reliable book of business and a dependable set of their own actuarial statistics. So they load on extra charges to cover their risk.

✕ So women are subject to a double whammy. First, they are discriminated against in the sale and pricing of life insurance. And then, because they are neglected and unsold, they pay an extra premium to boot. The women of America are financing the life insurance industry's self-imposed ignorance.

An Inherently Discriminatory Business With the Courage of Its Prejudices.

The insurance industry must operate by separating policyholders into various risk classifications. The object is to group those with similar loss potential into the same risk classification. Each policyholder is thus required to pay his own way in terms of the loss potential of his classification.

These risk classifications have to be broad enough to be workable, and to establish a reasonable premium. This is essential if the losses of the few are to be spread among the entire group that pays premiums.

Risk classifications cannot be too narrow. If they are, they become impractical to administer from an accounting viewpoint, and the narrow classification may lack the experience to be stable over time. Furthermore, there is usually no reliable and workable method to refine classifications to measure the precise potential risk of each policyholder.



This means that for better or worse each policyholder becomes a member of a larger class. The necessity of the insurance process requires that he be averaged into a larger group.

So insurance, by definition and by compelling necessity, must do justice on a class basis, not an individual basis. That means it cannot do what some might consider perfect justice, and in the process it can and often does make almost everyone unhappy.

One half of the insureds may want broader classifications to lower their premiums further by averaging them in with those with lower loss potential; the other half may want narrower classifications, to prevent them from being averaged in with those with higher loss potentials.

In this sense, insurance is inherently discriminatory. It is justice and loss spreading by averaging, by grouping, and by class; not by individual determination or merits.

Perhaps this is the explanation of Charles Dickens' antipathy to statistics, which has been described by June Goodfield (Science, November 11, 1977) as being based on the belief that they regard humans "solely as numbers in a statistical equation." By necessity, the insurer must regard the policyholder not only as a number, but as a mere average.

On top of justice by averaging, the insurer has almost unbounded discretion in his classification of insureds as acceptable or unacceptable risks. The underwriter decides who is eligible for insurance and at what premiums, in accordance to the approved rate tables of the company. But he has a great deal of discretion in making that decision, and sometimes it's based on whim rather than fact, surmise rather than statistics.



Some legislation, especially in recent years, has placed limitations on the underwriting process, but there is still great discretion, often unchecked and uncontrolled.

But some of this risk classification and underwriting discretion is essential to the business of insurance. Insurance is many things, but it is first and foremost a business.

To the extent we want insurers to compete in a free market, much of this classification and underwriting must be allowed. Only government, writing social insurance, such as Social Security, can largely eliminate risk classifications, underwriting discretion, and premium differentials. It does so aided by the force of compulsion and the taxing power of the state.

Unless we want government to be the sole insurer, we must content ourselves with the basic mode of operation of the insurance business, and attempt to rationalize and justify its operations and its classifications and decisions, rather than to eradicate them altogether.

There is a limit as to how much we can control and limit this discretion, and therefore the system will always have ample room for both legitimate and illegitimate discrimination in its acceptance and treatment of policyholders.

Insurers in Fish-Bowl Subject to Game Warden Called Commissioner.

Despite the ability to hide behind technical jargon and gobbledygook, the insurance industry must operate in the open due to regulatory requirements. For example, its policies and its rates are on file with government regulatory agencies, namely, the office of insurance commissioner in each state. It is subject to sweeping reporting and disclosure requirements under the insurance law.



Furthermore, its policies and rates are compiled and published in a series of trade publications that makes for easy monitoring of its activities, including its discrimination against various groups in our society.

So, for example, it is quite easy to document what almost all would agree is sex discrimination in the insurance business by simply inspecting its filings with insurance departments.

Even easier, it is quite easy to check the status of discrimination based on sex by consulting various publications of rates, policies, and underwriting rules. For example, you can consult Who Writes What for 1978 published by the National Underwriter Company. This is a listing of hard-to-place, substandard, or unusual coverages. There is a section listing occupations on the prohibited list of many life insurance companies.

There you will find domestics sandwiched in between deep sea divers involved in underwater demolition and those persons, who in training guard dogs play the villain, that is, the persons whom the dog attacks. In the same list are bomb search police officers, private contractors going to war zones, horse race jockeys, and mosquito researchers.

That example is perhaps richest in flavor, but other examples can be found in profusion in any of these books on the insurance marketplace. Best's Flitcraft Compend of 1977 (published by the A.M. Best Co.) lists life rates and underwriting rules for acceptance and rejection of risks. Most companies include a special section on "Women" and such phrases as this abound: "Considered on same basis as men except as follows: Series Select Disability granted to women regularly employed outside of their home or attending school, at same rate as men." This indicates only women are subject to these special rules.



Or you can check the 1977 Time Saver For Health Insurance published by the National Underwriter. You will find hospital expense policies which exclude only the following: injuries and expenses resulting from war, riot, military service, illegal occupations, attempts to commit a felony, and pregnancy. Philosophers might be able to explain the organizing principle of those exclusions better than insurance experts.

Insurers must not only operate in the fish-bowl of regulation, but they are also subject to the pressure from insurance commissioners. Much of the research documenting sex discrimination in insurance came out of reports prepared by or for insurance departments. The first such completed investigation was issued by the Pennsylvania Insurance Department as a result of a project initiated in 1973. Other states which have produced valuable reports documenting sex discrimination in insurance include Michigan, North Carolina, and New York. (Other valuable reports came from Commissions on the Status of Women in Iowa and California and some private groups such as the Women's Equity Action League and Lawyers for Colorado Women.)

A Well-Intentioned Industry Easily Subject to Strong Market Pressures.

Despite sample exceptions, as a general rule the insurance industry is an honest and well-intentioned industry. Having observed the insurance industry for many years, and then having the opportunity to observe many other industries as a consumer reporter, the insurance business looks better and better. After reporting on such industries as the food, drug and cosmetic industry, the chemical industry, the automobile industry, and the utilities, after all that, the insurance industry starts to look like a group of selfless humanitarians by comparison.



Consumer problems with the insurance industry are based more on inefficiency, lack of competition and inertia than on outright rip-offs or dishonesty. The public is victimized more by the stupidity of the insurance industry than its ethics.

The industry itself is not likely to generate change, but it can be pushed into change and competition by market forces.

Consumers, informed about products and prices, can stimulate companies to new levels of competition and market innovation. For example, the "Shopper's Guides", published by more and more insurance departments and by the media and other consumer groups, have had profound impact on the industry.

Consumer education can probably improve the market and bring about needed change faster than any other single force. As Insurance Commissioner of Pennsylvania, I found that the "Shopper's Guides" that we pioneered in 1971 had more impact on the companies and the market than much of the more conventional regulatory action. High-cost companies took measures to improve their ranking, while low cost companies immediately capitalized on the results.

Like the Insurance Departments of each state, consumer educational efforts are one of the key pressure points in moving the industry toward lower and more equitable prices, better service, and better products.

More improvements can probably be brought about by consumer education and more discrimination can probably be eliminated by the dissemination of information, than more conventional regulatory and legal procedures.

The insurance market is remarkably opaque, when it should be transparent. Consumers often don't understand what to look for, how to compare products and premiums, and where to turn to for help.



The quality of products and companies and the magnitude of prices and rates is so diverse that improved information could bring about improvements for virtually all consumers.

A Money Shovelling Industry That Makes Its Problems Your Problems.

The insurance industry is content to shovel money back and forth between policyholders and claimants with little attention to the environment of the insuring process. For example, over the years it did little to improve health care delivery. It was largely content to shovel money back and forth between policyholders and health care providers.

Thus, the insurance industry seems to behave as if it is a pure abstraction from its environment. This often translates into treating policyholder problems as though they were purely that, problems of the policyholders and not of the companies.

This attitude often leads the industry to ignore problems too long and to let them be resolved by forces over which they have no control.

This attitude seems apparent in the area of ethnic, race and sex discrimination. And this trend apparently lead one insurance man, David M. Holland of Munich American Reinsurance Company to comment as follows: "The insurance industry must address itself to charges of inequitable treatment; otherwise the remedies will be determined primarily by the courts, legislators and regulatory authorities."

The Nature and Extent of Insurance Discrimination

On July 12, 1973, I told the Joint Economic Committee of Congress that "the problem of sex discrimination in insurance has been serious, widespread, and up to now largely ignored."



At this time, the good news is that the problem of sex discrimination is no longer ignored. The good news is that dramatic progress has been made in fighting sex discrimination in insurance.

But the bad news is that the problem of sex discrimination is still serious and widespread. It is still often blatant, outrageous, inexcusable, and barbaric. Despite dramatic progress, we still have a long way to go.

The problem of racial and ethnic discrimination presents a different picture. There is little of the open and obvious discrimination that can be documented by a casual scanning of reference books on insurance policies and premiums, such as referred to earlier. Unlike the case of sex discrimination, there are no discriminatory rate tables for blacks or Puerto Ricans, there are no policy coverages written exclusively and openly only for whites. But there are the old and persistent problems of providing equal opportunities to blacks and other minorities in employment. And there is the basic problem of providing blacks and other minorities with the kind of sales attention, communication and advertising that has always been visited on more advantaged groups.

In the insurance business, the problem of lack of employment opportunity presents special problems which are more significant than in other industries. When a group is on the outside looking in, its special insurance problems and its insurance market opportunities may not be understood. So lack of jobs may also mean lack of sales effort directed to it.

This is of critical importance in insurance because it is a product which is sold, not bought. Without the sales effort, the need for insurance is not likely to be perceived or satisfied. This is especially true of the areas of insurance singled out for this conference -- life, disability, health, annuities and pensions. A basic part of that product is not only the policy, but the sales effort, advice and service that goes with it.



So a group that is not adequately employed may be subjected to a double whammy of neglect -- ignored or neglected in employment and ignored or neglected in sales effort.

This has a further indirect effect. A group on the outside looking in may also be misunderstood in all other processes of the insurer -- underwriting (acceptance and classification of risks), claims and servicing. These all depend on communication and understanding, and those groups not understood or otherwise neglected, are likely to get short-changed in all aspects of the insurance process.

There are still many different types of discrimination that can be readily found in the insurance marketplace. They are separated for purposes of discussion, but in practice they are overlapping and reinforcing.

#### Refusal to Make the Product Available Altogether.

Many companies still refuse to make essential coverages available to women. For example, it is still commonplace to refuse to sell women disability income insurance that covers pregnancy or its complications. There are some weak arguments for refusing to cover routine pregnancy (it is predictable, budgetable, voluntary, etc., arguments which could be made for many other covered items), but it is a gross barbarism to refuse to provide disability coverage for the complications of pregnancy.

There is no, absolutely no, justification for failing to provide economic security against the potentially catastrophic economic loss of pregnancy complications. The insurance industry, at least a segment of it, has managed to turn our proverbial reverence for god, motherhood and country on its head, leaving only god and country in tact, and visiting the most foolish and heartless discrimination on motherhood.



And you will find no special exclusion for any of the ailments to which the male reproductive system is heir to.

There are also many companies that do not cover pregnancy expenses under their health (medical-surgical-hospital) expense policies, another insurance quirk that sometimes borders on the insane. Among the exclusions that can be found are those barring payment for pregnancy, childbirth, miscarriage, and abortion; abortion, unless medically necessary to save insured's life; and pregnancy, childbirth, miscarriage or complications thereof.

One of the nation's largest insurers covers pregnancy only if it terminates when the wife is over 25 years of age. This is part of its "Tower" series, and what towers is the irrationality of such an exclusion.

Still other companies deny life insurance to the wife, unless the husband at least has an equal amount of coverage.

So diverse, so irrational and so unjustified is the discrimination against women, that one can only wonder about the less subtle and more devious forms of unfairness and discrimination which cannot always be easily documented by reference to policy language or numbers in rate tables.

A special form of this refusal to make coverage available occurs in center city areas. There auto and homeowners coverage may be virtually unobtainable through the regular market channels. The residents may be forced to go through specially created facilities to make coverage available (assigned risk plans and FAIR plans to provide fire insurance) often at higher cost and less favorable terms.

This phenomenon was documented over ten years ago in the Report by The President's National Advisory Panel on Insurance in Riot-Affected Areas, and it is a problem that has persisted since.



Center city areas are still often an insurance no-man's land. Although the problems of auto and homeowner's insurance do not restrict life, health, disability and pension marketing in the same way, they do have some carry-over effect. Auto and homeowners agents usually sell other kinds of coverage, too, but such agents are often not available to center city populations, especially the low-income and minority groups.

And many of the same factors that make center city areas undesirable for marketing auto and homeowners also make them undesirable for marketing life, health, disability and annuity (pension) coverage.

Refusal to Make Product Available With Same Provisions.

Instead of barring women altogether from certain coverage, the companies may simply restrict its liberality or other terms when the applicant is a woman.

Some companies, for example, still limit the amount of coverage a housewife can buy. This may extend to Accident Death and Dismemberment coverage, where, for example, one insurer will write \$100,000 on preferred risks; \$50,000 on standard risks; and only \$25,000 on housewives. There appears no similar limit on males who may also be maintaining a home as a "house-husband."

Another major company refuses to issue term life insurance to dependent women. Another major insurer will issue women waiver of premium on life insurance (a provision eliminating the need for premium payment during disability) only "if definite need exists." No other class of insureds is called on to demonstrate this "definite need." Such need would appear obvious for almost anyone who has life insurance, regardless of sex.

Another company will only issue waiver of premium for females of up to \$50,000; but a male may get waiver of premium with life insurance of up to \$150,000.



Another practice that was commonplace only a few years ago was to refuse to issue long-term disability to women, while freely granting it to men. This practice has been dramatically reduced in the last few years. But there are still some companies that adhere to this discredited form of sex discrimination.

Charging an Excessive Rate to Women Not Based on Their Actual Experience.

The insurance industry has a habit of sometimes making their premiums reflect their prejudices rather than their statistics. A classic example of this was the long-standing belief that senior citizens as a class were bad auto insurance risks. Then when studies were done it was discovered that they were better than average, and now they often get rate reductions on auto insurance.

Much of this same mythology still exists in the insurance companies approach to insuring women.

There is now general agreement that women have often been over-charged for life insurance. Many companies use the three-year set back, which means a woman is charged the same premium and gets the same policy as a man three years her junior.

More and more companies have seen fit to increase this adjustment. Teachers Insurance and Annuity Association, for example, now grants women a five year set-back on most of its insurance plans.

Other companies have recently revised their rates for women downward. One of the largest of companies to do so recently is The New York Life Insurance Company. They report a surprising amount of their new business is coming from women, and have tailored a major national advertising campaign to focus on the women's market.



Other companies to recently reduce their rates on women include INA Life and Provident Mutual.

Another company to recently grant lower rates for women is the state run Wisconsin State Life Insurance Fund for women. Until 1977, it used unisex rates (identical rates for men and women of the same age); but then it adopted a new rate schedule which grants women rate reductions far in excess of any three-year set-back.

At some ages for some types of insurance, the new rates are the equivalent of a set-back of over eleven years.

In a letter to me dated April 4, 1978, Richard J. Keintz, Deputy Commissioner of Insurance for Wisconsin said: "We feel that the three-year rate-back produces premiums too high in relation to those for males (it also provides females surrender value and often dividends that are artificially inflated)."

In a letter to me dated March 30, 1978, Angele Khachadour, Chief Attorney of the California Insurance Department said: "A couple of years ago, Commissioner Kinder declared that the three-year set back on life insurance does not fairly reflect the actual life expectancy of females."

The three-year set-back involves age discrimination as well as sex discrimination. As a three-year set-back arbitrarily relates female rates to male rates, by a fixed three-year set-back relationship at every age, it is bound to be improper at some ages even if it were proper at some other ages.

For that reason, it would be preferable to have companies make their rates depend on tables of female mortality, rather than attempt to find some relationship between male and female mortality, which is not likely to be constant at every age. This approach, of separate male and female premiums, surrender value and dividends, has been adopted by some companies, including the Wisconsin State Fund, mentioned above.



The same kind of arbitrary and discriminatory rate-making exists in the disability field. For example, many companies arbitrarily charge women an extra fifty percent for disability income coverage. Yet, the statistics show that at some ages women have lower disability costs than men, and at all ages the relationship between male and female disability costs is not constant.

In July of 1976, the New York Insurance Department completed a study entitled "Disability Income Insurance Cost Differentials Between Men and Women," which demonstrated that the relationship between male and female disability income is not constant over the ages 20 to 69, and that female disability is actually less costly than male disability at ages 60 to 69.

The Ohio Insurance Department and the Wisconsin Department, in correspondence to me, indicated that company disability income insurance rates had not always followed the reasonable statistical evidence that was available.

There is also some evidence that health insurance coverage (such as hospital-medical-surgical expense coverage) is often loaded with excessive premium charges for women not based on statistical information. They are almost always charged more for medical expense coverage. Yet Metropolitan Life Insurance Company itself recently reported on the hospitalization of its sales personnel, and found that females had fewer hospitalizations and shorter hospital stays than males. This was based on experience from 1965 to 1974.

Yet the authoritative voice of the insurance industry admits that "Premium rates are generally higher for females over the great range of ages where hospital expenses are covered." That according to the American Academy of Actuaries in a "Report on Academy Task Force on Risk Classification," dated August 1977.



Charging Different Rates to Men and Women Even Though Justified By Experience.

Perhaps the most controversial issue in the whole area of sex discrimination is whether women should be charged different rates than men, even though such differentials can be statistically justified.

Women live longer than men. Hence, they should pay less for life insurance and more for annuities and other pension benefits, if rates are to be based on experience.

This view has been challenged in many contexts, and it is not yet resolved administratively by insurance departments, judicially or legislatively.

Some advocate abolishing sex-based rates in insurance altogether. Others would await any final decisions until more statistics accumulate, and until alternatives are found that would be workable. Still others would permit sex-based differentials when based on sound statistics.

The mortality differences between men and women are not likely to go away. They are in fact substantial, enduring and widening, not receding or even stabilizing.

The problems raised by unisex rating in life, disability, and health insurance are more difficult than those raised in other lines. In my 1973 testimony before the Joint Economic Committee of Congress I pointed out that auto insurance has traditionally used different rates for men and women in the younger age categories. Men are charged more because as a class they produce higher losses.

The National Safety Council suggests the differences are due not to biological factors but to "the amount of driving done by members of each sex, and to differences in the time, place, and circumstances of driving."



I said, then, that the factors which really cause the difference in auto losses can probably be sorted out, and can then be used to replace sex as classification factors. My 1973 conclusion was that unisex rating in automobile insurance would, therefore, be an attainable goal in the near future. It is a goal that has in fact since been attained in some places. But the mortality and perhaps even the morbidity (illnesses and disability) statistics may be more firmly based on actual sex differences rather than other extraneous factors.

It still may be that society may decide that for insurance purposes sex should be treated as race is now, and any distinctions based on either sex or race would then be unacceptable.

But there is even a dispute about how this change should be brought about. Some say it is so fundamental and far reaching a measure as to be appropriate only by legislation. Others say that it should be done administratively and judicially, in view of statutes and the constitution.

In some kinds of insurance unisex rating has already been attained by statute. Section 294-33, Hawaii Revised Statutes, requires unisex rates for no-fault auto coverage: "No insurer shall base any standard or rating plan, in whole or in part, directly or indirectly, upon race, creed, ethnic extraction, age, sex, length of driving experience, credit bureau rating, or marital status." North Carolina has also abolished age and sex discrimination in auto insurance by statute. Massachusetts has done so by administrative action.

But there seems to be much less sentiment for unisex rating in life, disability, health and annuities among insurance departments. By and large, they oppose unisex rating, and in any event, would prefer the development of further statistics before any action toward unisex rates.



Unisex rating would create many practical problems in marketing. If rates were the same for life insurance, it would amount to a subsidy paid by women to men. Companies would find it more desirable to write women than men (due to their lower loss expectancy), and would have to manipulate their pricing and marketing to take that loss expectancy into account.

#### Providing Disparate Benefits to Men and Women.

Another kind of discrimination that can be considered separately is the pension plan, for example, which provides higher benefits to male than female workers. This is based on underlying costs and different life expectancies. The same problem can arise if the same pension benefits are provided, but larger contributions are required from women.

Various agencies of the federal government have reached different results on the issue of whether men and women must be provided the same benefits at the same costs, and the issue is likely to continue in litigation for some time.

The issue here is whether unisex rating should be required for purposes of employee benefits and charges to employees for those benefits. It involves some of the same issues raised by insurer pricing, but it also involves provisions of the law dealing with equal pay for both sexes.

#### Neglect in Sales and Advertising.

Various studies have documented the neglect of the women's market in sales and advertising of insurance companies. The June 2, 1975 Report to the Michigan Commissioner of Insurance, for example, analyzed ads in an insurance trade publication, Best's Review (life and health edition), and found that ads tended to feature men, and that the few time women were featured they were "pictured predominantly in traditional roles as back-up wife, secretary or nurse."



I quickly reviewed later editions of the same publication, and found that women are now featured in ads more often, and are more often featured in the non-traditional role. However, the ads are still loaded in favor of the male. For example, in the magazines I looked at, whenever rates were quoted, they were male rates, with no reference at all to female rates. And, after all, the rate is the punchline and guts of the ad, and this may all suggest that many of the pictorial changes are superficial, representing little change in attitude.

In this context, one picture is not worth a thousand words. In fact, a female rate of premium might be worth a thousand pictures. Yet both ads featuring rates showed only the male rate, and other life insurance material in the editorial section of the magazine also showed the male rates only.

A check of Best's Flitcraft Compend for 1977, which lists the life insurance rates for about 250 of the nation's leading companies, showed many cases in which insurers did not even bother to list their female rates. Those that don't even bother to publicize female premiums can't be very interested in female policyholders.

Here again, the evidence suggests that companies have thrown the movement for fair treatment of females a few pictures of women, in their ads, but when it comes to serious presentation of materials, such as rates and premiums, they are still thinking in terms of men.

There are of course, exceptions, including the impressive female-directed advertising campaign of the New York Life Insurance Company.

So here again, despite improvements, the women find themselves still treated as second-class citizens. However, they fared much better than blacks. At least the three issues of Best's checked (the first three of 1978), only the ads of a single company had a black face. The rest of the magazines were lily-white.



Neglecting Minorities and Women on Payrolls and in Boardrooms.

All of the studies and evidence I've seen suggests that women and minorities are still vastly underrepresented on payrolls and in board rooms.

The latest Equal Employment Opportunity Commission statistics for 1975, which has nationwide statistics on insurance carriers, found women made up 57.5 percent of the work force, but only 17.3 percent of officials and managers.

Blacks made up 9.4 percent of the total work force and 2.8 percent of officials and managers. Black women made up 7.0 percent of the work force and 1.1 percent of officials and managers.

There are also separate tabulations for insurance agents, brokers and servicing agencies. The representation is even less. Here females make up only 12.7 percent of the work force and blacks, 0.8 percent. Black women make up 0.4 percent of the total.

Other statistics suggest that this representation is even thinner at the very top of the industry. As indicated, my check of Who's Who In Insurance found less than one percent women represented. A check of Who's Who Among Professional Insurance Agents for 1978 found about 2 percent of the listings were women. And a further check of Who's Who In Risk Management for 1976 found less than one percent were women. (Risk Managers are insurance buyers for large corporations, but they frequently come out of the insurance industry and there is a great deal of cross-over).

Women as officers and directors of major insurance carriers are also a rare variety. In 1973, fifteen major companies were checked, representing the major divisions of the insurance industry. Men outnumbered women by 592 to 15.



A recent survey by Korn/Ferry International, an executive research firm, found that only 40 percent of the 35 major insurers surveyed had women on the board at all. In other words, 60 percent of the insurers surveyed don't even have token women board members. Only 22.9 percent of insurance companies had what the survey called "ethnic minorities" on their boards.

Attorneys had representation on over 60 percent of all boards as did bankers and academicians.

There are less than 400,000 lawyers in the United States. There are over 107 million women. But lawyers are found on many more insurance company boards than women.

Women and minorities are deprived of payroll and power, and this all has implications as to how well they will be served. This lack of women and minority representation probably accounts in part for the failure of the industry to adequately serve and sell minorities.

This deficiency, as suggested earlier, is especially significant when dealing with insurance as a product, as it is one that must be sold, and it is one that must be serviced, underwritten, and delivered with special regard to the needs and circumstances of the customer.

#### Neglect in Education of Women and Minorities.

Top level work in the insurance field requires a good deal of technical training and expertise. So ongoing education and training for women and minorities is a good way to test the preparation being made for their future utilization and advancement.

To test activity in educational work, I checked with several groups most actively involved in training for the industry.



First, I checked with the Life Underwriter Training Council (LUTC). This group provides educational and training activity for the life insurance industry and serves as a clearing house for information on life underwriter training and activity.

LUTC said that they could not even tell me how many women were participating in their activities by taking courses. To come up with this number would take a tremendous amount of work, I was told. Nor could LUTC give me any information about race.

Then I checked with the American College of Life Underwriters which grants the designation CLU (Chartered Life Underwriter). Since 1929, 35,816 men have received the CLU designation while only 893 women have. Since 1973, the number of men earning the designation has been fairly constant (between 2256 and 2353 each year). During that time, the number of women earning the designation has gone from 50 to 113 per year. Minority statistics were not available.

I was told that the American College has no special drive underway to bring women or minorities into the program. One of its professed aims is to conduct research aimed at manpower development. But the development of women power or minorities is apparently not within the purview of its aims.

I also checked with the American Institute for Property and Casualty Underwriters, which grants the CPCU designation (Chartered Property and Casualty Underwriters). This is the equivalent of the CLU on the property-liability side of the business. In 1973, 31 women were awarded the CPCU designation; in 1977, 98 received the designation. This compares, for the same years, to 645 and 1091 for men respectively. So progress has been faster on the property-liability side of the business, where in 1977 about 9 percent of those awarded the CPCU were women, compared to less than 5 percent for the CLU.



The CPCU group even had more impressive statistics in its so-called feeder program for the CPCU, which consists of a lower level group of courses in general insurance principles. In 1973, 26.3 percent of those who completed this course were women; in 1977, that figure was up to 55 percent. This is certainly an impressive piece of progress by any standard.

The CPCU's have a candidate development committee, but have no formal program to seek out women or minorities. They seem to be far more successful in doing so than their CLU counterparts in the life insurance industry.

The CLU people could give me no estimate of black involvement in their programs. The CPCU people said it was "almost negligible."

The Society of Actuaries, as already indicated, the all knowing all computing source of wisdom of the insurance industry, could give me no information about sex or race composition of their membership.

Overall, this brief check suggests that the training and education of women and minorities is not a high priority of the life insurance industry.

Employment Status as a Bar to Adequate Insurance Protection.

This is a somewhat different kind of insurance problem, but its consequences are just as serious as the direct discriminatory activity of insurers. More and more, insurance is provided through unions and employers on a group basis. But many simply do not get needed coverage because of the kind of employment they have.

Such fringe benefits as pensions and group life, health and disability are more likely to be available for those in stable and well paid employment than those at the margin.

Smaller, marginal employers often do not buy group insurance and pensions for their employees. Even if such coverage is available, the more unstable the employment, the less likely the employee is to have sufficient time in service to become eligible for benefits.



Some employee benefits are not even available until a specified period of service is completed, and pensions benefits do not become fully vested until a fairly lengthy period of service has elapsed.

The classic case is the domestic who is usually cut off from most social insurance programs (such as workmen's compensation) and is not likely to have any other kind of fringe benefits from an employer.

One part of this problem, relating to pensions, was explained in detail by Merton C. Bernstein, Professor of Law at Ohio State University, in his testimony before the Joint Economic Committee of Congress, when it held hearings in 1973 on the economic problems of women.

He pointed out that as one moves up the economic ladder, you are more likely to find pension coverage and better pension coverage. Women and minorities, who are often low-wage earners, are either left out of the private pension system altogether or tend to get inadequate benefits. What goes for pensions also goes for many other fringe benefits including insurance.

And of course, housewives ordinarily get no pensions or other fringe benefits at all.

Various recent studies have supported these conclusions about the pension and fringe benefit problems of women and minorities. A study published in the February 1978 Social Security Bulletin, concluded: "Women, particularly those employed in the private sector, were less likely than men to have been covered by a pension on their longest job. In general, they were more likely than men to have had those job characteristics associated with low coverage rates and, in addition, they had lower coverage rates when equated with men on individual job characteristics." The general picture, for 1972 benefits, painted by the study was quite pessimistic: "In sum, adequate retirement incomes are



heavily dependent on income from employee pension plans particularly among nonmarried persons. Unfortunately, most retired persons do not have access to such income and must rely on their social security benefits alone"

Blacks and other minorities tend to have the same problems as women for many of the same reasons. Even under Social Security, which has capabilities of coverage for better than the typical group insurance plan, blacks do not fare as well as whites. Blacks tend to get lower benefits and this is related to lower earnings and fewer years of employment. But the same factors may shut them out altogether from many other fringe benefits.

The Conventional Problem of the Poor Who Pay More.

As in all other areas, the poor end up paying more. In insurance, it may be more expensive to market small amounts of coverage to low-income minorities than large blocs of coverage to the affluent.

For that reason, the small policies sold through so-called industrial life insurance may be more than seven times more expensive, dollar for dollar, than the same coverage marketed to the affluent in larger amounts.

This "poor-pay-more" problem is compounded in the insurance market for several other reasons.

The information and sales needs in insurance are higher than with many other kinds of products to be marketed. Because low-income consumers, especially minorities, and women are neglected by the sales efforts of insurers, they tend to end up uninsured or insured with the wrong policies in the wrong companies.

In all areas, the poor pay more, the disadvantaged pay more, and the minorities pay more. But in insurance, a bad situation is compounded many times. Here the poor pay with a vengeance, with virtually every market imperfection working against them.



Lack of Information as a Cause and Possible Camouflage of Discrimination.

There are several different kinds of lack of information that result in insurance discrimination. The most disadvantaged do not have access to information and advice and therefore tend to end-up with substandard policies, substandard advice, and substandard companies.

Experts, for example, would probably avoid about 80 percent of the insurance companies in the marketplace. Experts would sharply limit their selection not only of companies but policies to a fairly narrow focus.

But the typical buyer often does not get the basic advice he needs. This problem, serious enough even for many better situated consumers, is especially severe for women and minorities for all of the reasons already described.

There is still another kind of lack of information that can result in discrimination. When an insurer does not have adequate information about insurance for a particular group, it tends to over-charge to provide a cushion against any contingencies. Such insurers will frankly admit that this has been the case with women.

Then too, when there is a lack of information about a particular group they may simply be avoided. This explains, in part, some of the problems of women and minorities in buying insurance.

And there is still another kind of lack of information that may result in the initiation or perpetuation of discrimination in insurance.

To the extent that insurers really do not know what markets they are reaching and which ones they are not, they are not likely to be able to change their marketing strategy to remedy the situation.

There is certainly a lack of information available about how well the industry serves certain racial and ethnic groups, and adequate information has not always been available even about the women's market.



There are some restrictions on what kind of statistics insurers can keep based on prohibitions against racial and ethnic discrimination. But this should not prevent other attempts to obtain needed marketing information.

Insurers will concede that there is ethnic and racial discrimination. For example, the American Academy of Actuaries in its August 1977 publication entitled "Report on the Academy Task Force on Risk Classification" states: "Companies with predominantly white markets have tended to avoid non-white markets." Yet, it would be impossible to precisely measure this kind of discrimination. It is commonplace but as yet unmeasured.

#### The Products of the Life Insurance Industry

The life insurance industry writes a portfolio that includes life, health (medical expense), and disability insurance and annuities and other pension products.

The contracts have long been viewed as necessities, and the lack of fair access to them makes it impossible for the typical consumer to achieve a reasonable measure of economic security. Government programs by themselves are inadequate, so the uninsured or underinsured court economic disaster.

The life insurance industry stands between the consumer and the poor house. The life insurance industry must perform, or the widow and orphans will be left unprotected. The life insurance industry must perform, or the consumer will not have access to the medical care he needs.

In a security conscious society, the life insurance industry offers one of the critically important necessities for that security.

#### Life Insurance.

The key product of the life insurance industry is life insurance. Life insurance is actually insurance against death, and provides a specified payment to a specified beneficiary upon the death of the insured policyholder.



Life insurance may provide protection and nothing else. That kind of protection is term insurance.

Life insurance may provide a mixture of protection along with an investment (what is called the cash value of the life insurance policy). The most common kind of insurance-investment policy is so-called straight life, which provides protection not limited by a specified time period, and also provides that premiums are to be paid for the whole of life.

Then there is endowment, which is the richest mixture of insurance and investment. An endowment policy provides that the face amount of the policy will be paid at a specified time (say, endowment at age 65).

There are all kinds of combinations of insurance and investment, with increasing and decreasing amounts (for example, decreasing term); various periods during which premiums must be paid (for example, 20-pay life); and various combinations of kinds of insurance (for example, straight life with the addition of a term rider) and various combinations of insureds to be covered (for example, a family policy that covers the entire family, not just one policyholder).

Then there are various additions to the policy, many of which are subject to discrimination discussed before and after in this report.

The waiver of premium provision provides that premiums need not be paid and will in effect be paid by the company during periods of disability of the insured.

The double indemnity rider provides for double payment in the event of accidental death.

The guaranteed insurability option gives the right of the insured to buy additional amounts of coverage at specified future intervals, without the need to prove insurability.

There is also a so-called payor benefit or agreement. This is usually



written on juvenile insurance, where the child is insured, and the parent wants to assure premium payments in the event of his own death or disability. In the event of such death or disability, under the payor benefit, the insurance company has to pay the premiums instead of the parent.

There are also disability income riders, which are agreements to pay the insured a specified amount of cash monthly in the event of his total disability. Disability is considered a separate kind of insurance, and is here written as an addition to a life insurance policy.

#### Health Insurance.

Health insurance is a kind of protection used to pay the expenses of medical care of all kinds -- medical bills, surgical bills, hospital bills, dental bills. (Sometimes the term is used also to include disability income insurance; but here we use the other more limited meaning).

Among the common types of health insurance are hospital expense coverage; surgical expense coverage; regular medical expense coverage; and major medical expense coverage. The latter is a kind of insurance used to finance major expenses of illness so it may be written with a large deductible, paying all or a specified percentage of covered expenses over that deductible.

Other terms are also used to describe more specialized health insurance policies -- dental expense insurance; dread disease insurance; cancer insurance, etc.

There are endless variations on these policies, with varied provisions for premium payments, with varied provisions relating to cancellations and non-renewal, and other features.

There are various exclusions in health insurance policies of special significance for women. Pregnancy is a common exclusion. Care for newborn infants may be excluded for a specified period, such as 14 days. There may be special exclusions relating to abortion, miscarriage, routine pregnancy, or pregnancy and its complications.



Pregnancy benefits may not be granted at all, or they may be extended only in limited fashion; or they may not be granted to single women, and they may not be granted to dependents of the insured (such as a minor child who might become pregnant).

Disability Income Insurance.

Disability income insurance provides cash payments in the event of total or partial disability.

Such coverage may be long-term (say, paying benefits until age 65) or short-term (perhaps paying benefits only for 13 weeks or one or two years).

The better coverage is non-cancellable and guaranteed renewable which means the premiums cannot change and the coverage cannot be increased until the insured reaches 65.

There are various exclusions in the policy, some of which have obvious significance for women. Disability due to pregnancy is often excluded.

Sometimes the definition of disability is such as to exclude housewives. For example, the policy may define disability in relation to earned income before and after disability with no provision for someone who works but is not paid a wage.

Pension and Annuity Products.

An annuity typically provides for a specified periodic payment for life. It is the common method of providing pension and other retirement benefits.

Annuities may be purchased in all forms. They may provide monthly, quarterly, semi-annual, or yearly payments for life.



Annuities may provide payments to only one person or more than one person. For example, the joint and survivor annuity provides payment during the lifetime of two persons (such as a husband and wife, so when one dies the other continues to receive payments).

There are also fixed-dollar and variable annuities. The fixed-dollar annuity is a specified unchanging amount, say \$100 a month. The variable annuity has a payment which changes, in accordance with the investment experience of a special fund held by the insurance company.

Most life insurance policies contain settlement options, one of which is the provision of an annuity to a beneficiary.

(More)



## The Insurance Industry

The insurance industry is one of our largest and most important parts of the financial sector. In 1975, it collected \$110 billion in premiums and controlled \$385 billion in assets. In 1976, those figures were up to \$130 billion and \$434 billion, respectively.

But its impact far outruns the magnitude of those figures. Its operations and loss payments influence many other vital institutions. For example, health insurance payments are of critical importance to the way hospitals and other health delivery institutions plan and grow. Auto insurance influences how the legal system operates and has enormous impact on the way it evolves.

But the insurance industry does more than make loss payments. It is an important device for individual savings and investments. In 1976, the life insurance industry acquired \$174 billion in assets, much of this representing savings of policyholders in the form of cash-value in life insurance policies. In 1977, that figure was \$197 billion.

The insurance industry is also an important source of capital and investment for the American economy, by virtue of its purchases of government securities, corporate securities, mortgages, real estate, and other financial instruments.

The industry is made up of about 4,700 companies and provides about 1,675,000 jobs.

It has historically been divided into two segments. One is a group of companies writing life, health, disability, and annuity insurance. This is usually referred to as the life and health insurance side of the business. The other side, so-called property and liability companies, write such lines as auto, homeowners, workers' compensation and marine insurance.



This separation between the two segments of the business came about due to historical and regulatory accident. Some of the separation still persists. For example, a property and liability company ordinarily cannot write life insurance.

But in a functional, rather than a regulatory sense, the industry has come together. There are multiple-line companies and groups of companies which together write all lines of insurance.

And more and more, the sales force of one kind of insurer sells the products of others. For example, in recent years some of the major life insurance companies have acquired property and liability insurance companies, and their agents now sell all major types of insurance.

Nevertheless, the two segments of the business are still largely separate in corporate structure, in regulatory treatment, and in many phases of operation. The main emphasis of this report is on the life, health, disability, annuity side of the business, but it should be noted there is one segment of the business that overlaps the usual distinctions between the two sides of the business. Both sides of the business can write health and disability insurance, but the bulk of it is written by the life and health insurance side of the business. For most purposes, however, health and disability can be considered almost an exclusive product of the life and health insurance business.

Often insurance-type products are provided directly by employers, unions or other groups. This is sometimes described as self-insurance. Sometimes the insurance industry helps in the administration only of such plans but does not participate as a risk bearer. Other institutions may be involved in the administration of such plans, such as banks.

At the end of 1976, about 17 million Americans were covered by pension plans in which the life insurance industry was involved. Over twice as many were



involved in self-insured private plans.

But whether the plan is insured, or self-insured, it often involves many of the same issues discussed in this paper under the rubric of insurance discrimination. The same problems involved in insurance are involved in any employee benefit program regardless of insurer participation.

#### Legal Structure.

Over 90 percent of the life and health insurance companies are stock companies, owned and controlled by their stockholders. These companies control only about one-third of the assets of the industry.

The other two-thirds are controlled by so-called mutual companies, which make up fewer than ten percent of all life and health insurance companies. The mutual company is controlled by its policyholders, in theory. In practice, the mutual is controlled by a self-perpetuating management.

One of the unsolved problems of insurance regulation is how to make mutual companies directly accountable to control by policyholders. If that problem could be solved, it might be an important technique for assuring fairer treatment to all policyholders.

There is one other major factor in the market that does not fit into the usual categories discussed above. That is the Blue Cross and Blue Shield organization. These are separate entities, about 143 different plans, operating throughout the United States. Some are controlled by doctors, others by policyholders, and they have diverse organizations. For example, in Pennsylvania, there is a single Blue Shield plan, providing medical and surgical benefits, which is controlled by doctors. There are also five Blue Cross plans operating in Pennsylvania, largely controlled by policyholders, but in different ways, through different structures.



In addition, there are the so-called HMO's (Health Maintenance Organizations) which are designed to provide comprehensive health insurance protection. They may be sponsored by employers, labor unions, consumer groups, insurance companies, and are subject to various kinds of governance and control.

There is one incidental characteristic of the legal form of organization of special interest to the issues addressed in this report. Mutual companies typically write participating policies which pay dividends (as opposed to stock companies which write non-participating or so-called guaranteed cost policies).

The participating policy involves an over-charge with refunds based on the mortality, interest and expense experience of the company. Some life insurance companies have made special dividend allowances for women, due to their unusually low mortality rates. But whether these dividends have been adequate is a largely unexplored issue.

#### Competition, Concentration, and Entry.

The life insurance industry has been subjected to growing criticism for failing to competitively market its products, especially its life insurance products sold to individuals (rather than groups). These products have not been subject to vigorous price competition, because of the confusion in determining the true cost of a policy, which requires the consideration not only of premiums, but also of dividends and cash values.

Some view the industry's efforts as competition by confusion and cover-up and see the haze beyond premiums and price structure. This matter is now subject to an investigation by the Federal Trade Commission and has been investigated by Congress over the years.

There is also little competition in the area of individual health insurance contracts. Many companies concede they are simply not interested in



the business. The American Academy of Actuaries "Report of the Academy Task Force on Risk Classification," dated August 1977, states: "Many private insurance carriers have, however, ceased to write individual medical expense insurance coverage because of their inability to keep up with increasing medical costs within the current economic and regulatory environment."

The marketing of disability income insurance and annuities (pensions) hasn't been visited with these just described problems peculiar to health and life insurance, but there is some reason to believe that competition there too is not as vigorous as it might be.

One indirect index of that competition is the amount of concentration in the business -- how many companies control a major block of the assets or premiums being written. The higher the level of concentration, the less the competition, according to the usual presumptions.

The U.S. Justice Department recently had occasion to look at the level of concentration in the life and health insurance industry in the course of preparing a document called: "The Pricing and Marketing of Insurance: A Report of the Department of Justice to the Task Group on Antitrust Immunities," dated January 1977.

That report states: "The life insurance industry is much more concentrated than the property-liability industry, with approximately seven companies accounting for 50 percent of total assets. However, the entry of new companies into the field, even though usually limited in both product and geographic market, has been 'slowly eroding the high degree of concentration found in the industry.'"

The Department of Justice cited 1969 figures in reaching its conclusion, although later figures do seem to support its conclusion, if its assumptions are accepted.



However, a closer look at life and health insurance industry figures indicates that concentration is much higher than appears from the broadest aggregate of figures apparently considered by the Department of Justice.

What determines competition is not so much what percentage of the market each company has on a national basis, but what percentage each company has of the market for a particular product in a particular area.

When this is done, an entirely different picture emerges. For example, Best's Executive Data Service which reports on market shares, shows that in Pennsylvania only three companies control over half the market for group annuities and for certain kinds of health insurance. Even on a national basis, when a single product is considered, as few as three companies may have about half the market.

And when less competitive states than Pennsylvania are considered, the concentration figures are even more ominous. When group annuities are considered, in four different states, a single company has over 60 percent of the market. In three other states, a single company has over 50 percent of the market. And in 16 additional states, a single company has between 30 and 50 percent of the market.

This all suggests that the degree of concentration in the life and health insurance industry has been consistently understated, and the amount of competition may have been overstated.

The degree of competition can also depend on the entry into the business and the ease of entry. In many states, life insurance is a remarkably easy business to enter. For example, last year companies were still being formed in Arizona with as little as \$25,000 in capital and \$12,500 in surplus.

In 1977, 92 new life and health companies were formed and 60 were retired.



Almost all of the new companies came in with rather modest capital and surplus, and many are related to existing companies.

Hence, despite relative ease of entry, there are still substantial barriers for any company to have any real impact on the competitive balance. It must have massive capital and surplus and a sales force able to produce.

This ease of entry, however, could be of great significance when attempts are made to set up women or minority-controlled insurers.

#### Marketing Systems of Insurers.

Insurance sales can be made by mail, and some companies have been successful with such methods. However, the great bulk of life and health insurance is sold by agents of various kinds, again reflecting the fundamental fact that insurance must be sold, it is not bought.

Agents may be tied to a single company, and are then called captive agents. Others may represent many companies, and are sometimes referred to as independent agents.

There is also what is called a broker, who usually represents the policyholder rather than the company, and takes business to many different companies.

In the life insurance business, most companies organize their agents according to one of two systems. The branch-office system involves the direct management control of field offices, which operate under a manager who recruits and controls the agents on behalf of the company.

The other system, called the general-agency system, involves a contract with a general agent, who is assigned a specific territory, and who then proceeds to develop that territory on his own, with the recruitment of agents.

There are various combinations of the two systems, with the trend being for companies to exert more and more control over the field force of agents, and a trend toward a branch-office type of system.



But another aspect of the marketing approach involves the kind of insurance being sold. There is individual insurance as opposed to group insurance.

Group insurance can be thought of as coverage on a wholesale basis, with the agent selling, for example, an entire group of employees through a contract with a single employer. Group coverage may also be sold to unions, professional associations, fraternal organizations, and other types of groups.

Sometimes the employer pays for the entire cost of the group policy. Sometimes each employee pays part of the premium.

Group insurance is usually underwritten and rated on a group basis. That is, a rate is set for the entire group, not on an individual basis, and the entire group is accepted or rejected depending on the general situation of the group, regardless of the insurability of some individual members.

Group insurance is often experience-rated, with the group premium being determined from time to time with due regard to the actual loss experience of the group.

There are two marketing methods involved in the sale of individual life insurance. One is referred to as the debit system of marketing, which involves the collection of premiums at the home of the policyholder. This system is associated with industrial life insurance, a kind of coverage sold in small amounts, usually about \$500, with premiums payable on a weekly or monthly basis.

Larger policies are now also being sold more often on the debit basis, and health insurance in small amounts, called industrial health is also sold on that basis.

The term used to define all life insurance -- other than group or industrial -- is ordinary life insurance. It is another kind of individual coverage (larger in amount than industrial) and sold in the conventional way.



About 90 percent of all health and disability insurance is sold on a group basis.

About 50 percent of life insurance is now sold on a group basis. Relatively little is sold on the debit basis with industrial life insurance making up less than 2 percent of the total.

#### Life Insurance Investments.

Life insurance, which involves the provision of protection and savings as well (cash-value in life insurance and other money ear-marked for future payment under annuities and other policies) produces huge sums for investments each year.

Among the investments made by life insurance companies during 1977, according to estimated figures released by the American Council of Life Insurance, are \$31 billion into government securities; \$146 billion into corporate securities including stocks and bonds; \$13 billion into mortgages; \$2 billion into real estate and \$5 billion into policy loans, for a total of \$197 billion.

At the end of 1977, the industry held \$23 billion in government securities; \$172 billion in corporate securities; \$96 billion in mortgages; \$11 billion in real estate; \$28 billion in policy loans and about \$20 billion in cash and other assets. That is for a total of \$350 billion dollars.

The property and liability business also made substantial investments in the American economy, but on a smaller scale than the life insurance business.

#### The Regulation of the Insurance Industry.

The insurance industry is subject to comprehensive regulation at the state level. Most states have an Insurance Commissioner, heading a state insurance department, assigned the responsibility of regulating the companies under detailed provisions of the state insurance laws.



Commissioners have power over the companies and their agents and brokers in all phases of operations. From birth to death, the companies are regulated. They must be admitted to do business in the state, and they are liquidated or dissolved only under the commissioner's supervision.

The commissioner has jurisdiction over such diverse matters as investment, sales and underwriting practices, policy forms, premiums, and the like.

Some state insurance departments are larger, better staffed and more influential than others. Among the traditional leaders in insurance regulation are New York, California, Pennsylvania and Wisconsin.

The regulatory action of some of these larger departments has a carry-over effect nationally. For example, when these larger states take action against certain policies because they discriminate against women, this is likely to have an effect across the land. Even though policy forms are approved by each state, many companies attempt to maintain uniformity nationwide. So when one state forces a change, it may go nationwide.

The insurance commissioner has great power over the companies based not only on specific legal authority, but also based on the moral suasion he typically commands over them. An early commentator described the insurance commissioner as a combination judge, jury and hangman over the industry. That may be an overstatement, but the commissioner does have great authority to bring about change in the insurance industry.

The commissioner's authority over the industry is not total, however, and many use their authority in an ultra-conservative manner. For example, some of the commissioners that responded to my survey to gather information for this report indicated that they do not have authority over life insurance rates, including the question of the fairness of the three-year set-back for women.



For example, W. W. Fritz, Insurance Commissioner of Oregon, in a letter to me dated April 4, 1978, stated: "The three-year set-back on life insurance is moot with us inasmuch as the Division has no authority over life insurance."

John H. Allen, Staff Attorney for the Department of Insurance of the State of Tennessee also said his department has no "rate-making authority" over life insurance rates.

However, even in such cases a Commissioner who senses unfairness in the insurance process can seek voluntary change by the companies, and can use publicity and proposed legislation to attempt to correct the problem.

The federal government, by virtue of the McCarran Act, has left insurance regulation to the states, except for certain areas in which indirect or back-up regulation exists.

The federal anti-trust laws apply to the insurance business only "to the extent that such business is not regulated by State law."

The tax laws, securities laws, labor laws, civil rights laws, and other general federal laws are also applicable to the insurance industry. For example, the Equal Employment Opportunity Commission has had great impact on the insurance industry.

Furthermore, the performance of state regulation has been under the surveillance of Congress, and its hearings and reports have had a profound impact on state regulation.

There are also some voluntary organizations that have a great deal of influence on state regulation. One of the most important is the National Association of Insurance Commissioners which sponsors meetings and develops legislative and regulatory proposals often acted on by the states.



For example, the NAIC developed a model regulation to eliminate unfair sex discrimination. As of December 1977, ten states had adopted the regulation and others had adopted parts of it. The purpose of the statute, as described by its own language, is "to eliminate the act of denying benefits or coverage on the basis of sex or marital status in the terms and conditions of insurance contracts and in the underwriting criteria of insurance carriers."

#### Questions and Issues to Be Resolved

This section will review some of the actions and proposals to bring an end to ethnic, racial and sex discrimination in the insurance business and in the insurance marketplace.

Some have already been implied or suggested in the previous discussion, but will be restated, refined and elaborated on here.

#### Consumer Education.

One of the most efficient ways to bring about change is through consumer education on the existence and methods of avoidance of discrimination in the marketplace.

Many of the abuses that exist would soon become untenable if consumers were better informed on alternatives in the marketplace. When consumers are aware of which kinds of discrimination exist and what companies avoid such practices, the industry would be forced to readjust its marketing plans.

Insurance departments could publish "Shopper's Guides" for women, minorities and any other group likely to experience unfair discrimination in the marketplace.

As Insurance Commissioner of Pennsylvania, in 1974 I published "A Mini Guide to Women's Insurance Rights" which is a first approximation of the kind of information women ought to have. The Insurance Department of Wisconsin has also since published an "Insurance Guide For Women" which might be used as a model.



The Appendix to this report also includes a guide, prepared for another purpose, but suggestive of the kind of information women ought to have available.

Similar guides might be prepared for other minorities or anyone else with special insurance problems. One of the important features of any such guide would be a list of channels for complaints about discrimination and how to proceed in asserting such complaints.

Other government agencies and private groups might also prepare such guides. They are undoubtedly one of the most efficient and economical ways to bring about change in the insurance marketplace, and to eliminate discriminatory insurance practices.

As another form of consumer education, women and minorities should be advised that lobbying with state insurance departments on administrative action designed to eliminate sex discrimination in insurance might pay handsome rewards.

On the issues involved in this report, insurance departments have been responsive, and insurance commissioners generally seem to be interested in ending many of the forms of sex and ethnic discrimination that persist.

#### Improved Publications Presenting Options Available to Women.

Surprisingly enough, the most widely used reference book for life insurance rates, Best's Flitcraft Compend (1977), does not even list women's rates for all companies. After all of the pious talk about eliminating discriminatory practices, many major insurers do not even have the good sense to present their life insurance rates for women, thus ignoring the greatest untapped life insurance market.

These companies could be easily embarrassed into ending such counter-productive and foolhardy omissions. At the same time, pressure should be brought to bear on the publisher of the volume, A. M. Best Company of Oldwick, New Jersey, to require or at least request companies to include female as well as male rates.



Other editorial material and advertising presented in insurance publications often omit the female rate, another omission that could probably be easily brought to an end.

Women can hardly obtain access to the insurance market when commonly used sources of company and premium information are largely directed only to men.

#### Special Complaint Gathering and Resolving Programs.

Insurance departments can be proficient at gathering and resolving consumer complaints on insurance discrimination or any other matter.

At one point, while I was Insurance Commissioner, the Pennsylvania Department established a special center city circuit rider program to gather insurance complaints from center city residents. At one point, a special effort was also made to gather women's complaints.

These programs are useful in order to discover patterns of abuse, formulate remedial action, and resolve grievances.

Most of the responses to my survey of Insurance Departments indicated they were not carrying out special programs along these lines, but they almost all said their regular complaint capabilities were open to all comers.

Whether or not the Insurance Departments want to formulate special programs, some of the groups affected by certain forms of insurance discrimination might take special measures to inform members of affected groups of the complaint capabilities of their state insurance departments.

#### Making Insurers More Accountable For Underwriting Decisions.

When people are rejected for insurance, they ought to know the reasons. When a company rejects someone, they ought to be able to justify their decision. It will probably do the decision making processes of the insurers some good to



force them to explain what they are doing, instead of letting them operate by the proverbial seat of the pants.

The recent (July 12, 1977) Report of the Privacy Protection Study Commission, entitled "Personal Privacy in an Information Society" contains a series of proposals to force insurers to be accountable for their underwriting decisions and to explain them on request.

The recommendations relating to insurance are set out in Chapter 5 of the Report. For example, one of these recommendations would require the insurer to disclose the details of any adverse information on which its refusal to insure is based. In other words, the insurer would be forced to explain any turn-down.

This would make the possibility of unfair discrimination more remote by requiring accountability.

The recommendations of the Privacy Commission might be implemented by amending the Federal Fair Credit Reporting Act, or by amendments to the state law. Virginia has already led the way by legislative adoption of sections 13, 14, and 15 of the Commission's privacy recommendations. Other states should follow that lead.

#### Special Education Programs.

One key to opening the way for women and minorities in the insurance industry is through special educational programs. From the programs I reviewed, it seems apparent that some new approaches are in order, some existing programs should be accelerated, and some institutions should be pushed harder to encourage the entry of minorities and women into the business.

A New Program. One new program announced this year is being carried out under the Center for Insurance Education at the School of Business and Public Administration of Howard University. It is headed up by Dr. James J. Chastain.



Under the program, 30 incoming black freshmen will come into the school where they will major in a newly established insurance program. During the course of their studies, the group will serve internships with insurance companies, they will be prepared for various professional insurance exams, they will maintain contact with the business by attending local and national meetings of insurance associations and professional groups, they will attend special workshops, and at the same time will receive a basic education in business administration.

The document proposing this new program indicates that of the 60,000 black high school juniors who took the Scholastic Aptitude Test in 1976, only 5 percent considered a business career, and the percentage thinking about insurance was apparently nil.

The program will cost about \$500,000 a year and is scheduled to start this fall. It has every indication of producing the kind of training needed for the insurance industry and will produce the kind of graduates being sought by the industry.

An Old Program. The Society of Actuaries attempts to recruit black students are apparent failures. Actuarial science requires a unique combination of someone proficient in practical and theoretical mathematics and knowledgeable about the insurance business.

So it may be that this program would be the equivalent of a medical school attempting to recruit candidates to become brain surgeons before any general practitioners are produced. This noble effort seems to have been misdirected at unrealistic goals, when resources might have been better spent at more generalized training and career objectives.

Some Other Old Programs. An existing program with marked success in bringing women in is the feeder program for the CPCU designation, sponsored by



the American Institute for Property and Liability Underwriters. It has gone from a 26.3 percentage participation of women in 1973 to 55 percent last year. That is the kind of success story that should be studied and applied elsewhere.

In contrast the programs of the American College (CLU) were unimpressive in results. Here is one of the many pressure points where an educational group could probably be persuaded to launch a more extensive educational and training program for women and minorities.

The CPCU program of the American Institute has been more impressive in recruiting women than its counterpart in life insurance, The American College. But none of the programs, based on the evidence I could gather, seems to be achieving significant results in bringing in blacks or other minorities.

#### Minority and Women-Power on Boards.

Women and minorities have been virtually unrepresented on insurance company boards. To change this, and to change the discriminatory policies of insurers, an attempt should be made to obtain broader representation on these boards.

Some insurers (for example, Blue Cross of Philadelphia) actually conduct elections for the board, during which it is feasible to come forth with a special slate. The process is usually more difficult on large national insurers, which operate as mutuals.

But organized efforts to bring about changes on boards are likely to pay off, as are attempts to make the election process more responsive to the will of policyholders.

#### Minority and Women-Controlled Insurance Companies.

Both the advantaged and disadvantaged have learned that when the insurance industry offers neglect, the alternative way may be to own and control your own insurance company.



This insight most recently came to the medical profession in the midst of the recent malpractice insurance crisis. Many doctors felt that the insurance industry was neither able nor willing to solve their malpractice insurance problems. So doctors set up their own companies that would pursue these problems more aggressively.

The same lesson has not been lost on women and minorities and consideration should be given to encouraging and setting up such companies.

According to U.S. Bureau of the Census figures, in 1972 there were 71 black-owned insurance companies with paid employees; 21 women-owned companies with paid employees, 4 Hispanic-owned companies with paid employees, and 3 other minority-owned companies with paid employees.

There are no 1969 figures available for women-owned companies, but since then black-owned companies have increased by 6; Hispanic-owned by 2; and other minority-owned by 3.

These same Census figures show that women and minorities have made little penetration in the insurance agency, brokerage and service side of the business. In 1972, considering only those firms with paid employees, there were only 629 women-owned agencies; 259 black-owned agencies; 165 Hispanic-owned agencies, and 145 other minority-owned agencies.

The agency business poses virtually no legal or financial barriers to entry. There are few capital requirements, and the licensing exams are generally not considered to be exceptionally difficult.

#### The Special Issue of Dividends on Participating Policies.

Dividends are subject to little scrutiny by regulators or anyone else. But in view of the long history of overcharge of women for life insurance, there should be high priority assigned to the review of dividend structures to see if women are getting adequate consideration.



This surveillance of dividends might come in many forms, including pressure on the insurance commissioner to act and pressure on the companies to disclose their dividend policies.

National Health Insurance As One Solution to Discrimination in Insurance.

A solution sometimes offered for ending sex discrimination in health insurance is a comprehensive national health insurance program.

There is no reason to believe that a government program would be free of sex discrimination. The February 1978 "Report of the HEW Task Force on the Treatment of Women Under Social Security" documents far reaching sex discrimination in the Social Security system.

There is also no reason to believe that the U.S. Department of Health, Education and Welfare (HEW) or anyone else in the federal establishment is capable of formulating a national health insurance program that would work.

These same people that would formulate national health insurance, have never been able to straighten Medicare or Medicaid out. If they goof up on a small scale, their performance is not likely to improve when they go to a larger scale operation.

What is almost comical is to find HEW working on a grand National Health Insurance Plan, at the very time it is unable to deal even with existing federal programs, and at the very same time HEW publicly proclaims it misspent from \$6.3 billion to \$7.4 billion in fiscal 1977. The HEW Secretary admits \$4 billion was spent unnecessarily on health care programs in fiscal 1977.

If that Department can waste \$4 billion in programs only covering a small fraction of the population, can you imagine how much they would be able to waste on a comprehensive national program? An architect who cannot build a one-story bungalow should not set out to build a sixty-story skyscraper.



Federal Insurance Regulation as a Solution.

It has been suggested that a federal take-over of insurance regulation might result in fairer treatment of women and minorities in the insurance process.

There is no evidence that federal regulation is an improvement over state regulation. Based on the performance of such agencies as the Interstate Commerce Commission, the U.S. Consumer Product Safety Commission, the Food and Drug Administration and a host of others there is much evidence to suggest that federal insurance regulation would be a step backward, simply removing regulation further from the public.

If federal steps are to be taken, they could be in the form of guidelines, which would be binding on insurers, but which would not transfer regulatory activity or responsibility to the federal government.

Ongoing Legislative, Administrative and Judicial Action for Change.

The proposed Equal Rights Amendment to the Constitution provides that "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." Some states have already passed amendments to their state constitutions.

The implications of this law for insurance discrimination are not clear. Some have argued it would only eliminate rates and classifications based on sex if they are not reasonably needed for some legitimate purpose. To date such constitutional changes have not affected the use of sex in insurance classifications. Other forms of sex discrimination (e.g., refusal to sell women long-term disability coverage) are now probably adequately treated under existing laws.

A great variety of legislation has been adopted to address the problem of sex discrimination. Oregon has adopted a series of statutes, requiring the same maternity benefits for an unmarried woman as is granted a married woman, including the wives of insured persons choosing family coverage; and requiring



mandatory pregnancy benefits in group disability or similar fringe benefit programs.

New York, in 1975, passed a law prohibiting discrimination in the issuance of policies based on sex, thus, requiring, for example, that long-term disability insurance be made available to women, too.

Effective January 1, 1977, New York mandated maternity care coverage in all medical expense policies (group and individual) for all women (single or married). The constitutionality of the law is now being challenged in the courts and the effect of the law has been stayed.

In 1977, the California Insurance Department proposed legislation to require that certain kinds of life insurance policies give greater recognition to the increased life expectancy of female insureds.

A great deal of other legislation is being considered at the state level. In addition, there is a proposal before Congress to amend Title VII of the Civil Rights Act to prohibit pregnancy exclusions in employee benefit programs. A U.S. Supreme Court case, *Geduldig v. Aiello* (1974), held that exclusion of coverage for disability that accompanies normal pregnancy and childbirth does not violate the Equal Protection Clause of the 14th Amendment to the U.S. Constitution. That case arose under the California Unemployment Compensation Disability Program. In *Gilbert v. General Electric* the U.S. Supreme Court held such exclusion does not violate Title VII of the Civil Rights Act.

There has also been a good deal of administrative action. As already indicated, many states have adopted all or part of the N.A.I.C. model act on sex discrimination. Many state insurance departments have taken other administrative action under the insurance laws. And the EEOC and other federal agencies have also been extremely active on these matters.

In addition, there is a good deal of pending litigation. There is the issue raised in *Manhart v. City of Los Angeles*, testing whether the city could provide



a retirement plan more advantageous to males than females. The U.S. Circuit Court of Appeals held that the pension plan of the City of Los Angeles (Department of Water and Power), violated Title VII of the Civil Rights Act by providing a more advantageous plan to men. The issue has not yet been resolved by the U.S. Supreme Court.

There are many other cases now before the courts. Such groups as Equal Rights Advocates, Inc., represented by Mary C. Dunlap, and others have brought a variety of cases, challenging sex discrimination in insurance and employee benefits.

Other Related Kinds of Discrimination.

During the course of the investigation for this report, there was much to suggest that unfair discrimination of other types can be found where ethnic, racial and sex discrimination persist.

Other kinds of insurance discrimination that should be investigated include those distinctions based on age, mental health, and religion. Many of the same irrationalities and imperfections of the market that permit one kind of discrimination often permit other and equally serious kinds of discrimination.



COMMISSION ON  
THE STATUS OF WOMEN  
IN THE UNITED STATES  
REPORT  
TO THE JOINT SELECT COMMITTEE  
ON THE STATUS OF WOMEN  
U.S. SENATE AND U.S. HOUSE OF REPRESENTATIVES  
95TH CONGRESS, 1ST AND 2ND SESSIONS  
1977-1978

## DISCRIMINATION IN INSURANCE

A paper prepared for the United States  
Commission on Civil Rights

BY  
LOIS G. WILLIAMS  
ACTING COUNSEL FOR APPELLATE  
LITIGATION  
OFFICE OF THE SOLICITOR  
U.S. DEPARTMENT OF LABOR



DISCRIMINATION IN INSURANCE:  
LEGISLATION AND LITIGATION 1/

Discrimination is a neutral term meaning the act of differentiating or distinguishing. In insurance, the term has a positive connotation, it being the art of the industry to draw fine distinctions. In law, the term has a negative connotation, it being illegal to discriminate against certain persons or groups. This paper deals with the collision between the two, those areas in which the discrimination practiced by insurers illegally disadvantages certain persons or groups, largely through their employment relationships. Thus, the discrimination dealt with here violates present (or sometimes proposed) law.

Discrimination against persons by insurers can take many forms. Coverage may be denied altogether, or it may be priced out of the reach of some persons. Some underwriting practices are viewed as arbitrary and subjective, and the statistical data on which they are based attacked as having no causal relationship to possible losses. When practices of this sort are viewed by enough persons as unjust or unfair, they will also become illegal. <sup>2/</sup>

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1/ The views expressed here do not necessarily represent those of the Department of Labor.

I am grateful for the invaluable assistance of Thomas Allen in the preparation of this paper. Special thanks are also extended to Eva Bowers and Zinora Mitchell.

2/ Some are already illegal under State law. In addition, the consumer's interest in fair treatment in insurance has recently been expressed in hearings on the subject before the Senate Subcommittee on Citizens' and Shareholders' Rights and Remedies, January 17, 1976.



The principal focus of this paper is federal anti-discrimination law. Significant as this body of law is, it works by indirection on the insurance industry. Direct regulation of insurance is still left, for the most part, to the States.

In 1945, in response to a Supreme Court decision declaring that insurance is interstate commerce subject to federal regulation,<sup>3/</sup> Congress passed the McCarran-Ferguson Insurance Regulation Act.<sup>4/</sup> The Act provided that the "business of insurance" is subject to State regulation, and shall be exempt from federal anti-trust law to the extent that a State has regulated it.<sup>5/</sup> An Act of Congress may not be construed to "invalidate, impair, or supersede" a State law unless it specifically relates to the business of insurance.<sup>6/</sup>

The "business of insurance" has been narrowly construed to refer to the relationship between insurer and insured, to questions regarding interpretation and enforcement

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<sup>3/</sup> United States v. South Eastern Underwriters Ass'n, 322 U.S. 533 (1944).

<sup>4/</sup> 15 U.S.C. §§1011-1015 (1945).

<sup>5/</sup> 15 U.S.C. §1012.

<sup>6/</sup> 15 U.S.C. §1012(b).



of policies, and to other activities of insurers closely related to their reliability as insurers.<sup>7/</sup> The Act has been invoked by insurance companies principally to resist federal securities or anti-trust regulation.<sup>8/</sup>

For our purposes, any federal law may regulate the business of insurance if it does so overtly. For example, the Employee Retirement Income Security Act of 1974 (ERISA)<sup>9/</sup> explicitly preempts State laws as they relate to employee benefit plans (Section 514(a)). Congress can regulate any aspect of insurance it wishes simply by stating the intention to do so and thus avoid any possible question of a McCarran

Act exemption. Also, the Act does not bar federal legislation unless it invalidates, impairs, or supersedes a State law which specifically regulates the business of insurance.<sup>10/</sup>

Therefore, unless a State insurance regulation explicitly permits a practice which a federal law (not an insurance regulation) prohibits, the McCarran Act does not operate.

Finally, the Act is a statute, not a constitutional provision.

Therefore, a State insurance practice may always be attacked

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<sup>7/</sup> SEC v. National Securities, Inc., 393 U.S. 453, 460 (1969).

<sup>8/</sup> See, e.g., SEC v. National Securities, Inc., 393 U.S. 453; American Hospital and Life Ins. Co. v. FTC, 243 F.2d 719 (C.A. 5, 1957), aff'd 357 U.S. 566; Meicler v. Aetna Cas. & Sur. Co., 506 F.2d 732 (C.A. 5, 1975).

<sup>9/</sup> 29 U.S.C. 1001 et seq.

<sup>10/</sup> Hart v. Orion Insurance Co., 453 F.2d 1358 (C.A. 10, 1971).



on constitutional grounds.<sup>11/</sup>

The McCarran Act exists because of possible conflict between State and federal law. If the federal statute can be construed in such a manner as to obviate any conflict with State law, the insurance company is not exempt from federal regulation.<sup>12/</sup> But in the area of discrimination, Congress has not yet taken aim at insurers directly. Nor have present federal civil rights laws been used by litigants to attack insurers. However, no reason appears why, for example, the venerable remedy against race discrimination in contracts, 42 U.S.C. §1981, could not be so used. Any State law which might conflict by condoning discriminatory contracts would surely be unconstitutional.

The State laws which regulate insurance contain a variety of prohibitions against discrimination. Such a patchwork exists that no comprehensive review of these laws may be undertaken here, but a few observations will serve as background for the discussion of federal law. Generally, there is a lack of uniform standard by which rates are set. Most States have laws that direct themselves toward maintaining rates that are not "excessive, inadequate, or unfairly

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11/ See *Stern v. Massachusetts Indemnity and Life Ins.*, 365 F.Supp. 433 (D. Mass., 1973). In litigation under the Equal Protection Clause of the Fourteenth Amendment, racial minorities have received a higher degree of constitutional protection than have other groups. Passage of the Equal Rights Amendment might well allow more potent direct attack by litigants on the insurance companies for sex discrimination.

12/ "Federal Regulation of Insurance Companies: the Disappearing McCarran Act Exemption," 1973 *Duke L.J.* 1340, 1344. See, e.g., *United States v. Sylvanus*, 197 F.2d 96 (C.A. 7, 1951), cert. denied 342 U.S. 943.



discriminatory." Some States have tried to define these terms, but, as one commentator notes, "even when defined, such elusive concepts as adequacy, excessiveness, and unfair discrimination are difficult to put into practical effect."<sup>13/</sup>

The standard provision prohibits "unfair discrimination" in insurance. However, a great many States define "unfair" in traditional insurance terms as a discrimination between individuals of the same class and life expectancy or degree of risk.<sup>14/</sup> Hence, this prohibition would not reach the practices discussed in this paper of classifying risks according to sex. Neither would it reach race-based classifications. However, States have separately prohibited assessment of different life or health insurance rates on the basis of race.<sup>15/</sup> Some States prohibit sex discrimination in insurance, primarily to assure

<sup>13/</sup> "McCarran-Ferguson Act," 29 Vanderbilt L.Rev. 1271, 1293-1294 (1976).

<sup>14/</sup> See, e.g., Virginia Code §38.1-52 (1952); Texas Code, Chapter 21, Art. 21 (1957); Oklahoma Code, Title 36 §1204(7); New Jersey Code, Title 17B:30-12(c) and (d) (1971).

<sup>15/</sup> James, The Metropolitan Life: a Study in Business Growth, 338-339 (1947). See, e.g., Pennsylvania Code, Title 40 §1171.5(iii); Illinois Code, Chapter 73 §1031(3) (1975); Maryland Code, Art. 48A §234A (1971); Connecticut Code, Chapter 676, §38-149, §38-151, §38-152 (1955); Massachusetts Code, Title 175 §122 (1954); Michigan Stat. Ann. 24.12027 (1977); Minnesota Stat. Ann. §70A.05(2) (1975); Wisconsin Stat. Ann. §625.12 (Supp. 1977).



that no one will be prevented from buying insurance on the basis of sex or marital status; some also prohibit sex discrimination in rates.<sup>16/</sup> And some of these only prohibit sex classification which is not justified by actuarial statistics,<sup>17/</sup> a prohibition which does not affect the use of sex-based mortality tables discussed here. With this brief background, we turn to the federal discrimination law.

#### FEDERAL LAW AND DISCRIMINATION IN INSURANCE PRACTICES

The premier federal employment discrimination law is Title VII of the 1964 Civil Rights Act.<sup>18/</sup> That law makes it illegal to discriminate against an individual in "compensation, terms, conditions, or privileges of employment" because of race, color, religion, sex, or national origin.<sup>19/</sup> It thus prohibits any refusal to hire, promote, or, in general, grant equal treatment to members of the enumerated classes. In addition, however, it broadly forbids employers to "limit, segregate, or classify" their employees on any of the

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<sup>16/</sup> See, e.g., Illinois Code, Chapter 73 1031(3) (1975); Pennsylvania, Title 40 §1171.5(iii) (1974).

<sup>17/</sup> See, e.g., Maryland Code, Art. 48A §226(c)(2), §234(b) (1975); Washington Code, Title 48:30.280 (1975-1976); Colorado Code, 10:3:1104 (1973 Am.); Michigan Stat. Ann. 24.12027 (1977).

<sup>18/</sup> 42 U.S.C. §2000e (1970).

<sup>19/</sup> 42 U.S.C. §2000e(a)(1).



enumerated bases "in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee."<sup>20/</sup>

With Title VII as the principal weapon, major attacks have been launched against two insurance practices which adversely affect women in employment. The first attacks were in the area of disability coverage for pregnancy, where assaults by litigation have been unsuccessful, and the assailants have repaired to Congress for new legislative weaponry. More recent attacks have been in the area of pensions, where battles are still being fought at numerous levels, with no decisive result as yet.

#### Pregnancy Disability

In the case of Geduldig v. Aiello,<sup>21/</sup> the Supreme Court addressed a disability insurance program which California provided its State employees. The plan covered virtually all disabilities but those arising from pregnancy. The plan was attacked as denying women their right under the Fourteenth Amendment to the equal protection of the laws. The Court held that discrimination on the basis of pregnancy was not a discrimination based on gender as such. In the celebrated footnote 20, Justice Stewart found it

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<sup>20/</sup> 42 U.S.C. §2000e(a)(2).

<sup>21/</sup> 417 U.S. 484.



"clear upon the most cursory analysis" that the challenged program "divides potential recipients into two groups -- pregnant women and nonpregnant persons."<sup>22/</sup>

Finding no gender-based distinction, the Court went on to inquire as to the effect of the plan. It found that there were no risks from which members of one sex are protected while members of the other sex are not.<sup>23/</sup> It expressed the usual deference to the State legislative process, which in the Court's view had simply resulted in the choice (assertedly for economic reasons) not to insure against every risk.<sup>24/</sup>

The unsuccessful challenge in Geduldig was constitutional, based solely on the Fourteenth Amendment. Subsequent challenges to similar disability plans were statutory, based on the arguably stricter standards of Title VII. Six courts of appeals held that Geduldig did not control in the Title VII context, and that the pregnancy exclusion violated Title VII.<sup>25/</sup> These courts gave weight to the EEOC's guidelines which required,

<sup>22/</sup> Id. at 496, n. 20.

<sup>23/</sup> Id. at 496-497.

<sup>24/</sup> Id. at 492-497.

<sup>25/</sup> See Communications Workers of America v. A.T.&T.Co., 513 F.2d 1024, 1030 (C.A. 2, 1975), vacated and remanded, 97 S.Ct. 724 (1977) (mem.); Wetzel v. Liberty Mutual Ins. Co., 511 F.2d 199, 206 (C.A. 3, 1975), vacated on jurisdictional grounds, 424 U.S. 737 (1976); Gilbert v. General Electric Co., 519 F.2d 661, 664 (C.A. 4, 1975), rev'd 429 U.S. 125 (1976); Tyler v. Vickery, 517 F.2d 1089, 1097-1099 (C.A. 5, 1975); Satty v. Nashville Gas Co., 522 F.2d 850, 854 (C.A. 6, 1975), aff'd in part, vacated in part, and remanded, 46 U.S.L.W. 4026 (Dec. 6, 1977); Hutchison v. Lake Oswego School Dist., 519 F.2d 961, 965 (C.A. 9, 1975), vacated and remanded, 97 S.Ct. 725 (1977) (mem.).



among other things, that pregnancy disability be treated like other temporary disabilities.<sup>26/</sup>

But in the first of these post-Geduldig cases to reach the Supreme Court, General Electric Co. v. Gilbert,<sup>27/</sup> the Court held, as it had in Geduldig, that pregnancy disability is not sex-based. In Gilbert, the plaintiffs challenged under Title VII GE's self-insured disability plan. The plan paid sickness and accident benefits at 60% of the normal weekly earnings for up to 26 weeks of total disability. It covered all disabilities save one: pregnancy. Not only did it specifically exclude all disabilities resulting from normal

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26/ The relevant portion of the EEOC Guidelines provides:

(b) Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

27/ 429 U.S. 125 (1976).



and abnormal pregnancy, it also excluded any disability that occurred during pregnancy leave, even if unrelated to the pregnancy.<sup>28/</sup>

The lower courts had held this exclusion to violate Title VII's ban on discrimination in compensation.<sup>29/</sup> The district court found (1) that although pregnancy may be (but is not always) voluntary and is not a disease, the plan covered many other conditions that were both voluntary and nondiseases; (2) that normal pregnancy is disabling for some 6 to 8 weeks; (3) that 10% of pregnancies are complicated by otherwise disabling diseases. The court drew no actuarial conclusions, but it acknowledged that pregnancy coverage would increase GE's cost by a large but undetermined amount.<sup>30/</sup>

The Supreme Court reversed, holding that the plan did not violate Title VII. In doing so it drew heavily on its earlier decision in Geduldig to the effect that discrimination against pregnancy is not discrimination against women. The Court found no pretext for discrimination against women, since pregnancy, although confined to women, is "significantly different" from the typical covered disease or disability.<sup>31/</sup> It did not even find a discriminatory effect on women, since

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<sup>28/</sup> Id. at 129, n. 4.

<sup>29/</sup> 375 F.Supp. 367 (E.D. Va., 1974); 519 F.2d 661 (C.A. 4, 1975).

<sup>30/</sup> 375 F.Supp. at 377.

<sup>31/</sup> 429 U.S. at 136. The Court ignored the fact that any condition, whether disease or not, whether voluntary or not, which could disable a man was covered.



the risks that were covered were equally covered for all employees and there was thus a "parity of benefits" from a "facially even-handed inclusion of risks."<sup>32/</sup>

In reaching its conclusion on the interpretation of Title VII, the Court refused to follow the EEOC guideline relied on by the lower courts. Such a guideline is entitled to "consideration in determining the legislative intent," but this one "does not fare well" because it was not contemporaneous with the statute (having been published some eight years after the law was passed), and because it is inconsistent with an earlier agency position as expressed in opinion letters.<sup>33/</sup> Moreover, the Court declared its preference for an interpretation of the Equal Pay Act, issued by the Department of Labor's Wage and Hour Administrator,<sup>34/</sup> which the Court took to be in opposition to the EEOC guideline. This interpretation and its relevance to Title VII will be

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<sup>32/</sup> Id. at 139.

<sup>33/</sup> Id. at 142-143. The case which sets forth the standards which the Court purportedly followed in assessing the weight of the guideline was Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). However, in Gilbert, the Court considered only the historical consistency of the EEOC's position, and its consistency with other agencies, and did not weigh the other factors enunciated in Swift: "the thoroughness evident in its consideration, the validity of its reasoning \* \* \* and all those factors which give it power to persuade" (ibid.).

<sup>34/</sup> 29 C.F.R. §800.116(d).



explored more fully in the discussion of pension practices (pp. 16 ff.). Suffice it to say here that its relevance to the pregnancy context is far from clear,<sup>35/</sup> and that its citation was quite unnecessary to the decision in Gilbert. Nevertheless, Justice Rehnquist reached out to indicate that the Wage-Hour interpretation supports "what seems to us to be the 'plain meaning' of the language used by Congress when it enacted §703(a)(1) [of the Civil Rights Act]."<sup>36/</sup>

In a subsequent case, Nashville Gas Co. v. Satty,<sup>37/</sup> the Court applied the same reasoning to an employer's practice of refusing to award earned sick leave pay for pregnancy absences. The Court finally drew the line, however, at the employer's practice of wiping out any accumulated seniority for female employees returning to work after childbirth. That practice, said the Court, had the effect of depriving a woman of employment opportunities and adversely affecting her employee status. Hence, in a case where women were specially burdened in employment because of their "different role in the scheme of things," Title VII was violated.<sup>38/</sup>

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<sup>35/</sup> Another part of the same interpretative bulletin explicitly states that "payments related to maternity" are not "wages" within the meaning of the Equal Pay Act, 29 CFR §800.110.

<sup>36/</sup> Id. at 145.

<sup>37/</sup> 46 U.S.L.W. 4026 (December 6, 1976).

<sup>38/</sup> Id. at 4028.



All of this prompted Justice Stevens, who had dissented in Gilbert, to conclude that the general problem in these cases was to decide when an employer's policy which specially burdens pregnancy absenteeism is a prima facie violation of Title VII, and he wryly observed:

The answer "always," which I had thought quite plainly correct, is foreclosed by the Court's holding in Gilbert. The answer "never" would seem to be dictated by the Court's view that a discrimination against pregnancy is "not a gender-based discrimination at all." The Court has, however, made it clear <sup>39/</sup> that the correct answer is "sometimes."

The task as viewed by Justice Stevens has become one of determining at what point a plan which is "facially neutral" (even though it frankly and unambiguously discriminates against pregnancy) has a "discriminatory effect." He suggests that, with pregnancy, the question is whether the employer's policy "adversely affects a woman beyond the term of her pregnancy leave."<sup>40/</sup>

*undated*  
As a result of these cases, and anomalous as it may seem to those who think that the capacity to become pregnant is a, perhaps the, salient distinction between men and women, the federal law of the land now is that discrimination on the basis of pregnancy is not sex discrimination. New legislation will be needed if such discrimination by employers in disability

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<sup>39/</sup> Id. at 4031. Stevens, J., concurring.

<sup>40/</sup> Ibid.



insurance is to be made illegal. In fact, legislation to amend Title VII to that effect is now pending in Congress.<sup>41/</sup> The bill should at least withstand any charge that coverage of pregnancy would constitute so-called "reverse discrimination" against men, since the Court has effectively "remov[ed] pregnancy disability from the realm of sex discrimination."<sup>42/</sup>

Also, it is still open to State courts to interpret their own State laws and constitutions contrary to the Supreme Court. At least one State court has done so in the area of pregnancy disability. The highest court of New York, the Court of Appeals, has reaffirmed since Gilbert earlier holdings to the effect that an employment policy which singles out pregnancy and childbirth for treatment different from that

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<sup>41/</sup> The Senate bill, S. 995, was passed on September 16, 1977. The House bill, H.R. 6075, has been reported out of committee and action is expected shortly (April 1978). The bill would amend Title VII by adding a new subsection to §701:

(k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth or related medical conditions; and women affected by pregnancy, childbirth or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 703 (h) of this Title shall be interpreted to permit otherwise.

<sup>42/</sup> "Recent Developments, Civil Rights," 45 Fordham L.Rev. 1202, 1221 (1977). Indeed, the Court said in Geduldig that "lawmakers are constitutionally free to include or exclude pregnancy" in disability programs. 417 U.S. at 497, n. 20.



given other physical or medical impairment or disability is illegal under the State Human Rights Law.<sup>43/</sup> Although the statute is "substantially identical" to the pertinent provisions of Title VII, the court declined to follow Gilbert, noting that the Supreme Court's determination, "while instructive, is not binding."<sup>44/</sup>

In all these disability cases, the framing of the question has suggested the answer. As Justice Brennan noted in his dissent in Gilbert, resolution of the question turns on the "conceptual framework" chosen to describe the features of the challenged program.<sup>45/</sup> On the one hand, the Court has surveyed the disabilities included, and seen that benefits are granted evenhandedly to both sexes. On the other hand, ~~the lower courts~~ (and the dissenters) have looked to the exclusions and have seen that pregnancy, which affects only women, and affects them significantly, is the only exclusion, while male-specific risks (such as prostatectomies, vasectomies, and circumcisions) and many "voluntary" disabilities (such as sports injuries and cosmetic surgery) are included.<sup>46/</sup> Given

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<sup>43/</sup> Brooklyn Union Gas v. N.Y. State Human Rights Appeal Board, 41 N.Y. 2d 84, 359 N.E. 2d 393, 395 (1976).

<sup>44/</sup> Id., n. 1.

<sup>45/</sup> General Electric Co. v. Gilbert, 429 U.S. at 147.

<sup>46/</sup> 429 U.S. at 151, Brennan, J., dissenting.



its point of view, the Supreme Court could refer to the "under-inclusiveness" of the plan rather than to the exclusivity seen by others. As we shall see, the point of view chosen is extremely important in the next area to be considered as well.

### Pensions

The second battleground is in the area of pension practices. Here, too, both the Fourteenth Amendment and Title VII have been used to attack practices by which persons are disadvantaged because of their sex.

Women, on the average, live longer than men. While their longevity makes women excellent life insurance risks, it makes them poor pension risks. The resulting insurance problem has been much discussed: should a woman not pay more for a pension benefit equal to a man's because the sex group to which she belongs will outlive his? The basic insurance principle so often cited is that "every insured person should contribute his fair share toward the risk involved -- that only applicants who are exposed to comparable degrees of risk should be placed in the same premium class."<sup>47/</sup> "Equity in insurance," it is said, "requires [imposing] equal costs for equal risks,"<sup>48/</sup> and, by implication, unequal costs for unequal risks.

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<sup>47/</sup> Shephard, Pearce, and Webster, Selection of Risks, The Society of Actuaries, 1957, p. 1.

<sup>48/</sup> Lautzenheiser, "Sex and the Single Table: Equal Monthly Retirement Income for the Sexes," 2 Employee Benefits Journal 8, 9 (Fall 1976).



As with the pregnancy disability question, the framing of the question dictates the answer. Actuaries are fond of asking, for example, how can we ignore the "inexorable facts of life, death and arithmetic,"<sup>49/</sup> by requiring legal equality where there is no "factual" equality? But the question of equality depends entirely on how risks are classified. Division of the insured group on the basis of sex makes it appear "fair" to apportion the cost on that basis. Yet it is the very classification by sex, when there are many other reliable predictors of life expectancy, that presents the legal question.

We might debate forever what is fair, equitable, or socially just. And perhaps as much as actuaries resent lawyers and judges telling them their actuarial business, so are lawyers troubled by the "legal" pronouncements of actuaries.<sup>50/</sup> What is mathematically "fair" or "equitable" does not necessarily

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49/ Brief for the Society of Actuaries and the American Academy of Actuaries as Amicus Curiae, p. 6, City of Los Angeles v. Manhart, Supreme Court Docket No. 76-1810, filed Nov. 17, 1977.

50/ E.g., Lautzenheiser: "Thus under the present system, while monthly benefits may not be equal, total benefits are equal just as contributions are equal, and therefore both the Equal Pay Act and Title VII are now currently satisfied." 2 Employee Benefits Journal at 39; King: "But civil rights legislation also recognizes and permits bona fide relevant classifications." "Men, Women, and Life Annuities," J. Risk & Insurance, 3 (1976).



determine what is legal, or even what is socially just. The problem at hand is to analyze the legal questions involved in sex-based distinctions in pensions. Actuarial considerations are important to, but do not govern, the legal issues.

Title VII prohibits discrimination against an individual in compensation, terms, conditions, or privileges of employment, on the basis of, among other categories, sex. It also prohibits classifying employees by sex in any way which would deprive or tend to deprive an individual of employment opportunities or otherwise adversely affect his status as an employee. Title VII, administered by the EEOC, is the broadest federal law aimed at prohibiting sex discrimination in employment.

Another, earlier federal law specifically prohibits sex discrimination in wages, obviously also encompassed within Title VII. This law, the Equal Pay Act of 1963, is administered by the Department of Labor's Wage and Hour Division, and provides that an employer may not discriminate on the basis of sex by paying any of its employees at a rate less than it pays employees of the opposite sex for "equal work."<sup>51/</sup>

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<sup>51/</sup> 29 U.S.C. §206(d)(1) provides:

No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees of the

(Footnote Cont'd. Next Page)



When Title VII was passed, one year after the Equal Pay Act, a provision was inserted which recited that a wage differentiation between the sexes would not be unlawful under Title VII "if such differentiation is authorized by the

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51/ CONT'D.

opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

In addition, Executive Order 11246, administered by the Labor Department's Office of Federal Contract Compliance, prohibits sex discrimination in broad Title VII terms by federal contractors (3 CFR §168 (1965), as amended by Executive Order No. 11375, 3 CFR §320 (1967 Comp.)). Also Title IX of the Education Amendments of 1972, administered by the Department of Health, Education, and Welfare, bans sex discrimination in educational institutions receiving federal funds.



provisions of [the Equal Pay Act]."<sup>52/</sup> This amendment, known as the Bennett Amendment, thus incorporates into Title VII the specific defenses to an equal pay violation. Under the Equal Pay Act, which applies only in the context of equal work being performed by men and women, the employer is not liable if he can prove that a wage differential between male and female employees is based on any factor other than sex.<sup>53/</sup> We have argued elsewhere that this is consistent with Title VII.<sup>54/</sup> Thus, when a plaintiff proves a prima facie case of sex-based differences in compensation, the employer must prove either that it is caused by a factor other than sex (Equal Pay Act) or that it is the result of "business necessity" (Title VII).

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52/ The Amendment reads in full:

It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29 [the Equal Pay Act].

42 U.S.C. §2000e-2(h).

53/ A wage differential based on (i) a seniority system, (ii) a merit system, (iii) a system which measures earnings by quantity or quality of production, and (iv) any other factor other than sex, does not violate the Equal Pay Act. 29 U.S.C. §206(d)(1).

54/ Bernstein and Williams, "Title VII and the Problem of Sex Classifications in Pension Programs," 74 Columbia L.Rev. 1203, 1217-1218 (1974).



The Bennett amendment clearly requires that the two statutes be interpreted consistently. In construing either Act, courts must look to the jurisprudence under the other Act in order to maintain the required consistent interpretation. Special care must be taken where these statutes overlap that the narrower not unduly restrict the broader. Indeed, in one of the early landmark Equal Pay Act decisions, the court warned that "the Equal Pay Act may not be construed in a manner which by virtue of §703(h) [the Bennett Amendment] would undermine the Civil Rights Act" (Shultz v. Wheaton Glass Co., 421 F.2d 259, 266 (C.A. 3), cert. denied 398 U.S. 905 (1970)). In the area of pension plans, this is precisely the threat.

It must be remembered that these federal civil rights laws deal with employment relationships. They reach into the private sector, of course, but only into the relationship between employer and employee. They do not regulate the "business of insurance," nor can they be used to attack the private individual purchases of insurance outside the employment context. Nevertheless, it is in group insurance (usually employee group insurance) where the problem of sex classification is most pronounced,<sup>55/</sup> so these laws can have widespread impact.

The controversy in the pension area centers on the pervasive use of sex-based mortality tables to determine rates

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<sup>55/</sup> When the individual purchases insurance, a great many factors affecting longevity are likely to be considered. For example, medical examinations are usually required, family medical histories taken, and hazardous hobbies or habits taken into account. In group plans, typically only age and sex are considered.



and benefits.<sup>56/</sup> The employer's dollar cannot buy the same pension benefits for a female employee as for a male of the same age. He may contribute more for the female (or require her to contribute more) to purchase equal monthly retirement benefits. Or, he may contribute equal amounts for male and female employees, which purchase higher periodic benefits for the men. We have argued elsewhere that the use of sex-based mortality tables in the employment context, which necessitates unequal treatment either in contributions or<sup>57/</sup>benefits, violates Title VII.

This view of the law has found some support in court decisions, although the Supreme Court has not yet spoken. As a preliminary matter, it has not been questioned that fringe benefits such as pension plans are within the "compensation, terms, conditions, or privileges of employment" covered by Title VII, and therefore must be free from sex discrimination. Chastang v. Flynn & Emrich Co., 541 F.2d 1040, 1042 (C.A. 4, 1976); Rosen v. Public Service Electric & Gas Co., 477 F.2d 90 (C.A. 3, 1973); Bartmess v. Drewrys U.S.A., Inc., 444 F.2d 1186 (C.A. 7), cert. denied, 404 U.S. 939 (1971).

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<sup>56/</sup> See generally Ruben and Elliott, "Sex Discrimination and Sex-Based Mortality Tables," 53 Boston L. Rev. 624 (1973).

<sup>57/</sup> Bernstein and Williams, 74 Columbia L. Rev. 1203 (1974).



In the use of sex-based mortality tables, we are dealing with explicit gender classifications. The actuarial lines are drawn precisely on the basis of sex. Unlike the pregnancy disability cases, where it could be argued, and indeed was held, that the line was drawn on a basis other than sex, here no such argument can be made. The employer cannot be said to have drawn its line on the basis of "life expectancy," first because group life expectancy exists only after groups are defined, and second because grouping by sex and age alone, as is commonly done, ignores all other factors known to affect life expectancy. The result is that individuals with different life expectancies are grouped together and many with the same expectancy (were individual traits considered) grouped separately. As the Ninth Circuit Court of Appeals has noted in distinguishing the pension problem from pregnancy disability, "[t]o say that the difference is not based on sex is to play with words." Manhart v. City of Los Angeles, 553 F.2d 581, 593 (C.A. 9, 1976).

The Manhart case is the first of these pension cases to reach the Supreme Court, where it has been argued and is awaiting decision (Docket No. 76-1810). The case involves a retirement plan for the City's Department of Water and Power employees, in which participation is mandatory. The plan pays equal periodic benefits to retired men and women, but its use of sex-based mortality tables requires a higher



contribution on behalf of women than men, during their employment. The plan is somewhat unusual in that the women employees themselves are required to make a 15% higher contribution to the plan out of their paychecks than are the men (with all employee contributions matched by employer contributions). Thus, every woman experiences differential pension treatment every payday of her career.

The Ninth Circuit held this practice to violate Title VII. All judges and parties agreed that the "overriding purpose" of Title VII is to require employers to treat each employee as an individual, without regard to "abstract generalizations" about the nature of the group to which the employee belongs (Manhart at 585; Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971)). The court reviewed the cases in which sex stereotypes had been uniformly rejected by courts as a basis for employment decisions (*id.* at 586). While it noted that many of these stereotypes were based in myth (*e.g.*, women cannot work long hours, or cannot work effectively and keep an adequate home life), the majority noted that stereotypic decision-making is illegal whether based in myth or on fact (*e.g.*, women cannot lift as heavy weights as men, women tend to be shorter and lighter, and the like)<sup>58/</sup> and that each employee must be treated as an individual in every instance. Of course, if the job requires lifting great weight, the employer may discriminate on the

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<sup>58/</sup> See Bernstein and Williams, 74 Columbia L. Rev. at 1215-1216.



basis of ability to lift the weight, and even if most women are excluded from his employ, the reason is a factor other than sex and the exclusion is not illegal.

The employer in Manhart argued that because it is statistically true that women live longer than men, and because it cannot be determined which women will not live out their life expectancy, the employer was justified in requiring greater contributions of all women. The Ninth Circuit dealt with this argument in traditional Title VII terms. Title VII case law establishes that any sex-based discrimination is illegal unless the employer can show a "business necessity" which justifies the practice. This means more than mere convenience; "discrimination based on sex is valid only when the essence of the business operation is undermined." (Diaz v. Pan American World Airways, Inc., 442 F.2d 385, 388 (C.A. 5, 1971); Weeks v. Southern Bell Telephone & Telegraph Co., 408 F.2d 228, 232 (C.A. 5, 1969); Manhart at 587). Under this test, the Ninth Circuit held that the pension practice in Manhart was not justified. It held that neither the business function of providing water and power to the City, nor the pension function of providing a stable and secure benefit program, required the practice in issue. Although sex-based actuarial distinctions may be helpful in pension planning, said the court, "it cannot be said that providing a financially sound pension plan requires an actuarial classification based wholly on sex" (Manhart at 587). Therefore, the employer's practice violated the law.



Another defense raised and treated by the court, involves the effect of the Equal Pay Act and the inter-relationship between that law and Title VII through the Bennett Amendment. This has been a matter of controversy recurring in the pension cases, the contention being that the challenged practice would not violate the Equal Pay Act and thus, by virtue of the Bennett Amendment, does not violate Title VII.

On the face of it, as the Ninth Circuit noted in Manhart, an actuarial distinction based on sex is not based on "any other factor other than sex" (Manhart at 588). It should not therefore be a defense under the Equal Pay Act any more than under Title VII. A troublesome trend in these cases is the attempt by employers to use the Equal Pay Act as though it were a defense to a Title VII violation, instead of the same kind of protective statute, with merely narrower scope, that it was meant to be. Both statutes have, after all, the same goal of eradicating sex discrimination.

Defendants who would pit the two statutes against one another often cite a colloquy between Senators Humphrey and Randolph on the Senate floor. Having neither a "factor other than sex," nor a "business necessity" defense, these employers and insurers have attempted to fashion a defense out of this brief colloquy on the Bennett Amendment. But it occurred after the Bennett Amendment was



enacted, and it sheds little light on the problem at hand. In this exchange, the Senators agreed that where longstanding difference in treatment like those in the "Social Security System" (they explicitly mentioned only widow's benefits being paid automatically while a widower must prove dependency, and female dependents receiving additional benefits while male dependents receive none) exist in industry as well, they may remain standing by virtue of the Bennett Amendment. 110 Cong. Rec. 13663-13664 (June 12, 1964). Whatever beliefs this colloquy reflects, the two civil rights acts in concert were intended to strike down "longstanding differences in treatment" unless based on a factor other than sex. For example, the Supreme Court has recently (since Gilbert) struck down one of the practices cited by the Senators as "unaffected": that of requiring a widower (but not a widow) to show dependency in order to receive social security benefits. Califano v. Goldfarb, 430 U.S. 199 (1977). The other specific example cited by the Senators, different compulsory retirement ages for men and women, has been held to violate Title VII. Bartmess v. Drewrys USA, Inc., 444 F.2d 1186 (C.A. 7), cert. denied, 404 U.S. 939. In addition, courts have also disapproved longstanding differences of treatment in which men have received smaller benefits than women who retire early. Chastang v. Flynn & Emrich Co., 541 F.2d 1040, 1042-1043 (C.A. 4, 1976); Rosen v. Public Service Electric & Gas Co., 477 F.2d 90 (C.A. 3, 1973); Fitzpatrick v. Bitzer, 390 F.Supp. 278, 285-288 (D. Conn., 1974), rev'd on other grounds, 427 U.S. 445 (1976).



Also, it must be noted that this exchange between Senators does not mention or purport to deal with actuarial distinctions based on sex, but only with examples of differential treatment which might arguably benefit women. Such "beneficent" differences, which can be viewed as compensating for past inequities, have occasionally been upheld. See, e.g., Kahn v. Shevin, 416 U.S. 351 (1974). That rationale is not available here, where the treatment generally penalizes women.<sup>59/</sup>

Those who wish to use the Bennett Amendment to defeat Title VII claims attempt to draw on interpretations of the respective enforcement agencies as well. Not only are the enumerated defenses under the Equal Pay Act incorporated into Title VII, the argument goes, but so are all administrative interpretations of the Act. This, of course, reads far more into the Bennett Amendment than its terms suggest. No one agency interpretation automatically takes precedence over the other. In the traditional manner of review of agency action, the courts should look to the underlying purposes of the statutes, the thoroughness with which the interpretation was considered, and the validity and persuasiveness of the reasoning, as well as the consistency with which the agency has interpreted the statute. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). (Justice Rehnquist seized upon an

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<sup>59/</sup> Whether that rationale actually motivated the colloquy is anyone's guess; the only examples the Senators used were of the beneficent type. However, Justice Rehnquist did not mention this distinction when he cited the colloquy with favor in Gilbert (429 U.S. at 144).



inconsistency in rejecting the EEOC guideline in Gilbert, but ignored all the other factors outlined by the Skidmore Court.) With all of the factors in mind, we turn to the agency interpretations.

The EEOC and the Labor Department have not taken an altogether consistent view of the problem of sex discrimination in pensions.<sup>60/</sup> It must be emphasized that in the Manhart case, where women were required to pay higher contributions out of their wages than men, the EEOC and the Labor Department agree that both Title VII and the Equal Pay Act are violated. Both agencies filed briefs as amici curiae in the court of appeals, arguing that the plan was illegal, and the Solicitor General of the United States filed an amicus curiae brief in the Supreme Court to the same effect.

In other situations, however, the Wage and Hour Division's historical interpretation of the Equal Pay Act has been that if the employer contributions to employee benefit plans are equal for men and women, "no wage differential prohibited by the equal pay provisions will result from such payments," even though resulting benefits are unequal.<sup>61/</sup> The same interpretative bulletin states, however, that unequal employer contributions will not be "considered to indicate" that the payments violate the Equal Pay Act if the resulting benefits are equal.<sup>62/</sup> Thus,

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<sup>60/</sup> See discussion in Bernstein and Williams, *supra*, 74 Columbia L. Rev. at 1208-1210.

<sup>61/</sup> 29 CFR §800.116(d).

<sup>62/</sup> Ibid.



an employer may make either equal contributions, or pay equal benefits, and not violate the Equal Pay Act. The EEOC, however, promulgated in 1972 guidelines which prohibit differentiation in benefits based on sex,<sup>63/</sup> and which reject any defense that the "cost of such benefits is greater with respect to one sex than the other."<sup>64/</sup> In some situations, then, the "equal benefits" rule conflicts with the "either-or" rule.

While the interpretations of the two agencies are at least potentially inconsistent, reading the entire interpretative bulletin of the Wage and Hour Administrator leaves doubt as to the reach and authority of the "either-or" rule regarding fringe benefits. First §800.113, issued at the same time, declares that:

[s]tudy is still being given to some categories of payments made in connection with employment subject to the Act, to determine whether and to what extent such payments are remuneration for employment that must be counted as part of wages for equal pay purposes. These categories of payments include \* \* \* contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employment.<sup>62/</sup>

Thus, it is not clear whether "wages" include contributions made to a retirement plan. Wages are normally viewed from the employee's perspective, as the remuneration he or she receives. It should make no conceptual difference that part of the wage

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61' 29 CFR §1604.9(f).

64' 29 CFR §1604.9(e).

62' 29 CFR §800.113.



package is deferred.<sup>66/</sup> Retirement benefits have been held to be "wages \* \* \* or other conditions of employment" under the National Labor Relations Act. Inland Steel Co. v. NLRB, 170 F.2d 247 (C.A. 7, 1948), cert. denied, 336 U.S. 960 (1949). Conceptually, if benefits are wages, they must be equal under the Equal Pay Act. If contributions are wages, they must be equal. It is difficult to perceive the statutory warrant for allowing either one, but not both, to be unequal.

Further, another section of the interpretative bulletin provides that a wage differential based on "claimed differences between the average cost" of employing women as compared with men "does not qualify as a differential based on any 'factor other than sex,' and would result in a violation of the equal pay provisions, if the equal pay standard otherwise applies."<sup>67/</sup> In language especially apropos of the issue at hand, the bulletin continues:

To group employees solely on the basis of sex for purposes of comparison of costs necessarily rests on the assumption that the sex factor alone may justify the wage differential -- an assumption plainly contrary to the terms and purposes of the Equal Pay Act. Wage differentials so based would serve only to perpetuate and promote the very discrimination at which the Act is directed, because in any grouping by sex of the employees to which the cost data relates, the group cost experience is necessarily assessed against an individual of one sex without regard to whether it costs an employer more or

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<sup>66/</sup> See 53 Boston U.L.Rev. at 644.

<sup>67/</sup> 29 CFR §800.151.



less to employ such individual than a particular individual of the opposite sex under similar working conditions in jobs requiring equal skill, effort, and responsibility.<sup>68/</sup>

This interpretation is amply supported by the legislative history which demonstrates that Congress twice rejected bills which would have justified wage differentials "attributable to ascertainable and specific added costs resulting from employment of the opposite sex."<sup>69/</sup> The Act's sponsors indicated that if costs were ever to be a factor in wage differences, they must be clearly established for each employee and must take into account any offsetting factors, such as higher productivity of one sex.<sup>70/</sup>

During these floor debates, specific reference was made to pension and welfare plans, with supposed high maternity costs in health benefits and "longer lifespan of women in pension benefits":

Evidence was presented to indicate that while there may be alleged costs, these were more than compensated for by the higher productivity of women against men performing the same work and that the overall result for the employer was a lesser production cost than would result from the hiring of only

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<sup>68/</sup> Ibid.

<sup>69/</sup> H.R. 1936, 99th Cong.; 109 Cong. Rec. 9217.

<sup>70/</sup> Rep. Goodell, 109 Cong. Rec. 9206-9208; Rep. Thomsen, 109 Cong. Rec. 9207.



men. Furthermore, questions can legitimately be raised as to the accuracy of defining such costs or pension and welfare benefits as related to sex.<sup>71/</sup>

The Wage and Hour interpretations, originally issued in 1965, have never been updated to reflect experience and judicial interpretation. The EEOC guidelines, on the other hand, were amended in 1968 and 1972 after experience with the Civil Rights Act. The Department of Labor recognized the problem and held hearings on the equal benefits rule in 1974. Changes were proposed but were not effected because then President Ford ordered the Equal Employment Opportunity Coordinating Council to consider the problem. The Council submitted a report to the President on April 15, 1976, recommending clarifying legislation, but the President took no action.

Since the issue of possible conflict between the EEOC and the Labor Department treatments of pension benefits has not been resolved, the Department has reopened its consideration of 29 C.F.R. §800.116(d).<sup>72/</sup> Its continuing authority is thus very much in doubt.

Two district courts have dealt with pension plans in which, unlike the plan in Manhart, the conflict between agency interpretations is clearly presented. They have resolved the

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<sup>71/</sup> 109 Cong. Rec. 8915.

<sup>72/</sup> Brief for the United States and the Equal Employment Opportunity Commission as amicus curiae, City of Los Angeles v. Manhart, Supreme Court Docket No. 76-1810 (December 1977), p. 42, n. 33.



question in opposite ways, and both have been appealed. The District Court of Maine held in EEOC v. Colby College<sup>73/</sup> that a plan which requires equal contributions but, owing to the use of sex-based mortality tables, pays higher periodic benefits to male retirees, does not violate Title VII. The court held that the Bennett Amendment requires that the Equal Pay Act and the interpretations thereunder take precedence over Title VII and its conflicting interpretations. It regarded Justice Rehnquist's favorable citation of the Wage and Hour interpretation in Gilbert as part of the Supreme Court's holding, although the Court did not discuss the application of that interpretative bulletin to the facts in Gilbert.

The District Court of Oregon reviewed a similar plan and came to the opposite conclusion. In Henderson v. State of Oregon,<sup>74/</sup> the court held that the use of sex-based mortality tables violates Title VII. It relied heavily on the district court decision in Manhart, and did not have the benefit of Justice Rehnquist's thinking in Gilbert. Nevertheless, the

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<sup>73/</sup> 15 F.E.P. Cases 1363 (Oct. 27, 1977). The case has been appealed to the First Circuit, No. 78-1010, but on motion of appellants briefing has been deferred until after the Supreme Court renders its decision in Manhart.

<sup>74/</sup> 405 F.Supp. 1271 (1975). Appeal is pending in the Ninth Circuit, No. 76-1706, and briefing was completed in August, 1976.



court did note the discrepancy between the EEOC and the Wage-Hour interpretations, indicating that Wage-Hour was reexamining its view (405 F.Supp. at 1276). The court went on to say what is demonstrably true:

Administrative interpretations are entitled to deference by the courts, but they are not binding.

Ibid. Should the Supreme Court take either of these cases, it may wish to cultivate the seeds it planted in Gilbert, and could do so, even if the Wage-Hour interpretation has been changed to conform to EEOC's. It would merely have to use another rationale than "conflicting agency interpretations." The Court would then have to deal with the underlying problem of sex-based classifications, which it could avoid in Manhart.

The Colby College court merely cited the agency ruling without analysis, but the Henderson court did grapple with the issue of sex-based classifications. At least one other court, the Supreme Court of Indiana, has also dealt with the basic issue in a decision upon which Gilbert has no effect, since it was decided under the State constitution.<sup>75/</sup> The Indiana State Teachers' Retirement Fund was attacked under the Federal and State constitutions and under Title VII. The court held that the use of sex-segregated life expectancy tables violated both constitutions in that it has no real and substantial relationship to the purposes of the plan. The

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<sup>75/</sup> Reilly v. Robertson, 360 N.E. 2d 171 (Sup. Ct. Ind., 1977).



lower court had held that the sex-based classification was without rational basis because (1) sex is only one of innumerable factors affecting life expectancy, and the rest are ignored, (2) group statistics ignore individual traits of females, (3) the 82.9% of females who have the same death year as males will receive less money each month than their counterparts, and (4) men can live more comfortably in retirement than women (360 N.E. 2d at 176). The Indiana courts have thus come to grips with the basic classification issue, and have avoided problems inherent in choosing either the equal benefits or the either-or rule.

It is the author's view that neither the either-or rule, nor the equal benefits rule, is a satisfactory interpretation of the law applicable to pensions. Title VII in the broadest terms prohibits classifications based on sex which adversely affect employee status. Classification under sex-based mortality tables without question adversely affects females who for their entire life, no matter how short or long, receive a smaller periodic benefit than males. Similarly, if the benefits are equal, the employer contributions must be greater for women, thus making it more expensive to employ them. This disincentive to hiring women would "deprive or tend to deprive" them of employment opportunities merely because they are women, in violation of the express language of the



statute,<sup>76/</sup> and also, apparently, of the Wage and Hour interpretation of 29 CFR §600.151.

We have been speaking of the common single-life annuity option, wherein women are penalized because of their sex.

However, under a joint and survivor option, men are similarly penalized by having to take a reduced benefit to account for the predicted long life of their spouses.<sup>77/</sup>

In these days of allegations of "reverse discrimination," by which I take it is meant discrimination against a group not accustomed to bearing it, a classification system which inevitably penalizes one sex or the other must be peculiarly suspect under the law.

Ironically, this reverse discrimination argument has been urged by employers, insurers, and actuaries in support of present practices. They argue that prohibiting the use of sex-based mortality tables would require men to "subsidize" women, a form of "reverse discrimination."<sup>78/</sup> We have argued on the contrary, that it would simply remove the advantage that men currently enjoy because of their sex.<sup>79/</sup> In meeting the subsidy argument, the Indiana Supreme Court noted that

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<sup>76/</sup> 42 U.S.C. 2000e-(a)(2). See Recinella, "Mortality Tables and the Sex-Stereotype Doctrine: Inherent Discrimination in Pension Annuities," 51 Notre Dame Lawyer 323, 326 (December 1975).

<sup>77/</sup> Bernstein and Williams, 74 Columbia L.Rev., at 1223.

<sup>78/</sup> See Lautzenheiser, 2 Employee Benefits J. at 41.

<sup>79/</sup> Bernstein and Williams, 74 Columbia L.Rev. at 1222.



\* "subsidization of one annuitant of another is constantly going on," that being the purpose of insurance. <sup>80/</sup> Furthermore, said the court --

the subsidization factor is demonstrable for the most part in group actuarial terms only, and the difference in treatment of the individual male under unisex and sex-segregated tables is practically immeasurable. <sup>81/</sup>

Again, the question dictates the answer. Subsidy can only occur after we have been divided into groups. It is common sense that if we think in terms of classes for pension purposes, blacks subsidize whites, smokers subsidize nonsmokers, those with a personal or family history of heart disease or cancer subsidize those without such history. All of these factors and others are significantly predictive of life expectancy. <sup>82/</sup> Yet only age and sex are typically considered. <sup>83/</sup> No one has adequately explained why only women must pay their "fair" share.

If women are to be charged extra for their longevity, then under the Wage and Hour interpretation, all cost factors must be taken into account. <sup>84/</sup> This would require consideration

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<sup>80/</sup> Reilly v. Robertson, 360 N.E.2d at 177.

<sup>81/</sup> Ibid.

<sup>82/</sup> Fellers and Jackson, "Non-Insured Pension Mortality, the UP-1984 Table," 25 Proceedings, Conference of Actuaries in Public Practice 456, 459 (1976); Bailey, Hutchison, and Narber, "The Regulatory Challenge to Life Insurance Classification," 25 Drake L. Rev. Ins. Ann. 779, 823 (1976).

<sup>83/</sup> Martin, "Gender Discrimination in Pension Plans," 43 J. Risk and Ins. 203, 207 (June 1976).

<sup>84/</sup> 29 CFR §800.151.



by sex of other factors which offset costs, most importantly turnover rates, forfeitures, and salary changes. For example, the contributions of women which do not vest because of their higher rate of withdrawal from the work force must be credited to the female group if that group is to be penalized for its longevity.<sup>85/</sup>

Discussion of "fairness"<sup>86/</sup> usually involves a concept treated by both the Indiana Supreme Court and the Oregon Court. If death ages of men and women are matched, the overwhelming majority of deaths in each group will coincide. Out of a random 1000 women and 1000 men, some 840 of one group will die at precisely the same age as 840 out of the other group. The remainder are men who will die earlier than all others and women who will die later. Yet under current practices, all women suffer the financial detriment of that longevity and all men reap the benefit.<sup>87/</sup>

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85/ Fellers and Jackson, "UP-1984 Table" at 459, 483; Koludrubetz and Landay, "Coverage and Vesting of Full-Time Employees Under Private Retirement Plans," Social Security Bulletin 20, 27 (November 1973); Koludrubetz, "Private Retirement Benefits and Relationship to Earnings: Survey of New Beneficiaries," Social Security Bulletin 16 (May 1973); see also Bernstein and Williams, 74 Columbia L.Rev. at 1228.

86/ "Fairness" also requires considering the fact that some employers use sex-based tables where it will benefit the male (pension) and do not use them where it would disadvantage him (life insurance). Bergmann and Gray, "Equality in Retirement Benefits," 8 Civil Rights Digest 25, 26 (Fall 1975); 53 Boston U. L. Rev. at 634, 642.

87/ Reilly v. Robertson, 360 N.E.2d at 176 (82.9% overlap); Henderson v. State of Oregon, 405 F.Supp. at 1275 (84% overlap); Bergmann and Gray, 8 Civil Rights Digest 25 (84% overlap); Martin, 43 J. Risk and Ins. at 208-209 (82.9% overlap); Bernstein and Williams, 74 Columbia L. Rev. at 1221-1222.



But, complains the actuary, such a technique is "erroneous," since "[e]xactly the same overlap analysis could be applied to the matter of taking age into account in the determination of life insurance and annuity values \* \* \*

Does this mean that we should use 'uni-age' life tables -- or, in other words, no life tables at all?"<sup>88/</sup> As the "horribles" have been paraded, it has been said that the drive to abolish sex-based classifications will result in abolishing all classifications. After all, "it's easy to see that all classifications may be faulted" in the same way.<sup>89/</sup>

The answer is easy. Some classifications are forbidden by law and others are not. Race and sex classifications may not be used, but age classifications (and any others not explicitly forbidden by law) may be. Although there is an age discrimination law structured in terms parallel to those of Title VII,<sup>90/</sup> it contains an explicit exception for actions taken under a bona fide retirement plan.<sup>91/</sup> The statute and its legislative history make it clear that retirement plans would have been

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<sup>88/</sup> Myers, "Pension Benefits and Sex," 9 Civil Rights Digest 45, 46 (Winter 1977).

<sup>89/</sup> Sher, "Equal Employment Benefits: Challenge to the Risk Classification System," Best's Rev. 10, 69 (July 1975); Lautzenheiser, "Sex and the Single Table" at 13; King, J. Risk and Ins. at 3-4.

<sup>90/</sup> Age Discrimination in Employment Act of 1967, 29 U.S.C. §621 et seq.

<sup>91/</sup> 29 U.S.C. §623(f)(2).



reached without the exception,<sup>92/</sup> but that the exception was necessary so as not to discourage the hiring of older workers. Another dimension of "fairness" may be noted: all persons who work the normal number of years enjoy the advantage of youth and suffer the detriment of age. Thus, all can expect actuarial adjustment as they age. But under current practices, women will always suffer by comparison with men, no matter what their age.

In concluding this analysis of what lines may legally be drawn for pension purposes, it is appropriate to mention the category of race. It is not disputed that whites, as a group, live longer than blacks. As a legal matter, there is no Bennett Amendment or Equal Pay Act to cloud the issue, so Title VII unequivocally prohibits race-based classification. Moreover, as noted earlier, States have generally prohibited racial classifications by insurers. But as a policy matter, no argument made about sex-based classifications would not apply with equal force to race. Both are easily and conveniently ascertained; both are statistically significant.<sup>93/</sup> There are those who suggest that the racial difference in mortality may be caused by environmental factors, and others who suggest the

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<sup>92/</sup> 113 Cong. Rec. 3125-3155 (1967). See Bernstein and Williams,  
<sup>74</sup> Columbia L.Rev. at 1218-1219.

<sup>93/</sup> Bailey, Hutchison, and Narber, 25 Drake L. Rev. Ins. Ann.  
 at 793, n. 54; Dingman, Risk Appraisal 119 (1957).



same about sex.<sup>94/</sup> And in any event, actuaries, it is said are concerned about the facts of mortality experience, not the causes.<sup>95/</sup>

I do not suggest that if race-based distinctions were drawn, then sex-based distinctions would be acceptable. Both are, in my view, illegal. I merely suggest that, in contrast with sex, race distinctions are somehow viewed as unfair and against public policy. At least actuaries no longer claim a right to use them. The fact is that race-based classifications are no longer used, and there is no evidence that the actuarial art has suffered.

Thus, in sum, the law prohibits employers from using sex-based mortality tables to fix either contributions to or benefits under pension plans. I acknowledge some basic assumptions made here. First, I assume that it is actuarially possible to merge the experience of males and females and still adequately fund equal benefits. I have seen no credible argument to the contrary. Second, any legal problems which might arise under ERISA from allowing unequal contributions to men and women would be avoided if employers were not allowed to use sex-based mortality tables at all. The legal theory proposed here is the only way to achieve both equal contributions and equal benefits. Finally, I acknowledge

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<sup>94/</sup> Halperin, "Should Pension Benefits Depend on the Sex of the Recipient?" 62 AAUP Bull. 43, 46 (Spring 1976).

<sup>95/</sup> 53 Boston U. L. Rev. at 624, n. 2.

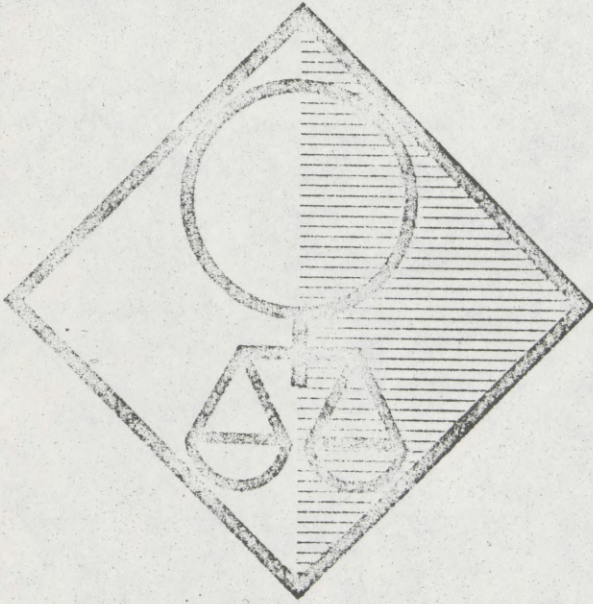


that there will be greater pension costs involved. Estimates have varied, but if men's pensions are not to be reduced, costs will certainly rise. While I do not wish to minimize this factor, I suggest that such an argument is not normally a defense to a Title VII violation. Reforms such as those embodied in the Equal Pay Act, in Title VII, and in ERISA, do cost money.



# Sex Discrimination In Insurance

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a guide for women

WOMEN'S EQUITY ACTION LEAGUE



**SEX DISCRIMINATION IN  
INSURANCE  
A GUIDE FOR WOMEN**

**Naomi Naierman  
Ruth Brannon  
Beverly Wahl**



**Congress of the United States**  
**House of Representatives**  
**Washington, D.C. 20515**

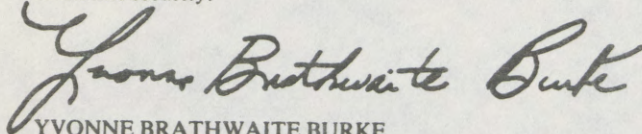
April 18, 1977

## **FOREWARD**

Despite significant changes in the law prohibiting sex discrimination, there remain a number of areas in which women have made little progress in gaining equality. The insurance industry, because of its unique characteristics, remains a bastion of sex-based practices which are deleterious to women. The industry's discriminatory practices are difficult to challenge for several reasons. Insurance terminology is confusing and incomprehensible to the lay consumer. Insurance practices are not easily identified because they are unpublicized. Moreover, insurance companies are regulated by state agencies, each with its own set of regulations. Therefore, in order to implement anti-discrimination laws throughout the country, it is necessary to work with all 50 state insurance departments.

Few women are aware of all the federal laws which prohibit discrimination on the basis of sex. Many women do not realize the full significance of the recent Supreme Court decision which overturned federal guidelines and ruled that excluding pregnancy from disability insurance does not constitute sex discrimination. Legislation recently introduced in Congress would clearly prohibit discrimination based on pregnancy, childbirth or related medical disability.

There remains a need for instruments of change to engender a more widespread awareness of the insurance practices which discriminate against women. The intent of this guidebook is to generate such awareness and to provide women with practical tools to be used in their efforts to gain adequate insurance coverage for a greater economic security.



**YVONNE BRATHWAITE BURKE**  
Member of Congress



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## I. INTRODUCTION

Insurance is a form of protection against financial losses due to theft, accident, illness, disability, and loss of life. In exchange for periodic payments, called premiums, consumers purchase a guarantee of predetermined benefits payable upon such occurrences. An insurance company combines all the premiums into a common pool which is tapped when policyholders are reimbursed for their losses. This method of spreading the losses ensures that no one person will sustain extraordinary financial hardship.

Insurance companies try to maximize their own profits by containing the costs of the benefits they offer and by predicting the financial risks of policyholders. To predict such risks, policyholders are divided into classifications representing different risk potentials. The broadest types of classifications are the most preferable in the insurance industry because they reduce financial risks by minimizing the impact of individual deviations. At the same time, broad classifications are imprecise. Individuals who do not possess the characteristics attributed to the group may be penalized solely on the basis of membership in the group.

The use of sex classification in insurance has been rationalized, in part, on the basis of actuarial statistics which reflect morbidity and mortality patterns; and, in part, on the basis of stereotypes of women as a homogeneous group of non-workers dependent on their husbands' wages and employment benefits. The statistical patterns are rapidly changing and the sex stereotypes are outmoded, bringing to question the very basis of sex-based classification. Yet, the insurance industry continues to use sex-based classification with discriminatory effects on women in all aspects of insurance, especially in availability and scope of benefits, and in premium rates. Many types of benefits available to men are not offered to women; and, even when benefits are equally available, women often pay higher premiums. Since so much of the insurance available to women is inadequate and/or expensive, the purpose of buying insurance is negated; it simply does not offer economic security to female policyholders and their families. The negative impact of inadequate and costly insurance on women was articulated by former Pennsylvania Insurance Commissioner Herbert Denenberg in his testimony before Congress in 1973:

*Denial of access to insurance at fair rates affects the economic status of all women. It touches employment discrimination, opportunities to hold a job, ability to maintain a family in the face of personal catastrophe, and economic security. Other economic disadvantages of women can be magnified by discriminatory, inadequate, or prohibitively costly insurance.<sup>1</sup>*



It is the intent of this guidebook to document the particular kinds of discriminatory practices which women face in insurance, to review the results of past efforts designed to eradicate such practices and to recommend avenues for further action. The next chapter discusses the definitions of discrimination. The third chapter delineates the specific practices affecting women in four lines of insurance: disability, health, life, and property and liability. Past activities initiated by legislative, judicial, and state regulatory bodies are discussed in the fourth chapter. The fifth and final chapter is devoted to recommendations for further action through improvement of insurance regulations, consumer activities, alternative health insurance mechanisms, and the Equal Rights Amendment.



## II. WHAT CONSTITUTES SEX DISCRIMINATION IN INSURANCE

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment practices, including the provision of fringe benefits such as insurance. Judicial interpretations of Title VII provide a legal framework by which discriminatory practices can be grouped into three categories: 1) overt discrimination, 2) disparate treatment, and 3) differential consequences of a neutral practice.<sup>2</sup>

Overt sex discrimination in insurance results from practices that deny women certain types of insurance policies or options which are available to men. A specific example of overt sex discrimination is the unavailability of disability insurance to women who work at home, while such insurance is available to men with identical jobs and risk factors. Another example of overt sex discrimination is the practice of offering men increased insurance coverage on special occasions such as marriage or birth of a child, while women often do not have this option.

Disparate treatment refers to the use of a different set of rules for each sex. For example, in disability insurance, Women are subject to disparate treatment when they are denied coverage for reasons which are not applied to men. In their dissenting opinion in *General Electric v. Gilbert*, Justices Brennan and Marshall argued that women are treated disparately when disability insurance excludes pregnancy, because it is deemed a "voluntary" condition, while the same insurance covers so-called "voluntary" male conditions such as vasectomies and prostatectomies.<sup>3</sup> Disparate treatment also occurs when the rules are the same for both sexes, but in reality are applied unequally. For some insurance companies, illegitimacy of children constitutes a reason for refusing life insurance to both men and women. In practice, however, only women are queried about the legal status of their children and are often denied life insurance on the basis of the industry's moral judgement.<sup>4</sup>

The third type of discrimination is probably the most subtle and insidious, for it results from practices which, on the surface, seem neutral but nevertheless have more adverse consequences for women than for men. The practice of excluding pregnancy conditions from disability and health insurance offered to all employees can be viewed as a neutral practice. Yet this practice has a more deleterious effect on women because they assume the costs of childbearing, the benefits of which are shared equally by men. In her testimony before the House of Representatives, Barbara Shack of the New York Civil Liberties Union argued:



*The insurance world mirrors the societal view that when a woman becomes pregnant, she makes a choice for which she is solely responsible and for which she alone should suffer the disabilities. Conversely, I suggest that because women serve the biological function of continuing the species, society should share the disabilities and costs instead of penalizing her for her necessary physiological role.<sup>3</sup>*

The industry's own official stance is that "the object [of insurance] is to spread the risk in such a way that the unit price of the benefit is adequate to provide the required benefit without subsidization of one group of participants by another..."<sup>6</sup> Under current practices of excluding or limiting pregnancy coverage in health and disability insurance, women are subsidizing the costs of reproduction in our society.



### III. DISCRIMINATORY PRACTICES AFFECTING WOMEN IN INSURANCE

In 1973, the Joint Economic Committee of Congress held hearings on the economic problems of women, including sex-based practices in the insurance industry. Although these hearings produced data which upheld some of the differences claimed by the insurance industry's actuarial tables, they also identified areas where outdated statistics, gathered and analyzed in the 1950s, were inappropriately applied, given the changing employment and morbidity trends of the 1970s.<sup>7</sup> Most important, these hearings uncovered many sex-based practices which were deemed discriminatory in the light of the Civil Rights Act of 1964.

Beginning in 1974, several states conducted studies of insurance practices which affect women. As expected, each of these studies concurred with the others because insurance companies are similar in their practices and all of the large companies cross state lines. In addition, the studies confirmed the findings of the Congressional hearings, identifying gaps in availability and scope of insurance offered to women, pointing at sex differentials in premium rates which have not been fully justified by current statistics, and specifying prevalent insurance practices which are discriminatory toward women. Based primarily on the results of these studies, the following is a detailed discussion of the discriminatory practices which women face in the four major lines of insurance: disability, health, life, and property and liability.

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#### DISABILITY INSURANCE

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Disability insurance protects an individual from loss of income due to inability to work. Disability benefits provide disabled policyholders with a monthly payment which is expressed as a fixed amount or as a percentage of monthly income prior to disability. Most insurance companies set a maximum limit to the amount of disability an individual may buy. Insurance policyholders are divided by occupational class, based on varying degrees of hazard associated with their jobs. The more hazardous the job, the lower the maximum benefits available and the higher the rates. Within each job classification, rates also vary by age and sex. In general, rates are higher among women and older people within each of the occupational classes.

##### Basic Concepts

Disability coverage is subject to three time variables: waiting period, benefit period, and basic period. *Waiting period* is defined as the number of days the insured must



be disabled before benefits are payable. Waiting periods can vary between one and 365 days. Length of waiting time is chosen by the insurance buyer as part of the benefits -- the shorter the waiting time, the more expensive the insurance package.

The *benefit period* is the length of time for which benefits are paid to the disabled person. This period may extend for one year or until the insured is 65 years old. The *basic period* is that subset of the benefit period in which the insured is deemed totally disabled, i.e., totally unable to perform any duties connected with his or her own occupation. Basic periods vary from one to ten years. After the basic period has expired, the disabled individual must show that he or she is unable to perform the duties of any job, even if it is unrelated to the original occupation. For example, if, by the end of the basic period, a surgeon's burned fingers have not healed sufficiently to perform surgery, she must prove that she is unable to perform the duties of other occupations, such as salesperson, bus-driver, or telephone operator, in order to receive disability payments for the rest of the benefit period.

Many insurance companies operate under the assumption that women do not need disability insurance because they are temporary and reluctant members of the workforce who work only for extra "pin" money.<sup>8</sup> This is not an accurate view of working women. Women make up a substantial portion of the workforce and most of them depend on their own wages. More than 42 percent of all working women in 1975 were either single, divorced, widowed, or separated, and another 26 percent shared financial responsibilities with husbands whose annual income was less than \$10,000.<sup>9</sup> (In 1975, the Bureau of Labor Statistics estimated \$9,838 to be a low standard of living for a family of four.<sup>10</sup>) Thus, contrary to the outdated notion that working women are cared for by well-earning husbands, most of the working women in this country depend heavily on their own income. Loss of earnings for these women would be economically crippling. Yet, when women seek protection in disability insurance, they find that certain types of insurance plans are totally unavailable or severely restricted; and that the disability insurance policies which are offered are generally more expensive than identical policies for men.

### Availability

One of the most serious problems facing working women is the prevalent insurance practice of eliminating pregnancy and related complications from disability coverage. Women do not receive adequate protection for loss of income due to pregnancy, childbirth, miscarriage, abortions, and any complications which may arise thereof. On those rare occasions when pregnancy coverage is available, it is usually subject to additional premium costs and to a time limitation which falls short of the benefit period applicable to other disabilities covered by the same policy.<sup>11</sup>



Insurers maintain that the separate treatment of pregnancy in disability benefit programs is justified because pregnancy is a voluntary condition and because the cost of providing coverage for pregnancy-related conditions would be prohibitively expensive. This rationale has several flaws. First, not all pregnancies are planned<sup>12</sup>; certainly, related complications are not. Second, disability insurance is not always limited to unplanned events, since it often covers disability due to vasectomies, circumcision, attempted suicide, and elective cosmetic surgery.<sup>13</sup> Third, there is evidence suggesting that disability coverage for pregnancy and childbearing does not have significant impact on the total cost of disability programs.<sup>14</sup> Finally, insurance companies do not recognize that there is a man involved in every pregnancy, as well as a woman; and that while women bear the physical responsibility of pregnancy, they should not exclusively be burdened with the financial responsibility. Supreme Court Justice Brennan points out the negative impact on women which results from this financial responsibility:

*...[P]regnancy exclusions built into disability programs both financially burden women workers and act to break down the continuity of the employment relationship, thereby exacerbating women's comparatively transient role in the labor force...A realistic understanding of conditions found in today's labor environment warrant taking pregnancy into account in fashioning disability policies.<sup>15</sup>*

Women with jobs such as domestic aides or waitresses have difficulty obtaining any kind of disability insurance, while men in the same jobs do not.<sup>16</sup> Part-time workers of both sexes face problems in obtaining disability insurance.<sup>17</sup> Since many more women than men are part-time workers, they are most seriously affected by this gap in availability.

Disability insurance for homemakers is almost universally unavailable. Although homemakers do not lose income when they are disabled, they do suffer the risk of expenses of housekeeping and/or child-care. Yet, homemakers meet impenetrable resistance when attempting to purchase disability insurance. When such insurance is available to them, it is subject to severe restrictions. Maximum benefits often fall short of the cost of homemaking and child-care services.<sup>18</sup> Some policies are restricted to a benefit period during hospitalization only, and others are sold only as riders on the husband's disability policy.<sup>19</sup>

#### **Scope of Benefits**

It is not uncommon to find that, despite higher premiums paid by women, the benefits they receive are much lower. Waiting periods are often longer for women than for men.<sup>20</sup> Monthly benefits are subject to lower maximum levels and benefit periods are shorter for women. Of the 13 insurance companies reporting in Iowa on



their respective disability policies, five reported sex differences in one or both of these areas.<sup>21</sup> One company reported that the maximum monthly benefit allowed to males was \$3,000 in 1974, while at the same time females were allowed a maximum of only \$1,500. Another company reported a \$2,000 to \$1,000 ratio between men and women. A Michigan study found that, for all four occupational classes reported by insurance companies, there were wide disparities in the length of basic periods.<sup>22</sup> In the two classes of the least hazardous occupations, the basic period for males was ten years, in comparison to two years for females. In the third class, men were offered a five-year basic period and women were again limited to a two-year basic period. In the class of the most hazardous occupations, men's basic period was two years, while no disability insurance whatsoever was available to women. Thus, regardless of their occupations, women were offered a basic period equal in length to the basic period offered to men in the most hazardous occupations, or no coverage at all.

Policy restrictions and limitations not imposed on men further reduce availability of disability insurance for women. For example, accident disability insurance which is usually available to men for life is offered to women only until the age of 65.<sup>23</sup> Many policies carry a provision which reduces benefits to women who, at the time of disability, are not employed away from home on a full-time basis. No such condition is applied to men.<sup>24</sup> Thus, when a female who usually works full-time must temporarily reduce her work-load or do her work at home because of family obligations, she runs the risk of decreased disability benefits.

### **Rates**

Premium rates are a source of much sex discrimination in all types of insurance, including disability insurance. In 10 out of 13 companies surveyed in Pennsylvania, premium rates were consistently higher for women than for men who carried identical or better coverage.<sup>25</sup> A New York study reported that women were charged as much as 150 percent higher rates than men in the same job classifications.<sup>26</sup> Companies surveyed in Colorado reported that premium costs for women ranged from 45 percent to 115 percent greater than for men in white collar and professional job classifications.<sup>27</sup> Two companies in Colorado admitted that, for the purpose of rating, they group professional women in the same classification as saleswomen and female office workers, while male professionals were classified separately in a higher job category which carried lower rates.<sup>28</sup> No rationale was offered for this practice.

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## **HEALTH INSURANCE**

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Health insurance is a means of protection against health care costs due to illness, injury, or other conditions requiring medical attention. Women rely on health care



services more than men. In 1975, women made 48 percent more physician visits than men<sup>29</sup> and were admitted to hospitals 41 percent more often.<sup>30</sup> Part of this differential is due to women's unique reproductive role. Approximately 13 percent of women's physician visits and 36 percent of hospital admissions are due to gynecological or obstetrical reasons. Thus, about one-third of the sex differential in physician visits and nearly nine-tenths of the difference in hospital discharges are due to conditions related to women's reproductive function. Yet, these conditions are subject to the most serious gaps in availability and scope of health insurance and to the most prohibitively expensive premium rates.

### Basic Concepts

Basic health insurance includes hospital expense plans and surgical expense plans. *Hospital expense* plans cover expenses incurred in a hospital, including room-and-board charges; emergency room, laboratory and x-ray services; and prescribed drugs (physician fees are not included). *Surgical expense insurance plans* cover the use of an operating room or surgical procedures performed in a doctor's office and also surgeon fees. Basic health insurance plans can be supplemented by regular medical insurance plans and major medical insurance plans. *Regular medical* plans cover physician services unrelated to surgery. The regular medical plans and both types of basic health insurance plans are subject to a maximum amount of benefits. *Major medical* plans are designed to cover expenses which exceed this maximum. All four types of plans are subject to cost-sharing mechanisms in the form of deductibles, co-payments, and co-insurance. A *deductible* is an expense which the policyholder must meet before insurance coverage takes effect. It may be expressed as a fixed dollar amount or as a value of specified services, such as three hospital days or two physician visits. A *co-payment* is a flat amount per unit of covered services which the policyholder must pay in sharing costs with the insurance company. A co-payment charge may be ten dollars per day or five dollars per physician visit. *Co-insurance* differs from co-payment only in that it is expressed as a percentage of cost, rather than as a flat amount.

### Coverage for Maternity Costs

Although maternity coverage is central to women's insurance needs, many women in this country cannot obtain insurance protection for conditions related to pregnancy and childbirth. Small firms averaging 25 employees, or less, often do not offer maternity benefits because of high premiums charged by insurance companies.<sup>31</sup> Three out of the six private insurance companies responding to a 1974 Pennsylvania survey admitted that they sold a large portion of their group insurance plans without maternity coverage whatsoever; and all six excluded dependent daughters from such coverage.<sup>32</sup> These companies justified the exclusion of maternity coverage on the premise that pregnancies are planned and budgetable conditions that require no insurance protection. A study conducted in 1975 by the



Health Insurance Institute showed that 56.4 percent of all new health insurance group policies did not include maternity.<sup>33</sup> Even major medical policies which are intended to supplement basic hospital and physician costs offer women little relief.<sup>34</sup>

When maternity coverage is available in group policies, it is almost always restricted to dependent coverage. A single woman, or a married woman who wishes to buy insurance separately, while her family is covered by her husband's policy, cannot get maternity benefits without buying a family policy which is designed for an average family of four, and therefore costs considerably more than a one-person policy. As a result, many women cannot afford adequate maternity coverage. Some insurance companies refuse maternity coverage to single women under any type of policy, presumably for moral reasons.<sup>35</sup>

Maternity coverage often carries more limitations and restrictions than benefits. It may be subject to an initial waiting period of as long as 10 months during which no benefits can be claimed.<sup>36</sup> The insurance industry uses this particular restriction to discourage "adverse" selection of women who would purchase maternity coverage for a planned and imminent pregnancy. However, insurance companies rarely lift the waiting period for such unplanned occurrences as premature birth, miscarriage or other complications of pregnancy.<sup>37</sup>

Maternity benefits are often established without regard for true expenses of normal pregnancy and delivery. In Michigan, a 1975 survey showed that commercial health insurance plans covered only 38 to 44 percent of maternity costs.<sup>38</sup> The Pennsylvania study reported that in 1974 some companies were still using 1958 hospital rates to set the maximum limit for maternity coverage.<sup>39</sup> Whereas major medical policies usually supplement basic hospital insurance by covering costs in excess of the maximum limit, maternity coverage rarely enjoys that type of protection.

Services required by newborn infants are sometimes excluded from maternity coverage, either altogether or for a period which may range from 7 to 15 days.<sup>40</sup> This exclusion may result in out-of-pocket expenses for nursery services in cases of healthy infants, and numerous others services in other cases.

#### **Coverage for Prenatal and Postpartum Care**

Another limitation of health insurance plans, whether they cover maternity or not, is their emphasis on hospital-based, acute care for mothers and children. Very few health insurance plans cover prenatal and postpartum services which are the basis of preventive health care for mothers and infants. Early prenatal care with frequent subsequent visits can reduce infant mortality by one-third.<sup>41</sup> Prenatal and postpartum care require anywhere from 10 to 20 visits for normal pregnancy and delivery, all of which add to health care expenses not covered by health insurance.



### Coverage for Family Planning and Gynecological Services

Unwanted pregnancies are among the major causes of the high rate of infant and maternal mortality in our country, which trails 10 other nations in these important health status indicators.<sup>42</sup> Furthermore, an unwanted or ill-timed pregnancy can have a deleterious effect on a woman's employment stability and economic independence. Thus, it is important that women avail themselves of family planning services which include counseling, contraceptive drugs and devices, sterilization, and abortion. Insurance policies rarely cover these essential services. Occasionally sterilization and abortion services are covered, but only when they are justified on the basis of medical necessity. Contraceptive drugs and devices are almost never covered by health insurance, although other drugs and devices are. In 1975, a Blue Shield plan in Michigan offered coverage for prescription drugs, "except contraceptives for whatever purpose prescribed." Even a medical necessity would not override the absolute tone of this exclusion.<sup>43</sup>

Although some states have banished the practice of excluding from health insurance coverage all conditions related to female reproductive organs, this exclusion is still allowed in some states. It is still common to find riders\* which exclude all pre-existing gynecological disorders. Such riders do not exclude pre-existing prostatic disorders peculiar to men.<sup>44</sup>

### Underwriting Practices

Whether her husband has his own insurance or not, a married woman should be allowed to buy coverage for him, just as any male is allowed to buy insurance for his wife. However, some insurance companies refuse to cover the husband of a female employee under a family policy unless she can prove that he is financially dependent on her for reasons of physical or mental disability.<sup>45</sup> Other reasons such as unemployment, or simply a preference for the wife's insurance plan, are not permissible. Obviously this rule is discriminatory against women, by even the most conservative definition of discrimination, since men never have to prove any disability conditions in order to insure their wives.

Another insurance underwriting practice which may limit a woman's health insurance coverage severely is the practice which allows a husband's insurance policy to override a wife's policy, when benefits are claimed for their children. Under this rule, a family may be forced to use the father's health insurance policy, regardless of

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\*A rider is a stipulation of an insurance policy which defines exceptions in the form of additions to, or exclusions of, the basic policy.



how much more extensive the mother's may be. The far-reaching implications of this insurance practice are pointedly documented in a complaint letter written by a victim of such a practice (letter enclosed in Appendix A).

### **Rates**

An Iowa study found that female policyholders pay considerably more for health insurance than male policyholders.<sup>46</sup> When women bought maternity coverage, they paid almost twice as much as men with the same policies excluding maternity benefits. Without maternity coverage, the Iowa study showed that women pay as much as 50 percent more than men for identical policies. Another study found that premiums for a single-parent family headed by a male are the same as the rate for a two-parent family which by definition includes an extra adult.<sup>47</sup>

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## **LIFE INSURANCE**

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Life insurance protects against financial losses which result from death. Although most women face no difficulty in obtaining basic life insurance coverage, they have limited access to many life insurance options. When these options are offered, the premium rates are unjustifiably higher for women than for men. Basic life insurance is generally less expensive for women, but current mortality tables justify an even greater advantage.

### **Basic Concepts**

Life insurance policies come in two basic forms: term insurance and permanent insurance, each of which has its own variations. *Term insurance* provides coverage during a specified time period. It may carry an option for renewal without proof of good health, or for continuation of benefits at a reduced level, after the specified term has expired. *Permanent* life insurance policies require that premiums be paid within a specified period of time, but benefits are paid whenever death occurs. These policies allow for conversion into cash before the insured's death or for borrowing at lower interest rates. Permanent policies have three variations: whole life, endowment, and annuity coverage. *Whole life* coverage provides benefits only in the event of death. *Endowment* insurance provides for payment of cash at the end of a specified term, regardless of whether the insured has died. Should the insured die before the end of the term, the beneficiaries receive the total value of the policy. *Annuity* insurance provides a monthly benefit after a specified number of years, or a total lump sum should death occur before the policy term expires.

Basic life insurance is generally accompanied by various options including: guaranteed insurability, option dates for increased coverage, waiver of premium, disability income protection, and payor benefit. *Guaranteed insurability* allows for



an increase in the amount of life insurance without proof of good health. *Option dates* are special occasions, such as marriage or birth of a child, upon which the insured may increase coverage without proof of insurability. The *waiver of premium* option provides for continuation of a policy without premium payments in case of total disability. Basic life insurance can also carry a *disability income protection rider* which guarantees a monthly income benefit to replace loss of income due to inability to work. The *payor benefit* option, usually attached to children's policies, waives unpaid life insurance premiums when the insured dies or is disabled before the child can assume payments.

#### Availability

Based on the outdated notion that women's earnings are not crucial to the family, the insurance industry, until recently, did not believe that women needed much life insurance coverage. Therefore, life insurance policies marketed to women have been limited in scope and availability. Many options which are available to men are still not available to women. For example, guaranteed purchase options to buy additional coverage without evidence of insurability are not available equally to men and women. Men may increase their coverage on option dates such as marriage or birth of a child, while women often do not have the option to buy additional coverage for their families on those or any other dates.<sup>48</sup>

The waiver of premium option, commonly available to men in all risk classifications, is restricted to women in low-risk classifications.<sup>49</sup> When women in high-risk classifications are granted this option, they must pay higher rates than men in the same group. To qualify for a waiver of premium option, women must prove that they are employed away from home, a condition which is not placed upon men.<sup>50</sup> Another condition placed unfairly upon women seeking a waiver of premium option is an age ceiling. Some companies deny this option to males over 55 and females over 50. Others set the age limit at 60 for males and 55 for females.<sup>51</sup> There seems to be an age differential of about five years in favor of men, in spite of the proven fact that women live longer.

Disability income protection as an option of life insurance is ordinarily available to men in all but the highest risk classification. Some insurance companies, however, do not offer this option to women in the lowest risk classification.<sup>52</sup> As for the payor benefit option, it is readily available to men regardless of risk classification, while women must prove themselves as good risks to obtain this option.<sup>53</sup>

#### Underwriting Practices

In addition to denying women these life insurance options, the basis of underwriting practices restrict policies available to married women. Insurance companies commonly limit the amount of coverage available to a married woman not to exceed



the amount of coverage held by her husband.<sup>54</sup> The reverse is rarely true, even when a woman is the principal wage earner in the family. Thus, women with a high income and a low-risk classification may be subject to a maximum coverage set for a husband who earns much less and who may be categorized in a high-risk classification. Regardless of her own credentials for life insurance, a married woman's insurability and rates are assessed on the basis of her husband's credentials. The industry's rationale for this practice is that the husband is the primary supporter of the family and therefore most of the life insurance protection should be on his life.<sup>55</sup> However, as discussed previously, many families are dependent on the woman's income. Moreover, a family should be protected to the extent possible and desirable. If a woman is more insurable than her husband, the family would clearly benefit from the insurance coverage she would obtain on her own credentials.

Another group of women severely handicapped by life insurance underwriting practices includes mothers of illegitimate children. It is not uncommon for companies to deny life insurance policies to these women, while men are seldom questioned about their part in illegitimate births. The attitude of insurance companies seems to be that women with illegitimate children and the children themselves are immoral and therefore represent an insurance risk.<sup>56</sup> Clearly, this attitude is purely subjective and has yet to be supported with actuarial data or other evidence appropriate to underwriting considerations.

#### **Rates**

Ordinarily, life insurance premiums for basic coverage (excluding options) are lower for women than for men in the same risk classification. Premiums are usually based on a three-year "set-back" which means that a woman pays the same rate as a man three years her junior. However, mortality data show that, on the average, women live six to nine years longer than men in every age group.<sup>57</sup>

In a 1975 study conducted in Michigan, life insurance companies were asked about the reason for using the three-year setback. The two most common responses were that a three-year setback is the maximum according to state law and that three years is the limit established in the "1955-1960 Basic Tables," which are used prevalently throughout the insurance industry.<sup>58</sup> Such a state law does exist in many states. In Iowa, insurance companies are instructed that "for any category or ordinary insurance issued on female risks, adjusted premiums and present values may be calculated according to an age not more than three years younger than the actual age of the insured."<sup>59</sup> This kind of law, combined with the use of outdated mortality tables developed in the 1950s deprives women of a setback of six to nine years. Thus, even where women could benefit from a sex-based rating structure, their advantage is curbed by insurance laws and practices.



## PROPERTY AND LIABILITY INSURANCE

Property and liability insurance protects an insured's car, home, and other personal belongings against losses caused by accidents and other perils. In addition, it protects against suit brought by another person who may claim that the insured is responsible for damage to property or for personal injury. Premiums are based upon the frequency of claims (in this case, frequency of auto accidents, fires, thefts, etc.), the costs of settling each claim, and a variety of other factors such as sex, age, driving record, place of residence.

### Basic Concepts

Automobile insurance is the most common type of liability insurance. There are six basic types of automobile insurance. *Bodily injury liability* covers the policyholder and his or her family, guests, or other victims of a car accident. This type of automobile insurance provides protection in the form of legal defense and ensures that the insurance company will pay damages assessed against the policyholders, up to an established maximum amount. *Property damage liability* provides legal defense and pays repair costs when the car damages the property of others. *Medical payments* coverage guarantees payment of reasonable medical expenses after an accident. It covers the policyholder, his or her family and guests, but not passengers in other cars or pedestrians. *Protection against uninsured motorists* covers bodily injuries for which an uninsured motorist or hit-and-run driver is responsible. *Comprehensive physical damage* applies to the policyholder's car only, when it is not involved in a collision. The car is protected against perils such as fire, theft, flood, vandalism, etc. Finally, *collision* insurance covers damage to the policyholder's car when it is involved in an accident with other vehicles.<sup>60</sup>

Property insurance generally covers loss of personal property due to fire and theft or liability due to negligence. It comes in three forms: basic, broad, and comprehensive. The *basic* form of property insurance usually covers damages due to the following perils: fire, lightning, windstorm, hail, explosion, riot, civil commotion, aircraft, vehicles, smoke, vandalism, theft, and breakage of glass in a building. The *broad* form of property insurance covers damages due to the above perils in addition to others, such as falling objects and collapse of buildings. The *comprehensive* form covers damages caused by all perils except major catastrophies such as earthquake or war. This type of property insurance covers a wider range of perils than the other two discussed above.<sup>61</sup>

### Underwriting Practices

Women experience some difficulty in obtaining property and liability insurance,



although insurance companies do not, with few exceptions, specify sex as a criteria for accepting or rejecting an insurance application. Women are more affected by the criteria of marital status. Single or divorced women may be denied property insurance for their home, presumably because they are apt to leave their homes for longer time periods than married couples, widows, or unmarried men.<sup>62</sup> Married women have difficulty getting such insurance in their own name because agents prefer to write the policy in the husbands' names.<sup>63</sup> Divorced women are often faced with lack of coverage in auto insurance because the policy remains in the husband's name, even if both contributed to the premiums. Upon divorce, women are often forced to apply for auto insurance and, as new customers, may be subject to higher premiums because the divorce factor places policyholders in higher risk categories.<sup>64</sup> A survey of underwriting manuals reveals that the above practices are based on attitudes about the "moral hazard" of divorce.<sup>65</sup> One manual warns agents to be especially careful when writing policies for women who do not have custody of the children after a divorce, even though it is perfectly acceptable for men to lose such custody.<sup>66</sup> Women who are not married to the men with whom they live are also discussed in manuals as unacceptable risks.<sup>67</sup> Men face some of the same prejudices. However, because of individual agents' attitudes, women often suffer greater vagaries of treatment than men in similar situations.<sup>68</sup>



## IV. RECENT ACTIVITIES DIRECTED AT CHALLENGING DISCRIMINATORY PRACTICES

This chapter of the guidebook is devoted to a review of the activities already undertaken to challenge sex discrimination in insurance. These activities are grouped according to their source of initiative: federal legislation, judicial review, and state regulations.

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### FEDERAL LEGISLATION

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Direct federal regulation of the insurance industry is prohibited by the McCarran-Ferguson Act of 1945, which declared that the "continued regulation and taxation by the several states of the business of insurance is in the public interest."<sup>68</sup> The act's most important provision is that, "No act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any state for the purpose of regulating the business of insurance..."<sup>70</sup> Since 1945, the McCarran-Ferguson Act has had only minor revisions, and no efforts of repeal have been made. However, a number of efforts on the federal level have been made to eliminate sex discrimination in insurance, through regulations pertaining to employment practices, legislation dealing with sex discrimination in general, and more recently, through legislative amendments to the Civil Rights Act of 1964.

#### The 1964 Civil Rights Act

Title VII of the Civil Rights Act and subsequent guidelines have been the most definitive manifestations of Congressional intent to eliminate sex discrimination. Title VII of the 1964 Civil Rights Act prohibits employers from discriminating on the basis of sex (in addition to race, religion, or national origin) with respect to compensation, conditions, or privileges of employment. The Equal Employment Opportunity Commission (EEOC) was established by Congress in 1965 to enforce the provisions of Title VII. Initially, its guidelines about sex discrimination were very broadly defined and only gradually did they address specific problems affecting women. For example, in 1969, the Commission stated that it found no reason to require an employer to provide fringe benefits for pregnancy equal to benefits for other conditions because pregnancy is unique to females and could not be considered an unanticipated condition or an illness.<sup>71</sup>

In a definitive revision of EEOC guidelines in 1972, the Commission made it unlawful for an employer to discriminate between the sexes in fringe benefits offered to employees. The revised guidelines require that benefits be made available to



husbands and families of female workers if they are offered to wives and families of male workers; and more significantly, that all benefits offered to wives of male workers must be offered to female workers, regardless of marital status.<sup>72</sup> Thus, if maternity or abortion coverage is available to wives of male employees, it must also be available to single and married female employees.

Also in 1972, in its first formal statement on pregnancy-related employment practices, the Commission issued guidelines which specify that disabilities caused by pregnancy and childbirth should receive the same treatment as other temporary disabilities under insurance and sick leave plans:

*Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices...shall be applied to disability due to pregnancy and childbirth on the same terms and conditions as they are applied to other temporary disabilities.<sup>73</sup>*

Although the EEOC guidelines on pregnancy and disability were effective in protecting women against certain discriminatory employment practices, they were recently struck down by the Supreme Court decision in *General Electric v. Gilbert*. As will be discussed more fully in the next section, the Court ruled that excluding pregnancy from disability does not necessarily constitute sex discrimination. Nevertheless, these and other EEOC guidelines should not be overlooked because they document a federal commitment to abolishing sex-based discrimination in employment practices.

#### **Executive Order 11246**

Executive Order 11246, issued in 1965, is responsible for another set of federal regulations which have had an impact on insurance coverage for female employees. This Order specifies the terms under which the federal government awards contracts or subcontracts. In 1967, the Order was amended so that federal contractors were prohibited from considering sex as a condition of employment.<sup>74</sup>

In June of 1970, the Office of Federal Contract Compliance Programs (OFCCP) issued guidelines to carry out the intent of the Executive Order. Applying Equal Pay Act Standards to sex discrimination, OFCCP ruled that employers must provide equal benefits to men and women in employment contributions, welfare programs, insurance premiums, and other similar fringe benefits. The OFCCP addressed the



issue of maternity leave by declaring that a contractor's maternity leave policy must provide, at a minimum, a reasonable period of time away from work for childbearing, reinstatement to the original job or one of like status and pay, and continuation of service credits.<sup>75</sup>

#### **Recent Bills Introduced in Congress**

Since 1973, several bills have been introduced in Congress prohibiting sex discrimination in *coverage and availability* of insurance. Congresspersons Abzug, Koch, Patterson, Moakley, Green, Holtzman, Sullivan, and Holt each introduced bills which specified gender as the basis for the prohibited discrimination. Congresswoman Abzug added marital status to her bill, recognizing that it has been a crucial factor in sex discrimination against women. However, neither she nor any of the other Congresspersons addressed the problem of sex discrimination in insurance rates.

None of these bills received the attention they deserved on Capitol Hill, presumably because they were overshadowed by two major bills in other areas affecting the economic status of women. The Pension Law of 1974 and the Equal Credit Opportunity Act of 1975 have been the focus of much of women's lobbying energies. The Pension Bill guarantees that a widow will receive survivor's benefits if her husband was receiving pension payments at the time of death, unless he had specified otherwise. The Credit Bill is also relevant to women's insurance problems, in that it prohibits creditors from denying credit on the basis of sex.

The 95th Congress, currently in session, is focusing on the specific issue of disability coverage for pregnancy-related conditions. Public attention to the question was created by the Supreme Court decision in *General Electric v. Gilbert* (that excluding pregnancy from disability insurance does not constitute sex discrimination). Congress has responded with Senate Bill 995, introduced in March of 1977 by Senator Williams (D.N.J.). The Bill amends Title VII of the Civil Rights Act to prohibit sex discrimination on the basis of pregnancy. The amendment mandates that women affected by pregnancy or pregnancy-related conditions would be "treated the same for all employment-related purposes, including receipt of benefits under fringe programs, as other persons not so affected but similar in their ability or inability to work."<sup>76</sup> This proposed legislation is concerned primarily with guaranteeing the economic security of the family dependent on the wages of the female worker, whether she is the head of the household or whether she shares financial responsibility with another person. The Bill recognizes the changed role of women in the workforce and in the family. Since this Bill has a broad base of support, ranging from women's groups to the major labor unions, its chance for passage in Congress is promising. (See Appendix B for the specific language of the Bill with a list of its supporters.)



In March of 1977, Congressman Hawkins (D. Cal.) introduced a similar bill in the House of Representatives. The specific intent of this bill is to overturn the Supreme Court's decision in *General Electric v. Gilbert* and to support the Williams' bill in the Senate.

Another piece of legislation which has potential impact on women's insurance problems is the proposed Equal Rights Amendment (ERA). If ratified by the necessary 38 states, the ERA can be used as a tool for eradicating sex-based classification. The promise and limitations which the ERA holds for women in insurance are discussed more fully in the next chapter, as one of the avenues for further action

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## JUDICIAL REVIEW

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The courts have discussed three specific issues relating to sex discrimination in insurance: Sex as suspect classification; pregnancy coverage in disability insurance; and financial responsibility of childbearing.

### Suspect Classification

Legal interpretations of "suspect classifications" are based on Title VII of the Civil Rights Act of 1964. In the 1960s and early 1970s, the courts reviewed numerous cases which pronounced race a suspect classification. Under this definition, the use of race as a basis of classification is automatically subject to close scrutiny by the law, and the burden of proving the absence of discrimination is placed upon those who use any race classification. Sex classification, on the other hand, has not been deemed as "suspect" and is therefore not scrutinized for possible discriminatory effects unless the victim of such classification brings it to the attention of the courts. For their part, the courts, even when ruling in favor of the victims of sex discrimination, have stopped short of labeling sex as a suspect classification.

The decision which came closest to labeling sex as suspect was *Frontiero v. Richardson*, where a plurality of the Supreme Court argued that "classifications based upon sex, like classifications based on race, alienage, and national origin, are inherently suspect and must therefore be subjected to close judicial scrutiny." The Court went on to say that:

*Since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to*



*individual responsibility... 'And what differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or to contribute to society. As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of the individual members.'*<sup>9</sup>

The potential impact of this decision was mitigated by the concurring opinion of Justices Powell, Burger, and Blackmun, who insisted that it is not necessary to characterize sex as a suspect classification, and that the Court should refrain from setting that precedent until the states make their stance on the ratification of the Equal Rights Admendment.

#### **Pregnancy Coverage in Disability Insurance**

The most recurrent theme addressed by the courts relates to the question of whether excluding pregnancy from disability insurance constitutes sex discrimination. The lower courts have adhered to EEOC guidelines, but the Supreme Court ignored those guidelines and reversed the lower court decisions.

In *Wetzel v. Liberty Mutual Insurance Company*, the Third Circuit Court of Appeals stated that disabilities caused or contributed to by pregnancy are temporary disabilities and are to be treated as such under disability insurance.<sup>9</sup> The court agreed with the EEOC guidelines that higher costs for benefits for one sex shall not be a defense under Title VII to a charge of sex discrimination in benefits.

A Federal District Court in Virginia followed in a similar vein three months later with its decision in *Gilbert v. General Electric Co.*:

*There is no rational distinction to be drawn between pregnancy related disabilities and a disability arising from any other cause. The defendant does not exclude from coverage any disability because it was voluntarily incurred other than disabilities arising from childbirth or other pregnancy related conditions. That this is sex discrimination is self evident.*<sup>10</sup>

In two major cases reviewed by the Supreme Court on the issue of disability coverage for pregnancy, the direction of the lower courts was reversed. In *Geduldig v. Aiello* and *General Electric Co. v. Gilbert*, the Court maintained that, as a condition unique to women, pregnancy and any related disability may be excluded from employment compensation plans covering other physical disabilities without



constituting discrimination on the basis of sex. The plaintiffs in *Geduldig* brought the case under the Equal Protection Clause of the Fourteenth Amendment by charging that the pregnancy exemption of the state's disability insurance program denied women full protection from disability-related expenses and loss of income, while it provided full protection to men.<sup>11</sup> Plaintiffs in *General Electric*\* filed under Title VII of the Civil Rights Act, which prohibits discrimination on the basis of sex in employment compensation, terms, conditions, and privileges.<sup>12</sup> In *General Electric*, plaintiffs charged that the company disability insurance plan, considered part of the company's employment compensation, deprived women of full insurance coverage by excluding pregnancy disability coverage, while offering full coverage to men.

In both cases, the Supreme Court ruled that the pregnancy exclusion did not constitute sex discrimination on its face. The Court defined the issue, instead, as one of "underinclusiveness,"<sup>13</sup> in that the programs insure certain disabilities and exclude others. The Court found no evidence that the selectiveness of insurance risks works to discriminate against any definable group or class:

*There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.*<sup>14</sup>

*The Plan, in effect (and for all that appears), is nothing more than an insurance package, which covers some risks, but excludes others...As there is no proof that the package is in fact worth more to men than to women, it is impossible to find any gender-based discriminatory effect in this scheme simply because women disabled as a result of pregnancy do not receive benefits; that is to say, gender-based discrimination does not result simply because an employer's disability benefits plan is less than all inclusive.*<sup>15</sup>

A comprehensive insurance plan which is less comprehensive for one group of individuals than for another denies equal protection to that group. In stating that there is no risk from which men are protected and women are not,<sup>16</sup> the Supreme Court ignores the purpose for which the disability insurance coverage was intended. The insurance plans in both cases covered disabilities due to voluntary risks, and also disabilities unique to men, such as prostatectomies, vasectomies, and circumcisions. In his dissent in *General Electric*, Justice Brennan points to the flaw in the Supreme Court's rationale:

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\*The Supreme Court case is usually referred to as *General Electric* and the lower court case as *Gilbert*.



*In fostering the impression that it is faced with a mere underinclusive assignment of risks in a gender-neutral fashion -- that is, all other disabilities are insured irrespective of gender -- the Court's analysis proves to be simplistic and misleading. For although all mutually contractible risks are covered irrespective of gender...the plan also insures risks such as prostatectomies, vasectomies, and circumcisions that are specific to the reproductive system of men and for which there exist no female counterparts covered by the plan. [P]regnancy affords the only disability, sex-specific or otherwise, that is excluded from coverage.<sup>87</sup>*

Aside from the "underinclusiveness" rationale, the Court argued that pregnancy is not comparable to other disabilities since it is a voluntary condition rather than a disease.<sup>88</sup> The fallacy of this argument is discussed by the dissenting Justice Brennan:

*The characterization of pregnancy as 'voluntary' is not a persuasive factor, for as the Court of Appeals correctly noted, 'other than childbirth disability (General Electric) has never construed its plan as eliminating all so called "voluntary" disabilities,' including sport injuries, attempted suicides, venereal disease, disabilities incurred in the commission of a crime or during a fight, and elective cosmetic surgery...Similarly, the label 'disease' rather than 'disability' cannot be deemed determinative since General Electric's pregnancy disqualification also excludes the 10% of pregnancies that end in debilitating miscarriages,...and cases where women recovering from childbirth are stricken by severe diseases related to pregnancy<sup>89</sup>*

#### **Financial Responsibility of Childbearing**

Equal rights and equal protection under the law guarantee that all rights will be protected equally among individuals. The Third Circuit Court of Appeals commented in *Gilbert v. General Electric Company*:

*'Women...must be permitted to be women,' and this means a right to be 'women' without being burdened by any discrimination in employment benefits, whether in wages or in fringe benefits, on account of characteristics peculiar to their sex.<sup>90</sup>*

The insurers in *Geduldig* and *General Electric* maintained that the exclusion of pregnancy from coverage prevented women from receiving additional benefits which are not available to men.<sup>91</sup> This view, that the benefits and responsibility of



pregnancy are limited to the individual mother, is a very narrow understanding of the relationship between childbearing and social welfare. The District Court opinion in *Gilbert* expressed the wider view that childbearing, as the necessary means of procreation, is an essential part of human existence. If additional costs are generated by women as a result of pregnancy and childbirth, the court reasoned that these costs should be shared by the whole society which benefits from the birth of children.

*If it be viewed as a greater economic benefit to women, then this is a simple recognition of the women's biologically more burdensome place in the scheme of human existence. An industrial policy which does not account for this fails in providing such sexual equality as is within its power to produce. If Title VII intends to sexually equalize employment opportunity, there must be this one exception to the cost differential defense.<sup>92</sup>*

The Supreme Court decisions in *Geduldig* and *General Electric* have effectively closed the federal courts as an avenue for challenging the exclusion of pregnancy from disability coverage. However, the state courts have the ultimate authority over state laws and are not bound by the Supreme Court decisions on Title VII. Shortly after *General Electric*, the New York Court of Appeals ruled that a disability plan which does not cover pregnancy-related conditions violates New York's Human Rights Laws.<sup>93</sup> Prior to *General Electric*, several other state courts (in Wisconsin, Iowa and Massachusetts) required pregnancy coverage in disability programs under their respective fair employment practices acts. These requirements were not affected by the *General Electric* decision.

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## STATE INSURANCE REGULATIONS

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A number of states have conducted investigations of women and insurance, either through the auspices of insurance commissioners' offices or the state women's commissions. These investigations resulted in a series of recommendations to improve women's rights in obtaining insurance. In some states, the proposals of the investigating group resulted in significant changes in insurance regulations. The following pages summarize some of the more illuminating recommendations made in the states.

In 1974, Pennsylvania conducted the first of the state studies on sex discrimination in insurance. This study resulted in a comprehensive set of recommendations for executive action by the Pennsylvania Insurance Department Division of Policyholders Service, and for rate regulation by the Bureau of Rate and Policy Regulation.<sup>94</sup> Based on these recommendations, the Pennsylvania Insurance



Commission invalidated all insurance policies which discriminate on the basis of sex. The regulations issued by the Commissioner were addressed in Pennsylvania Senate Bill 561 which prohibited all types of discrimination in the advertising, underwriting, and sale of insurance. The bill deemed unlawful a company's refusal to write any particular coverage on the basis of sex, marital status, family size, or occupation. Rate differentiations based on sex are still permitted, but insurance companies are now required to prove that the rate differentials are justified on the basis of claims experience. This Senate Bill was enacted and became the Unfair Insurance Act of 1974 which bans discrimination in coverage, benefits, and availability. However, it does not address the issue of sex discrimination in insurance rates.<sup>95</sup>

In New Jersey, James J. Sheeran, the Commissioner of Insurance proposed in 1975 that: "No person engaged in the business of insurance shall refuse to issue any policy of insurance or shall decline to renew such policy because of the sex and/or marital status of the applicant or policyholder."<sup>96</sup> This ruling is designed to eliminate discrimination in availability by requiring all insurers to make available to both men and women any coverage that was previously available to only one sex. Later clarifications of this ruling specified that group plans which offer maternity benefits to the spouses of male employees must also offer such benefits to female employees. Group plans must also make dependent coverage equally available to both sexes.

The New Jersey Insurance Commission has challenged several other discriminatory practices. The problem of the male insured's policy taking precedent over the female in coverage of dependents is addressed by a ruling that the primary coverage would be that of the parent who has financial responsibility for the child. Equal access to maternity coverage is mandated by a requirement that it be offered to single, divorced, separated, and widowed women on the same terms as it is offered to married women. Finally, life and health insurers in New Jersey are forbidden to treat complications of pregnancy more restrictively than any other sickness or illness.<sup>97</sup>

In New York, a task force on sex discrimination in insurance completed a report in 1974. The Task Force made three basic recommendations to the Department of Insurance: 1) amend the insurance law to prohibit discrimination by sex and marital status in policy offerings, benefit provisions, cancellation, non-renewal, and refusal to issue policies; 2) require the Insurance Department to examine and certify data upon which actuarial tables and rating classifications are developed; and 3) create an Affirmative Action Unit to review policy offerings and underwriting guidelines to eliminate bias.<sup>98</sup> The insurance law was amended to outlaw discrimination as suggested in the first recommendation; the other two recommendations were not implemented. At the present time, the New York Insurance Department is investigating the possibility of requiring that maternity care cover abortions.



It was mandated in New York that health insurance policies cover maternity conditions as they would any other illness (there is a four-day hospital limit and state government workers are excluded). The Health Insurance Association and 22 insurance companies have brought suit against the State to overturn that requirement. The companies claim that group policies can absorb the increased cost of such coverage, but that policyholders of individual plans will have to pay a high price. Presently, individual policies covering maternity costs sometimes require deductibles as high as \$1,000 or \$1,500. This prohibitively expensive deductible may cause all women except those planning a pregnancy to drop their health coverage, thus creating a "self-selection" process which drives costs of insurance even higher.

The State of Michigan has adopted an Unfair Trade Practices Act, effective in April 1977, which contains a clause prohibiting unfair or deceptive practices in insurance. This clause specifically prohibits the refusal "to insure or continue to insure an individual or risk solely because of...race, color, creed, marital status, sex or national origin."<sup>99</sup>

In California, a number of insurance bills have passed the legislature. Disability and health insurance policies which offer maternity coverage are prohibited from limiting complications of pregnancy they cover. Health care services plans, group policies, and self-profit hospitals are prohibited from providing fewer benefits to employees than they provide to spouses of employees. Health insurance companies are required to provide conversion rights of terminated employees to spouses who are no longer legal dependents. State required disability insurance must cover normal pregnancy for a period of three weeks before and three weeks after the birth of a child.

More action to combat sex discrimination in insurance is being considered in California. In the current legislature, two bills were introduced. The first provides for workman's compensation for household employees, and the other requires the Insurance Commissioner to evaluate the validity of sex-differentials in insurance.

During the 1975 general session of its General Assembly, Colorado passed a series of acts which prohibit various sex-based insurance practices. Pregnancy complications in Colorado must now be treated like any other illness, and maternity coverage must be offered to single and married women in group or individual policies. Classification cannot be based on sex or marital status unless justified actuarially, and insurance companies must offer conversion privileges to spouses.

In North Carolina, after receiving a report from the Task Force on Women and Insurance, the Insurance Commissioner proposed and held a series of hearings on regulation of sex discrimination. At the hearings, the insurance industry, with the support of the Task Force, proposed more specific regulations based on the



National Association of Insurance Commissioners' (NAIC) model regulations.

The NAIC model regulations, which have been used in many states considering insurance reform,\* are designed "to eliminate the act of denying benefits or coverage on the basis of sex or marital status in the terms and conditions of insurance carriers."<sup>100</sup> (See Appendix C.) The regulations address the problem of sex discrimination in availability and scope of insurance coverage. However, they do not address the important issues of adequate maternity coverage under health and disability insurance, nor do they address the sex discrimination inherent in the use of sex-based classifications in insurance. The NAIC believes that availability of coverage and rate determinations are separate issues and that availability should be addressed first because, "any attempt to tamper with the pricing mechanism of the insurance business must be approached with great care."<sup>101</sup>

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\*Among these states are Arkansas, Idaho, Iowa, Nevada, Ohio, Tennessee, Wisconsin, and Texas.



## V. AVENUES FOR FURTHER ACTION

Past efforts to eradicate sex discrimination in insurance have realized some progress and have also suffered serious setbacks. There are still a number of promising avenues women can pursue to bring about significant changes in availability, scope, and rates of insurance. Women can work for improved state regulations. They can also encourage insurance companies to improve insurance coverage and rates by registering complaints, serving on company boards, and initiating court action. To improve their health insurance coverage, women can take advantage of alternative insurance schemes currently available and also press for specific provisions in a future national health insurance program. Finally, the ERA can be a useful tool in abolishing the sex-based classifications which have fostered discrimination in insurance. These and other recommendations are discussed more fully in the following pages.

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### IMPROVING INSURANCE REGULATIONS

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Although advances have already been made in insurance regulations in many states, none have gone the full distance of meeting all of women's insurance needs. On the basis of trends already established in some states, the following suggestions are made for improving current state insurance regulations. To ensure equality in availability and scope of *all insurance*, it is recommended that insurance commissioners require that:

- Insurance policies may not limit the amount of coverage an insured person may purchase based on the sex or marital status of that person.
- Policy options, as well as basic coverage, are equally available to men and women, regardless of marital status.
- Companies guarantee conversion options in case of divorce, separation, or death on all insurance sold on a family or husband/wife basis.
- The insurance policy of the person financially responsible for a dependent child is primary over the insurance of the other parent.



- Dependent coverage is available to families (including husbands) of female employees if such coverage is available to wives and children of male employees.
- Insurance agents may not sell any policy on the life of an insured's spouse without first contacting that spouse and witnessing the spouse's signature on the application.
- Insurance agents must notify all spouses when they are dropped as beneficiaries from life insurance policies.
- Insurance companies may not drop or alter the dependent coverage of an insured's health policy without first notifying the dependent of the change.

In order to improve the availability and scope of *disability insurance* offered to women, state insurance commissioners should require that:

- Disability plans may not include more restrictive benefit periods and more restrictive definitions of disability for women than men in the same job classification.
- Disability plans offer women the same monthly benefits as men in the same job classification.
- Females are offered disability coverage on the same basis as males when employed at home, on a part-time basis, or by relatives.
- Disability coverage includes conditions related to pregnancy on the same basis as other conditions which prevent a person from working.

*Health* insurance plans can be improved for women by regulations requiring that:

- All health insurance policies cover pregnancy and related complications, without special riders or rates.
- Maternity benefits are available to both married and unmarried women, including female dependents.
- Newborn infants are covered by the family or individual health policy immediately upon birth.



- Health insurance policies may not include any provisions which restrict, reduce, modify, or exclude benefits relating to coverage of the genital organs of one sex.

The problem of *unfair rate differentials* between men and women can be rectified by requiring that:

- Insurance companies submit substantial loss experience, sales, claims, and complaint data by sex and marital status so that systematic rate approval procedures can be established.
- Rate approval is monitored on a regular basis, preferably with the participation of a consumer division within the insurance department.
- The use of sex-based classification in establishing rates is prohibited.

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### ALTERNATIVE CONSUMER ACTIVITIES

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As individuals or as members of organized groups, women can use alternative mechanisms to challenge discriminatory practices in insurance. In their respective states, women can lobby for the creation of a special consumer division within the state insurance department. This division should contain a fair representation of women, particularly female actuaries, economists, statisticians, accountants, and lawyers. Such a group would increase the responsiveness of the department to insurance complaints and would serve as a lobbying force for improving insurance services to consumers.

When possible, women should attempt to serve on insurance company boards, in order to have a direct impact on insurance company policies and underwriting. Female employees can press their employers for more adequate insurance, either through union negotiations (when applicable) or through other organized efforts with fellow employees.

Women who personally experience discrimination in obtaining insurance should consider filing complaints with organized groups dealing with problems related to insurance, consumers, or women. It is important to keep informed of what insurance companies are legally permitted to do in a particular state. As discussed earlier, individual agents may create problems for women even if the insurance company itself has no specific policy vis-a-vis women. It is also possible for an agent



to be uninformed about a new interpretation of an existing regulation or the issuance of a new one. Filing complaints may bring an adjustment to a particular problem. Equally important is the impact that complaints have in educating legislators, insurance commissioners, and insurance companies.

A complaint letter should be addressed to the insurance company responsible for the discriminant act. Copies should be sent to one or more organized groups which can offer support. The insurance commissioner's office is a very good place to start with an inquiry or a complaint (Appendix D contains the list of commissioners for the 50 states). A local or state consumer organization should be informed of unfair insurance practices. Equally important are the state commissions on women, because they deal specifically with women's issues. (Appendix E contains a list of all the state womens' commissions).

If legal grounds exist for challenging sex discrimination in insurance, at least two options are available. The first is the Public Interest Research Group (PIRG), which is modeled closely after the Ralph Nader group in Washington, D.C. Its members are university and law students who work with professional research staff to challenge both government and business to be more responsive to public needs. The second resource for legal advice is the American Civil Liberties Union.

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## HEALTH MAINTENANCE ORGANIZATIONS

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A health maintenance organization (HMO) is an organized system of health care delivery which provides comprehensive health services to an enrolled population, in return for a prepaid monthly or annual fee. With prepaid revenues and a fixed budget, an HMO's financial incentive is to contain costs. This financial incentive, coupled with a philosophy of preventive care, encourages HMOs to keep enrollees as healthy as possible by emphasizing regular physical examinations and early detection of disease. To qualify for federal funds, HMOs must fulfill a list of requirements among which is the provision of unlimited basic services and regular preventive care.

Once an HMO has been approved by the federal government, the law requires that all employers of 25 people or more, within a 25-mile radius of the HMO facilities, must offer the HMO plan as an alternative to the more traditional health insurance plans. On behalf of employees who wish to join an HMO, employers must pay, at a minimum, an amount equivalent to premiums paid to an insurance company for employees using an ordinary health insurance plan. If HMO prepaid fees exceed these premiums, the employee must make up the difference. Generally, HMO fees are higher than ordinary health insurance premiums. Individuals can enroll in



HMOs during an "open enrollment" period which is required of all federally-approved HMOs.

Although an HMO may require some extra out-of-pocket payments for health insurance, it is an option which women should consider. No other type of health insurance plan guarantees women such comprehensive and preventive health care services with minimum fragmentation. In order to take advantage of HMOs, women can do one of two things. First, they can inquire as to whether a qualified HMO exists in the community, by writing or calling Group Health Association of America in Washington, D.C., an umbrella organization of prepaid health plans. If no HMO is available to interested women, it is possible to participate in the development of an HMO through involvement in health planning agencies located in every region and state in the country.

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## NATIONAL HEALTH INSURANCE

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A national health insurance (NHI) program is no longer a mere possibility in this country. It is now clear that some form of NHI will be initiated by the 95th Congress. Since 1973, at least 17 NHI proposals have been introduced in Congress, and even the most liberal and comprehensive fail to address all of women's health insurance needs. It is essential that women become aware of NHI issues which affect them and voice their demands during the imminent NHI debates in Congress. The issues which are particularly important to women are related to: eligibility requirements, covered benefits, and provider qualifications.

Eligibility requirements, by definition, determine who will be allowed to participate in an NHI program. Upon review of the past and current NHI proposals, it is instructive to distinguish between two principal eligibility definitions. The first is linked to family membership and employment status, and the second requires merely residency in the United States. Based on the first definition, the principal wage earner in the family would be enrolled in NHI, and his/her family would be eligible as dependents. Thus, a married woman who does not earn more than her husband would be insured under his name. Should her marital status change, she may well find herself without health insurance until she is reinstated in her own name. The eligibility definition linked to family and employment would prevent many women from claiming their own health insurance, and would only serve to reinforce women's economic dependence on men.

Under the alternative eligibility definition requiring only U.S. residency, every individual would be enrolled under his/her own name without regard to sex, marital status, income, employment status, or age. Since this definition leaves no room for sex discrimination, it is the one women should press for.



For women, as well as for all others, it is crucial to emphasize the preventive aspect of health services. So, aside from hospital and emergency room coverage for acute and chronic disorders, women should seek coverage for annual complete physical examination, including x-rays and laboratory tests. Health care expenses for normal and complicated childbirth and for newborn infants should also be covered. Covered preventive services should include: family planning visits, contraceptive drugs and devices, abortion, prenatal and postpartum care, well-baby care, and annual gynecological screening tests, including breast exams and pap smears.

Physicians, hospitals, and group practices are traditional health care providers who can easily gain certification in any health insurance program. However, women also rely on other less traditional types of providers including women's health centers, family planning clinics, and abortion clinics. These facilities face difficulties in qualifying for Medicaid, Medicare, and private insurance reimbursement unless they affiliate with hospitals and are closely supervised by physicians. These requirements come from the medical model tradition which places the physician at the top of the pyramid of health professionals and encourages the hospital's control of community health services. Yet, for many of the services used by women, physicians and hospitals are not the most appropriate providers. Many maternity-related services can be well provided by nurses, nurse-practitioners, nurse-midwives, family planning counselors, nutritionists, and trained health educators. Women's health care needs would be better served should they succeed in gaining NHI certification and financial reimbursement for these providers.

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#### THE EQUAL RIGHTS AMENDMENT

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The Equal Rights Amendment (ERA) reads, in part, that "equality of the rights under the law shall not be denied or abridged by the United States or by any state on the account of sex."<sup>102</sup> Until the ERA is ratified by the necessary number of states and thereafter interpreted by the usual process of constitutional adjudication, one can only speculate on its potential impact on sex-discrimination practices in insurance. Nevertheless, while working on ERA's ratification, woman can research particular issues and formulate strategies which would supply information for legislative debate and provide direction for judicial interpretation.

To begin with, three questions must be asked. First, will the insurance industry, a private business, be touched by the ERA which is intended for federal and state actions only? Second, how does the principle of equality apply to insurance practices? Finally, what does legislative history teach us about the limitations of this principle?



This issue of state action versus private action was addressed in *Stern v. Massachusetts Indemnity and Life Insurance*, where a Federal District Court ruled that a state commissioner's approval of insurance policy forms and premium rates constitutes state action and therefore requires participation in the discriminatory provisions contained in the Fourteenth Amendment.<sup>103</sup> Since the ERA does not differ from the Fourteenth Amendment in its focus on federal and state actions, this case may be used as a precedent to judicial arguments on the appropriateness of the ERA's application to the insurance industry.

Congressional hearings and analyses of ERA observers provide the basis for interpretation of the principle of equity underlying the Amendment. A House minority report strikes down the use of sex groupings based on common, but not universal, characteristics found in either gender:

*The existence of a characteristic found more often in one sex than the other does not justify legal treatment of all members of that sex different from all members of the other sex...The law may operate by grouping individuals in terms of existing characteristics of functions, but not through a vast overclassification by sex.*<sup>104</sup>

The Senate Judiciary Committee was more specific and brief: "the basic principle on which the Amendment rests may be stated shortly: sex should not be a factor in determining the legal rights of men or women."<sup>105</sup>

In one of the most extensive analyses written on the ERA, the *Yale Law Journal* translates the equality principle into an unequivocal ban against sex-based groupings and insists that, under the ERA, sex is not a permissible factor in *any* classification used in federal or state activity:

*The issue under the Equal Rights Amendment cannot be different but equal, reasonable or unreasonable classification; suspect classification, fundamental interest, or the demands of administrative expediency. Equality of rights means that sex is not a factor.*<sup>106</sup>

Regardless of how absolutely the ban is defined, both the literature and the legislative hearings concede to one exception: gender categories may be allowed when they are based on physical characteristics, unique to one sex:

*[The ERA] ...does not require that women must be treated in all respects the same as men. Equality does not mean sameness. As a*



*result, the original resolution would not prohibit reasonable classification based on characteristics that are unique to one sex.*<sup>107</sup>

After the ERA was ratified in Pennsylvania, this "uniqueness" clause was applied directly by the State's Insurance Department when it instructed insurance companies that premium rate differences between males and females would be allowed only with proof "that the statistical variations used in support of discriminatory rates or benefits are directly related to inherent physiological differences between the sexes, or that the discrimination by sex can be supported by other compelling rationale."<sup>108</sup>

Although women may benefit from the equality principle, application of the physical uniqueness clause raises serious questions. For instance, would this clause strengthen the industry's position on excluding pregnancy-related conditions from disability and health insurance coverage? Women should take the initiative to guarantee that ERA is passed and that it will be used to eradicate the inequities which women have faced in the past. Clearly, some precedents already exist to encourage women in this effort. The ERA holds much promise for women in insurance because of its potential to inhibit the use of the sex-based classification. However, its impact would be undermined unless women initiate clear directions for eradicating sex-discrimination in the insurance industry.

In sum, the ERA has the potential of carrying the issue of sex-based classification over and beyond the threshold anticipated by the Supreme Court in *Frontiero v. Richardson* (the case which discussed sex as a suspect classification). Sex would not only be labeled a suspect classification, it would be banished from actuarial tables, unless it can be specifically linked to unique physical sex differences which contribute to higher risks in insurance.



## **VI. AFTERWORD**

Women have just begun to challenge the insurance industry on its sex-based discriminatory practices. There is much more work to be done and several means of action are still unexplored. It is the hope of the authors that this guidebook will serve as a catalyst in women's future efforts to eradicate sex discrimination in insurance. We at WEAL plan to continue our work by monitoring activities initiated by women, state legislatures and regulatory agencies, Congress, and the insurance industry itself. We urge our readers to keep us informed of their own activities and to send us documentation of the specific discriminatory practices they have encountered in insurance.



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**APPENDIX A**



Husband's Insurance Company\*  
 P.O. Box 000  
 Anywhere, U.S.A.

Attention: Claims Division

Gentlemen:

More than eight years ago I won a divorce from a marriage of 16 ½ years and received custody of my five-year-old son. Since that time I have been held responsible for, and paid for, all my son's drug and medical bills -- receiving from his father only the court-appointed monthly child support payments, which have failed to arrive enough months through the years to add up to *many* hundreds of dollars still owed me.

Seven years ago I remarried, and since that time my husband and I have paid expensive monthly premiums to give my son hospitalization and major medical coverage. Fortunately my son was quite healthy and we never had to put this insurance to use until the autumn of 1973. Since then this child has been in the hospital four times, once (May 1974) for major surgery. The claims for the November 1973, January 1974 and May 1974 confinements were promptly paid by my insurance company.

However, when my ex-husband came home in May 1974 to be present for the major surgery, he announced that he had just placed our young son on *his* insurance coverage and that his insurance company would pay anything my insurance failed to pay. (Though this sounds like a generous act, you and I both know that since my ex-husband already had three dependents on his group coverage it cost *no* more to add my son.) So, fool that I was, I mailed my ex-husband copies of all the hospital and doctor bills connected with this May 1974 confinement.

Though my insurance company promptly paid the claim, in December 1974, seven months after the date of loss, my ex-husband was still driving around with the May 1974 bills in his glove compartment, so I paid all outstanding balances in full. My son had just been confined to the hospital again in December 1974 and, since my ex-husband and his insurance coverage had proved most unreliable, in the future, as in the past, my husband and I planned to depend only upon *our* insurance coverage and pay the difference ourselves.

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\*The names of persons and insurance companies have been deleted in order to ensure anonymity of all involved.



Then, in February 1975, *nine months* after the May 1974 confinement, I received word from my insurance company that your company had just notified them of my ex-husband's policy's having "primary coverage" on the May 1974 confinement, reducing my policy to secondary coverage. My insurance company went on to tell me that this will involve your refunding it and, since you will only recognize *your* insured, all money paid out of *my* pocket for that confinement will be refunded to *my ex-husband*.

As for the December 1974 confinement, which is still pending due to an earlier problem with the hospital bill, I am told that since my ex-husband was not present to assign his coverage to the hospital, doctor, etc., you will be well within your rights to pay *all* this money to my ex-husband, meaning, you will refund *my ex-husband* for all bills *paid by my husband and me*.

Should you decide to have my ex-husband assign his coverage to the medical people owed, there is still the matter of approximately \$150.00 worth of bills connected with the December confinement that I have already paid in full. My company tells me that you will completely ignore my existence and refund this money, *and that of all future drug and medical bills I pay on this child*, to my ex-husband.

At the same time, I am told by my insurance company that I cannot solve my problem by refusing to accept your coverage for my child. That is, due to the agreement between all insurance companies that on *all overlapping group coverages the natural father's coverage is always primary*, the mere existence of my ex-husband's coverage had made my coverage all but impotent -- since the secondary coverage will not pay at all until the primary coverage pays, and then only the small portion that the primary coverage does not pay. In other words, the insurance companies have conspired to pen me in a trap, and more than eight years after the divorce you have once again placed me at the mercy of my ex-husband's generosity. This is not to even mention what you have done to my present husband who is responsible for all my son's bills.

The agreement between insurance companies that the father's coverage is always primary is unjust and discriminates against all divorced mothers who have custody of their children -- and should be changed so that the insured having custody of the child has the primary coverage. Meanwhile, I cannot think of a word strong enough to describe the inequity of refunding to *an ex-husband money paid out of the mother's pocket for a child's medical and drug bills*.

Therefore, please be advised that as soon as I receive notice that you have issued a check to *my ex-husband* for bills that *I* owe, or have already paid, in defense of my rights and those of every divorced mother in this country, I will file suit against both insurance companies.

Very truly yours,



**APPENDIX B**



**SENATE BILL S. 995**

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that section 701 of the Civil Rights Act of 1964 is amended by adding at the end thereof the following new subsection:

“(k) The terms ‘because of sex’ or ‘on the basis of sex’ include, but are not limited to, because of or on the basis of pregnancy, childbirth or related medical conditions; and women affected by pregnancy, childbirth or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 703 (h) of this Title shall be interpreted to permit otherwise.”

**LIST OF ORGANIZATIONS SUPPORTING LEGISLATION****AFL-CIO**

American Alliance for Health and Physical recreation  
 American Civil Liberties Union  
 American Federation of State and County Municipal Employees  
 American Federation of Teachers AFL-CIO  
 American Newspaper Guild AFL-CIO  
 American Nurses Association  
 Amalgamated Clothing and Textile Workers Union  
 Americans for Democratic Action  
 Association of Flight Attendants AFL-CIO  
 Coalition of Labor Union Women  
 Committee of Feminist Organizations and Other Non-Aligned Women  
 Communications Workers of America AFL-CIO  
 Delta Sigma Theta Sorority  
 Federally Employed Women  
 International Union of Electrical, Radio and Machine Workers AFL-CIO  
 Leadership Conference on Civil Rights  
 Massachusetts Governor's Commission on the Status of Women  
 Mexican-American Womens National Association  
 National Association for the Advancement of Colored People  
 National Association of Commissions for Women  
 National Education Association  
 National Federation of Business and Professional Women's Clubs, Inc.  
 National Organization for Women  
 National Women's Health Network  
 New Jersey Insurance Department



Pennsylvania Commission for Women  
United Auto Workers  
United Electrical, Radio and Machine Workers  
Urban League  
Women for Racial and Economic Equality  
Women United for Action  
Women Employed  
Women's Equity Action League  
Women's Law Project of Philadelphia  
Women's Lobby, Inc.



**APPENDIX C**



**NAIC MODEL REGULATION****Purpose:**

The purpose of this regulation is to eliminate the act of denying benefits or coverage on the basis of sex or marital status in the terms and conditions of insurance contracts and in the underwriting criteria of insurance carriers.

**Availability Requirements:**

Availability of any insurance contract shall not be denied to an insured or prospective insured on the basis of sex or marital status of the insured or prospective insured. The amount of benefits payable, or any term, conditions or type of coverage shall not be restricted, modified, excluded, or reduced on the basis of the sex or marital status of the insured or prospective insured except to the extent the amount of benefits, term, conditions or type of coverage vary as a result of the application of rate differentials permitted under the (insert name of state) Insurance Code. However, nothing in this regulation shall prohibit an insurer from taking marital status into account for the purpose of defining persons eligible for dependents benefits.\* Specific examples of practices prohibited by this regulation include but are not limited to the following:

- a. Denying coverage to females gainfully employed at home, employed part-time or employed by relatives when coverage is offered to males similarly employed.
- b. Denying policy riders to females when the riders are available to males.
- c. Denying maternity benefits to insureds or prospective insureds purchasing an individual contract when comparable family coverage contracts offer maternity benefits.
- d. Denying, under group contracts, dependent coverage to husbands of female employees, when dependent coverage is available to wives of male employees.
- e. Denying disability income contracts to employed women when coverage is offered to men similarly employed.

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\*Sentence as amended by the (C1) Subcommittee.



- f. Treating complications of pregnancy differently from any other illness or sickness under the contract.
- g. Restricting, reducing, modifying, or excluding benefits relating to coverage involving the genital organs of only one sex.
- h. Offering lower maximum monthly benefits to women than to men who are in the same classification under a disability income contract.
- i. Offering more restrictive benefit periods and more restrictive definitions of disability to women than to men in the same classifications under a disability income contract.
- j. Establishing different conditions by sex under which the policyholder may exercise benefit options contained in the contract.
- k. Limiting the amount of coverage an insured or prospective insured may purchase based upon the insured's or prospective insured's marital status unless such limitation is for the purpose of defining persons eligible for dependent benefits.



**APPENDIX D**



## THE STATE REGULATORY AUTHORITIES

- ALABAMA:** Commissioner of Insurance, Administrative Building, Montgomery, Alabama 36104
- ALASKA:** Director of Insurance, State Office Building, Juneau, Alaska 99801
- ARIZONA:** Director of Insurance, 1601 West Jefferson, Phoenix, Arizona 85007
- ARKANSAS:** Insurance Commissioner, 12th and University Avenue, Little Rock, Arkansas 72204
- CALIFORNIA:** Insurance Commissioner, 600 South Commonwealth, Los Angeles, California 90005
- COLORADO:** Commissioner of Insurance, 106 State Office Building, Denver, Colorado 80203
- CONNECTICUT:** Insurance Commissioner, 425 State Office Building, Hartford, Connecticut 06115
- DELAWARE:** Insurance Commissioner, 21 The Green, Dover, Delaware 19901
- DISTRICT OF COLUMBIA:** Superintendent of Insurance, 614 H Street, N.W., Suite 512, Washington, D.C. 20001
- FLORIDA:** Insurance Commissioner, State Capitol, Tallahassee, Florida 32304
- GEORGIA:** Insurance Commissioner, 238 State Capitol, Atlanta, Georgia 30334
- GUAM:** Insurance Commissioner, P.O. Box 2796, Agana, Guam 96910
- HAWAII:** Insurance Commissioner, P.O. Box 3614, Honolulu, Hawaii 96811
- IDAHO:** Director of Insurance, 206 State House, Boise, Idaho 83702
- ILLINOIS:** Director of Insurance, 160 N. LaSalle Street, Room 1600, Chicago, Illinois 60601
- INDIANA:** Commissioner of Insurance, 509 State Building, Indianapolis, Indiana 46204
- IOWA:** Commissioner of Insurance, State Office Building, Des Moines, Iowa 50319
- KANSAS:** Commissioner of Insurance, State Office Building, Topeka, Kansas 66612
- KENTUCKY:** Insurance Commissioner, Capitol Plaza Tower, Frankfort, Kentucky 40601
- LOUISIANA:** Commissioner of Insurance, P.O. Box 44214, Capitol Station, Baton Rouge, Louisiana 70804
- MAINE:** Superintendent of Insurance, Department of Business Regulation, Augusta, Maine 04330
- MARYLAND:** Insurance Commissioner, One South Calvert Street, Baltimore, Maryland 21201
- MASSACHUSETTS:** Commissioner of Insurance, 100 Cambridge Street, Boston, Massachusetts 02202
- MICHIGAN:** Commissioner of Insurance, 111 North Hosmer Street, Lansing, Michigan 48913



- MINNESOTA: Commissioner of Insurance, Metro Square Building, St. Paul, Minnesota 55101
- MISSISSIPPI: Commissioner of Insurance, P.O. Box 79, Jackson, Mississippi 39205
- MISSOURI: Director of Insurance, P.O. Box 690, Jefferson City, Missouri 65101
- MONTANA: Commissioner of Insurance, Capitol Building, Helena, Montana 69601
- NEBRASKA: Director of Insurance, 1335 L Street, Lincoln, Nebraska 68508
- NEVADA: Insurance Commissioner, Nye Building, Carson City, Nevada 89701
- NEW HAMPSHIRE: Insurance Commissioner, 169 Manchester Street, Concord, New Hampshire 03301
- NEW JERSEY: Commissioner of Insurance, 201 East State Street, Trenton, New Jersey 08625
- NEW MEXICO: Superintendent of Insurance, P.O. Drawer 1269, Santa Fe, New Mexico 87501
- NEW YORK: Superintendent of Insurance, Two World Trade Center, New York, New York 10047
- NORTH CAROLINA: Commissioner of Insurance, P.O. Box 26387, Raleigh, North Carolina 27611
- NORTH DAKOTA: Commissioner of Insurance, Capitol Building, Fifth Floor, Bismarck, North Dakota 58501
- OHIO: Director of Insurance, 447 East Broad Street, Columbus, Ohio 43215
- OKLAHOMA: Insurance Commissioner, 408 Will Rogers Memorial Building, Oklahoma City, Oklahoma 73105
- OREGON: Insurance Commissioner, 158 12th Street, N.E., Salem, Oregon 97310
- PENNSYLVANIA: Insurance Commissioner, 108 Finance Building, Harrisburg, Pennsylvania 17120
- PUERTO RICO: Commissioner of Insurance, P.O. Box 3508, San Juan, Puerto Rico 00904
- RHODE ISLAND: Insurance Commissioner, 169 Weybosset Street, Providence, Rhode Island 02903
- SOUTH CAROLINA: Insurance Commissioner, 2711 Middleburg Drive, Columbia, South Carolina 29204
- TENNESSEE: Commissioner of Insurance, 114 State Office Building, Nashville, Tennessee 37219
- TEXAS: Commissioner of Insurance, 1110 San Jacinto Street, Austin, Texas 78701
- UTAH: Commissioner of Insurance, 275 East Second South, Salt Lake City, Utah 84111
- VERMONT: Commissioner of Insurance, State Office Building, Montpelier, Vermont 05602
- VIRGINIA: Commissioner of Insurance, 700 Blanton Building, Richmond, Virginia 23209



VIRGIN ISLANDS: Commissioner of Insurance, P.O. Box 450, Charlotte Amalie, St. Thomas, Virgin Islands 00801

WASHINGTON: Insurance Commissioner, Insurance Building, Olympia, Washington 98501

WEST VIRGINIA: Insurance Commissioner, 1800 Washington Street, E. Charleston, West Virginia 25305

WISCONSIN: Commissioner of Insurance, 201 E. Washington Avenue, Madison, Wisconsin 53702

WYOMING: Insurance Commissioner, 500 Randall Boulevard, Cheyenne, Wyoming 82001



**APPENDIX E**



## STATE COMMISSIONS FOR WOMEN

- ALABAMA: Alabama Women's Commission, No. 9 Office Park Circle, Suite 106, Birmingham, Alabama 35223
- ALASKA: Alaska State Commission for Human Rights, 2457 Artie Boulevard, Suite 3, Anchorage, Alaska 99503; State Court Building, Pouch AH, Juneau, Alaska 99811
- ARIZONA: Arizona Women's Commission, 1624 W. Adams No. 305, Phoenix, Arizona 85007
- ARKANSAS: Governor's Commission on the Status of Women, Room 001, State Capitol Building, Little Rock, Arkansas 72201
- CALIFORNIA: California Commission on the Status of Women, 926 J Street, Room 1003, Sacramento, California 95814
- COLORADO: Colorado Commission on the Status of Women, Room 600 C, 1525 Sherman Street, State Services Building, Denver, Colorado 80203
- CONNECTICUT: Permanent Commission on the Status of Women, 6 Grand Street, Hartford, Connecticut 06115
- DELAWARE: Council for Women, 630 State College Road, Dover, Delaware 19901
- DISTRICT OF COLUMBIA: D.C. Commission of the Status of Women, Room 204, 14th and E Streets, N.W., District Building, Washington, D.C. 20004
- FLORIDA: Governor's Commission on the Status of Women, Office of the Governor, The Capitol, Tallahassee, Florida 32304
- GEORGIA: Georgia Commission on the Status of Women, c/o Office of the Governor, State Capitol, Atlanta, Georgia 30334
- HAWAII: Hawaii State Commission on the Status of Women, 250 S. King Street, Room 500, Honolulu, Hawaii 96813
- IDAHO: Idaho Commission on Women's Program, Statehouse, Boise, Idaho 83720
- ILLINOIS: Illinois Commission on the Status of Women, 1166 Debbie Lan, Macomb, Illinois 61455
- INDIANA: Fort Wayne Women's Bureau, P.O. Box 554, Fort Wayne, Indiana 46801
- IOWA: Iowa Commission on the Status of Women, 507 10th Street, Des Moines, Iowa 50319
- KANSAS: Mayor's Commission on the Status of Women, Mayor's Office, City Hall, 215 E. 7th Street, Topeka, Kansas 66612
- KENTUCKY: Kentucky Commission for Women: 212 Washington Street, Frankfort, Kentucky 40601
- LOUISIANA: Bureau on the Status of Women, 150 Riverside Mall, Baton Rouge, Louisiana 70801



- MAINE: Maine Commission for Women, State House, Augusta, Maine 04333
- MARYLAND: Maryland Commission for Women, 1100 North Eutaw Street, Baltimore, Maryland 21201
- MASSACHUSETTS: Governor's Commission on the Status of Women, Room 1105, 100 Cambridge Street, Boston, Massachusetts 02202
- MICHIGAN: Michigan Women's Commission, 815 Washington Square Building, Lansing, Michigan 48933
- MINNESOTA: Women's Advisory Committee, Department of Human Rights, 200 Capitol Square Building, St. Paul, Minnesota 55101
- MISSISSIPPI: Mississippi Governor's Commission on the Status of Women, 1315 Camp Street, Hattiesburg, Mississippi 39401
- MISSOURI: Missouri Commission on the Status of Women, c/o Department of Labor and Industrial Relations, 421 E. Dunklin Street, Jefferson City, Missouri 65101
- MONTANA: Montana Status of Women Advisory Council, Power Block Building Annex, Room 2, Helena, Montana 59601
- NEBRASKA: Nebraska Commission on the Status of Women, 619 Terminal Building, Lincoln, Nebraska 68508
- NEVADA: Governor's Commission on the Status of People, c/o Dr. Felicia Campbell, University of Nevada, Department of English, Las Vegas, Nevada 89154
- NEW HAMPSHIRE: Commission on the Status of Women, 3 Capitol Street, Room 301, Concord, New Hampshire 03301
- NEW JERSEY: New Jersey Department of Community Affairs, Division on Women, 363 West State Street, Trenton, New Jersey 08625
- NEW MEXICO: New Mexico Commission on the Status of Women, 600 Second Street, N.W., Albuquerque, New Mexico 87102
- NEW YORK: Women's Division, Executive Chamber, State of New York, 1350 Avenue of the Americas, New York, New York 10010
- NORTH CAROLINA: North Carolina Council on the Status of Women, 526 N. Wilmington Street, Raleigh, North Carolina 27604
- NORTH DAKOTA: Governor's Council on Human Resources, Commission on The Status of Women, 13th Floor, State Capitol, Bismarck, North Dakota 58505
- OHIO: Ohio Women's Advisory Council, Women's Services Division, Ohio Bureau of Employment Services, 145 S. Front Street, Columbus, Ohio 43216
- OKLAHOMA: Commission on the Status of Women, Governor's Office, State Capitol, Oklahoma City, Oklahoma 73105
- OREGON: Oregon Governor's Commission on the status of women, P.O. Box 40011, Portland, Oregon 97240
- PENNSYLVANIA: Pennsylvania Commission for Women, 512 Finance Building, Harrisburg, Pennsylvania 17120



- RHODE ISLAND:** Permanent Advisory Commission on women in Rhode Island, 235 Promenade Street, Providence, Rhode Island 02908
- SOUTH CAROLINA:** South Carolina Commission on the Status of Women, P.O. Box 11467, Columbia, South Carolina 29201
- SOUTH DAKOTA:** South Dakota Commission on the Status of Women, State Office Building, Illinois Street, Pierre, South Dakota 57501
- TENNESSEE:** Tennessee Commission on the status of Women, 1212 Andrew Jackson Building, Nashville, Tennessee 37219
- TEXAS:** Dallas Commission on the Status of Women, c/o Dallas Public Library, 1954 Commerce Street, Dallas, Texas 75201; San Antonio Mayor's Commission on the Status of Women, 235 Yolanda Drive, San Antonio, Texas 78228
- UTAH:** Governor's Commission on the Status of Women, 118 State Capitol, Salt Lake City, Utah 84114
- VERMONT:** The Vermont Governor's Commission on the Status of Women, 2nd Floor, Pavilion Office Building, Montpelier, Vermont 05602
- VIRGINIA:** Virginia Commission on the Status of Women, 4th Floor, 4th Street Office Building, Richmond, Virginia 23219
- WASHINGTON:** Washington State Women's Council, 313 Insurance Building, Olympia, Washington 98504
- WEST VIRGINIA:** West Virginia Commission on the Status of Women, Box 446, Institute, West Virginia 25112
- WISCONSIN:** Wisconsin Governor's Commission on the Status of Women, 30 W. Mifflin Street, Room 210, Madison, Wisconsin 53703
- WYOMING:** Wyoming Commission on the Status of Women, Office of the Labor Commissioner, Barrett Building, Cheyenne, Wyoming 82002





Women's Equity Action League (WEAL) is a national women's rights organization dedicated to improving the status of women through education, legislation, and litigation. WEAL is particularly concerned with changing federal and state policies and laws that discriminate against women. WEAL lobbies for legislation, in areas such as education, credit, taxation, insurance, employment, and social security and then monitors enforcement. WEAL depends on membership dues and contributions for its survival.

Please send \_\_\_\_\_ copies of *Sex Discrimination in Insurance—A Guide for Women* at \$3.00 each. Ten or more copies, \$2.50 each. Enclosed is \$\_\_\_\_\_.

Also, please send \_\_\_\_\_ Membership Information \_\_\_\_\_ Publication List.

Name \_\_\_\_\_

Address \_\_\_\_\_

City/State/Zip \_\_\_\_\_

**SEND TO: WEAL, 733 Fifteenth Street, N.W., Suite 200, Washington, D.C. 20005**



AMERICAN ASSOCIATION OF UNIVERSITY WOMEN



Phone 202/785-7700

2401 VIRGINIA AVE., N.W. / WASHINGTON, D.C. 20037

STATEMENT IN SUPPORT OF  
THE NONDISCRIMINATION IN INSURANCE ACT

S.2477

Submitted to the  
Senate Subcommittee on Antitrust,  
Monopoly, and Business Rights  
April 30, 1980

by

Dr. Quincalee Brown, Executive Director  
American Association of University Women

on behalf of

AMERICAN ASSOCIATION OF UNIVERSITY WOMEN  
WOMEN'S EQUITY ACTION LEAGUE



AMERICAN ASSOCIATION OF UNIVERSITY WOMEN



2401 VIRGINIA AVE., NW., WASHINGTON, D.C. 20037

Phone 202/785-7700

The American Association of University Women, a national organization with over 190,000 members is proud of its 99-year commitment to equality and human rights. In this spirit, we strongly urge passage of the Nondiscrimination in Insurance Act, S. 2477.

#### An Issue of Fairness

Members of the business community are rallying against what they casually term "unisex insurance." Evoking the absurd images of unisex washrooms and other alleged by-products of equality, the phrase "unisex insurance" belies the soundness of the proposed legislation. Senate Bill 2477 is designed to prohibit insurance companies from discriminating against customers on the basis of race, color, religion, sex, or national origin. Quite simply it represents another step towards economic and social justice.

Time and again, this legislature has felt compelled to address the fundamental question of fairness to individuals affected by discriminatory classifications. In passing the Civil Rights Act of 1964, Congress affirmed the importance of individual rights. That Act precludes treating people as if they are mere components of a racial, religious, sexual, or national grouping. For example, a tall woman applying for a police officer's job which has a strict



height requirement may not be refused employment simply because women, on the average, are too short for such positions--just one example of the breadth of protection afforded by the Act.

This basic principle, that individuals deserve fair, unbiased treatment, is the cornerstone of our democracy and the essence of our freedom. The same thoughtful scrutiny that you have given to employment, housing, and credit laws must be given to the insurance practices of today. This you can do through the Nondiscrimination in Insurance Act of 1980.

#### Women Working for Security

Today, women are entering the work force at a rate of almost 2 million each year. Over 50 percent of all women are employed or are currently seeking jobs. Who are these working women?

- 53% are mothers with children of school age or younger
- 56% are married with husbands present
- 27% of those have husbands who earn less than \$13,000 a year
- 25% are never married, and another
- 20% are widowed, separated or divorced
- 14% of all families, or one in every 7, is headed by a woman

The economic realities of today demand that women work, not for pin money, but to support their families; not for surplus second incomes, but to help break even in the race against inflation. These



women, like men, are dependent on fringe benefits to buffer their paychecks against rising costs. Insurance is an absolute necessity to help workers hedge against troubled times and to see their families through loss of income due to accident, illness, and death. Yet women, who are already confronted with such financial barriers as earning 59 cents for every dollar earned by men, are further penalized because of their sex and are continuously denied the right to a secure and insured tomorrow.

#### Denial of Equal Protection

The business of insurance is, in part, the business of classification. Inherent in the process of spreading losses is the practice of grouping individuals according to the risk they pose. The coverage you can get, the types of benefits you are offered, and rates you are charged will depend on how the insurance company chooses to categorize you.

Unfortunately, women, as a group, are routinely and systematically denied coverage, offered few benefits and charged excessive rates for the policies they receive. For example, women who work at home are unable to purchase disability insurance, while such insurance is available to men with identical jobs and risk factors. The prevalence of such discrimination is not denied by the industry; rather, it is justified as a time-honored practice. In fact, one insurance company advertises its product by asking the reader to pick the \$25,000-a-year executive with inadequate insurance from a crowd waiting for a



commuter train. The one woman in the picture is the obvious answer. The company, of course, is suggesting that women need only wake up to the attractiveness of insurance to avail themselves of its benefits. I suggest that women are waking up, but we are awakening to the need for change in an industry which, for too long, has denied us equal protection.

#### An Industry-wide Problem

According to Kenneth Viet, Vice President for Life Products of Aetna Life and Casualty Co., insurance companies try to price their products "to make each group pay its own way." Women, however, consistently find themselves paying in more ways than one: companies not only refuse to make insurance available to women with the same provisions as they offer men--they often withhold the product from women altogether. When purchasing coverage, men and women may be charged a different rate based on statistical experience, or women may be charged higher rates based on no experience at all. Such practices do not occur in isolation, but are pervasive throughout the industry and in all forms of insurance. Let me cite some specifics:

#### Health Insurance:

In purchasing health insurance, women, like most customers, seek protection against the high cost of medical care. Unlike most customers, however, insurance coverage is unavailable or inadequate for one of our most basic medical needs: motherhood.



For example:

- a study by the Health Insurance Institute discovered that 56.4% of all new health insurance group policies excluded any coverage for maternity;
- a Michigan survey revealed that commercial health insurance plans offering coverage provided only 38 - 44% of medical costs for maternity; and
- a Pennsylvania study reported that some insurance companies were using 16-year-old hospital rates to set the maximum limit for current maternity coverage.

If over half of the new health policies exclude maternity altogether, if the minority of plans that do provide coverage meet less than half the actual costs, and if the insurance rates applied by companies are both obsolete and blind to inflation, what price is motherhood today? As a result of discriminatory practices, women find themselves bearing the full costs of reproduction for society, curious treatment by an industry whose primary function is to spread costs fairly.

#### Disability Insurance

Under disability insurance, as with health insurance, working women are unable to purchase adequate protection against the disabling effects of maternity. Pointing to the so-called voluntary and predictable nature of pregnancy (and related conditions such as miscarriage), insurance companies rationalize such discriminatory treatment of women. These same companies, however, routinely provide



coverage for male-specific risks, such as vasectomies and prostatectomies, as well as other voluntary conditions, including sports injuries, cosmetic surgery, and hair transplants.

These inequities are not confined to maternity benefits: indeed, they pose an all-too-familiar barrier against women seeking income security in all forms of disability coverage. For example:

- in 10 out of 13 companies surveyed in Pennsylvania, premium rates were found to be consistently higher for women than for men who carried identical or better coverage;
- in New York, a study reported that women were charged as much as 150% higher rates than men in the same job classification;
- in Colorado, a 45% - 115% rate differential between the sexes was discovered, as well as the practice of singling out professional women and classifying them in lower job categories with higher insurance rates.

But, for some women, rate discrimination is a remote problem: these women face the more fundamental obstacle of total exclusion from disability coverage. They are the part-time employees working without the fringe benefits and protections attached to full-time salaried positions. They are the waitresses and the domestic aides, whose male counterparts often enjoy disability coverage while they do not. Most importantly, they are the homemakers, working without wages, yet providing the valuable services of child care, housecleaning, and cooking--services which would cost more than \$17,000 to replace.



### Life Insurance and Pension Benefits

In purchasing life insurance and pension benefits, women face the most explicit form of discrimination. On the grounds that women as a group live longer than men, insurance companies compute rates and benefits almost exclusively on the basis of sex, overlooking other relevant criteria such as smoking and drinking habits. For example, under defined contribution pension plans, sex-based tables are often used to compute the amount of monthly annuity. Even though a man and a woman are the same age and have the same amount of money in their pension accounts, the woman will receive a smaller monthly annuity because, theoretically, her total amount will have to be spread over a longer period of time. Thus penalized for their longevity, all women receive lesser monthly retirement benefits than men regardless of their individual life expectancies. In recent court decisions, such generalizations have been persuasively challenged, in terms of both statistical and legal merit: a 1978 Supreme Court decision, citing Title VII, squarely rejected differential treatment under employer-operated pension plans. Private insurers offering other policies, however, remain outside the scope of the decision and can freely rely on classifications based on sex.

Ironically, where sex-based ratings might cut in their favor, women are victims of a "Catch 22," paying life insurance premiums based on a limited three-year setback, despite the fact that statistically they outlive their male counterparts by six to nine years. Furthermore, women are often denied equal access to equal



benefits. For example, under some life insurance policies:

- a married woman can purchase coverage up to, but not exceeding the amount of coverage held by her husband, a limit rarely applied in reverse, despite the size of each spouse's income;
- a disabled woman, seeking the customary waiver of premium option, bears the burden of proving a "definite need" for the waiver, unlike any other class of insureds;
- a working woman, in a high-risk classification, may be denied the waiver of premium option altogether or may pay higher prices than men in the same high-risk grouping.

Few satisfactory explanations are offered for these inherently unfair practices--the singling out of pregnancy as an uninsurable condition, the arbitrary classification of women as higher disability risks, and the disproportionate and discriminatory emphasis on sex as the sole determinant of life expectancy. The pattern that emerges is not one of equity for customers, but of convenience for insurers, who find it easier and cheaper to apply broad sex-based standards. Such standards, however, are often based on outmoded assumptions and inappropriate generalizations about the value of a woman's work and her need for financial security.

#### A Time for Change

To sanction the inequities of current insurance practices is to relegate women to inferior economic and legal status. For you



to overlook the changing demographics in the home and on the job is to perpetuate the myth of the dependent female. For you to continue to allow the exclusion of women from a growing industry is, quite frankly, to ignore good business sense. For today, women represent a great potential market for smart companies looking to the future: in life insurance coverage alone, growth is up 90 percent from \$200 billion in 1970 to \$380 billion in 1976, due to the increased numbers of female buyers. And that is with only half of all women in the labor force. The Labor Department now estimates that by 1990, 95 percent of America's women will be in the paid labor market. Surely our insurance companies are aware of the great potential that offers them.

To date, piecemeal efforts have been made to eliminate discrimination in insurance practices. Model regulations, proposed by the National Association of Insurance Commissioners, have been adopted in whole or in part by several states. Unfortunately, these bandaid solutions have done little to alleviate what remains a glaring gap in our record of civil rights achievements.

Now, the '80s are upon us; legislation enacted today will set the tone for a new and promising decade. In considering passage of the proposed Nondiscrimination in Insurance Act, this distinguished Committee is showing the leadership and foresight that represents our hope for tomorrow. This bill has no price tag; it forms no new agency; it promulgates no new rule. Rather, it incorporates and



adapts a piece of our Constitutional wisdom that says each individual deserves fair and equal treatment. Women--working, mothering, saving, and investing--have a right and a responsibility to secure their financial futures through the purchase of insurance, fairly and equitably offered.



AMERICAN ASSOCIATION OF UNIVERSITY WOMEN



2401 VIRGINIA AVE., NW. / WASHINGTON, D.C. 20037

Phone 202 / 785-7700

SUPPLEMENTAL STATEMENT  
IN SUPPORT OF  
THE NONDISCRIMINATION IN INSURANCE ACT  
S 2477

Submitted to the  
Senate Subcommittee on Antitrust,  
Monopoly and Business Rights  
June 16, 1980

by

Katherine Eaton, Chairman  
Association Legislative Program Committee  
on behalf of the  
American Association of University Women



AMERICAN ASSOCIATION OF UNIVERSITY WOMEN



2401 VIRGINIA AVE., N.W. / WASHINGTON, D.C. 20037

Phone 202/785-7700

Recent testimony before the Senate Subcommittee on Antitrust, Monopoly and Business Rights has spurred a new round of debate over current insurance practices which discriminate against women. The American Association of University Women, a national organization with over 190,000 members, appreciates this opportunity to reaffirm our commitment to passage of S 2477, the Nondiscrimination in Insurance Act.

The proposed legislation, introduced by Senator Mark Hatfield (OR), incorporates a basic Constitutional maxim that individuals qua individuals deserve fair and equal treatment. By prohibiting discrimination in insurance on the basis of race, color, religion, sex or national origin, S 2477 safeguards the fundamental civil rights of all current and prospective insurance customers.

In response to this call for fairer nationwide practices, the insurance industry has registered strong opposition. Their testimony of April 30, 1980, submitted on behalf of the American Council of Life Insurance and the Health Insurance Association of America (hereafter referred to as the ACLI/HIAA Statement) reflects particular concern with the proposal to eliminate gender-based discrimination. A careful review of their remarks, presented by spokesperson Barbara J. Lautzenheiser raises several key issues which lie at the core of the current debate between supporters



and opponents of S 2477. These issues are:

- whether sex discrimination is pervasive throughout the insurance industry
- whether sex-based methods of risk classification are contrary to public policy
- whether existing state regulations offer inadequate protection against sex discrimination
- whether S 2477 fosters fair and equitable treatment of insurance customers

The American Association of University Women takes the position that each of these questions must be answered in the affirmative. As this statement shall show, the proposed Nondiscrimination in Insurance Act represents an essential and, indeed, inevitable step forward in our nation's record of civil rights achievements.



I. Whether Sex Discrimination is Pervasive Throughout the Insurance Industry

In presenting their critique of S 2477, the insurance industry deliberately understates the scope and severity of sex discrimination facing female customers today. The ACLI/HIAA Statement acknowledges and ardently defends the custom of charging different premium rates for men and women. It fails, however, to address other discriminatory and equally commonplace practices. Contrary to the industry's claims, women meet with unfair treatment in *all* forms of insurance. Companies providing disability, health, life and pension policies routinely deny women equal access, equal benefits or adequate coverage for their basic insurance needs.

Lack of equal access to insurance

Traditionally, women have been regarded as secondary customers in a market geared towards providing financial security for the breadwinner rather than the breadmaker. As a result, disability insurance, the primary vehicle for replacing lost income due to injury or illness, has been tailored to the needs of the male employee and is largely unavailable to the woman working at home.

For example, in 1975, 57 percent of all married women were full-time homemakers, providing valuable services, including child rearing, housekeeping, and cooking. Yet a November 1975 survey by Consumer's Union turned up only four companies offering disability insurance for the homemaker; furthermore, one policy was available only as a rider to a husband's disability plan with the same



company. Five years later, the problem remains: disability insurance is almost universally unavailable to women working in the home even though their services, purchased in today's market, would cost more than \$17,000 to replace.

Lack of equal access to disability insurance is not confined to the homemaker. Women employed as domestic aides or waitresses and women over 65 years old, for example, have greater difficulty obtaining disability insurance than their male counterparts. In addition, part-time employees find that disability plans are unavailable to cover their insurance needs, while full-time workers are well protected. This problem has a more burdensome impact on female employees who generally bear the dual responsibilities of home and career. In 1979, 28 percent of all working women were employed in part-time positions, whereas, only 9.6 percent of all working men were part-time employees.

Pension benefits, another vital means of securing income protection, are often unavailable to female customers. According to a recently released study by the President's Commission on Pension Policy, "Women are less likely to participate in a pension plan...than men." The Commission reports that the worker who belongs to a union and works for a company that employs 500 or more persons has a much higher probability of being a participant in a plan than other workers. Unfortunately, only 15.7 percent of all



employed women are union members, compared with 29.6 percent of all men. Also, women are disproportionately concentrated in smaller industries--such as retail trade and personal services--where pension coverage is less likely to be available as a fringe benefit. In addition, vesting requirements, which presume on-the-job continuity, cut against female workers who adjust their work patterns to meet changing family responsibilities.

Not surprisingly, the President's Commission concludes that "women workers do not fare as well as men in the nation's pension programs." Today, when one of every seven Americans over the age of 65 lives in poverty and 72 percent are unmarried women, industry assurances are not enough to guarantee equal access for all.

#### Lack of equal benefits

In the ACLI/HIAA Statement, the insurance industry states with confidence, "Life insurance is equally available to women and men," implying that women should be satisfied with current industry practices. Unfortunately, mere access to insurance does not necessarily lead to equal treatment regarding benefits and options. For example, an important term in life insurance policies is the waiver of premium option. This provision eliminates the need for premium payment during disability and offers valuable "gapless" protection during a time of particular hardship. Women, unlike



male customers, are often required to meet certain conditions before availing themselves of this benefit: they must be employed away from home, they must be classified in a "low risk" occupation, and, unlike any other group of customers, they must demonstrate a "definite need" for the waiver. Such conditions, which ultimately turn on the sex of the insured, are clear evidence of gender-based discrimination practiced by the life insurance industry today.

In disability insurance, female customers face even greater problems in seeking equal benefits. An October 1979 article by Ann O'Shea in Working Women, describes several common discriminatory practices: waiting periods--the number of days an insured must be disabled before benefits are payable--are often longer for women than for men; basic periods--the maximum time for which the insured is deemed completely unable to perform his or her duties--is generally five years for men but only two years for women; benefit periods--the maximum time for which the insured is paid benefits--are almost always shorter for women. For example, notes O'Shea, men in the least hazardous occupations can obtain policies providing ten-year benefit periods while women in the same occupations are usually limited to two-year periods. Such practices severely undermine the value of economic protection offered by disability insurance and leave female customers in precarious financial positions.



Lack of adequate coverage

The adequacy of insurance protection depends as much on what a policy excludes from its package as it does on what it includes. Today the routine exclusion of pregnancy and related medical conditions from health and disability plans, creates an insurmountable barrier to adequate insurance protection for women.

In 1978, Congress responded to discriminatory employment practices by amending Title VII of the 1964 Civil Rights Act to broaden the definition of sex. This mandate, known as the Pregnancy Discrimination Act, specifically states that, "Women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes...as other persons not so affected but similar in their ability or inability to work." As a result of this legislation, employment group insurance policies may no longer discriminate against women: female-specific disabilities--including normal pregnancy--must be treated like any other temporary disability warranting protection.

Unfortunately, insurance companies offering private group and individual policies have failed to follow the lead of Congress in providing adequate coverage for female customers. Companies continue to exclude pregnancy from health and disability policies, while at the same time providing coverage for male-specific risks, such as vasectomies, prostatectomies, and circumcisions. Today, for example, the well-known Blue Cross & Blue Shield plans fail to provide any maternity benefits in their individual insurance packages.



In their ACLI/HIAA statement, the insurance industry defends this discriminatory practice by stating that "families can anticipate the expenses of normal pregnancies," implying that pregnancies are generally planned. Yet in 1976, 12 percent of all births were reported as "unwanted" by mothers at the time of becoming pregnant. For black mothers, the numbers were even higher--25.8 percent or one out of every four births were unplanned at the time of conception. Yet most companies continue to isolate pregnancy as a "predictable" risk while, at the same time, offering insurance protection for elective cosmetic surgery, hair transplants, and sports injuries.

The insurance industry also suggests that pregnancy is "budgetable." Yet today, a normal delivery--including hospital expenses and doctor's fees--can typically cost \$2000, posing a severe financial strain on the average family's budget. Unfortunately, companies which do include maternity in their insurance package set limits on the amount of coverage available without regard for the true costs of childbirth in current inflationary times. For example, Aetna Insurance Company offers a separate rider to women seeking pregnancy protection. Maximum benefits for normal delivery, however, are only \$500--less than *one fourth* of the actual maternity expenses born by families today.

Vital medical needs such as prenatal and postpartum health care, and family planning and gynecological services are also often excluded from health insurance plans. In disability insurance, "riders", which define exceptions to the basic policy, commonly exclude all pre-existing gynecological disorders, while pre-existing prostatic disorders are covered. For example, one insurance company demanded that a female



customer, applying for an income protection policy, sign an elimination rider because of her medical history of menopause-- a condition common to *every* middle-aged woman.

Sex discrimination in insurance thus manifests itself in several troublesome forms: denying women adequate coverage for their basic medical needs, refusing them equal benefits and options, and depriving them access to protection on the job and in the home. Yet, the insurance industry continues to overlook the currency of such practices and to ignore the needs of the individual female customer. Minimizing the problem, however, does not eliminate it; nor, indeed, does it solve it.



II. Whether Sex-based Methods of Risk Classification are  
Contrary to Public Policy

The use of sex-distinct actuarial tables is the most common yet controversial practice of the insurance industry today. Designed to classify individuals according to the risk they pose, segregated tables are defended as a means of reflecting the different mortality and morbidity experiences of men and women. In response to this practice, the Supreme Court, in the City of Los Angeles vs Manhart decision, rejected the use of such tables in employer-operated annuity plans which required women to make larger periodic contributions than their male co-workers. Citing Title VII, the Court emphasized the prohibition against the treatment of individuals "as simply components of a racial, religious, sexual, or national class ..." and rejected the disparate treatment of female employees *despite* statistical justifications.

The Nondiscrimination in Insurance Act incorporates the spirit of the Manhart decision by mandating fair and equitable treatment of individuals in all forms of insurance practices, including rate-making. The insurance industry, however, has expressed great reservations over this proposal. "Mortality statistics have been kept for over two hundred years and consistently show female mortality substantially below male mortality", they claim, advocating the continued use of sex-segregated tables.



A forthcoming article in the University of Chicago Law Review (Vol. 47 - Winter) sheds new and valuable light on the current controversy over risk classification methods. This legal and demographic analysis, prepared by Lea Brilmayer, Richard Hekeler, Douglas Laycock and Teresa Sullivan, persuasively demonstrates that:

- basing benefits on segregated actuarial tables is disparate treatment of individuals under Title VII
- contrary to conventional wisdom, the association between sex and mortality is neither stable nor uniform

#### Prohibiting disparate treatment

In evaluating the legality of sex-based actuarial tables, the "ultimate issue", says Brilmayer and colleagues, is "whether sex may be used to predict longevity". The resolution of this issue turns not on the accuracy of sex as a predictor, but rather on its *legitimacy* as a criterion for classifying individuals.

The recent trend in civil rights law represents a national recognition that certain immutable traits -- race, color, religion, national origin and sex -- are historically subject to misuse. Classifications based on these criteria tend to victimize the individual and are therefore restricted by current law in all forms of social transactions.

As explained by Professor Brilmayer, *"These reasons for forbidding classifications based on sex are fully applicable to insurance plans. Sex is still immutable; no woman can ever obtain the male rates, regardless of her own health or other indications*



of life expectancy. Segregated annuity tables aggravate the cumulative disadvantage imposed on women whose annuities are generally based on smaller life-time earnings. Segregated life insurance tables do little to compensate. Segregated annuity tables also produce the frustration that results from discrimination based on an immutable characteristic" (emphasis added).

While insurance companies may seek to justify their disparate treatment of women with reams of statistical data and claims of "business necessity," such arguments are legally unacceptable as to other "forbidden criteria". The constitutional underpinnings of our public policy against discrimination based on race, color or national origin applies with equal force to discrimination based on sex. Under S 2477, such disparate treatment of the women would not be tolerated.

#### Responding to changing demographics

The legal merits of eliminating sex-based rating practices do not depend on demographic evidence for their cogency. Indeed, in the Manhart decision, the Supreme Court stressed that even "true generalizations" about a class do not justify unfair treatment of the individual. It is, however, interesting to note that the statistical association between mortality and sex, so strongly asserted by the industry, is less uniform and less stable than is suggested.

For instance, a February 23, 1980 article in the National Underwriter, reported that the life expectancy of a typical 65



year-old man increased by about ten months during the last five years. "It contrast to previous trends," it stated, "the improvement was greater for men than for women." Such a recent shift in trends is not surprising giving medical advances in the control of heart disease and blood pressure -- health conditions commonly associated with men. Indeed, as more women seek paid employment, the risk of heart disease for certain female workers may increase. According to a recent report in the American Journal of Public Health, working mothers, combining outside jobs with the demands of raising children at home, and women employed as clerical workers, with limited advancement opportunities, may face greater coronary risk than their female counterparts.

Such studies underscore the fallacy of treating individuals as mere components of sexual groupings when predicting their individual mortality patterns. Other relevant criteria -- medical history, lifestyle, and occupation, to name a few -- greatly influence a given person's life expectancy regardless of sexual affiliation. For example, a fifteen year survey by State Mutual Life disclosed that death rates for smokers were found to be more than *double* those of non-smokers. Yet today, in computing pension annuities, insurance companies look only to sex and age when classifying individual applicants, and ignore how many packs they smoke a day.

It is oddly ironic that an immutable trait such as sex takes precedence over other individual characteristics in determining one's right to insurance protection. The logic of such a policy may escape most women seeking adequate security for themselves and their families.



### III. Whether Existing State Regulations Offer Inadequate Protection Against Sex Discrimination

In their testimony before the Senate Subcommittee on Antitrust, Monopoly and Business Rights, the insurance industry places great emphasis on current state regulations which purport to eliminate discriminatory practices. The ACLI/HIAA Statement fails, however, to address the limitations of these piecemeal laws and their inadequacy as legislative remedies for a nationwide problem. A recent study by the Congressional Research Service surveyed the relevant statutes in the fifty states, examining their individual provisions aimed at curbing discrimination in insurance.

State statutes which purport to specifically prohibit discrimination based on "race, color, religion sex or national origin"

Although insurance is bought and sold throughout the country, only a dozen states have adopted some form of non-discrimination statute phrased specifically in sexual terms. Even among these twelve states, however, the particular limitations of each statute largely negate their effectiveness.

- Six of the twelve states prohibit sex discrimination with regard to *accessibility only*. Thus, companies may be required to assure women equal access to policies, but are without constraints as to the type of rates, benefits and scope of coverage they provide female applicants. In other words, the heart of insurance protection remains uncovered by law.



- One state, Massachusetts, prohibits sex discrimination in accessibility, benefits and coverage. There, however, rate discrimination--a primary source of unequal treatment--is unregulated and, by implication, condoned.
- Five states purport to eliminate sex discrimination in accessibility, rates, benefits and coverage. These statutes however, are qualified in such a way as to gut their proscriptive impact. Major exceptions are carved, for example, to allow for discrimination between individuals of different classes and to permit the application of rate differentials based on sex. Such loopholes effectively reduce the apparent standard of "sex blindness" to a simple and malleable "sex...but" test.

State statutes similar to the NAIC Model "Act relating to Unfair Methods of Competition..."

In their ACLI/HIAA statement, the insurance industry points out that "every state has an Unfair Trade Practices Act," thus implying the existence of effective, local safeguards. These statutes, which are similar to the model legislation proposed by the National Association of Insurance Commissioners, do not specifically prohibit discrimination based on sex. Rather, they address only "*unfair discrimination between individuals of the same class.*"

As a result, only those life insurance customers "of the same expectation of life" or health insurance customers "of essentially the same hazard" are protected by statutes in fifty states. Disability insurance customers, on the other hand,



are covered by law in only half of the states. In any event, the legal rights of an individual female applicant may turn on how she is "classified" according to industry statistics and, indeed, on where she lives.

State statues similar to the NAIC "Model Regulation to Eliminate Unfair Sex Discrimination"

In challenging the need for S 2477, the insurance industry makes constant reference to the National Association of Insurance Commissioners' Model Regulation to Eliminate Unfair Sex Discrimination. Although cited as a panacea for current industry ills, this measure has not received universal acceptance and is only in force, in whole or part, in some sixteen states.

Under close scrutiny, the ostensible solution provided by the Model Regulation contains major holes. Its terms not only permit unequal treatment of men and women in the critical area of rate-making; it also explicitly approves discrimination against women regarding a fundamental medical condition--maternity--thus denying them the full protections afforded other customers.

These exclusions evidence a continued insensitivity to the importance of adequate, affordable insurance coverage for all individuals. Today, women contributing to their families' incomes--as wage earners, homemakers, and heads of households--warrant fair and equal treatment by the insurance industry. The Model Regulation, which represents a positive but limited step forward, unfortunately fails to guarantee such protections for all customers and in all states.



As this brief survey indicates, existing state statutes vary greatly in their approach to eliminating sex discrimination. Their efficacy as remedial measures depend not only on the strength and scope of their terms but also on the vigor with which they are enforced.

Many state insurance departments, however, are understaffed, underfunded, and, according to a 1979 report by the General Accounting Office, exhibit "serious shortcomings." Furthermore, enforcement efforts are undermined by the failure to maintain "an arms-length relationship between the regulators and the regulated." For example, in 1979, Consumers Union conducted a survey to examine the current whereabouts of the fifty state commissioners who preceded the current incumbents. Their study discovered that *nineteen* previous commissioners found employment with insurance companies after leaving office.

The revolving door that plainly exists between the state regulators and the industry itself threatens the independent judgment of the local administrative agencies. As a result, piecemeal state efforts may lack the bite necessary to protect the rights of insurance customers nationwide.



IV. Whether S 2477 Fosters Fair and Equitable Treatment of  
Insurance Customers

The proposed Nondiscrimination in Insurance Act, S 2477, offers an effective, streamline solution to a persistent national problem. Simply stated, the bill prohibits discrimination in insurance on the basis of race, color, religion, sex or national origin.

The principle of equity reflected in S 2477 is hardly revolutionary; indeed, it is a natural outgrowth of other recent legislative reforms. Like housing, employment, and credit, insurance is critical to the economic survival of the individual, and must therefore be held to the same standard. Accordingly, each and every customer warrants fair and equitable treatment without regard to his or her sex, or other immutable traits. Such treatment is the very essence of our civil rights.

Nevertheless, the insurance industry claims that sex-based risk classification is essential to its business. Without it, they say, the insurance market may become so disrupted as to render most practices unmanageable and unavoidably complex. Yet, several major insurers are successfully providing sex-neutral policies to customers. A most well-known example is the Teachers Insurance and Annuity Association and College Retirement Equities Fund which covers some 600,000 subscribers who work in 3,300 educational institutions. This summer, TIAACREF is implementing a new system of annuity allocation based on merged-gender mortality tables, proving that progress in this area is possible.



Pricing without prejudice

Implementing sex-neutral standards is, admittedly, inconvenient, and requires industry actuaries to rethink old assumptions about their customers in general and women in particular. In his testimony before the U.S. Commission on Civil Rights, Herbert S. Denenberg, former Pennsylvania Insurance Commissioner, discussed the industry's tendency towards parochialism:

"The insurance industry has a habit of sometimes making their premiums reflect their prejudices rather than their statistics. A classic example of this was the long-standing belief that senior citizens as a class were bad auto insurance risks. Then when studies were done it was discovered that they were better than average... Much of this same mythology still exists in the insurance companies' approach to insuring women."

Traditionally, working women, for example, have been considered higher risks than their male counterparts. Female disability claims, according to the insurance industry, are more frequent and more costly than male claims. As a result, women employees throughout the country generally pay higher premium rates for identical or less disability coverage.

The industry's assertions, however, are not always born out by actual experience. A 1979 statement prepared by Carol Bellamy, President of the City Council of New York, documented disability patterns in two New York City labor unions - locals 2,3 and 5 of the United Storeworkers Union and District Council 37 of the Association of State, County and Municipal Employees (ASCME). Her report included the following findings:



- In the Storeworkers Union, women were responsible for only 82% of the disability claims even though they accounted for 85-90% of the union membership. Furthermore, the average length of a female disability claim proved to be 31.58 days compared to 34.36 days for men.
- In comparison, women in District Council 37 were responsible for 77% of the union's disability claims even though they accounted for only 62% of the union's membership. However, the average length of disability was 4.4 days shorter for women.

The contrasting experience within the two unions highlights a simple but telling fact: women are not necessarily higher disability risks than men. Yet the industry continues to rely on sex-based generalizations in setting premium rates for disability insurance, citing higher costs for females. Why is the pattern perpetuated? According to Ms. Bellamy:

*"An important explanation for the higher costs experienced by the commercial insurers for female policyholders is the simple fact that disability insurance has never been available to women on a cost competitive basis. Since women have always paid significantly higher premiums than similarly-situated men for less comprehensive coverage, the commercial insurers have never sold disability to a broad spectrum of the female market. The higher costs for women can be at least partially attributed to adverse selection, whereby only women who feel they will use the coverage are willing to pay the high premiums. At more competitive rates, healthier women might purchase insurance, thereby lowering the cost of insuring women in the commercial market."*

By prohibiting discrimination based on sex, S 2477 will eliminate factors which tend to distort market relationships. Contrary to industry fears, the Nondiscrimination in Insurance Act will



stimulate pricing reforms which fairly reflect cost and which wisely respond to consumer demand.

Impetus for equity

To date, the lack of a uniform, nationwide standard has posed a hardship on all involved parties. Customers seeking adequate, affordable insurance protection have had to face disparate treatment in access, benefits, coverage, and rates. Insurance companies commendably showing initiative in their field --for example, by offering homemakers disability policies-- have had to prove the market without the company of their peers. State regulators responding to civil rights concerns have had to regulate unfair practices while fearing the migration of companies to more lenient states.

S 2477 remedies this untenable situation by setting forth a "rule of thumb" to govern insurance transactions nationwide. The bill does not purport to intrude in the contractual relationship between customer and company nor in the political relationship between industry and state. It does, however, offer a manageable, uniform standard, reflective of our national commitment to civil rights.

Precisely to avoid excessive federal involvement, the application of the proposed Nondiscrimination in Insurance Act is confined to a narrow set of circumstances. Only a thorough exhaustion of state remedies-- both administrative and judicial-- will trigger a private right of action in federal court based on S 2477. Thus, a victim of insurance discrimination must first look to existing state law for full protection of her interests.



Unfortunately, existing state laws are severely deficient in this area. The limited acceptance of even the NAIC Model Regulation to Eliminate Unfair Sex Discrimination-- a minimalist approach, at best-- suggests a strong reluctance on the part of state legislators to upgrade their standards of protection.

Yet, the right of each individual to fair and equal treatment without regard to sex, race, religion or national origin is too precious to be neglected. The proposed Nondiscrimination in Insurance Act recognizes the growing importance of financial security in these troubled economic times. It enables Congress to respond when no others will.



# GAZETTE

NEWS

## MENOPAUSE: IT'S A DISEASE, SAYS INSURANCE COMPANY

You may have trouble with insurance if you were born female and are beyond your reproductive years.

Women have been excluded from income protection policies, for "sickness resulting from pregnancy, childbirth, or miscarriage." Now one company has tried to exclude a middle-aged woman from the ranks of normal healthy people simply because she was getting older.

When Nora Graham, at 49, a healthy, active music teacher in the Los Angeles school system, applied for an income protection policy sponsored by her union, United Teachers-Los Angeles (UTLA), she found herself in difficulty.

An application form from CNA Casualty of California seemed innocuous enough; however, one question asked, "During the past five years, have you had any condition requiring the use of prescribed medication, medically prescribed diet, physical therapy, etc. . . . ?"

Sensing no threat, Graham accurately filled in the blank space: "No. Just colds (routine) and estrogen (supplementary) pills." She then returned the application to

the Pacific Educators Insurance Agency.

Graham was surprised to learn, a month later, that more medical information was required: a physician's statement on her "estrogen medications."

Graham's gynecologist replied: "Irregular menses, menopause; 6-3-74 to 12-2-75; good results, prognosis excellent; no complications."

But Pacific Educators and CNA, in a joint letter, then demanded that Graham sign an elimination rider which stated, "In consideration of the fact that the insured has heretofore suffered from or has a medical history of—MENOPAUSE—it is agreed that the policy . . . does not . . . cover loss caused by or resulting from—MENOPAUSE—."

Incensed that the insurance company could decide that menopause (a stage of life) is a disease, Graham refused to sign the rider. Asking for union intervention, she wrote UTLA, "As my doctor's letter states, there are no complications in my case, I have no history of any absence pertaining to this 'condition,' which every female over 45 has or will have a medical history of, eventually. I

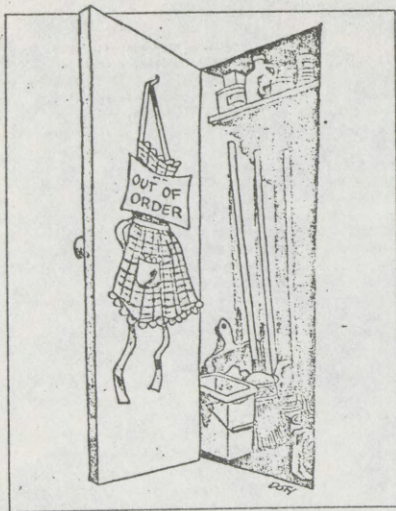
think the rider is discriminatory and if it is not dropped I plan to take legal action." UTLA's Associate Executive Director, Larry K. Gallup, wrote a letter supporting Graham to the insurance company.

Six months later, the policy had still not been issued, so Graham appealed directly to the Medical Director of CNA, Carolyn Curtis M.D., to eliminate the rider.

No reply was ever received from Dr. Curtis. But without explanation, Graham received notification the following month that her policy had been approved. Without the rider.

Graham won that round, but other insurance companies may take up the challenge. So be prepared to fight. —Belle Can





# DISABILITY INSURANCE FOR HOMEMAKERS

With twelve key  
questions to ask  
when buying any  
disability policy

**T**he millions of persons who spend full time tending to household and family affairs make a vital but officially invisible economic contribution. The value of their labor is not part of the Gross National Product. They earn no wages, belong to no unions, and, when disabled, collect no Workmen's Compensation benefits.

But when a homemaker is disabled, the economic value of her\* work may suddenly become all too clear. Perhaps another family member can watch over the children, prepare the meals, and clean the house. But for many families, a homemaker's disability introduces at least some unexpected costs—for a housekeeper, or a babysitter, or for dining out more frequently.

How does a family manage such costs? One possibility, of course, is to take the money out of savings—if there are any. Another is to sell some assets—if there are any. A third approach, the one examined in this report, is to hedge against the problem in advance by buying insurance covering a homemaker's disability.

But such insurance is hard to find. Companies have long been reluctant to write disability policies on women in general. Only in the past two years or so have working women become widely eligible for the same type of policies men buy. And it is still true that women must pay much more for disability insurance than men do—anywhere from 50 to 250 per cent more. Many companies have also been reluctant to issue policies for anyone—female or male—who works at home or who is self-employed, since it's more difficult to check the disability of a person who sets his or her own hours than of a person who reports to a boss.

It turns out, then, that a homemaker shopping for disability insurance has four things stacked against her: (1) She is female. (2) She works at home. (3) She is, in effect, self-employed. And (4) there is no dollar figure to use as a yardstick in issuing her a disability policy.

As a result of these difficulties, homemakers' disability insurance is rare. But CU has found, and analyzed, four products that are sold as homemakers' disability insurance. They are *Aid Association for Lutherans' Form ADE* (available only to Lutherans); *Mutual of Omaha's Form 3760M*; *Ohio State Life Insurance Co.'s Form A-1650*; and *World Insurance Co.'s Form A6503*.

*Ohio State's* coverage is available only as a rider (that is, added coverage) to a husband's disability policy with the same company. The other three policies are available to homemakers regardless of what company covers the breadwinner for disability. The *Mutual of Omaha* and *World Insurance Co.* policies are available to men or women who keep house; the other two are for married women only.

On the next two pages,  
a comparison of the four policies.

\* We say "her" because convenience and statistics both suggest that homemakers be referred to in this report as females. There is no implication that women should be homemakers or that men should not be.



To compare the four policies, CU developed 12 key questions a consumer should ask in evaluating any disability coverage, homemaker's or otherwise.

**1. How is disability defined?** This is the critical question. Some policies define disability in terms of specific types of bodily injuries. More common, and more desirable, is a functional definition, by which you are "disabled" if you can't work at your own occupation or another for which you are reasonably suited by training, education, or experience.

Other policies do not consider you disabled unless you are under the "regular care" of a doctor or nurse. Some consider you disabled only if you're confined to your home or a medical facility.

Except for the *Ohio State* rider, the policies we evaluated defined disability in a fairly uniform fashion, requiring that the homemaker be unable to perform all the duties of her regular occupation. *Mutual of Omaha* and *World* add that she must not receive any "earnings for performing other work or service." But *Ohio State* also stipulates that a homemaker be considered disabled only if she has been confined in a hospital for at least 24 hours as a result of the illness or injury in question. All four policies require that the homemaker be under a doctor's care.

**2. Does the policy cover partial disabilities?** It is possible for a homemaker to be quite sick or injured and still not qualify as totally disabled—because she can carry on with some of her "duties." So benefits for partial disabilities are a must. These vary substantially. *Aid Association for Lutherans* pays half the normal benefits and limits payments to one month. The *Ohio State* rider pays the full amount, but only for one month, and only if the insured has been hospitalized for at least 24 hours. *Mutual of Omaha* pays half benefits for up to three months—but only in the case of accident, not sickness. *World Insurance Co.* pays half benefits for up to six months—again, in the case of accident only. Two of the coverages define "partial disability" as the inability of a homemaker to perform at least half of her normal duties. *Aid Association for Lutherans* defines it as her inability to perform "one or more . . . of the important regular duties." And *Ohio State* defines it as the "partial and substantial inability" of a homemaker to perform her task. On balance, the *World* policy is probably the best of an uninspiring lot in this respect.

**3. What are the policy's exclusions?** Disability policies usually don't cover sicknesses or injuries caused by war, service in the armed forces, or pregnancy and its

complications. Beyond those common exclusions, policies vary widely. The fewer exclusions, the better.

The homemakers' policies we examined stick pretty close to the standard exclusions, including the unfortunate one on the complications of pregnancy. *World Insurance Co.* excludes coverage of any disability sustained abroad when the policyholder has been out of the country for six months or more. It also excludes coverage of mental disorders and of disabilities caused by suicide attempts.

**4. What is the maximum monthly benefit?** No disability policy will reimburse you fully for your economic loss, but you should look for the policy that comes closest to full reimbursement. The disability of a homemaker with children could cost a family \$600 a month or more. In this light, the monthly maximum benefit of \$400 offered by *Aid Association for Lutherans* and *Ohio State Life* is a significant advantage over the other two policies, which pay a maximum of \$200 a month.

**5. What is the maximum benefit period?** In disability policies sold to wage earners, benefits are usually payable for one, two, or five years, or for life up to age 65. For homemakers, the maximum is usually one year. In general, the longer the benefit period, the better the policy—but the more it is likely to cost.

*World Insurance Co.* will issue coverage for up to two years to a homemaker. The maximum is one year with *Aid Association for Lutherans* and *Mutual of Omaha*.

Coverage under the *Ohio State* rider is limited to six months if the homemaker is continuously hospitalized, two months if she is under the care of a nurse at home, and one month if she is not under a nurse's care (but then a housekeeper must be hired). The benefits may run serially, but the combined time limit on all of them is six months. These restrictions raise the question of whether the rider ought to be viewed as disability insurance at all. In many ways, it resembles hospital indemnity coverage—insurance that pays a flat sum for each day the covered person is in the hospital. Looked at as such, the *Ohio State* offering is respectable. Viewed strictly as disability insurance, its severe restrictions make it far less desirable.

**6. What is the "elimination period?"** This period—the interval between the onset of a disability and the time a policyholder becomes eligible for benefits—is often 14 days, but may be anywhere from 0 to 90 days. It parallels the "deductible" in auto insurance: The shorter the period, the more costly the policy.

With *Mutual of Omaha*, a homemaker

can select an elimination period of 7, 15, 30, 60, or 90 days; with *World Insurance Co.*, 7, 14, or 30 days. *Aid Association for Lutherans* offers a choice of either 14 days or one month. The *Ohio State* rider pays upon the onset of a disability—assuming that at least a 24-hour hospital stay is involved.

**7. What is the waiting period for pre-existing conditions?** Insurance companies offering disability coverage require the disclosure of pre-existing conditions. Often no benefits will be paid for a certain period for disabilities stemming from these conditions. Among the four homemakers' policies, only *Mutual of Omaha* imposes a waiting period (one year). However, any company may write a specific exclusion into the insurance contract to eliminate a pre-existing condition from coverage. If a homemaker fails to disclose a pre-existing condition, all four companies reserve the right to deny or reduce payment on a claim arising from the hidden problem. However, claims that arise after the policy has been in force for two years cannot be contested by a company on this ground.

**8. How much does the policy cost?** The cost of any disability policy depends on the applicant's age, state of health, and occupation. It is also affected by the elimination period and the duration of benefits chosen. And it is proportional to the size of the monthly benefit. The dollar figures given in this report thus reflect CU's testing assumptions; they are not necessarily the same as a given individual may pay.

CU assumed a 35-year-old housewife as the buyer. Each policy was analyzed at its highest available monthly benefit and at its longest available benefit period. Elimination periods were standardized at 14 days or as close to it as possible.

Under these assumptions, *Aid Association for Lutherans' Form ADE* (with a \$400 monthly benefit, 14-day elimination period, and one-year duration of benefits) would cost \$201 a year. *Mutual of Omaha's Form 3760M* (with a \$200 monthly benefit, 15-day elimination period, and one-year duration of benefits) would be \$163 a year. *World Insurance Company's Form A6503* (with a \$200 monthly benefit, 14-day elimination period, and two-year duration of benefits) would cost \$95 a year.

The *World* policy is thus slightly less expensive (per \$100 of monthly benefit) than the *Aid Association for Lutherans* policy and more than 41 per cent less than the *Mutual of Omaha* policy. Yet in CU's evaluation of 10 hypothetical claims (discussed on next page), *World's* policy paid as much as the *Mutual of Omaha* policy



in every case, and more in two cases.

The *Ohio State* rider cannot readily be compared in cost with the other three coverages. Its annual cost, under CU's assumptions, would be only \$28 a year. However, the rider must be tacked on to a wage-earning husband's disability policy with *Ohio State Life*—a policy likely to cost between \$100 and \$300. The rider itself is clearly inexpensive, but it consists largely of hospital indemnity insurance. Such insurance is usually quite low-priced.

9. What are the renewal provisions? With any kind of disability insurance, the annual premium paid at the outset may not give a total picture of a policy's cost. An important factor in any type of insurance is what happens when you try to renew the policy. Essentially, there are three kinds of renewals. Policies that are "renewable at the option of the company" can leave you stranded without coverage. Policies that are "guaranteed renewable" can still involve rate increases at renewal time. Best is a "guaranteed renewable, noncancellable" policy, which must be renewed at the rate given in the original contract.

Of the homemakers' disability coverages, only the *Ohio State* rider can be guaranteed against rate increases (and then only if the husband has elected a "noncancellable" policy). The *Aid Association for Lutherans* and the *Mutual of Omaha* are guaranteed renewable, but they are subject to rate changes. The *World* policy could be cancelled altogether, but only if the company decides to cancel all the disability policies it has in force in a state or commonwealth.

10. What is the Best's rating of the company issuing the policy? A standard insurance-industry reference source available at many libraries, "Best's Insurance

Reports," rates companies according to their estimated ability to withstand unexpected financial reverses. Those companies deemed soundest receive a "policyholder's recommendation." In general, CU advises against buying from a company without a Best's recommendation.

All four companies offering homemakers' coverage hold a "policyholder's recommendation" from Best's. Three received the highest recommendation. *World Insurance Co.* received the third-highest. (Most companies receive no Best's recommendation at all.)

11. Is the policy available? This question involves both geography and the company's underwriting (eligibility) standards. It's wise to buy any insurance policy from a company licensed to do business in your home state, so your state insurance department can help you should a problem develop. But some policies are available only to persons of a certain age, economic status, health status, or institutional affiliation.

The four homemakers' coverages differ substantially in availability. The *Aid Association for Lutherans* policy is available in all 50 states, but only to the approximately 6 per cent of the population who are Lutherans. The *World Insurance Co.* policy is available in all states but New York, New Jersey, and Massachusetts. *Mutual of Omaha's* is available throughout the United States. The *Ohio State* rider is available in only 20 jurisdictions (Ariz., Calif., Colo., Del., D.C., Fla., Ill., Ind., Iowa, Ky., Md., Mich., Minn., Mo., N.C., Ohio, Pa., Texas, Va., W. Va.).

12. Does the policy have a rehabilitation provision? A new and desirable trend in disability insurance is the encouragement of rehabilitation therapy. Unfortu-

nately, none of the four coverages for homemakers offers such a provision.

## HOW WELL DO THEY PAY?

In evaluating the four homemakers' policies, CU also used a "claim matrix"—a series of hypothetical claims an applicant might make. We tested 10 such claims. The length of hypothetical disabilities ranged from 28 days to 15 months. In some cases, a period of total disability was assumed to be followed by one of partial disability. In some cases the homemaker was assumed to be hospitalized, in others not. The cause of the disability was assumed in some cases to be sickness, in others, accident.

For each hypothetical claim, CU computed the amount a given policy would pay. This was then divided by the cost of the policy, giving a cost-to-benefit ratio.

From this interplay of variables, clear patterns emerged. The policies from *World Insurance Co.* and *Aid Association for Lutherans* were extremely close in cost-to-benefit ratios. Both were much superior to the *Mutual of Omaha* policy. The *Ohio State* rider was not statistically comparable to the three self-sufficient policies.

## RECOMMENDATIONS

The *Aid Association for Lutherans Form ADE* would come closest to meeting the needs that call for the purchase of homemakers' disability insurance. Its \$400 monthly benefit at least begins to approach the probable cost of replacing a homemaker's services. The policy is guaranteed renewable until age 65. And its ratios of cost-to-benefit in CU's tests of hypothetical claims were relatively favorable.

Our second choice—and our recommended policy for non-Lutheran buyers—is *World Insurance Co. Form A6503*. Its cost-to-benefit ratios were the best among the four coverages, as was its partial-disability benefits. Its disadvantages were a ceiling of \$200 on monthly benefits and a lack of guaranteed renewability.

*Mutual of Omaha's Form 3760M* provides benefits very similar to the *World* policy, but at a much higher cost. Its appeal would be limited, in CU's judgment, to those buyers who urgently desired homemakers' disability coverage and who were ineligible for either of the two higher-rated policies.

*Ohio State's Form A-1650* does not really fill the bill as disability coverage, because of its hybrid nature. As a mixture of low-cost hospitalization insurance with a dab of disability coverage, it might be a worthwhile purchase for families whose breadwinners already carry their basic disability insurance with *Ohio State*.

## WHY IS THERE SO LITTLE CHOICE?

As the accompanying report notes, a homemaker seeking disability coverage has precious little choice in the insurance marketplace. Why? Three companies that have stopped writing homemakers' disability (*Bankers Life Co.*, *Educators Mutual Life Insurance Co.*, and *Northwestern National Life Insurance Co.*) told CU there was too little demand. Even companies still issuing the coverage characterized demand as light.

Yet women's groups insist there's a widespread need for such coverage.

How can there be a need on one end of the pipeline and a lack of demand felt on the other? One answer lies in the nature of the insurance distribution system, which depends on agents to seek out likely clients. It is an adage in the industry that "insurance is sold, not bought." The agent sales force is still overwhelmingly male and male-oriented; most homemakers are female. "Let's face it," said one prominent industry figure who preferred not to be identified, "this coverage is almost experimental at this stage. Most of the big companies are taking the attitude: Let's let the pioneers work. If they take a bath, we'll stay away. If they do well, we'll get in."



lawyer advertising. This despite a provision in their own Code of Professional Responsibility obliging the legal profession to inform the public about legal problems and facilitate the selection of attorneys. As a result of the ruling, no lawyer may furnish the requested information. Consumers Union has sued the two associations, maintaining that the ban on advertising violates the constitutional rights of consumers to publish and receive information. That suit is pending.

A second lawsuit was brought by CU in California. There, individual lawyers, legal clinics, and the Berkeley Co-op's legal services program, all devoted to providing legal services to low- and middle-income people, want to inform the public about the legal services they provide and the cost of those services. But the same ethical prohibitions against advertising bars such information from being disseminated to consumers. CU has therefore joined forces with those providers of legal services to sue the State Bar of California.

The litigation crystallizes the frustration of consumers over the inaccessibility of information on so essential a service as legal aid. If lawyers were free to advertise (in a way that was not deceptive, misleading, or otherwise in violation of law) consumers would learn more about their legal rights and what lawyers can do for them. Consumers would also learn about the fees lawyers charge and could compare various fees before making an appointment to see an attorney.

Lawyers who now don't compete with one another on the basis of fees might come to recognize the need to reduce some fees and perhaps even adopt some of the same cost-saving methods and economies that active price competition forces on others in the marketplace. Lawyers who target their services to particular needs (matrimonial problems, for example) or particular persons (those who speak a foreign language, for example) could make known their availability.

There's good reason to believe that many people go without needed legal help because they don't know about moderate-cost legal services or other

specialized legal services they might require. At the same time, lawyers who wish to render services to such people are unable to develop the clientele, because they can't advertise. The American Bar Association recently reported that 79 per cent of respondents to a survey it conducted agreed that "a lot of people do not go to lawyers because they have no way of knowing which lawyer is competent to handle their particular problem."

#### DISABILITY POLICIES AVAILABLE TO HOMEMAKERS (CONT'D)

Last November, CU evaluated the only four homemakers' disability policies we could find. Since then, we've learned of two more such policies—and one of them turned out to be the best we've examined.

Our November article explained how to judge any disability policy, including one aimed at a homemaker. We suggested key questions a prospective policyholder might ask. Among the questions: What is the policy's maximum monthly benefit and its maximum benefit period? How long is the "elimination period" between the onset of a disability and the time a policyholder becomes eligible for benefits? Is renewal of the policy at the option of the company, at the policyholder's option but with a possible rate increase, or at the policyholder's option and at the original rate?

CU also evaluated the four policies against a claim matrix—a series of hypothetical claims a policyholder might make. We computed what each policy would pay on the claims and arrived at its cost-to-benefit ratio.

Judged by the same yardstick, one of the newly discovered pair of homemakers' disability policies—Form 80.93-80.94 issued by The Columbus Mutual Life Insurance Co.—is excellent. The policy covers up to two years of disability due to accident or illness, pays a maximum monthly benefit of \$300, and has an elimination period of 30 days. It is renewable at the option of the policyholder and at the rate specified in the original contract. In terms of cost-to-benefit ratio, it outperformed

the four policies we evaluated in November. But, unfortunately, it is currently available only in 28 states—Alabama, Arizona, California, Colorado, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, North Carolina, New Jersey, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Virginia, Washington, and West Virginia—and in the District of Columbia.

The Housewife Disability Plan offered by Business Men's Assurance Co. of America also showed up extremely well in cost-to-benefit analysis—better, in fact, than any of the other policies analyzed. And its elimination period is only 15 days. But its coverage is quite skimpy: It has a maximum of one year's benefits and a monthly maximum benefit of \$200. Moreover, the policy is renewable only at the option of Business Men's Assurance, and since that could leave a policyholder stranded without coverage, we really can't recommend the policy.

#### WANT TO RATE BANKS? A CU QUESTIONNAIRE CAN HELP



In "A Guide to Banking Services," published in January, February, and March 1975, CU showed readers how and where to shop for the best deals in checking, savings, and loans. Much of the information in the banking series came from a detailed questionnaire sent to 87 financial institutions in five different cities.

Our survey uncovered a wide range



THE NEW PREGNANCY  
DISABILITY LAW REVERSES  
THE SUPREME COURT

# A Victory for Women

By Peg Simpson

The millions of women who increasingly combine careers with marriage and children have won important new support from a law that bans discrimination based on pregnancy or childbirth.

The new law, passed in the closing hours of the 1978 congressional session, says pregnant workers may not be treated differently from other workers just because they are going to have a baby.

Congress' action constitutes a rebuff to the Supreme Court, which had said in effect that pregnancy was not a gender-related condition and had given employers a green light to continue to deny sick leave and disability pay or equal medical benefits to pregnant workers.

A coalition of women, civil rights, church, and organized labor groups pushed hard to persuade Congress to override the Supreme Court, fearing a further erosion of the 1964 Civil Rights Act guarantees of equality to women workers.

It was the first time such a

broad-based coalition had been brought together for a woman's issue. Bonds were formed that could be significant in future fights—especially since all groups are aware of the social service cutbacks likely to come in the wake of Proposition 13 unless a strong united front opposes them.

The Pregnancy Disability Amendments to the 1964 Civil Rights Act took effect October 31, 1978, after being passed by Congress only days before. They make it illegal to refuse to hire or promote a worker because she is pregnant—or might be in the future.

The law also makes it illegal for employers to force her to take early maternity leaves, as hundreds of schools routinely had required of teachers when their pregnancy began to "show." The law also precludes employers from setting arbitrary time limits on when the new mothers can return to work.

The decision must be left up to the worker: a pregnant employee must be permitted to work as long

*Peg Simpson covers Congress for the Associated Press and is currently a Nieman Fellow at Harvard University.*



as she feels fit and her doctor certifies she is able to work safely. The same standard applies to her return to work after childbirth.

Congress said pregnant workers must be given the final say—with their doctors, in some cases—over their work schedules, as would a worker recuperating from a heart attack or a broken leg.

Congress did not require companies to start new medical or sick leave plans. But where these exist or are offered in the future, Congress said the rules of eligibility must apply equally to women and men. Pregnant women cannot be held to a different standard of benefits.

The second part of the law, applying to the fringe benefit plans, took effect April 30. The plans promise to be both more costly and more controversial. And they also provide the broadest improvement of health care for women in decades.

Ruth Weyand, now an attorney with the Equal Employment Opportunity Commission, was co-chair of the coalition that lobbied Congress for the pregnancy disability bill. She predicts a vast improvement in health benefits for women.

In the 1930s, she noted, European countries restructured their health systems and offered new, centralized health and retirement plans for all workers. In most countries, the state paid for the health costs, with employees contributing part of the expenses.

In the United States, private employers convinced the Federal Government that they could do the best job of providing health and disability plans for their workers—and that these, in effect, were incentives to stay with a particular company. The government ultimately launched social

security as a national retirement plan but left health and disability plans to private employers.

Weyand said the major health cost left out of these private plans, as they evolved in the subsequent decades, was coverage of pregnancy and childbirth. These expenses were covered, in contrast, under European plans.

In the United States, the average health plan offered by an employer provided reimbursement for 80 percent of most health expenses—but only 20 percent for pregnancy and often nothing at all for the frequent office visits, X-rays, or prenatal tests associated with pregnancy.

It has been common for plans to pay only a flat \$250 for childbirth. The current average cost is \$1,200 for a normal childbirth.

This has led to the United States having one of the highest rates of infant mortality and health complications for infants and poor mothers of any industrialized country, Weyand said. She said the new bill will go far to remedy these problems:

—if a health plan covers 80 percent of the costs of most medical expenses, that same percentage must be paid out for pregnancy and related medical costs.

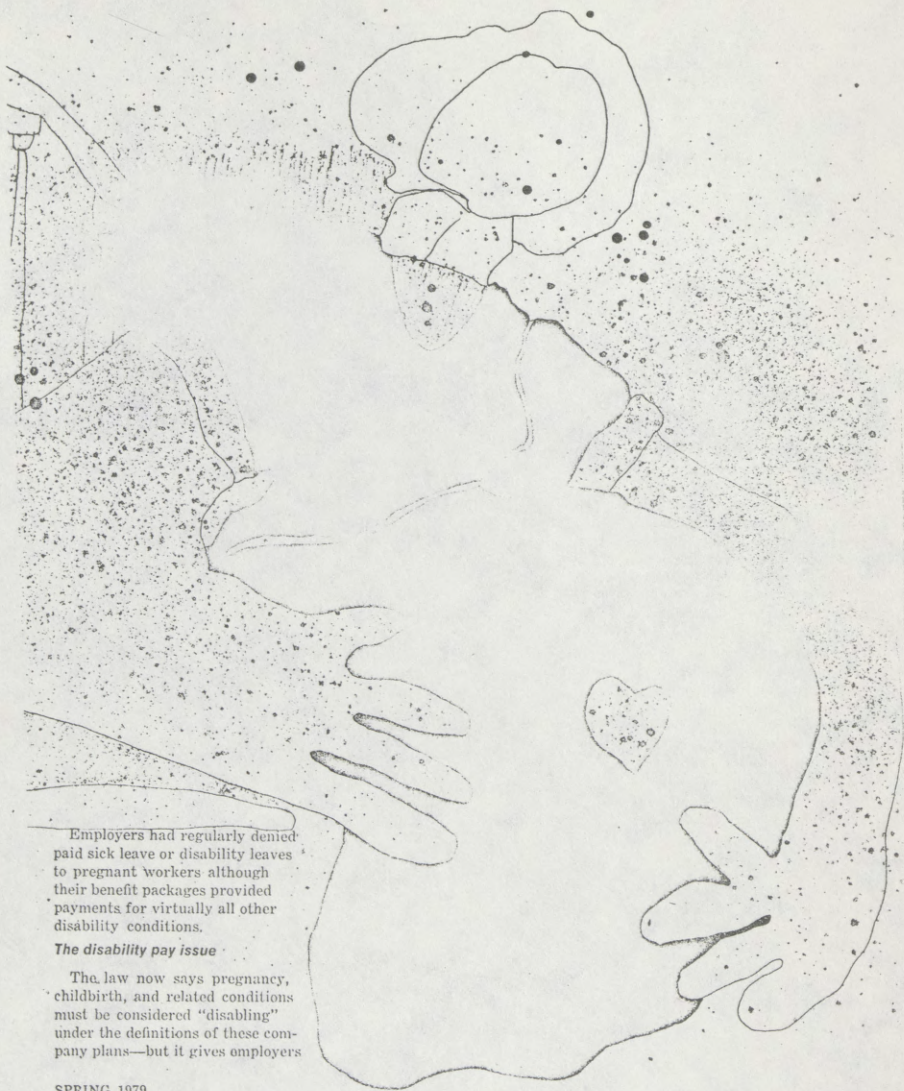
—if a doctor certifies that a woman must be bedridden to avoid a miscarriage at any time during the pregnancy, her incapacity must be covered under a sick leave policy just as time off for any other disabling illness would be granted.

—if the company has a policy of transferring workers with temporary disabilities, such as weakness due to an operation, to lighter jobs, then this policy should apply to pregnant workers if they or their doctors believe it advisable.

—if the company plan provides 4 weeks' paid sick leave, that is the time a pregnant worker can apply toward disabilities of pregnancy or childbirth. If the plan provides 25 weeks, that same time could be applied toward a pregnant woman's absence. But actual disability must be proven and a company can request a doctor's certification—if such a request is made as well of male workers on extended disability leaves.







Employers had regularly denied paid sick leave or disability leaves to pregnant workers although their benefit packages provided payments for virtually all other disability conditions.

***The disability pay issue***

The law now says pregnancy, childbirth, and related conditions must be considered "disabling" under the definitions of these company plans—but it gives employers



leeway to attach conditions to granting such leave. It would be legal for a company to grant paid disability benefits to a woman recovering from childbirth in exchange for a pledge that she will return to the job—just as long as the company requires the same commitment in advance from other workers who apply for disability pay.

It was the disability pay controversy that provided the legal catalyst for the current rethinking of "women's role" and Congress' reaffirmation that working women deserve full protection of the law, including the right to equal fringe benefits.

Seven women on General Electric assembly lines filed suit in 1972 protesting the company's refusal to pay them sick leave or disability benefits when they were pregnant or recovering from childbirth. They also protested what was then GE's policy of requiring pregnant workers to take unpaid leaves after their third month of pregnancy—even when the doctors certified the women could work and when the women desperately needed those monthly paychecks.

Across the country, other challenges were surfacing to the network of company policies that excluded pregnant women from many fringe medical and sick leave benefits and that treated them arbitrarily as a class rather than as individual workers who had differing medical conditions with their pregnancies.

Federal district courts and appeals courts unanimously were ruling in favor of the women. A favorable ruling also was expected when the landmark test case made it to the Supreme Court—that of Martha Gilbert and the six other GE assembly line workers.



CIVIL RIGHTS DIGEST



But instead the Court told GE and all other employers they could legally exclude pregnant women from benefits reserved for disabled employees without violating the 1964 Civil Rights Act or the 1972 amendments to it.

A company has the right to restrict its benefits, the Court said, as long as the exclusion did not discriminate against one sex. The GE plan covered virtually every disabling condition: vasectomies, facelifts, and hair transplants as well as the more traditional broken legs and arms.

The only exclusion was for pregnancy or childbirth. That was permissible, the Supreme Court said in a decision written by Justice William H. Rehnquist, because pregnancy is a "gender neutral" condition.

The December 7, 1976, ruling was met with incredulity in many quarters, including the congressional sponsors of the 1964 and the 1972 civil rights legislation who said the ban on sex discrimination clearly was written to encompass bias against pregnant workers.

As Rep. Pat Schroeder of Colorado noted caustically, the Court apparently rationalized its ruling against the GE women by saying the company could deny vital disability pay to pregnant women because if men got pregnant they, too, would be denied these benefits.

Sen. Harrison Williams of New Jersey, chairman of the Senate Human Resources Committee, said the Supreme Court obviously was out of touch with what has been happening in U.S. society in recent decades; where women by the millions have been taking full-time jobs—and rearing a family as well.

"Lurking between the lines of the Gilbert decision is the outdated

notion that women are only supplemental or temporary workers—earning 'pin money' or waiting to return home to raise children full time," Williams said.

The Court ruling galvanized women's rights activists into immediate action on a strategy to overturn the ruling. The outcome was a coalition with civil rights groups, labor, church, and even some antiabortion groups who saw clearly that many low-wage women would have abortions if their company policies denied them medical and sick leave support for carrying a pregnancy to term.

Within a week of the Court's ruling, the Campaign to End Discrimination Against Pregnant Workers had been formed and was working with congressional supporters on a strategy to overturn the Court's decision and shore up legal protections for women workers.

This worked—but only because the pressure was kept on by the coalition, which ultimately grew to more than 200 groups.

#### *The changing work force*

The 22-month congressional debate on the discrimination encountered by pregnant workers provided a national forum for examining the dramatic changes in the work force that have taken place in recent decades, where women have taken full-time jobs and kept them in far greater numbers than any of the experts had predicted.

Five times as many mothers are working today as in 1950. More than 60 percent of the women in the prime years of 25-54 are working, triple the percentage of postwar years.

And—confounding most economists—the trend has been steadily

toward more women working. This is partly because some women are making their way gradually into more interesting, better-paying jobs. Another force probably is the spiraling inflation that puts pressure on families for both husband and wife to work, even if one of them is stuck in a low-wage job.

Society's laws and attitudes have been slow to adjust to the reality of women as full-time, permanent fixtures in the labor force, however.

During World War II, millions of women poured into the jobs held almost exclusively by men who had left them for the war: carpenters, steelworkers, shipbuilders, doctors, and editors. "Rosie the Riveter" was a popular song used to cheer the women on as they enabled the economy to keep up production needed for the war.

But when the men came home, virtually all the women who had become veteran riveters or steelworkers were laid off. It was partly because the government had promised the men they would get their jobs back after they served military duty. It was partly because production patterns changed and fewer ships were built. But it was also because business, government, and the influential leaders in society decreed women should then go home and have babies.

Books, research articles, and films are only now being produced documenting the expulsion of many single or widowed women with children from these high-paying, better "riveting" jobs—expulsion because they were women and expulsion into the oblivion and lower living standard of minimum-wage jobs.

Many women wanted to marry and stay at home and rear



children—and the baby boom bore out the fact that millions did just that. But what has been eclipsed and is now being brought forth with research is the change in working circumstances forced on millions of women when society decided "their place" was at home, not in the factory.

The actual employment of women dipped sharply after World War II—as the baby boom began—and it took years for the statistical profile of women working to reach wartime levels again.

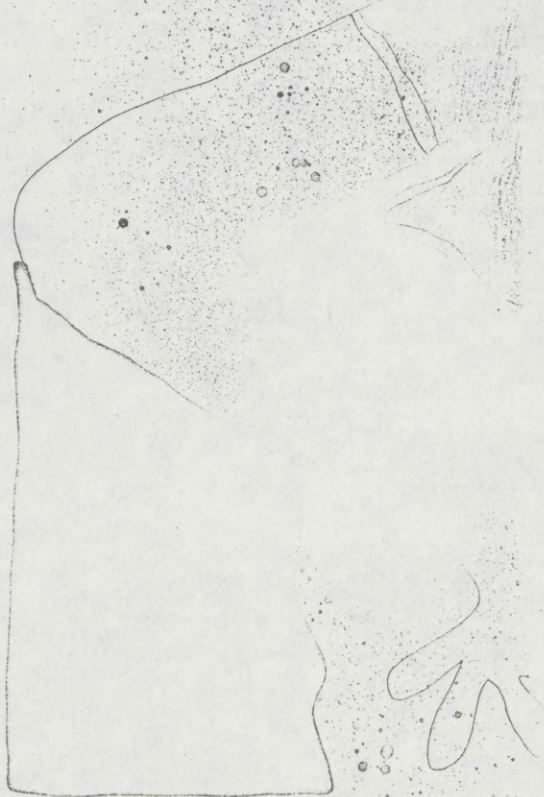
But that steady climb of women working never stopped once it began again, in the early 1950s.

Statisticians and labor economists didn't pay that much heed, however, and neither did business as it perpetuated the myth that women were only marginal workers, waiting to marry and lead a life dependent on a man.

In many cases, businesses would not hire a young single woman because they contended she would marry and quit. If the woman already was married, it was believed she would get pregnant and quit.

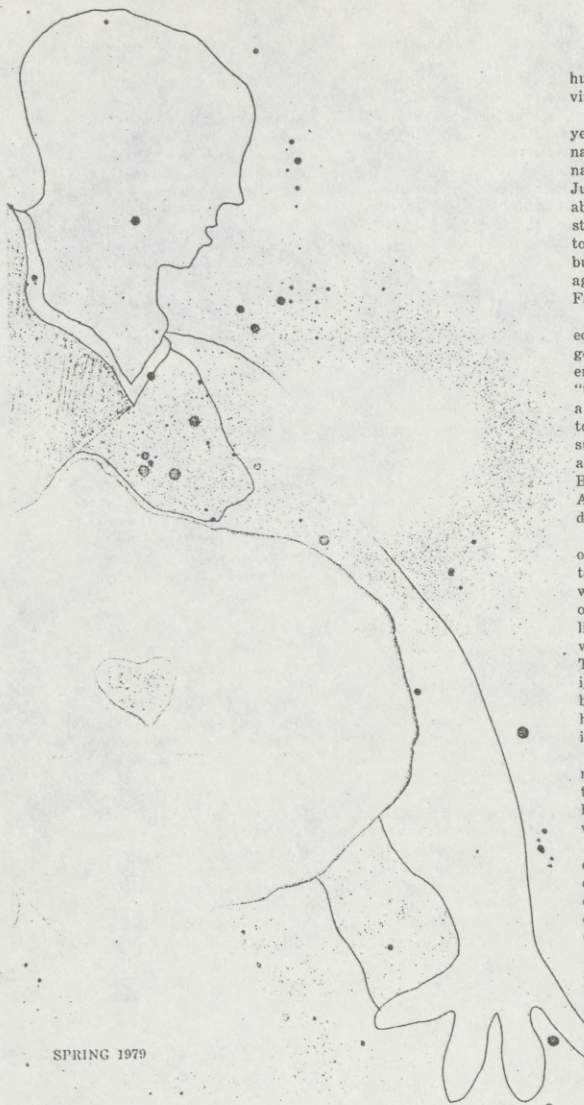
As late as the mid-1970s, banks and savings and loan institutions were found demanding that a wife be sterilized or prove she was taking birth controls pills before agreeing to include her income along with her husband's in their application for a home loan.

It was commonplace for department stores to deny credit to a newly divorced woman—even though she may have had credit at that store both during her marriage or before it. The assumption was that since the charge card was listed in her husband's name (at the store's insistence), only he earned the income and paid the bills. When there was a divorce, the credit record followed the



CIVIL RIGHTS DIGEST





husband, leaving the wife with virtually no credit history.

Congress took action several years ago to ban credit discrimination based on sex, race, or national origin—although the Justice Department has been notably disinterested in hiring statisticians and other researchers to develop cases against the many businesses that still discriminate against women, in violation of the Fair Credit Act.

And some Labor Department economists have been working to get across the idea that the government's constant reliance on "the average family of four" is not a benchmark of much at all in today's world. That statistic assumes a working husband, a wife at home, and two young children. By the 1970s, only 6 percent of American families fit that description.

In the courts, unbroken strings of decisions upheld women's right to try for whatever jobs they wanted—invalidating the myriad of restrictive labor laws that had limited the hours women could work or the weights they could lift. These laws—which were mostly ignored during World War II when business wanted women to work—had been used to isolate women into dead-end, low-wage jobs.

By the late 1970s, many elements of society had come around to recognizing barriers that had been raised against women workers.

That's why the Rehnquist decision on the pregnancy disability case came as such a shock. It went counter to the trend—indeed, counter to what many members of Congress thought they had done.

During the months of Senate and House hearings on the legislation to overturn the Supreme Court ruling, the focus became the



outdated view business still holds of women workers.

Business treats women as marginal laborers who drop in and out of low-paying jobs between pregnancies, with no allegiance to any company, let alone to a career, some witnesses said.

This is traceable to the continued perception of women as—first and foremost—childbearers and only afterwards as potentially useful workers, they said.

Drew Days III, Assistant Attorney General in charge of the Civil Rights Division, told the hearings that discrimination based on pregnancy dramatically hampers the job options of women, keeping them clustered in low-paying, low-status jobs. Policies that prevent them getting medical and sick leave benefits when they are pregnant exacerbate their problems, he said.

"Uncovered medical expenses, loss of income and employment opportunities, and limitations on reinstatement rights all operate to make women—whether pregnant, potentially pregnant, or formerly pregnant—second-class citizens in the employment sphere," Days said.

"The fundamental purpose of Title VII (of the Civil Rights Act) as it prohibits discrimination on account of sex is to make men and women equals in the marketplace. To the extent that women employees are required to absorb economic costs and disadvantages because of pregnancy, this goal cannot be met," Days added.

Sue Deller Ross, formerly an attorney with the American Civil Liberties Union, who with Weyand headed the campaign to overturn the court ruling, said that "employers routinely fire pregnant workers, refuse to hire them, strip them of seniority rights, and deny

them sick leave and medical benefits given other workers.

"Such policies have a lifetime impact on women's careers," said Ross, now a law professor at George Washington University. "Together, they add up to one basic fact: employers use women's role as childbearer as the central justification of and support for discrimination against women workers. Discrimination against women workers cannot be eradicated unless the root discrimination, based on pregnancy and childbirth, is also eliminated.

#### **The bill passes**

The coalition's steady pressure paid off. Less than 2 years after the Gilbert-GE ruling, Congress overturned it with greatly strengthened protections against bias aimed at pregnant women—and, ultimately, all women.

Rep. Augustus F. Hawkins of California, chairman of the employment opportunities subcommittee that handled the bill, told the House that the bill would "go a long way toward ensuring the equal treatment of women in the workplace with respect to fringe benefit programs."

Despite overwhelming support for the concept, however, the bill was almost killed when House members on the Education and Labor Committee added provisions letting employers veto payments for abortions under company plans. The full Senate voted down a similar amendment.

After a summer-long impasse that continued until the final hours of Congress' session, a compromise was reached: employers can veto medical payments for abortion procedures but must cover the cost of any complications through the health and disability benefits.

What does the law mean to

working women?

Weyand, who defended the GE women in their ultimately unsuccessful Supreme Court battle and then helped convince Congress to override the Court, said the law puts working women on a more equitable footing than before with their male colleagues. She predicted that all women would gain, not just those who might actually use the pregnancy benefits.

"The employer can't say, even subtly, 'We can't hire you for this job because you might get pregnant' or 'We'd have to put you through 15 months' training and what good would that do because you'd quit to have babies,'" she said.

Blue-collar women such as those who dominate the GE assembly lines probably will benefit most from the legislation.

"There has been more lenience about 'allowing' white-collar women to work after they become pregnant. But this has been slow in coming for blue-collar women. The men around them thought that women should go home when they began to 'show,'" Weyand said.

And the hearings also dramatized the economic vulnerability of many of these women.

One of the GE workers who testified was Sherrie O'Steen, who said she was thrown off the GE payroll and onto welfare with no food or heat for herself or her 2-year-old daughter as she waited out her pregnancy. At that time, in 1972, GE had a policy of requiring workers to take unpaid leaves after their third month of pregnancy. O'Steen, newly separated from her husband, pleaded for the company to let her work and was permitted to stay on a little longer. But then she was out in the cold—literally. During the months before



her son was born, she and the daughter walked twice a week to a neighbor's house a mile away for a hot meal. In between, they lived on water and cold sandwiches in an unheated house. Her first welfare check arrived after her son was born.

The O'Steens since have reunited and both the husband and the son born that winter came with Sherrie O'Steen to the House hearing to testify—with the famous feminist lawyers—for the pregnancy disability amendments.

There is evidence that many unions are using the new law as a minimum bargaining chip for greater gains for both women and men employees.

The Communication Workers of America recently negotiated a pact with the Bell System, for instance, that goes far beyond the new law's mandate to provide disability payments for pregnancies where an existing plan provides payments for other disabilities.

Employees with at least 6 months' service will be eligible for disability pay during absences for pregnancy-related conditions. All employees, no matter how long they are with the company, are eligible for an unpaid leave of absence to accommodate what the CWA calls "an anticipated disability" such as pregnancy.

Veteran workers can take extended disability leaves, with pay. For instance, a worker with 5 to 15 years' experience can get full pay for 13 weeks' disability leave and half pay for another 39 weeks; those with 20 to 25 years' experience can get full pay for 39 weeks' disability and half pay for 13 weeks' disability leave.

In addition, parents of either sex would be eligible under the CWA-Bell System plan to take unpaid leaves of absence to care for new-

born children. This would include mothers who have just finished a period of disability leave that did not extend more than 6 months after delivery and parents of both sexes "in direct association with newborn children." This translates to mean parents of infants under 6 months of age before the unpaid leave begins.

In all these instances, the employees are guaranteed their job back—if not the identical one, then one of similar status and pay.

The trend in industrial jobs covered by union contracts has been toward more time off for new mothers and, increasingly, for new fathers.

Scandinavian countries have pioneered in these provisions, as in many other social programs. In Sweden, mothers or fathers receive 8 months' vacation and 90 percent of their earnings when a baby is born.

A similar policy in the United States appears nowhere on the horizon, especially with the cut-back in social services due from the protests over high prices.

But the Pregnancy Disability Amendments do broaden the protection for millions of working women—especially the majority of women who do not have either wealthy husbands or strong unions to support them.

"This is an issue women won by fighting hard since the early 1970s," says Sue Ross. "It is extremely important that, when the Supreme Court turned out not to take Title VII seriously, we were able to overturn them."

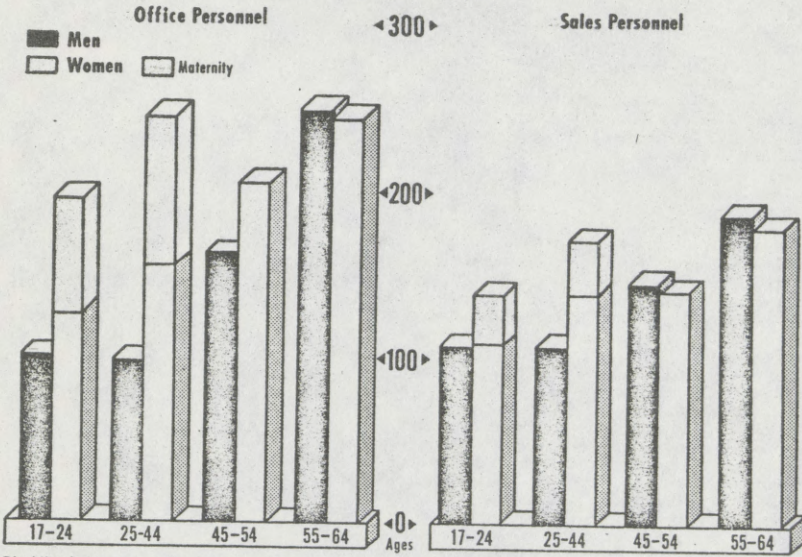
"The pregnancy question is central to what has kept women in lower-paid jobs," she adds. "Employers still perceive women as childbearers. The point of this legislation is to say you have to treat them as individual people."



## Incidence of Disability—1978

Personnel of the Metropolitan Life Insurance Company

Annual Rate Per 1,000



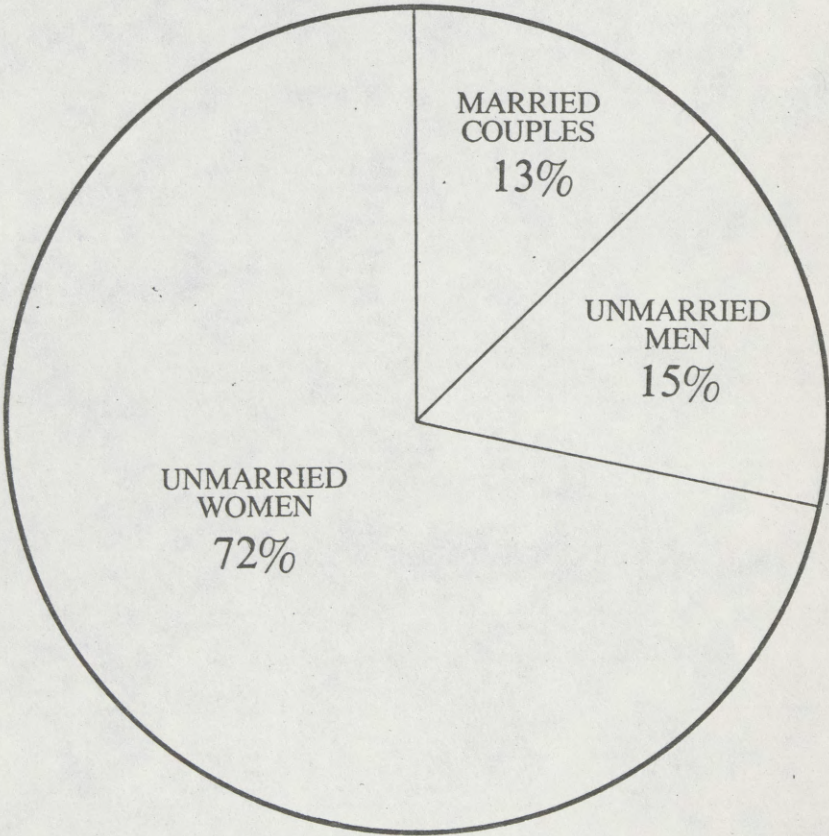
Disability lasting longer than a week. Personnel in the Pacific Coast States and Canada are not included.



CHART IV

## THE ELDERLY POOR

(THE DISTRIBUTION OF AGED UNITS  
WITH INCOMES BELOW THE POVERTY LINE,  
BY MARITAL STATUS AND SEX, 1976)



<sup>1</sup> Married Couples are counted as one unit.

<sup>2</sup> For 1976 the poverty line for those age 65 or older was \$3,445 for married couples and \$2,730 for single persons.

Source: U.S. Department of Health, Education, and Welfare, Social Security and the Changing Roles of Men and Women, 1979.

PRESIDENT'S COMMISSION ON PENSION POLICY



# Life-insurance regulation: What's needed?

Suppose that car buyers were never told the price of a car, just the monthly payment. And suppose that the monthly payment turned out to be roughly the same for most cars. It would hardly be a surprise to find many a Rolls-Royce, Mercedes-Benz, and Jaguar on the road, with rarely a Chevy in sight.

What the buyers didn't know, and weren't told, was that the Rolls-Royce payments were on 20-year loans rather than three-year loans, that the Mercedes payments covered interest only, and that the Jaguar payments were for leases, not for purchases.

Absurd? Of course. And absurd is the only way to describe the cost information used by consumers in deciding what insurance policy to buy. Most buyers focus on the premium—the payment. Few buyers know the cost, and much of the industry is reluctant to disclose it. That's why, in the insurance business, companies sell as many Rolls-Royce policies as Chevy policies.

In CU's judgment, what prospective buyers of life insurance need most is improved cost disclosure. (President Carter seems to agree—see the box on the next page.) Such disclosure would also be of immense benefit to longstanding policyholders. Some progress on the buyer's end was made during the 1970's. The interest-adjusted index was developed, the National Association of Insurance Commissioners (NAIC) recommended its use, and 29 states now have laws or regulations requiring that it be furnished on request.

The NAIC-recommended program provides that buyers be given both net-cost and net-payment indexes for a cash-value policy. For participating policies (those that pay dividends), the buyer must also be furnished, on request, with the "equivalent level dividend," a figure that reveals the extent to which the cost index is based on dividends to be paid. The NAIC program leaves it up to the states whether this information is furnished automatically or only at the request of the consumer. The vast majority

of states adopting the NAIC program have chosen the latter.

## CU's recommendations

The NAIC program does not go far enough in meeting the needs of consumers, however. Here are seven ways in which the cost-disclosure system should be improved and broadened. These recommendations take into account suggestions from other industry critics, notably Joseph Belth, professor of insurance at Indiana University.

1. The cost-disclosure information that is now furnished only on request should be furnished automatically, along with a clear explanation of its significance. The importance of this can clearly be seen by scanning CU's Ratings tables. Let's take the case of a 45-year-old man buying \$100,000 of participating cash-value insurance. If he were to buy the lowest-cost commonly available standard risk policy shown in CU's table for that age and face amount (Central Life Assurance Co.'s Maximum Life), his projected cost over the next 20 years, including foregone interest at 5 percent, would be \$22,567. If he bought the highest-cost policy (Fidelity Life Association's Ordinary Life), his projected cost would be \$57,043. That's a difference of more than \$34,000. (Both costs are based on the calculation of the interest-adjusted net-cost index and assume that he surrenders the policy after 20 years and that dividends are paid as illustrated.)

2. Rate-of-return information for the savings component of cash-value insurance should be provided both at the time of sale and each year thereafter. Again, CU's Ratings illustrate the importance of this step. Consumers deal with the interest-adjusted index only when they're buying life insurance, a relatively rare event. But consumers deal with rates of return dozens of times a year. CU believes that well-prepared, adequately explained rate-of-return information will help consumers make informed choices about life-insurance policies at all times. Certainly, buyers could appreciate at a

glance the difference between the 6.12 percent rate of return over a period of 19 years projected by the Central Life policy, as against the 0.84 percent rate of return over the same period projected by the Fidelity Life Association policy. And they could also compare (subject to the caveats mentioned in "Comparing costs and yields," page 165) the 6.12 percent, which is substantially tax-sheltered, with the rate they may be getting on other investments.

Ongoing disclosure of the yearly rate of return would be a great help to long-time policyholders. If the yearly rate of return were very poor, they could recognize that fact easily and might then want to evaluate the pros and cons of switching policies (see page 169).

3. Regulators should give careful scrutiny to dividend practices—up to now an area little examined. As CU has reported before, the formulas by which dividends are computed are often considered company secrets. The formulas may well be biased. Some companies, for example, have improved their dividend formulas on newer issues, while keeping the dividend formulas unchanged on policies issued years ago. That may be grossly unfair to older policyholders, whose interests are being sacrificed in the rush for new business. But the older policyholders may never realize how badly they've been treated, since there's no ongoing disclosure.

Questionable dividend practices are also of concern because they may distort the price comparisons made by current buyers. By raising dividends only on recent business (which costs the company relatively little), a company can develop attractive dividend scales that may make the company look better in cost comparisons than it deserves to. But extra cost may well be borne by old policyholders who are deprived of their rightful share of dividends.

4. Complete year-by-year information concerning premiums, cash values, and dividends should be available on request both to prospective purchasers and



to policyholders of long standing.

5. People who own insurance policies, whether for term or cash-value insurance, should be told each year the ongoing cost of their insurance protection.

6. The Annual Percentage Rate (APR) for the added cost of paying premiums on other than an annual basis should be disclosed. Even though 81 percent of policyholders pay other than annually, they have no way of knowing how much they are paying for the privilege. In a study done by Joseph Belth in 1978, the APR's for 15 major companies ranged from 4.9 percent to 29.3 percent for those who paid their premiums monthly.

7. Cost indexes and other information should be available, at least on request, for periods longer than the traditional 20 years. The importance of this recommendation can again be illustrated by CU's Ratings tables. A 35-year-old man buying \$25,000 of nonparticipating cash-value insurance might be considering two policies—"Preferred Executive Whole Life" from Life & Casualty Insurance Co. of Tennessee, and "Executive Life Paid Up at 95" from Kansas City Life Insurance Co. Based on the 20-year index, he'd be likely to pick the former. But with cost information going beyond the traditional 20 years, he'd probably pick the latter.

#### Response from the industry

The life-insurance industry often answers demands for additional cost disclosure by saying that it would be too expensive. CU would be hard to convince on this point. Similar arguments were made against the interest-adjusted index in the early 1970's. Yet, since that step toward cost disclosure was made, cost indexes on newly sold policies have gen-

erally gone down, not up. In large part, that is an effect brought about by rising interest rates. But CU thinks increased price competition on new sales may also have played a part in that decline.

One wonders how consumers would react if GM said that it would cost too much to figure out the price of a Chevy, and that all the consumer really needed to know was the monthly payment.

#### The role of regulators

The McCarran-Ferguson Act, a Federal statute passed in 1944, reserved to the individual states the right to regulate the insurance industry. If you're wondering why state insurance departments haven't done more to require cost disclosure, there are two basic reasons—a lack of money and an excess of coziness between the regulators and the regulated.

In a 1979 report on state regulation of insurance, the General Accounting Office (GAO) said the state insurance departments exhibited "serious shortcomings," were understaffed and underfunded, and had failed to maintain "an arms-length relationship between the regulators and the regulated."

The Wall Street Journal put it more succinctly in a 1973 headline: "The States' Regulation of Insurance Companies Often Viewed as Farce." According to the Journal, the size of insurance department staffs doubled from 1945 to 1973, but during that period there was a fourfold increase in the number of insurance companies, and a tenfold increase in the amount of life insurance written. "We have two kinds of people," one regulator told the newspaper, "youngsters who don't know what they're doing yet and who will go to work in the industry just as soon as they learn, and older guys

who have come here to retire and draw a paycheck at the same time."

Apparently, the situation hasn't improved too much since 1973. Said the GAO's recent report: "In general, the number of individuals on insurance department staffs with relevant professional training is small, departments spend little to upgrade staff skills, and salary levels are low in relation to the salaries of similar professionals elsewhere."

The second reason why state insurance departments have been less than effective in their regulation of insurance companies has to do with the attitude of the regulators themselves. "Many insurance department employees, including commissioners, either come from the industry or go into it after serving in the insurance department. The phrase commonly used by critics in describing this procedure is 'the revolving door.'"

#### In the door and out

Not all state insurance department commissioners come from the industry, nor do they all thence return. But quite a few do one or the other. CU did a survey in late 1979 to determine the current whereabouts of the 50 state insurance commissioners who preceded the current incumbents.

We found that the former New York commissioner is working for Travelers. The former Pennsylvania commissioner is working for Allianz, a European insurance group that has been acquiring U.S. insurance companies. The former Illinois commissioner is working for Ryan Insurance Group. The former Missouri commissioner is working for Kemper, and the former Ohio commissioner is working for Nationwide.

In all, CU learned that 19 previous state commissioners found employment in the insurance industry after leaving office. One can hardly be surprised if present state commissioners want to be appreciated by VIP's in the industry they are regulating.

If there is so much evidence of deficiency in state regulation, why hasn't the Federal Government taken over? For one reason, there is a reluctance on all sides to add to the Federal bureaucracy. Any move to take jurisdiction over the insurance industry away from the states would naturally require careful study. However, CU believes that the situation is serious enough to call for Congressional hearings to consider the possible repeal of the McCarran-Ferguson Act, allowing the Federal Government to intervene.

One insurance executive, asked if he would prefer state or Federal regulation, replied, "Would you rather be regulated by 50 monkeys or by King Kong?" We're not sure that's the real choice, but if it is, we'd rather have King Kong on the consumer's side.

#### President Carter puts in a word

In mid-January, as this issue was being prepared for the press, President Carter addressed a letter to the governors of all the states on the specific subject of life-insurance regulation.

"Americans spend over \$30-billion a year on life-insurance premium payments," he began. "Yet too often, consumers lack the basic cost information they need to find the best policy at the lowest price." CU itself could hardly have summed up the consumer's problem more clearly.

President Carter went on to discuss the report prepared by the staff of the Federal Trade Commission. "On the basis of economic study and consumer research," he said, "the Commission concluded that whole-life insurance policies not held to maturity pay a relatively low rate of return on their cash values, and that con-

sumers are not getting the information they need to understand the true costs of their policies. The result is billions of dollars a year in unnecessary costs to consumers."

The President recommended that the governors give "most careful consideration" to the model state regulation prepared by the FTC. "[This] regulation is designed to provide meaningful disclosure of life insurance costs."

CU endorses many, though not all, aspects of the FTC's suggested regulations. (Our recommendations are spelled out in full in the report on these two pages.) We applaud the President for backing up the FTC's work on this question and for publicizing the difficulties consumers have faced in obtaining comparative cost information before they purchase life insurance.



# Harvard Women's Law Journal

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**SEX-BASED PENSION PLANS IN PERSPECTIVE:**  
*City of Los Angeles, Department of*  
*Water and Power v. Manhart*

SYDNEY J. KEY

*Introduction*

In *City of Los Angeles, Department of Water and Power v. Manhart*,<sup>1</sup> the Supreme Court held that it is a violation of section 703(a)(1) of the Civil Rights Act of 1964<sup>2</sup> for an employer to require a female employee to make larger contributions to an employer-operated pension fund than her male counterpart<sup>3</sup> simply because women *as a class* live longer than men.<sup>4</sup> The Court said that the thrust of Title VII "requires that we focus on fairness to individuals rather than on fairness to classes."<sup>5</sup> It concluded that "there is no reason to believe that Congress intended a special definition of discrimination in the context of employee group insurance coverage. . . . Individual risks, like individual performance, may not be predicted by resort to classifications proscribed by Title VII."<sup>6</sup>

The factual situation in *Manhart* whereby female employees contributed 14.84% more into the retirement fund than their male counterparts<sup>7</sup> was an anomaly. Employee group pension plans requiring higher contributions by the female employees themselves (as opposed to higher contributions by the employer on behalf of female employees) are very rare.<sup>8</sup> In fact, while *Manhart* was pending, the contested practice was

<sup>1</sup> 435 U.S. 702 (1978).

<sup>2</sup> The statute provides in part that "[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . ." 42 U.S.C. § 2000e-2(a)(1) (1976).

<sup>3</sup> The term "male counterpart" is used in this article to refer to a man with the identical work history and of the same age as a given female.

<sup>4</sup> 435 U.S. at 708-09.

<sup>5</sup> *Id.* at 709.

<sup>6</sup> *Id.* at 710.

<sup>7</sup> *Id.* at 705.

<sup>8</sup> Brief for the Society of Actuaries and the American Academy of Actuaries as Amicus Curiae at 18, *City of Los Angeles, Dep't of Water and Power v. Manhart*, 435 U.S. 702 (1978) [hereinafter cited as Actuaries' Brief].



discontinued by the defendant after the enactment of a new California law that prohibits certain municipal retirement plans from requiring female employees to make higher pension fund contributions than their male counterparts.<sup>9</sup> Still at issue for the *Manhart* parties, however, was the question of whether the discontinued practice had violated Title VII and, if it had, whether restitution of excess contributions should be made to the female employees. While the Supreme Court agreed with the lower court that the practice had violated Title VII, it vacated the award of retroactive relief.<sup>10</sup> Beyond the parties in *Manhart*, the decision specifically covers only the type of pension plan that still requires higher contributions by females than by males,<sup>11</sup> notably the New York City teachers' retirement program.<sup>12</sup>

There are, however, a number of other pension discrimination cases involving unequal monthly benefits rather than *Manhart*'s unequal monthly employee contributions that either already have been settled as a result of *Manhart* or are now working their way through the courts.<sup>13</sup> In one of these cases, *Henderson v. Oregon*,<sup>14</sup> the State of Oregon in effect conceded the applicability of *Manhart* to a pension plan with unequal monthly benefits.<sup>15</sup> To the extent that the reasoning in *Manhart* applies to the factual situations not only in *Henderson* but also, as seems almost certain, in other pending unequal benefits cases,<sup>16</sup> most of which involve as defendants the Teachers Insurance

<sup>9</sup> CAL. GOV'T CODE § 7500 (West Supp. 1978).

<sup>10</sup> 435 U.S. at 723. For further discussion of retroactive relief, see text at notes 146-54 *infra*.

<sup>11</sup> 435 U.S. at 717.

<sup>12</sup> Resolution, Board of Estimate, City of New York, July 25, 1968.

<sup>13</sup> *Bailey v. University of S. Cal.*, Civ. No. 75-3862 (C.D. Cal., filed Nov. 17, 1975); *EEOC v. Colby College*, 439 F. Supp. 631 (D. Me. 1972), *rev'd and remanded*, No. 78-1010 (1st Cir. Dec. 18, 1978); *Peters v. Wayne State Univ.*, Civ. No. 670165 (E.D. Mich., trial began Sept. 28, 1977, decision pending); *Michigan State Univ. Faculty Ass'n v. Michigan State Univ.*, No. G76-640 CA 5 (W.D. Mich., filed Dec. 15, 1976); *EEOC v. Columbia Univ.*, No. 78-4420 (S.D.N.Y., filed 1978); *Spirit v. Teachers Ins. and Annuity Ass'n*, 416 F. Supp. 1019 (S.D.N.Y. 1976); *American Nurses' Ass'n v. Teachers Ins. and Annuity Ass'n, College Retirement Equities Fund*, Civ. No. 75-558-G (M.D.N.C., filed Dec. 31, 1975); *Henderson v. Oregon*, 405 F. Supp. 1271 (D. Ore. 1975), *remanded for consid. of entry of proposed judgment*, No. 76-1706 (9th Cir. Aug. 21, 1978), Civ. No. 74-538 (D. Ore., consent decree entered, Sept. 20, 1978); *EEOC v. Marquette Univ.*, No. 78-C-572 (E.D. Wis., filed Sept. 6, 1978).

<sup>14</sup> 405 F. Supp. 1271 (D. Ore. 1975), *remanded for consid. of entry of proposed judgment*, No. 76-1706 (9th Cir. Aug. 21, 1978), Civ. No. 74-538 (D. Ore., consent decree entered, Sept. 20, 1978).

<sup>15</sup> Motion by Defendants-Appellants, joined by Plaintiffs-Appellees, for entry of proposed judgment, 405 F. Supp. 1271 (D. Ore. 1975), *remanded for consid. of entry of proposed judgment*, No. 76-1706 (9th Cir. Aug. 21, 1978).

<sup>16</sup> A recent ruling by the First Circuit in one of these cases found the "issues in the instant case blackly comparable to *Manhart*." *EEOC v. Colby College*, No. 78-1010, slip op. at 8 (1st



and Annuity Association and College Retirement Equities Fund (hereinafter referred to as TIAA-CREF),<sup>17</sup> present practices regarding the use of sex-based mortality tables in employer-sponsored retirement programs and, possibly, the structure of group insurance programs themselves, may be altered significantly.<sup>18</sup>

The first section of this article examines the correlation between sex and mortality rates. The second section discusses the statistical usefulness of sex-based mortality tables in employee group pension plans and the possible consequences, if any, of restricting or prohibiting their use in such plans. The third section contains a brief discussion of the applicability of the Title VII standard that was enunciated in *Manhart* to other pension plan cases now being litigated; this section also examines litigation challenging differences in terms and availability of insurance between the sexes outside the employer-employee context. A final section discusses the general problem of social policy goals that conflict with the use of statistically useful risk classification factors in private sector insurance, a problem exemplified by *Manhart*.

## I. SEX AND MORTALITY

The validity of the proposition that females as a group live longer than males as a group was not a factor in the Supreme Court's *Manhart* decision: "Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply."<sup>19</sup> In fact, the Court specifically noted that the case did "not . . . involve a fictional difference between men and women."<sup>20</sup> Instead,

Cir. Dec. 18, 1978). A recently proposed amendment to the Wage and Hour Administrator's interpretative bulletin on the Equal Pay Act, 29 U.S.C. § 206(d) (1976), also suggests the applicability of *Manhart* to pension plans providing unequal monthly benefits. 43 Fed. Reg. 38,029 (1978) (amending 29 C.F.R. § 800.116(d) (1977)). See text at notes 165-87 *infra*.

<sup>17</sup> TIAA is a non-profit legal reserve life insurance company established in 1918 by The Carnegie Foundation for the Advancement of Teaching. CREF, created in 1952 by a special act of the New York Legislature, is a companion non-profit corporation. TIAA and CREF "provide retirement and other benefit plans suited to the needs of employees of educational institutions." Joint Brief of Appellees Colby College, Teachers Insurance and Annuity Association and College Retirement Equities Fund at 3, EEOC v. Colby College, No. 78-1010 (1st Cir. Dec. 18, 1978). See also W. GREENOUGH & F. KING, PENSION PLANS AND PUBLIC POLICY 56-57 (1976).

<sup>18</sup> For a similar conclusion, see *The Supreme Court, 1977 Term*, 92 HARV. L. REV. 57, 299 (1978).

<sup>19</sup> 435 U.S. at 708.

<sup>20</sup> *Id.* at 707.



it involved "a generalization that the parties accept as unquestionably true: Women, as a class, do live longer than men."<sup>21</sup>

Nevertheless, a discussion of the implications and possible effects of *Manhart* cannot ignore the issue of sex-based mortality differentials. The Supreme Court made it clear that the only point at issue in its holding was "a requirement that men and women make unequal contributions to an employer-operated pension fund."<sup>22</sup> The decision did not call into question the insurance industry practice of taking into account the male-female ratio in an employer's work force in order to calculate the probable cost of a pension plan to the employer.<sup>23</sup> Moreover, TIAA-CREF has continued to allege, after *Manhart*, that the use of sex-based mortality tables to determine employee pension benefits is a "business necessity."<sup>24</sup>

Not surprisingly, statistics relating to male-female mortality differentials and the meaning of these statistics have become the subject of some controversy. It seems useful, therefore, to begin an article on the potential consequences of *Manhart* by attempting to sort out facts from appearances in the relationship of sex and mortality.

Statistics for the general population of the United States show that throughout the twentieth century mortality rates for males have been higher than those for females at all ages.<sup>25</sup> Death rates among women averaged about 90% of those among men from 1900 to 1920.<sup>26</sup> Although there has been a general decline in mortality rates since that time, the decrease has been greater among women than among men.<sup>27</sup> By 1970 the age-adjusted ratio of female to male mortality for the general population was about 57%.<sup>28</sup> For age groups between 5 and 85 the ratio of female to male mortality in 1970 ranged from 36% (for ages 15-24) to 67% (for ages 75-84).<sup>29</sup> At ages under 5 and at ages 85 and

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 717.

<sup>23</sup> *Id.* at 718.

<sup>24</sup> Second Supplemental Memorandum of Defendants Teachers Insurance and Annuity Association and College Retirement Equities Fund in Support of Their Motion for a Judgment of Dismissal at 25, *Spirt v. Teachers Ins. and Annuity Ass'n*, 416 F. Supp. 1019 (S.D.N.Y. 1976) [hereinafter cited as *Spirt Memorandum*].

<sup>25</sup> Metropolitan Life Insurance Co., *Sex Differentials in Mortality*, STATISTICAL BULL., Aug. 1974, at 2-3 [hereinafter cited as *Sex Differentials in Mortality*].

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* The comparable figure for 1976, calculated for the author by the Metropolitan Life Insurance Company, was 55%.

<sup>29</sup> *Sex Differentials in Mortality*, *supra* note 25, at 2.



over, decreases in the ratios of female to male mortality from 1900 to 1970 were relatively small.<sup>30</sup> While mortality rates for both males and females tend to be lower for the insured population than for the general population,<sup>31</sup> data for the insured population for the 1955-1970 period show ratios of female to male mortality similar to those for the general population.<sup>32</sup>

It is not clear to what extent observed sex mortality differentials are attributable to (a) organic factors, that is, basic genetic and physiological differences between the sexes, or (b) environmental factors. C. Lewis and M. Lewis point out that "distinguishing the relative contributions of biologic sex and sex-related behaviors to patterns of . . . mortality is difficult."<sup>33</sup> While it has been suggested that a variety of biological and hormonal factors may contribute to sex differentials in mortality,<sup>34</sup> there is no single, simple explanation.

Statistics that may be difficult to explain on other grounds are sometimes used to support the contention that sex mortality differentials result primarily from biological factors.<sup>35</sup> Frequently cited are perinatal mortality rates, that is, stillbirths and deaths in the first week of infancy, which are higher for males than for females.<sup>36</sup> An oft-quoted study by F. Madigan compared sex mortality differences among Roman Catholic teaching orders from 1900 to 1954 and found both male-female mortality differentials and their trends over time comparable to those of the general population.<sup>37</sup> Madigan assumed that he had found male and female groups in which "cultural stresses and strains had been so standardized between sexes that one could observe the operation of biologi-

<sup>30</sup> *Id.* at 2-3.

<sup>31</sup> S. HUEBNER & K. BLACK, *LIFE INSURANCE* 238 (9th ed. 1976).

<sup>32</sup> *Sex Differentials in Mortality*, *supra* note 25, at 4.

<sup>33</sup> Lewis & Lewis, *The Potential Impact of Sexual Equality on Health*, 297 *NEW ENG. J. MED.* 863, 865 (1977); see also R. RETHERFORD, *THE CHANGING SEX DIFFERENTIAL IN MORTALITY* 12-14 (1975). The effect of biological differences between the sexes on observed sex mortality differentials can depend on environmental factors; medical advances, for example, could reduce mortality from a cause of death previously associated, for biological reasons, primarily with one sex. *Id.*

<sup>34</sup> "Changes in female endocrine function have been suggested as reasons for sex differentials in cancer mortality, and the sex differential in mortality from coronary heart disease has been linked with estrogen levels which seem to give greater protection to women." *Sex Differentials in Mortality*, *supra* note 25, at 5 (footnotes omitted).

<sup>35</sup> See, e.g., *id.*; Lautzenheiser, *Sex and the Single Table: Equal Monthly Retirement Income for the Sexes?*, 2 *EMPLOYEE BENEFITS J.* 8, 11 (1976).

<sup>36</sup> Metropolitan Life Insurance Co., *Major Factors in Perinatal Mortality*, *STATISTICAL BULL.*, Feb. 1962, at 3.

<sup>37</sup> Madigan, *Are Sex Mortality Differentials Biologically Caused?*, 35 *MILBANK MEMORIAL FUND Q.* 202 (1957).



cal factors in comparative isolation."<sup>38</sup> This assumption may be questionable; for example, as Madigan himself admits, "[T]he Brothers are more likely to smoke and to take an occasional drink."<sup>39</sup> Moreover "an important factor" that was not taken into account was "the relative incidence of obesity . . . within each sex group."<sup>40</sup>

Other studies have suggested that biological causes of male-female mortality differentials are relatively unimportant. R. Retherford has suggested that male-female differences in smoking habits accounted for 47% of the female-male difference in life expectancy between ages 37 and 87 (the age range for which he had data) in 1962 and for about 75% of the increase in this difference between 1910 and 1962.<sup>41</sup> However, as Lewis and Lewis note, "[T]he sex ratio of the prevalence of smoking . . . has changed in the last few years, especially among the young."<sup>42</sup>

Given the dramatic changes in the role of women in the economy in recent years, it would seem interesting, although not conclusive, to compare mortality data for working women and working men in the same occupations. As increasing numbers of women not only work but have the same high-pressure jobs and professional life-styles as do men, other things being equal, mortality differentials for working men and working women might be expected to be smaller than for the general population. At present, the evidence on this point can best be described as fragmentary. One study indicates that the ratios of female to male mortality rates in 1969-1973 for physicians in age groups between 30 and 44 were much higher than comparable ratios for the general population;<sup>43</sup> however, the author cautions against aberrations in the data due to the small number of females.<sup>44</sup>

An internal TIAA study compared mortality rates in the mid-1970's for male and female annuitants who received pension benefits as a result of employment (rather than as spouses of covered workers).<sup>45</sup>

<sup>38</sup> *Id.* at 204.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 205.

<sup>41</sup> R. RETHERFORD, *supra* note 33, at 104.

<sup>42</sup> Lewis & Lewis, *supra* note 33, at 865. Lewis and Lewis note that male and female death rates for cancer of the lung are now very similar. *Id.* at 867.

<sup>43</sup> Goodman, *The Longevity and Mortality of American Physicians, 1969-1973*, 53 *MILBANK MEMORIAL FUND Q.* 353, 358-59 (1975).

<sup>44</sup> *Id.* at 358.

<sup>45</sup> Testimony of Ardian Gill, Record at 957-59, *Peters v. Wayne State Univ.*, Civ. No. 670165 (E.D. Mich. Sept. 28, 1977) [hereinafter cited as *Peters Record*]. To date, of *Manhart* and the other cases cited above, only in note 13 *supra*, *Peters* is the only case in which there has been



According to the TIAA figures, the ratios of female to male mortality for these former workers (who were primarily faculty members or administrative personnel)<sup>46</sup> in the 65-69, 70-74, and 75-79 age groups were similar to those for the general annuitant population.<sup>47</sup> Nevertheless, these data do not really refute the hypothesis that changes in the role of women will produce smaller sex differentials in mortality. For pension plans the most relevant mortality data are for annuitants 65 and over. Capturing the longer-run effects on mortality of recent economic and sociological changes in the role of women would require data for the generation of college age in the 1960's at ages 65 and above, data that will not be available for several decades.

Clearly there is no definitive medical or statistical evidence as to what extent observed sex differentials in mortality are attributable to biological or environmental causes. But even if there were, would this really be the most useful way to consider the relation between sex and mortality? Two points merit consideration.

First, suppose it could be shown that sex differentials in mortality are biologically caused. Should that change the Supreme Court's ruling in *Manhart*? Logically, it should not: What the Court concluded was that the pertinent issue for a violation of Title VII was whether generalizations about a class could be applied to individual women, and not whether the generalizations were true.<sup>48</sup> Since, as far as the Court was concerned, the validity of the generalization was irrelevant, by implication the reason for the generalization would also seem irrelevant. In keeping with the Supreme Court's approach, the point is that even if sex differentials in mortality were biologically caused, an individual woman could still die at any time. It must be noted, however, that the Court did cite some of the literature emphasizing the environmental component of sex-based mortality differentials.<sup>49</sup>

Second, the traditional approach of trying to explain observed sex differentials in mortality does not always put the relationship of sex and mortality in proper perspective. At any given time, biological sex differences are only one of many factors affecting mortality. It seems more appropriate, therefore, as A. Anderson suggests, to think in terms of

<sup>46</sup> TIAA-CREF, SUMMARY OF RETIREMENT PLAN PROVISIONS: TIAA-CREF 4-YEAR COLLEGE AND UNIVERSITY RETIREMENT PLANS, Table A (Dec. 31, 1977) (pamphlet).

<sup>47</sup> Testimony of Ardian Gill, *Peters Record*, *supra* note 45, at 957-59; *Defendant's Exhibit 37*, *Peters v. Wayne State Univ.*, Civ. No. 670165 (E.D. Mich. Sept. 28, 1977).

<sup>48</sup> 435 U.S. at 708.

<sup>49</sup> *Id.* at 710-17.



multivariate analysis.<sup>50</sup> The variables affecting mortality include not only sex but also age, health, race, socio-economic status, habits (such as smoking), hobbies (such as hang-gliding), life-styles (such as marital status), and occupation.<sup>51</sup> The interesting and pertinent issue is the relative importance of these different types of factors. Anderson cites data indicating that certain medical impairments can cause mortality rates on the order of 500% of standard.<sup>52</sup> J. Bragg emphasizes the importance of socio-economic status.<sup>53</sup> Retherford's statistical analysis emphasizes the importance of smoking and, to a lesser extent, marital status.<sup>54</sup> Yet there is really no comprehensive study trying to take into account and evaluate the relative importance of the multiplicity of variables affecting mortality.<sup>55</sup> In practice such a study would be very difficult; not only are there severe data limitations, but also the variables affecting mortality are themselves strongly interrelated, which can make it extremely difficult statistically to measure their independent contributions.

Before leaving the subject of the statistical relation between sex and mortality it is necessary to discuss one widely used (and mis-used) statistical demonstration, the so-called "overlap argument." B. Bergmann and M. Gray have pointed out that if one takes a group of males and females aged 65, for example, and looks at their mortality experience, a very high proportion of their deaths will "overlap."<sup>56</sup> More precisely, 84% of the group's men and 84% of the group's women will have matched deaths, that is, the death of each of these men can be

<sup>50</sup> Anderson, *A Critique of the Manhart Brief*, 12 ACTUARY 5 (May 1978).

<sup>51</sup> *Id.*; Myers, *Pension Benefits and Sex*, CIVIL RIGHTS DIGEST, Winter 1977, at 46.

<sup>52</sup> Anderson, *supra* note 50, at 5.

<sup>53</sup> Bragg, *Mortality differences and trends in the United States of America, taking account of color, sex, and socioeconomic status*, 2 TWENTIETH INTERNATIONAL CONGRESS OF ACTUARIES TRANSACTIONS 391, 397-400 (1976); see also Pedoe, *Occupation, Social Class and Mortality*, 12 SOCIETY OF ACTUARIES TRANSACTIONS 227 (1960). For other studies of socio-economic differentials in mortality, see Metropolitan Life Insurance Co., *Socioeconomic Mortality Differentials*, STATISTICAL BULL., Jan. 1975, at 2-5.

<sup>54</sup> R. RETHERFORD, *supra* note 33, at 104-05.

<sup>55</sup> Retherford's study, see note 33 *supra*, is the most systematic, but its limitations should be noted. First, sex mortality differentials rather than, for example, occupational mortality differentials, are what Retherford is trying to explain; choosing this focus for the statistical analysis inevitably emphasizes sex as opposed to other determinants of mortality. Second, the only external factors used to explain the sex differentials were smoking and marital status; Retherford himself noted that "[u]nfortunately the effects of such relevant external variables as diet, body weight in relation to height, exercise, and stress are not considered . . . because the detailed mortality data required to incorporate them into the analysis are not available." *Id.* at 7-8.

<sup>56</sup> Bergmann & Gray, *Equality in Retirement Benefits - The Need for Pension Reform*, CIVIL RIGHTS DIGEST, Fall 1975, at 25.



matched against a death in the same year of one of these women.<sup>57</sup> Because comparable figures have been widely cited in court opinions, legal briefs, and articles,<sup>58</sup> it is important to consider what the overlap phenomenon does or does not demonstrate.

First, it must be emphasized that the remaining 16% of the men die relatively early, unmatched by female deaths, and the remaining 16% of the women die relatively late, unmatched by male deaths.<sup>59</sup> Statistically, there are two different distributions with different means;<sup>60</sup> the fact that the distributions overlap does not imply that the averages are not significantly different in statistical terms.

Second, the overlap figure is derived by matching deaths according to the year of death, not according to the order in which the deaths occur. Since annuities are paid to those who survive in each year, the chronological order of male and female deaths matters.<sup>61</sup> The overlap statistic says nothing about the relative numbers of male and female survivors in the years in which the "overlapping deaths" occur. TIAA figures, for example, show that while the average number of deaths for TIAA-insured males and females in a single year is about 3,000, the system has 70,000 or 80,000 survivors to whom annuities are being paid.<sup>62</sup>

The overlap argument's only valid implication for the attribution of group characteristics to an individual is both obvious and important: not all women live longer than all men, some women do not live as long as the average man, and some men outlive the average woman. This is why the Supreme Court felt that even if generalizations about a group were true, they should not be controlling. As the Court noted in *Manhart*, "all individuals in the respective classes do not share the characteristic that differentiates the average class representatives."<sup>63</sup>

<sup>57</sup> *Id.*

<sup>58</sup> See, e.g., *Henderson v. Oregon*, 405 F. Supp. at 1275 n.5; *Reilly v. Robertson*, 360 N.E.2d 171, 176 (Ind.), cert. denied, 434 U.S. 825 (1977); Brief for Respondents at 19-20; Brief for ACLU and Am. Ass'n of Univ. Professors as Amici Curiae at 16-17; *City of Los Angeles, Dep't of Water and Power v. Manhart*, 435 U.S. 702 (1978); Brief for the Equal Employment Opportunity Commission as Appellant at 6-7, 10, *EEOC v. Colby College*, No. 78-1010 (1st Cir. Dec. 18, 1978); *Martin, Gender Discrimination in Pension Plans*, 13 J. Risk & Ins. 203, 208 n. 16, 208-09 (1976); *Halperin, Should Pension Benefits Depend upon the Sex of the Recipient?*, 62 AAUP BULL. 43, 47 (1976).

<sup>59</sup> *Bergmann & Gray, supra* note 56, at 25; *Myers, supra* note 51, at 46.

<sup>60</sup> Testimony of Ardian Gill, *Peters Record, supra* note 45, at 1001-03.

<sup>61</sup> *Id.* at 1009, 1011-15.

<sup>62</sup> See *id.* at 1008.

<sup>63</sup> 414 U.S. at 708.



The overlap phenomenon does not, however, address the issue of the relative importance of sex as a determinant of mortality.

## II. CLASSIFICATION BY SEX IN EMPLOYEE GROUP PENSION PLANS

Insurance is a risk-spreading device based on statistical theory.<sup>64</sup> While an individual cannot predict with certainty when he or she will die, the law of large numbers allows an actuary to predict with extreme accuracy how many people of a given large group will die each year.<sup>65</sup> These predictions are made using mortality tables which represent "a record of mortality observed in the past and . . . arranged in a form to show the probabilities of death and survival at each . . . age."<sup>66</sup> For each age, a mortality table shows the expected number of deaths during one year at that age as a proportion of the number of men and women in a group who have survived to that age; these figures are the probabilities that a person who has attained a given age will die before attaining the next age.<sup>67</sup> Mortality tables sometimes also show life expectancy at each age, that is, the average number of years men and women in the group who are alive at a particular age are expected to continue to live.<sup>68</sup>

Since different segments of the general population have different mortality rates, "a mortality table used for a particular purpose must reflect that body of mortality experience most appropriate for that purpose."<sup>69</sup> For example, age-specific mortality for employee groups is lower than that for the general population, since employment requires a minimum level of health.<sup>70</sup> Moreover, "mortality among individuals who purchase life insurance tends to be higher, age for age, than that of persons who purchase annuities."<sup>71</sup>

<sup>64</sup> See S. HUEBNER & K. BLACK, *supra* note 31, at 232-33.

<sup>65</sup> The law of large numbers (Bernoulli's Theorem) states that although actual experience may vary from expected (predicted) experience, as the number of trials increases, the relative variation decreases, and if a very large number of trials are made, on the average, the actual and the expected experience will converge. *Id.* at 237. For a mathematical statement of the law of large numbers, see A. MOOD, F. GRAYBILL & D. BOES, *INTRODUCTION TO THE THEORY OF STATISTICS* 231-33 (3d ed. 1974).

<sup>66</sup> S. HUEBNER & K. BLACK, *supra* note 31, at 238.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 241.

<sup>69</sup> D. MCGILL, *FUNDAMENTALS OF PRIVATE PENSIONS* 315 (1975).

<sup>70</sup> *Id.* at 316.

<sup>71</sup> *Id.* at 315.



For pension plans, a widely used mortality table is known as the 1971 Group Annuity Mortality Table.<sup>72</sup> Both actuarial consultants and insurance companies, however, adjust this or other standard tables to reflect the experience of the pension plans they service, and, in some cases, construct their own mortality tables.<sup>73</sup> Almost any large pension plan will be experience rated, which means that contributions to the fund (or, in the case of a defined contribution plan,<sup>74</sup> the benefits received) will be adjusted to reflect, among other things, the actual mortality experience of that particular pension plan.<sup>75</sup> Experience rating of a group's mortality is done not only because of the divergence of a particular group's mortality from the average (because of factors such as occupation) but also because of increases in longevity over time.<sup>76</sup>

The concept of risk classification groups is obviously important. There is a conflict between preserving individual equity and pooling risks. The risk classification groups for which mortality tables are constructed must include a sufficiently large number of individuals so that, statistically, the mortality rates have high predictive value.<sup>77</sup> On the other hand, the risk classification groups must also be equitable; that is, individuals whose expected mortality differs greatly from one another should not be included in the same group, since, at least in a competitive market, one could not be expected to subsidize the other.<sup>78</sup> In brief, the goal is to share the risk within a risk class that is not so small as to be statistically unreliable but is small enough to be "fairly" defined. The issue of defining risk classes is conceptually complex, since the line between sharing the risk, which is the basic principle of insurance,<sup>79</sup> and subsidization, which occurs when people of widely varying risks are grouped together, is difficult to draw.

For individual as opposed to group insurance a variety of criteria are used to classify risks,<sup>80</sup> thereby achieving some degree of individual

<sup>72</sup> *Id.* at 318; see also S. HUEBNER & K. BLACK, *supra* note 31, at 244.

<sup>73</sup> *Id.* at 316.

<sup>74</sup> See text at notes 89, 94-100 *infra*.

<sup>75</sup> S. HUEBNER & K. BLACK, *supra* note 31, at 399; D. MCGILL, *supra* note 69, at 258-59.

<sup>76</sup> Testimony of Ardian Gill, Peters Record, *supra* note 45, at 945.

<sup>77</sup> See note 65 *supra*; see also S. HUEBNER & K. BLACK, *supra* note 31, at 363.

<sup>78</sup> S. HUEBNER & K. BLACK, *supra* note 31, at 363.

<sup>79</sup> *Id.* at 232-33.

<sup>80</sup> For individual life insurance, many different factors are used, including age, sex, build, health, habits, and occupation. See *id.* at 364-68. For individual annuities, health is occasionally used in addition to age and sex. Testimony of Ardian Gill, Peters Record, *supra* note 45, at 945.



equity. But in the context of group insurance, such as an employer's program where all employees are compelled to participate as a condition of employment, the meaning of individual equity is less clear. As the Supreme Court recognized in *Manhart*, under a group insurance program

the better risks always subsidize the poorer risks. . . . Treating different classes of risks as though they were the same for purposes of group insurance is a common practice which has never been considered inherently unfair. To insure the flabby and the fit as though they were equivalent risks may be more common than treating men and women alike; but nothing more than habit makes one "subsidy" seem less fair than the other.<sup>81</sup>

Why then do most actuaries and insurance companies have such strong views as to the usefulness and/or necessity of sex as a risk classification factor in employee pension plans? Sex and age are the only factors commonly used to classify risks in such plans.<sup>82</sup> The claim is that these are the only characteristics that are significant, stable, and practical to measure at low cost.<sup>83</sup> Health, for example, is impractical to measure at low cost and can change over time.<sup>84</sup> Smoking, for which some claim sex is in part acting as a proxy,<sup>85</sup> is an example of a characteristic that is considered unstable, since it is within the power of the individual to change at any time.<sup>86</sup>

One highly respected actuary sums up the reason for using sex as a risk classification factor as follows:

It can quite correctly be pointed out that other characteristics such as race, geographic location, smoking, medical history, and family history are significant determinants of future mortality. However, on the whole these elements do not have anywhere near the overall importance of age and sex, and also, some of them can be changed at the will of the person involved or by future occurrences. Although such

<sup>81</sup> 435 U.S. at 710 (footnotes omitted).

<sup>82</sup> Testimony of Ardian Gill, Peters Record, *supra* note 45, at 921.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 928.

<sup>85</sup> See text at notes 41-42, 49 *supra*.

<sup>86</sup> TIAA-CREF, *Retirement Benefits for Men and Women*, PARTICIPANT, July 1973, at 3-4 [hereinafter cited as *Retirement Benefits for Men and Women*].



other characteristics may be used for individual underwriting, they would tend to have little aggregate effect on the large groups generally involved in pension plans.<sup>87</sup>

It is difficult to find an actuary who does not hold similar views. One actuary has, however, argued that "there simply is no compelling actuarial reason why, having ignored health, class, smoking and other important factors affecting longevity, we cannot now rid pension plans of sex discrimination."<sup>88</sup>

In order to evaluate some of the possible effects of restricting the use of sex as a risk classification factor it is necessary to review briefly the two major types of pension plans and the way in which sex-based mortality tables are used to calculate contributions and benefits. The two types of pension plans are: (1) defined benefit (or formula benefit) plans, and (2) defined contribution (or money purchase) plans.<sup>89</sup> Either type of plan may be contributory, whereby the employee pays part of the cost, or noncontributory, whereby the plan is financed entirely by the employer.<sup>90</sup> Either type of plan may be insured, in which case the insurance company not only administers the plan (that is, accumulates and invests contributions and pays benefits) but also, in some cases, assumes the legal obligation to pay the benefits "whether the amounts contributed by the employer turn out to be more or less than required for that purpose."<sup>91</sup> Or, a plan may be trustee (non-insured), in which case the trustee administers the plan without assuming the legal obligation to pay the benefits.<sup>92</sup> Also, under either type of plan the form of the benefits may vary; for example, the benefits could be in the form of annuities that are monthly sums only for life, or for a stated minimum period of years and life thereafter, or, in some instances, the retiree can elect full or partial payment in the form of a lump sum.<sup>93</sup>

Under defined contribution plans the percentage of earnings going into a pension plan is usually the same for each employee regardless of

<sup>87</sup> Myers, *supra* note 51, at 46.

<sup>88</sup> Anderson, *supra* note 50, at 7.

<sup>89</sup> W. GREENOUGH & F. KING, *supra* note 17, at 176; see also Actuaries' Brief, *supra* note 8, at A1-A8.

<sup>90</sup> Actuaries' Brief, *supra* note 8, at 5, A3, A4.

<sup>91</sup> *Id.* at A8. Insurance companies make available pension plans where they assume the legal liability. They also have plans where, in essence, they are trustees until retirement and then guarantee the pension payments.

<sup>92</sup> *Id.* at 9, A7-A8.

<sup>93</sup> *Id.* at 9, A3, A5. See note 139 and accompanying text, notes 117, 138 & 168 *infra*.



age or sex.<sup>94</sup> Defined contribution plans frequently are used by small businesses and by the nonprofit sector.<sup>95</sup> They are usually but not always contributory. The TIAA-CREF system serving educational institutions is the largest of the defined contribution plans.<sup>96</sup> In defined contribution plans, benefits are not precisely stated in advance; rather they are whatever pension can be provided at retirement out of funds accumulated on behalf of each plan participant. The amount of the benefits depends on the plan's investment experience<sup>97</sup> and also on its mortality experience and administrative costs.

In a defined contribution plan the accumulations for a female worker and her male counterpart will be equal.<sup>98</sup> Thus, if a female and her male counterpart retiring on the same day were to receive the pension benefits as lump sums, the amounts of the benefits would be identical. But if they receive the benefits as lifetime monthly payments, the monthly benefit payment will be lower for the female worker, since she is expected to live longer and to receive a greater number of payments than the male.<sup>99</sup> The benefits received by the man and woman are considered to be actuarially equivalent,<sup>100</sup> that is, the present value of the expected pension benefits is the same for both sexes. In other words, the expected total retirement benefits — a stream of future income that the average woman will collect over a longer period of time than the average man — are of equal value as of the day of retirement.

But, as Anderson points out, actuarial equivalence is not an absolute but depends on the classification categories chosen at the outset.<sup>101</sup> The benefits are indeed actuarially equivalent, but only because the dependence of mortality on sex and age alone is presumed (by using sex-based mortality tables) and the calculations of actuarial equivalence are made accordingly.<sup>102</sup> If it were statistically useful to classify a mortality table by a measure of obesity and blood pressure, for example,

<sup>94</sup> *Id.* at 23; W. GREENOUGH & F. KING, *supra* note 17, at 177.

<sup>95</sup> W. GREENOUGH & F. KING, *supra* note 17, at 177.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 178; Actuaries' Brief, *supra* note 8, at A4-A5.

<sup>98</sup> *Retirement Benefits for Men and Women*, *supra* note 86, at 4.

<sup>99</sup> College Retirement Planning: 'Defined Contribution' and 'Formula Benefit' Plans, at 2 (June 1972) (TIAA-CREF memorandum).

<sup>100</sup> *Retirement Benefits for Men and Women*, *supra* note 86, at 4.

<sup>101</sup> Anderson, *supra* note 50, at 6.

<sup>102</sup> *Id.*



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this measure could be included in the notion of actuarial equivalence, and, other things being equal, "fit" persons would receive lower monthly benefits than "flabby" persons.

Most persons covered by pension plans in private industry are in defined benefit plans,<sup>103</sup> under which benefits are predetermined either by a formula related to wages or set at a flat level.<sup>104</sup> The majority of these plans are noncontributory;<sup>105</sup> the defined benefit plans that are contributory usually provide for employee contributions that are less than employer contributions and that are equal for a female employee and her male counterpart,<sup>106</sup> past practices of the Los Angeles Department of Water and Power notwithstanding.<sup>107</sup>

Under defined benefit plans a female and her male counterpart receive equal monthly benefits but, if all other things are equal, the employer's contributions on behalf of the female are higher. Since women as a group live longer than men as a group, a greater accumulation is required for a group of female employees than for a group of their male counterparts.<sup>108</sup> Similarly, a greater accumulation is required for "fit" people than for their "flabby" counterparts, although this difference is not explicitly taken into account by the mortality tables being used. When monthly pension benefits are equal for males and females, the female's benefits are considered to have a larger actuarial value than those of her male counterpart; that is, on the day of retirement, the present value of the expected pension benefits is greater for the female than for the male.

At present, the cost of the extra longevity of "healthy" people is borne by the employer and/or by all employees, healthy and unhealthy. Clearly, if females as a group live longer (for whatever reasons) than males as a group, the cost of greater female longevity has to be borne by someone. If the cost is not to be assessed against females, it must be assessed against the employer and/or all employees in a group, both

<sup>103</sup> Types of Private Pension Plans Reported to Department of Labor, at 1 (Mar. 31, 1975) (data processed by ICF, Inc. from U.S. Department of Labor EBS-1 Forms).

<sup>104</sup> W. GREENOUGH & F. KING, *supra* note 17, at 178-79.

<sup>105</sup> Actuaries' Brief, *supra* note 8, at 12.

<sup>106</sup> *Id.* at 18. A3. The largest plan of this type is the Civil Service Retirement System. *Id.* at A3.

<sup>107</sup> See text at note 7 *supra*.

<sup>108</sup> College Retirement Planning: 'Defined Contribution' and 'Formula Benefit' Plans, *supra* note 17, at 2.



male and female. In either of these two cases the males would, at least to some extent, be subsidizing the females.<sup>109</sup>

The *Manhart* decision makes it clear that, at least in a defined benefit plan, females alone may not be required to pay the cost of extra female longevity.<sup>110</sup> Note, however, that the Court said it was not questioning the insurance industry practice of taking the composition of the work force into account in determining funding requirements for a pension plan.<sup>111</sup> Apparently it is still permissible to continue to use sex-based mortality tables to estimate the cost of a pension plan as long as the tables are not used to charge females more per month, as in *Manhart*.

Another method of estimating funding requirements, while still taking into account explicitly the sex composition of the work force, is to construct a single mortality table for the group derived from sex-based tables and data for the proportion of men and women in the group.<sup>112</sup> Such a table would then be used to determine benefits and contributions for each employee (both male and female) made by the employees and/or by the employer. Even if the use of sex-based mortality tables were prohibited, experience rating of a large employee group with a relatively stable ratio of males to females would tend to produce a similar single table.<sup>113</sup> A single mortality table for an employee group is often referred to as a "unisex" table,<sup>114</sup> although one hesitates to use the term both because it is not (at least not yet) a word in the English language and also because, not surprisingly, interpretations of its meaning vary widely.

<sup>109</sup> Whether the cost is assessed in the first instance against an employer or that employer's work force does not necessarily indicate who ultimately bears the burden. If the cost is initially paid by the employer, the employer would tend to reduce his or her demand for labor and/or to lower wages. The extent of the male subsidy would depend on the extent to which the cost is borne by the employer or shifted to the employees in the form of lower wages, and also on the sex-composition of the work force.

<sup>110</sup> 435 U.S. at 708-10. It should be noted that in *Manhart* the cost of extra female longevity was paid by both the employer and the female employees. Actuaries' Brief, *supra* note 8, at 23 n. 16.

<sup>111</sup> 435 U.S. at 718.

<sup>112</sup> F. KING, MEN, WOMEN AND LIFE ANNUITIES 5 (1976) (TIAA-CREF pamphlet).

<sup>113</sup> See Lautzenheiser, *supra* note 35, at 40.

<sup>114</sup> *Id.* at 40; EEOC v. Colby College, No. 78-1010, slip op. at 10 (1st Cir. Dec. 18, 1978); Comments of Teachers Insurance and Annuity Association of America and the College Retirement Equities Fund on Proposed Amendments to the Equal Pay Act Interpretative Bulletin and to the Office of Federal Contract Compliance Program Sex Discrimination Guidelines, at 14 (submitted to the U.S. Department of Labor, Oct. 23, 1978) [hereinafter cited as TIAA Comments]; F. KING, *supra* note 112, at 5-6.



Requiring that monthly employee contributions and both monthly and lump sum benefits be equal between the sexes means that the extra cost of female longevity cannot be assessed exclusively against females. One concern is that if it is assessed against employers, it will cause employers in the long run to perceive female workers as more expensive than male workers and thus be provided with a disincentive to hire them.<sup>115</sup> Even though Title VII makes it illegal for an employer to discriminate in hiring on the basis of sex,<sup>116</sup> it is still of interest to consider whether the employer has an economic incentive to do so. A second, and rather different, type of concern involves possible reactions of male employees. For example, it has been suggested that males within a given plan might have an incentive to choose options other than the single-life annuity<sup>117</sup> and/or employers with predominantly male groups might have an incentive to change plans.<sup>118</sup> A third concern involves issues of economic and legal equity in implementing Title VII requirements, in particular, the question of retroactive relief. These concerns are examined in the discussion that follows.

#### *A. Possible Disincentive to Hire Females*

Under noncontributory defined benefit plans, employers were, before *Manhart*, already paying the cost of extra female longevity. Although there does not seem to be any problem at the present time, it has been suggested that this situation may change as increasing numbers of women enter the labor force and move into high paying jobs.<sup>119</sup> (Employee benefits, and therefore employer costs, are often a function of salary.) While in theory, if all other things were equal, the extra em-

<sup>115</sup> Bergmann & Gray, *supra* note 56, at 27; Lautzenheiser, *supra* note 35, at 40; see also Bernstein & Williams, *Title VII and the Problem of Sex Classifications in Pension Programs*, 74 COLUM. L. REV. 1203, 1212 (1974).

<sup>116</sup> The statute provides in part: "It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire . . . any individual . . . because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (1976).

<sup>117</sup> Testimony of Ardian Gill, Peters Record, *supra* note 45, at 1025-26. A single life annuity pays an income to a retired employee as long as he or she lives. For a given accumulation, a single life annuity provides a larger monthly income than other options such as a joint-and-survivor option or a period-certain-and-life option, since under these other forms of benefits there is the possibility that a monthly income will continue beyond the life of the employee. TIAA-CREF, *YOUR RETIREMENT ANNUITY 11* (Feb. 1977) (pamphlet); see note 139 and accompanying text & note 144 *infra*.

<sup>118</sup> TIAA Comments, *supra* note 114, at 16-17.

<sup>119</sup> *N.Y. Times*, June 17, 1977, at D5, col. 1.



ployer expense associated with greater female longevity could become an incentive not to hire women, there are several empirical reasons why this seems unlikely to occur.

The first, and possibly most important, reason is that in estimating costs for a defined benefit plan, actuarial assumptions are made about all sorts of factors — not just sex — in order to calculate funding costs.<sup>120</sup> Moreover, these factors may vary among plans, since in the final analysis they are a matter for the actuary's professional judgment.<sup>121</sup> Factors that are usually included are the age and sex composition of the group, the applicable mortality assumption for active and retired employees, turnover rates, present and expected levels of employee compensation, administrative costs, ages at retirement, and interest rates.<sup>122</sup> In brief, the sex composition of the work force is far from being the only or even one of the more important factors in pension plan funding.

In addition, the fact that female employees generally have higher turnover rates than male employees<sup>123</sup> may, to some extent, offset the cost to the employer associated with extra female longevity. Under a defined benefit plan, higher female turnover reduces the aggregate cost of female pension benefits both because the employer's cost increases with an employee's age and length of service<sup>124</sup> and also because of vesting requirements, which many consider an important source of discrimination against women.<sup>125</sup> Pension rights based on employer contributions are said to be vested if, when an employee leaves a particular employer, he or she has the right to receive benefits based on those contributions.<sup>126</sup> The Employee Retirement Income Security Act of 1974 (ERISA) sets minimum standards for vesting of employer contributions.<sup>127</sup> But even under ERISA it is possible that someone with less than ten years of service may have no portion of the employer contribution vested.<sup>128</sup> If an individual leaves an employer before any of the

<sup>120</sup> W. GREENOUGH & F. KING, *supra* note 17, at 192.

<sup>121</sup> Anderson, *supra* note 50, at 6.

<sup>122</sup> W. GREENOUGH & F. KING, *supra* note 17, at 192.

<sup>123</sup> EMPLOYMENT STANDARDS ADMINISTRATION, U.S. DEP'T OF LABOR, 1975 HANDBOOK ON WOMEN WORKERS 60-64 (1975).

<sup>124</sup> College Retirement Planning: 'Defined Contribution' and 'Formula Benefit' Plans, *supra* note 99, at 3.

<sup>125</sup> See, e.g., CIVIL RIGHTS DIVISION, U.S. DEP'T OF JUSTICE, THE PENSION GAME: THE AMERICAN PENSION SYSTEM FROM THE VIEWPOINT OF THE AVERAGE WOMAN 67-68 (Report of the Task Force on Sex Discrimination).

<sup>126</sup> W. GREENOUGH & F. KING, *supra* note 17, at 163.

<sup>127</sup> 29 U.S.C. § 1053 (1976).

<sup>128</sup> *Id.* at § 1053(c)(2)(A). See also § 1053(c)(2)(D)-(C) for alternative minimum vesting



benefits are vested, he or she will forfeit any claim on employer-funded pension benefits, and contributions apparently made on his or her behalf by the employer will ultimately be used for other employees. Thus under a defined benefit plan, an employer with high turnover will, other things being equal, have lower pension costs. At present, therefore, vesting requirements work to the disadvantage of many females and, at least to some extent, offset the employer's cost associated with extra female longevity.<sup>129</sup>

Another reason that employers are not likely to be disinclined to hire women due to their higher pension costs is the form in which the extra cost is paid. Under defined benefit plans, employers pay their pension contributions as a lump sum, that is, as an unallocated sum that is not broken down by age or sex characteristics of the work force.<sup>130</sup> Employers may ask their actuarial consultants about the factors causing changes in contribution rates over time, but the appearance of increasing numbers of females in more highly paid positions is likely to occur only gradually and, as noted earlier, will be only one of many factors affecting employer contributions.

Over time the employer may be able to shift part or all of the cost of extra female longevity to all employees either through smaller increases in pension benefits or smaller increases in net wages. To the extent that the cost of extra female longevity is borne by the employees themselves, both male and female employees might have an incentive to be part of a predominantly male work force, since, if other things were equal, their pension benefits or their net wages would be higher in a predominantly male work force. If other things truly were equal and if employees acted on this basis, one might expect, for example, employee groups within a given occupation and geographic area to have similar ratios of males to females, since females as well as males would have an economic incentive to move out of groups with more females and into ones with more males. However, it must be emphasized that this type of analysis singles out one of a multitude of complex factors affecting labor market behavior and wage determination, and there is no empirical reason to think that the financial consequences of all employees in a group sharing the burden of extra female longevity would be particularly important in determining such behavior.

<sup>129</sup> In the future, however, if female life expectancy rates decline as much as given turnover rate, the cost of extra female longevity would be offset by the cost of extra male longevity. This cost would be borne by the employer.



Creating disincentives to hiring females has also been suggested as a problem under defined-contribution plans if monthly benefits were required to be equalized between the sexes and the cost of extra female longevity were assessed explicitly and visibly against the employer.<sup>131</sup> For example, one of the possible ways that has been suggested to equalize TIAA's monthly benefits between sexes, should the courts require such equalization, is having employers "top up" female accumulations. Topping up means making a female's accumulation at the time of retirement greater in dollar terms than that of her male counterpart in order for monthly single-life annuity payments to be equal;<sup>132</sup> one method of doing so is for employers to make additional payments on behalf of a female throughout her career. In other words, using sex-based mortality tables, a female's accumulation at the time of retirement is explicitly made greater than the male's accumulation so that monthly benefits can be equal.<sup>133</sup> Such a procedure would explicitly and visibly raise the cost of females to employers. Moreover, if the burden of topping up for a female's entire career were to be placed only on the last employer, a method that is unlikely to be suggested seriously, employers would have a significant incentive not to hire women within a few years of retirement. This disincentive to hire older women would be comparable to, but much more extreme than, the disincentive to hire older workers of either sex under some defined benefit plans.<sup>134</sup>

### *B. Possible Reactions of Male Employees*

One imaginable response of males to *Manhart* would be similarly to challenge any employee group life insurance plan that may require higher premiums from a male employee than his female counterpart or, alternatively, as in TIAA collective life insurance, provide a male em-

<sup>131</sup> See, e.g., Van Alstyne, *Equality for Individuals or Equality for Groups: Implications of the Supreme Court Decision in the Manhart Case*, 64 AAUP BULL. 150, 154 (Sept. 1978).

<sup>132</sup> *Retirement Benefits for Men and Women*, *supra* note 86, at 6.

<sup>133</sup> Since "topping up" creates a greater accumulation of funds for a female than for her male counterpart, it raises technical questions as to how to deal with pre-retirement death benefits and with options other than the single life annuity. See note 168 and accompanying text *infra*.

<sup>134</sup> Although objective evidence is lacking, employers who have chosen a defined benefit plan may find costs so high for new employees in the upper age brackets that they may feel almost forced to discriminate against older job-seekers in their hiring practices. In order to eliminate this potential for discrimination, the Pension Reform Act of 1974 allows defined benefit plans to exclude people from any benefits under the plan if they are initially employed within five years of the normal retirement age. W. GREENOUGH & F. KING, *supra* note 17, at 189.



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ployee with a smaller amount of insurance than his female counterpart.<sup>135</sup> Since the use of sex-based mortality tables gives opposite results in life insurance and pension plans, for a given amount of life insurance a higher premium is required for a male, who on average is expected to die sooner than his female counterpart. The apparent absence of male challenges to employee group life insurance plans may reflect employer inconsistency with regard to life insurance and pension plans offered employees. For example, both the Los Angeles Department of Water and Power and a university that has been sued under Title VII for providing lower monthly pension benefits for women than for men have group life insurance plans that do not require male employees either to pay a higher premium or to receive a smaller amount of insurance than their female counterparts.<sup>136</sup>

With regard to pension plans themselves, a variety of male reactions to *Manhart* have been suggested. The discussion below assumes that monthly employee contributions and both lump sum benefits and periodic benefits (under all payment options) must be equal between the sexes in employer-sponsored pension plans. If this caused large numbers of male employees to change options or employers with predominantly male employee groups to change plans, it could mean that, although for any given benefit plan the mortality experience of males and females would be pooled, in practice the relevant mortality experience for a given option or plan would reflect a predominantly female group.

The Supreme Court specifically noted in *Manhart* that "[n]othing in our holding implies that it would be unlawful for an employer to set aside equal retirement contributions for each employee and let each retiree purchase the largest benefits which his or her accumulated contributions could command in the open market."<sup>137</sup> Thus, assuming he were allowed to do so, one possibility for a male would be to take his employee group pension benefits as a lump sum at retirement,<sup>138</sup> and

<sup>135</sup> Plaintiffs' Post-Trial Memorandum at 7, *Peters v. Wayne State Univ.*, Civ. No. 670165 (E.D. Mich. Sept. 28, 1977).

<sup>136</sup> *Id.* at 55; 435 U.S. at 710 n.19. Under such plans the employer's cost of group life insurance is higher for a male than for his female counterpart. It should be noted, however, that group-term pension costs are generally much higher than life insurance costs. See U.S. DEPT. OF LABOR 1977 HANDBOOK OF LABOR STATISTICS 236.

<sup>137</sup> 415 U.S. at 717-18 (footnote omitted).

<sup>138</sup> While pension plans do not allow a retiree to elect full payment in the form of a lump sum, for example, the TIAA system permits commutation of a maximum of 10% of the



then purchase an individual immediate annuity from an insurance company, whose individual policies are not covered by Title VII. However, for a given lump sum it is not clear that a healthy male could obtain from an insurance company an individual immediate single life annuity with monthly payments larger than those under his employee group plan, despite the fact that the insurance company would be using sex-based mortality tables. One major reason is the high transactions cost associated with switching: The so-called "loading charge" required by an insurance company for the purchase of such an annuity in order to cover the company's expenses and/or profits would decrease the amount of pension provided for a given lump-sum premium.

If purchasing an annuity in the open market were not a viable alternative, an individual male might consider simply choosing an option other than a single-life annuity within his employee plan. The likelihood of a male's doing so is contingent upon a critical assumption that is rarely made explicit, namely that an individual male perceives his own longevity as being less than that of his female counterpart. Granting this assumption, the male would also perceive that the value of his lump sum benefit is greater than the present value of his expected monthly pension benefits, and he might therefore opt for the lump sum rather than a life income. However, unless a competitive annuity existed in the open market, a male choosing a lump sum would lose the essence of a pension, namely, a monthly income that cannot be outlived. An individual male acting on these considerations might take some portion of his pension benefit in the form of a lump sum to capture the perceived greater present value and the remainder in the form of lower periodic annuity payments. It seems unlikely, however, that a large proportion of males would elect to take their entire benefit in the form of a lump sum solely as a result of the equalization of all forms of benefits between the sexes.

Other possible options within a given plan would be a period-certain-and-life option, that is, payment of a monthly income for the lifetime of the employee but with a minimum number of payments guaranteed to his or her beneficiary,<sup>139</sup> or a joint-and-survivor option,

value of the pension into a lump sum at retirement. *YOUR RETIREMENT ANNUITY*, *supra* note 117, at 13. The United Nations Joint Staff Pension Plan permits commutation of one-third of the value of the pension. Myers, *supra* note 51, at 46.

<sup>139</sup> TIAA, for example, offers a life annuity with payments guaranteed to a beneficiary for either 10 or 20 year minimum periods. *YOUR RETIREMENT ANNUITY*, *supra* note 117, at 12.



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under which some percentage of the original benefit continues to be paid to the surviving spouse. Presumably, in choosing options a male would evaluate as he now does the state of his health, his financial situation, and, if relevant, his spouse's health and financial situation. Typically, a period-certain-and-life option, which for a given lump sum provides lower monthly payments than a single-life annuity, is chosen only by someone who perceives at the time of retirement that his or her life expectancy is so short that he or she expects to die before the end of the guaranteed period. The joint-and-survivor option is likely to be chosen by someone who is very concerned about providing for the financial security of his or her spouse. Thus, in practice, even if as a result of the equalization of benefits between the sexes, a male perceives a change in the relative worth of the period-certain-and-life option or of the joint-and-survivor option vis-à-vis the single-life annuity, it is not clear that this perception would be a determining factor in the choice for most males.

Moreover, even if a male were to make his own present value calculations based on a male mortality table, mathematically the value of these other benefit options relative to the single-life annuity would be heavily dependent on the method by which benefits are equalized between the sexes. For example, if benefits were equalized between the sexes separately for the population taking each option, then a male might have a strong incentive to switch from a single-life annuity to a period-certain-and-life option. However, assuming that benefits under all options were equalized between the sexes "by a method that spreads the cost as widely as possible across the various payout options,"<sup>140</sup> it is not clear that the incentive for a male to choose options other than the single-life annuity would be different than at present.

It has been suggested that an absolute ban on or extreme restrictions on the use of sex in estimating pension costs would result in a problem of selection against insurance companies, specifically, that employers with predominantly male groups would either select insurance companies that insure predominantly male groups or would self-insure by setting up trusteed plans.<sup>141</sup> Such a situation would not occur as a result of the *Manhart* decision, since sex can still be taken into account in determining costs for each plan. The *Manhart* decision did not "call into question the insurance industry practice of considering the compo-

<sup>140</sup> See, e.g., *commentary*, *supra* note 114, at 38.

<sup>141</sup> *Commentary*, *supra* note 14, at 41; Myers, *supra* note 51, at 46.



sition of an employer's work force in determining the probable cost of a retirement . . . plan."<sup>142</sup> In general, it is not relevant here whether the employer is explicitly assessed the cost of extra female longevity or whether a single mortality table is used to determine contributions and benefits, since, if the sex composition of a group is taken into account in constructing a single mortality table for that particular group, there would be no incentive for the group to switch insurance companies or to self-insure.

There is, however, a potential problem of selection in the TIAA system if a single mortality table is constructed, taking into account the sex composition of the group, in order to determine contributions and benefits. Under TIAA, although there are many employers, the company's insured population comprises one employee "group." Thus one or more universities with predominantly male faculties might decide to opt out of TIAA, perhaps setting up trustee plans or purchasing their own group plans from another insurance company, since the mortality experience of a predominantly male group would presumably be worse than that of the TIAA population as a whole. At present, TIAA has the advantage of its dominance of the pension market for employees of educational institutions, its extremely low expenses, full and immediate vesting of employer contributions, the "portability" of its contracts as employees move from one institution to another, and intangible elements such as the prestige some universities might feel is attached to being part of the TIAA system. But industrial structures are not permanent, and these factors could change as circumstances change.

The *Manhart* decision does not require that a single mortality table for a group be derived from experience without explicitly considering sex. Even if it did, large predominantly male employee groups still would not have an incentive to switch from a self-insured basis or from insurance companies with predominantly female insured populations to insurance companies with predominantly male insured populations, since each large group is experience rated independently; that is, an insurance company does not pool its large groups for experience rating. Small groups are also experience rated as to their mortality experience compared with what would be expected from the age and sex distribution of the group, but the rating is generally given a minimal weight in actuarial calculations because of its statistical unreliability;<sup>143</sup> and thus

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<sup>142</sup> 435 U.S. at 718.

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the group is largely dependent on an insurance company's mortality experience with other groups. Therefore small groups might have some incentive to select insurance companies on this basis. However, it is difficult to imagine plans for small groups differing widely among insurance companies because of the sex composition of an insurance company's insured small-group population, since female small groups would also have an incentive to switch to companies with a predominantly male insured population. Also, insurance companies could be prevented by state regulation from discouraging or rejecting groups on the basis of their sex composition.

A more extreme case would be an absolute ban on the use of sex as a risk classification factor both in employee group insurance and in individual underwriting. Sex then could be reflected in insurance rates for individuals only through an insurance company's experience with its population of individual insureds. Since that experience would be affected by the sex composition of the company's individually insured population, in the annuity market there then would be an incentive for individuals to select or switch to companies with a predominantly male insured population.<sup>144</sup> But since females as well as males would have this incentive, it seems unlikely that some insurance companies would end up with predominantly male insured populations and others with predominantly female insured populations; in theory, assuming the market operated efficiently, selection on the basis of the sex composition of an insurance company's population would result in male to female ratios that would tend to be equal among insurance companies.<sup>145</sup>

### C. Implementation and Retroactivity

Assuming that Title VII requires equal monthly employee contributions and also equal monthly and lump sum benefits between the sexes, reasonable implementation of this requirement is perhaps more difficult in the pension area than in other situations. The Supreme Court's ruling on retroactivity in *Manhart*, the consent decree in *Henderson*, and the possible methods of equalization suggested for the TIAA system illustrate the particular problems.

<sup>144</sup> Similarly, in the life insurance market, there would be an incentive to select or switch to companies with a predominantly female population. If the market is not efficient, some insurance companies might succeed in attracting a disproportionately high percentage of female policyholders.



As the Supreme Court recognized in *Manhart*:

These plans, like other forms of insurance, depend on the accumulation of large sums to cover contingencies. The amounts set aside are determined by a painstaking assessment of the insurer's likely liability. Risks that the insurer foresees will be included in the calculation of liability, and the rates or contributions charged will reflect that calculation. The occurrence of major unforeseen contingencies, however, jeopardizes the insurer's solvency and, ultimately, the insureds' benefits. Drastic changes in the legal rules governing pension and insurance funds, like other unforeseen events, can have this effect.<sup>146</sup>

Primarily for this reason, the Court concluded that "the rules that apply to these funds should not be applied retroactively unless the legislature has plainly commanded that result."<sup>147</sup> The Court also emphasized that its prohibition against employee contributions differing by sex represented a marked departure from past practices based on valid actuarial tables,<sup>148</sup> and noted that although Title VII was enacted in 1964, this was apparently the first litigation challenging these practices.<sup>149</sup> The Supreme Court specifically stated, however, that it was not qualifying the presumption of retroactive relief in Title VII cases that it had previously set out in *Albemarle Paper Co. v. Moody*.<sup>150</sup>

As a result of the Supreme Court's ruling, female employees at the Los Angeles Department of Water and Power did not receive any refund of past excess contributions to the pension fund. The district court had ordered and the Ninth Circuit had affirmed retroactive relief,<sup>151</sup> and the district court had determined that the amount of relief should be based on the full difference between contributions of a female and her male counterpart to the retirement fund.<sup>152</sup> The Supreme Court observed that even if the grant of retroactive relief had been approved, the amount ordered by the district court might have been too large.<sup>153</sup> The Supreme

<sup>146</sup> 435 U.S. at 721.

<sup>147</sup> *Id.* (footnote omitted).

<sup>148</sup> *Id.* at 722.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 723 (referring to 422 U.S. 405 (1975)). Cf. "On the question of retroactive relief. *Manhart* appears only to add a degree of uncertainty to the question of its propriety in individual Title VII cases." *The Supreme Court, 1977 Term, supra* note 18, at 308.

<sup>151</sup> *Manhart v. City of Los Angeles, Dep't of Water and Power*, 553 F.2d 581, 591-92 (9th Cir. 1976), *vacated and remanded*, 435 U.S. 702 (1978).

<sup>152</sup> See 435 U.S. at 719-20 n.36.

<sup>153</sup> *Id.*



Court noted that if employer contributions had remained unchanged and male and female contributions to the plan had been equal, the joint contribution rate would have been higher than the actual male contribution rate.<sup>154</sup> But, although this proposition is true, the fact remains that male employees did not contribute at this intermediate rate; thus it is not obvious that the district court's approach was incorrect.

Aside from the question of retroactive relief, the equality in employee contributions required by *Manhart*, and by the California statute that legislatively eliminated unequal employee contributions,<sup>155</sup> could have been implemented either by increasing contribution rates for males and lowering those for females to an intermediate level, or by lowering the female employee contribution rate to the male rate and providing extra employer contributions on behalf of the female.<sup>156</sup> The latter solution was the one actually adopted.<sup>157</sup> It was very easy to implement and presented no problem in terms of funding benefits, since as soon as the extra female employee contribution was eliminated, an extra employer contribution was substituted as part of the unallocated employer contribution to the plan.

In a defined contribution plan the issues of implementation and retroactivity become more complex, since the inequality to the employee begins to occur at the time of retirement in the form of benefits that were funded years earlier. This means that if periodic benefits were to be equalized between the sexes as of a given implementation date without any lowering of male benefits associated with pre-implementation contributions (which arguably would be a violation of the Equal Pay Act,<sup>158</sup> if not also of Title VII), there would be two parts to the funding requirement.

<sup>154</sup> *Id.*

<sup>155</sup> CAL. GOV'T CODE § 7500 (West Supp. 1978); see text at note 9 *supra*.

<sup>156</sup> In Los Angeles, effective January 1, 1975, a female's contribution rate was lowered to that of her male counterpart. City of Los Angeles, Board of Administration of the Department of Water and Power Employees Retirement Plan, Res. No. 124 (adopted Aug. 22, 1974), and Res. No. 413 (adopted Dec. 23, 1974). See also Letter concerning *Manhart*, from City Attorney of Los Angeles to Clerk, United States Court of Appeals for the First Circuit (Nov. 1, 1978).

<sup>157</sup> The Los Angeles Department of Water and Power "did not increase the men's contribution rate because California law prohibits decreasing pension benefits without giving concomitant advantages." Letter, *supra* note 156, at 1.

<sup>158</sup> The Equal Pay Act of 1963 requires employers to pay the same wage rate to men and women who do equal work in the same establishment, except where there is a wage differential based on one of the following specified exceptions: "(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor." The statute also provides "that an employer who is paying a wage rate differential in violation of this section shall not, in order to comply with the provisions of



The first part of the funding requirement arises because female benefits received after the implementation date would be higher than expected. These extra benefits would not have been funded, and thus there would be a gap to be made up. No such funding gap would arise if the only benefits that were required to be equalized were those associated with contributions made after the implementation date.<sup>159</sup>

The second part of the funding requirement is simply the cost of extra female longevity associated with future benefits that, as of the implementation date, have not yet been funded by any contributions. For example, if upon implementation contributions were raised for a thirty-year-old male and a thirty-year-old female in order to reflect the new benefit requirements, benefits based on these post-implementation contributions would not be paid for thirty-five years. There are, of course, intermediate cases; for example, an employee now fifty years old might, upon retirement, have fifteen years worth of post-implementation contributions plus twenty years of pre-implementation contributions that would either require additional funding (for a female) or for which the associated benefits would remain unequal between the sexes.

In *Henderson*, the parties "applied" *Manhart* to a defined contribution plan by agreeing that sex-based mortality tables could not be used to calculate refund annuity benefits for employees retiring after July 1, 1978, and that benefits for females retiring after that date would be raised to the level of male benefits prior to that date.<sup>160</sup> The consent decree did not specify the source of the additional funding that would be required. But in this case the employer, the State of Oregon, will make up the gap in funding for the unexpected increase in benefits and will in the future contribute more each month into the retirement fund for its female employees than for its male employees.<sup>161</sup>

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this subsection, reduce the wage rate of any employee." 29 U.S.C. § 206(d) (1976) (emphasis added). See note 164 *infra*.

<sup>159</sup> TIAA has argued that if equalization of benefits between the sexes is required, this implementation rule would be the appropriate one to use. TIAA Comments, *supra* note 114, at 50; Defendant TIAA-CREF's Post-Trial Brief at 97, *Peters v. Wayne State Univ.*, Civ. No. 670165 (E.D. Mich. Sept. 28, 1977). See note 164 *infra*.

<sup>160</sup> *Henderson v. Oregon*, Civ. No. 74-538 (D. Ore. Sept. 20, 1978). The judgment also stated that the State of Oregon had no obligation to recalculate refund-annuity benefits for female employees already retired or retiring before July 1, 1978. *Id.* at 2. A refund annuity is one that "guarantees to return in one manner or another a portion or all of the purchase price of the annuity." D. McGill, *supra* note 69, at 119.

<sup>161</sup> Minutes of Board Meeting, Oregon Public Employees Retirement System, May 25, 1978, at 4.



Should the Supreme Court's decision against retroactive relief be interpreted to mean that only monthly benefits associated with post-implementation contributions must be equalized between the sexes in the TIAA system, there are basically two approaches to funding.<sup>162</sup> One possibility would be for employers, as discussed above, to institute the practice of topping up female contributions indefinitely into the future. The other possibility would be for TIAA to construct a single mortality table for its insured population and to use the table to determine benefits associated with post-implementation contributions. Compared with previous benefits, these benefits associated with post-implementation contributions could be raised for females and lowered for males.<sup>163</sup> Alternatively, benefits for both sexes could be set at the higher pre-implementation male level. In that case, increased contributions would be needed; they would take the form of higher contribution rates for each employee, male and female, and could be made by the employees and/or by the employer.

If the courts were to require immediate equalization of all periodic benefits in the TIAA system for annuitants retiring after the implementation date, it would be difficult to meet the resulting funding gap without creating serious inequities.<sup>164</sup> One possible way to make up the

<sup>162</sup> Other approaches — for example, conversion to employer-owned group contracts and/or to defined benefit plans — would change the basic characteristics of TIAA's product; that is, they would involve giving up individually owned contracts. TIAA Comments, *supra* note 114, at 35; *Retirement Benefits for Men and Women*, *supra* note 86, at 6.

<sup>163</sup> TIAA has also suggested that lowering these male benefits might be a violation of the Equal Pay Act. TIAA Comments, *supra* note 114, at 50. However, there may be a distinction between benefits based on pre-implementation contributions and benefits based on post-implementation contributions; it is not clear why the latter, at least, could not be lower than what they would have been if the male and female mortality experience had not been pooled.

TIAA-CREF has urged that the Wage and Hour Administrator, should the proposed amendment be adopted, *see* note 15 *supra*, have the Department of Labor specifically state "that use of 'unisex' or merged payout rates for future service benefits [benefits associated with post-implementation contributions] will not be construed as a wage reduction prohibited by the statute." *Id.*

<sup>164</sup> If, as of the implementation date, male benefits associated with pre-implementation contributions were lowered and female benefits associated with pre-implementation contributions were raised to an intermediate level, the funding gap could be avoided; however, doing so might be illegal. *See* note 158 *supra*. TIAA has argued that lowering male benefits associated with pre-implementation contributions would be an abrogation of individually owned contracts, and a violation of state insurance laws and/or of the Equal Pay Act. TIAA Comments, *supra* note 114, at 31, 43. The First Circuit has also raised the issue of the contract in this situation. *EEOC v. Colby College*, No. 78-1010, slip op. at 11 (1st Cir. 1978).

"... each individual contract with each individual employee states:

"... the policy provides a guaranteed amount of your life annuity. . . . Each such amount will be determined by the Rate Schedule in effect under this contract at the



funding gap would be for each employer to top up, as of the implementation date, the accumulation to date of every female employee, an accumulation resulting from contributions to TIAA-CREF throughout her career regardless of whether she had changed employers. The employing institution would then be asked to assume liability not only for its own past violations of Title VII but also for the past violations of other institutions. In practice, it would be difficult to have each former employer of a particular female top up contributions associated with her employment by that employer; moreover, even if such a solution were feasible, it would still be retroactive from the employer's point of view.

### III. RELATED LITIGATION

#### *A. Implications of Manhart for Other Cases Involving Employee Pension Plans*

Decisions in two cases that are pending in federal district courts involving monthly pension benefits that are unequal for a female and her male counterpart may be handed down as this article goes to press,<sup>165</sup> and a trial on the merits may begin in a third, *EEOC v. Colby College*.<sup>166</sup> After *Manhart*, the obvious primary issue in these cases is the extent to which inequality between the sexes in periodic pension benefits is legally comparable to the inequality in pension contributions by male and female employees that was found to be a violation of Title VII in *Manhart*. The approach of *Manhart* suggests that the Court would

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time the premium is due. This schedule will be the Schedule on Page 9 until further notice; if a new Schedule is substituted under the provisions of this contract, such substitution will not affect the portions of benefits already purchased.

Specimen TIAA Retirement Annuity Contract at 1 (emphasis added). "The annuity income . . . provided by premiums . . . while this Rate Schedule is in effect will be calculated on the following bases: . . . (3) for income methods involving life contingencies, mortality according to the 1971 Individual Annuity Mortality Table with ages set back 5.5 years for males and 7 years for females." *Id.* at 9. Similarly, the CREF contract states: "Each premium purchases Accumulation Units representing your proportionate share in CREF [. . .] the dollar amounts payable being determined by actuarial methods as described in the Rules of the Fund, a copy of which is furnished each Participant." CREF Retirement Unit-Annuity Certificate at 1.

<sup>165</sup> *Peters v. Wayne State Univ.*, Civ. No. 670165 (E.D. Mich. Sept. 23, 1977); *Spirit v. Teachers Ins. and Annuity Ass'n*, 416 F. Supp. 1019 (S.D.N.Y. 1976).

<sup>166</sup> 439 F. Supp. 631 (D. Me. 1972), *rev'd and remanded*, No. 78-1010 (1st Cir. Dec. 18, 1973).



consider them in the same way, at least in the context of the employer-employee relationship covered by Title VII. In a footnote in *Manhart*, the Court stated that "[t]he Department's *pension benefits*, and the contributions that maintain them, are 'compensation' under Title VII."<sup>167</sup> Therefore, if unequal contributions by male and female employees constitute sex discrimination in compensation, it would seem to follow that unequal benefits must be similarly discriminatory. While "benefits" might be interpreted by some to mean equal lump sum benefits but not equal periodic benefits, the actuarial rationale for identical lump sums but unequal periodic benefits rests on the use of sex as a classification factor in determining employee benefits,<sup>168</sup> which the Court has already rejected as a violation of Title VII in determining employee contributions.<sup>169</sup>

As the First Circuit stated when it remanded *Colby College* to the district court for trial on the merits,

If the statute's [Title VII's] "focus on the individual" forbids an employer from treating women as a class with respect to annuities so as to require from them higher premiums . . . it is

<sup>167</sup> 435 U.S. at 712 n.23 (emphasis added). It is not clear whether this statement refers to employer contributions as well as to the employee contributions at issue in *Manhart*. The Court also stated that "[w]e need not decide whether retirement benefits or contributions to benefit plans are 'wages' under the [Equal Pay] Act, because the Bennett Amendment extends the Act's four exceptions to all forms of 'compensation' covered by Title VII." *Id.* (The Bennett Amendment, which became part of § 703(h) of Title VII of the Civil Rights Act of 1964, provides that a wage or compensation differential based on sex is not unlawful under Title VII if it is authorized by the Equal Pay Act of 1963. 42 U.S.C. § 2000e-2(h) (1976). See note 158 *supra* for the specific provisions of the Equal Pay Act.) See note 186 and accompanying text *infra* for a discussion of the proposed amendment to the Wage and Hour Administrator's interpretative bulletin.

<sup>168</sup> See text at notes 98-103 *supra*. Similar reasoning would apply to benefit options other than the single life annuity that has been used as the example in this article. A common option is the joint-and-survivor annuity under which some percentage of the original benefits continues to be paid to a surviving spouse. At present, under defined benefit plans, monthly payments for these options are usually calculated on the basis of the lump-sum present values of the single life annuity benefits, which are greater for a female than for her male counterpart. See text at note 108 *supra*. Assuming that a male retiree and a female retiree and their spouses are the same age, then for the same single life employee pension for the two retirees, the female and her spouse receive larger monthly benefits under a joint-and-survivor option than the male and his spouse. If benefits under these types of options were calculated on the basis of a single mortality table for the employee group, the two couples would receive equal monthly benefits. TIAA Comments, *supra* note 114, at 64.

In *Manhart* benefits were not at issue. The Court observed that "monthly benefits for men and women of the same age, seniority, and salary are equal." 435 U.S. at 705. This statement does not address the question under the single life annuity option; "[t]he plan itself [was] not in the dispute" and the question of whether forms of benefits other than the single life annuity were equal was not addressed. 435 U.S. at 705 n.3.



difficult to perceive a distinction that would permit a plan whereby women make contributions equal to those of men but receive smaller monthly benefits. The same would appear with regard to the Court's treatment of the Equal Pay Act.<sup>170</sup>

As noted earlier, the State of Oregon assumed *Manhart* would be applicable to an employer-operated defined contribution plan with unequal periodic benefits when it signed a consent decree requiring that monthly benefits in its retirement plan for state employees be equalized between the sexes as of July 1, 1978.<sup>171</sup> Also, in part as a result of the *Manhart* decision, the Wage and Hour Administrator has proposed an amendment to its interpretative bulletin under the Equal Pay Act that would require both equal benefits and equal employee contributions between the sexes.<sup>172</sup>

*Colby College* and the other pending Title VII TIAA cases present a somewhat different factual situation than *Henderson*, since TIAA is a private insurance company. Here, a threshold question is whether

<sup>170</sup> *Colby College*, slip op. at 8.

<sup>171</sup> *Henderson v. Oregon*, Civ. No. 74-538 (D. Ore. Sept. 20, 1978); see text at note 14 *infra*.

In *Reilly v. Robertson*, periodic benefits differing by sex in the Indiana state teachers' retirement system were challenged in state court; the Indiana Supreme Court found the plan's sex-differentiated benefits to be in violation of the Equal Privileges Clause of the Indiana Constitution (IND. CONST. art. 1, § 23) and also of the fourteenth amendment of the United States Constitution. 360 N.E.2d 171, 177 (Ind.), cert. denied, 434 U.S. 825 (1977).

<sup>172</sup> 43 Fed. Reg. 38,029 (1978) (amending 29 C.F.R. § 800.116(d) (1977)). At present, pending adoption of the proposed amendment, the Wage and Hour Administrator's interpretative bulletin contains what is known as the "either/or" rule, which states that the Equal Pay Act is not violated if an employee benefit plan either provides equal benefits to male employees and their female counterparts or if an employer makes equal contributions to the plan on behalf of all employees. 29 C.F.R. § 800.116(d) (1977).

By contrast, the EEOC, which is charged with enforcing Title VII, has regulations that make it a violation of Title VII for an employee group pension plan to provide unequal benefits even if employer contributions are equal. 29 C.F.R. § 1604.9(e)-(f) (1977). As the Ninth Circuit noted in its *Manhart* decision, "[L]ike the Wage and Hour Administrator's, these regulations do not squarely cover the present case." 553 F.2d at 590. (In *Manhart* the challenged practice was unequal employee contributions.)

The EEOC is, however, the plaintiff in three of the pending cases involving defined contribution plans under which periodic benefits differ between the sexes. See note 13 *supra*. Moreover, Title VII provides that if, after a specified time, the EEOC has not secured an appropriate conciliation agreement or filed a civil action, a complainant may seek a "right to sue letter" from the agency and sue the employer, 42 U.S.C. § 2000e-5(f)(1) (1976), either as an individual or through a class action. Excluding the three EEOC cases, *Manhart* and all but one of the other cases listed in note 13 *supra* were brought as class actions. No class actions can be brought under the Equal Pay Act.

As of July 1, 1979, as part of a government reorganization, enforcement of the Equal Pay Act will be transferred from the Wage and Hour Administrator to the EEOC.



TIAA-CREF is an agent of the employer, since "Title VII and the Equal Pay Act primarily govern relations between employees and their employer, not between employees and third parties."<sup>173</sup> *Manhart* did not present this issue, since at the Los Angeles Department of Water and Power "no private insurance company is involved in the administration or payment of benefits."<sup>174</sup> But in a footnote the Court stated:

We do not suggest, of course, that an employer can avoid his responsibilities by delegating discriminatory programs to corporate shells. Title VII applies to "any agent" of a covered employer . . . and the Equal Pay Act applies to "any person acting directly or indirectly in the interest of an employer in relation to an employee."<sup>175</sup>

Thus, if TIAA-CREF is deemed an agent of the employer, the pension plan at issue is covered by Title VII; if TIAA-CREF is not an agent of the employer, the plan may not be subject to the requirements of Title VII.<sup>176</sup>

TIAA-CREF has emphasized the lack of any contractual agreement between itself and the employer.<sup>177</sup> It argues that "the sole contractual relationship is the one that exists between TIAA-CREF and each [individual employee] participant."<sup>178</sup> However, a particular TIAA-CREF plan is made available to employees of, for example, a university by a decision of its governing board, which adopts a resolution setting forth contribution levels for the employer, minimum contribution levels for the employees and other plan provisions that vary among institutions, such as eligibility requirements and normal retirement age.<sup>179</sup>

The First Circuit, considering the relationship between TIAA and the educational institution, concluded that

<sup>173</sup> 435 U.S. at 718 n.33. Should the courts determine that TIAA-CREF is an agent of the employer, there are other defenses that have been raised in TIAA's litigation that are not discussed in this article. See, e.g., *Spirit Memorandum*, *supra* note 24, at 23-41. But see, e.g., *Plaintiffs' Reply Brief to Defendants' Post-Trial Briefs* at 1-20, *Peters v. Wayne State Univ.*, Civ. No. 67-1651 E.D. Mich. Sept. 28, 1977).

<sup>174</sup> 435 U.S. at 705.

<sup>175</sup> *Id.* at 718 n.33.

<sup>176</sup> *Id.*

<sup>177</sup> *Spirit Memorandum*, *supra* note 24, at 18-19; *TIAA Comments*, *supra* note 114, at 5.

<sup>178</sup> *TIAA Comments*, *supra* note 114, at 5.

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difficult to perceive a distinction that would permit a plan whereby women make contributions equal to those of men but receive smaller monthly benefits. The same would appear with regard to the Court's treatment of the Equal Pay Act.<sup>170</sup>

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<sup>173</sup> 435 U.S. at 718 n.33. Should the courts determine that TIAA-CREF is an agent of the employer, there are other defenses that have been raised in TIAA's litigation that are not discussed in this article. See, e.g., Spirt Memorandum, *supra* note 24, at 23-41. But see, e.g., Plaintiffs' Reply Brief to Defendants' Post-Trial Briefs at 1-20, *Peters v. Wayne State Univ.*, Civ. No. 67-1651 E.D. Mich. Sept. 28, 1977).

<sup>174</sup> 435 U.S. at 705.

<sup>175</sup> *Id.* at 718 n.33.

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<sup>178</sup> TIAA Comments, *supra* note 114, at 5.

<sup>179</sup> *Spirt v. Teachers Ins. and Annuity Ass'n*, 416 F. Supp. 1019, 1021 (D. Mass. 1976).



[i]t is true that TIAA is the carrier, and that the insured employee looks solely to it for payment, but Colby is more than a broker, or other intermediary, that enables the parties to enter into the arrangement. As one district court has observed in a case presenting an identical challenge to the TIAA plan, an educational institution's adoption of TIAA "constitutes affirmative, active participation," without which "the challenged program could not operate."<sup>180</sup>

In the decision referred to by the *Colby College* court, the district court had directed that the university employing the plaintiffs be joined as a defendant. The district court had ruled that the relationship among TIAA-CREF, the employing institution, and the employees is a "triangular one" and that "the absence of a contract *per se* between the University and TIAA-CREF is not significant."<sup>181</sup>

Moreover, in *Colby College* the First Circuit rejected the college's argument that TIAA's distinct contractual relation with employees relieved the college of alleged liability. The court found "altogether too facile" the college's argument that the "difference in benefit payments does not depend on the employment 'relations between Colby and its employees.'"<sup>182</sup> The same conclusion is implicit in an analysis of the plan in Chief Judge Coffin's concurring opinion:

The plan that is before us, as I see it, fails because it is as if a company paid its male and female employees equal salaries, but in the form of chits that could be redeemed only in a particular store which, the company knew, would give to one sex more for the same number of chits than to the other sex. That company could hardly claim that it was not discriminating between men and women. So here.<sup>183</sup>

Both the First Circuit's comments "on certain difficulties that occur to us that the district court may face"<sup>184</sup> and the Wage and Hour Administrator's proposed amendment (which may be issued in final form by the time this article appears) raise issues beyond the scope of

<sup>180</sup> *Colby College*, slip op. at 2-3 (quoting *Spirit v. Teachers Ins. and Annuity Ass'n*, 416 F. Supp. 1019, 1021, 1022 (S.D.N.Y. 1976)).

<sup>181</sup> *Spirit v. Teachers Ins. and Annuity Ass'n*, 416 F. Supp. 1019, 1021, 1022 (S.D.N.Y. 1976).

<sup>182</sup> *Colby College*, slip op. at 2-3.

<sup>183</sup> *Id.* at 14 (concurring opinion).

<sup>184</sup> *Colby College*, slip op. at 10.



*Manhart*<sup>185</sup> For example, under the Wage and Hour Administrator's proposed amendment, it is not clear whether, in a defined contribution plan such as TIAA-CREF, topping up female contributions to achieve equal periodic benefits would be a permissible method of funding. If the employer's contributions are "wages" under the Equal Pay Act and therefore must be equal for individual men and women, then this method of achieving equal periodic benefits would itself appear to violate the law.<sup>186</sup>

The majority in *Colby College* concluded that "the thrust of the *Manhart* opinion envisaged a single rate, hereafter unisex rate, of sufficient size to pay for both sexes."<sup>187</sup> The use of a single mortality table is tied to the legal question of what constitutes "wages." For example, if the courts should determine that in a defined contribution plan employer contributions are wages and employee benefits are also wages, the method of funding the plan could become a difficult legal issue. In

<sup>185</sup> The First Circuit in *Colby College* considered that "[w]hether by accident, or design, *Manhart* brought to the Court the case that presented the fewest difficulties." *Id.* at 7.

<sup>186</sup> Under the present either/or rule, see note 172 *supra*, "[t]he mere fact that the employer may make unequal contributions for employees of opposite sexes" is not considered a violation of the Equal Pay Act so long as periodic benefits are equal. 29 C.F.R. § 800.116(d) (1977).

The preamble to the proposed amendment states that "if employer contributions are 'wages,' they should be equal; if employee benefits are 'wages,' they should be equal; and if both are 'wages,' both should be equal. The either-or rule, however . . . appears to treat both contributions and benefits as 'wages' within the meaning of the [Equal Pay] act, but it fails to require that both be equal." 43 Fed. Reg. 38,031 (1978).

However, while the language of the proposed amendment makes it clear that benefits are "wages" and must be equal between the sexes and that employee contributions must be equal between the sexes (the *Manhart* issue), it does not specifically address the question of employer contributions. TIAA has asked the Wage and Hour Administrator to clarify this point. TIAA Comments, *supra* note 114, at 31-33. Note that in a defined contribution plan, employer contributions are associated with individual participants at the time the contributions are made and their equality or inequality between the sexes can be easily measured. But in a defined benefit plan, it is not necessary to establish individual accounts or make contributions for individual employees; since contributions are unallocated, the inequality of contributions for a female and her male counterpart is less easily observed. See text at note 130 *supra* and Actuaries' Brief, *supra* note 8, at 19 n.16.

Should the Wage and Hour Administrator's proposed amendment be adopted with a provision requiring not only that benefits be equal but also that employer contributions be equal — referred to as the "equal in/equal out rule" — TIAA, for example, would "despite its obvious inequities . . . favor a 'unisex' approach" that would be "achieved by merging the rates of payout for benefits purchased by future premiums." TIAA Comments, *supra* note 114, at 36.

<sup>187</sup> *Colby College*, slip op. at 10. But see the concurring opinion of Chief Judge Coffin in

*Colby College*

I am not sure that *Manhart* held that an employer could never offer a benefit plan using unisex tables. To say the same thing another way, I am not sure that every employer offering an annuity or life insurance plan must both pay in and pay out the same amounts for equally situated men and women.

*Colby College*, slip op. at 14 (concurring opinion).



calculating an employee's wages in a given case, one would count only one of these elements as wages, that is, one would count either the employer contributions or the employee benefits. In theory it would not matter which were counted, since contributions equal the discounted present value of the expected benefits. This theoretical parity cannot last, however, if both employer contributions and employee benefits must be equal for a female and her male counterpart and if sex-based mortality tables continue to be used. It then would be mathematically impossible for contributions to equal the present value of the expected benefits. The present value relationship between contributions and benefits could be restored only by the use of a single mortality table for the employee group.

*B. Relationship of Manhart to General Electric Co. v. Gilbert*

As noted earlier, *Manhart* was apparently the first Title VII litigation challenging differences in employee contributions based on the use of sex-based actuarial tables.<sup>188</sup> Perhaps the most similar previous Title VII case to reach the Supreme Court was the challenge in *General Electric Co. v. Gilbert*<sup>189</sup> to a disability income insurance program excluding pregnancy. Indeed, the Court in *Manhart* felt the need to reconcile its decisions in the two cases.

The opinion of the Court in *Manhart* simply states that "neither the holding nor the reasoning of *Gilbert* is controlling."<sup>190</sup> In *Gilbert* the Court, relying on *Geduldig v. Aiello*,<sup>191</sup> held that the General Electric plan did not involve discrimination based on gender as such.<sup>192</sup> As explained by the Court's opinion in *Manhart*,

[T]he two groups of potential recipients which that case [*Gilbert*] concerned were pregnant women and non-pregnant persons. "While the first group is exclusively female, the

<sup>188</sup> 435 U.S. at 722.

<sup>189</sup> *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976). There is no longer any practical effect of the Court's decision to allow the pregnancy exclusion, since in October 1978 Congress amended Title VII to overrule the result in *Gilbert*. See, e.g., S. REP. 95-331, 95th Cong., 1st Sess. 2-3 (1977). This was done by amending Title VII to include in the definition of sex discrimination any discrimination "because of or on the basis of pregnancy, childbirth or related medical conditions." Act of Oct. 31, 1978, Pub. L. No. 95-555 (to be codified at 42 U.S.C. § 2000e-2(k)).

<sup>190</sup> *Id.* at 715.

<sup>191</sup> 417 U.S. 484 (1974).

<sup>192</sup> 429 U.S. at 135.



second includes members of both sexes.' " . . . In contrast, each of the two groups of employees involved in this case is composed entirely and exclusively of members of the same sex. *On its face*, this plan discriminates on the basis of sex whereas the General Electric plan discriminated on the basis of a special physical disability.<sup>193</sup>

In a separate opinion Justice Blackmun concurred with the judgment in *Manhart* but questioned the logic of the Court's attempt to distinguish *Manhart* from *Gilbert*.<sup>194</sup> Although he found that the Court's distinction "is probably the only distinction that can be drawn," he felt that "it does not serve to distinguish the case on any principled basis."<sup>195</sup> His conclusion was that *Manhart* cuts back on both *Gilbert* and *Aiello*.<sup>196</sup>

In one section of the *Gilbert* opinion, as part of its analysis of possible discriminatory impact, the Court characterized the challenged disability plan as "nothing more than an insurance package, which covers some risks, but excludes others."<sup>197</sup> Quoting from *Aiello*, the Court said, "There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not."<sup>198</sup> It has been suggested that this "analogous risk method" provides a logical basis for distinguishing between *Gilbert* and *Manhart*.<sup>199</sup> According to this approach, the *Manhart* program failed *Gilbert*'s analogous risk test because in *Manhart* males and females were insured against the same risk, longevity without income, but women had to pay more to receive the same monthly benefits.<sup>200</sup> Similarly, it has been suggested that according to the analogous risk test, a defined contribution plan under which monthly benefits are

<sup>193</sup> 435 U.S. at 715 (emphasis added). Thus, in *Manhart*, the "practice does not pass the simple test of whether the evidence shows 'treatment of a person in a manner which but for that person's sex would be different.'" *Id.* at 711 (quoting *Developments in the Law - Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1174 (1971)). The plan at issue in *Gilbert* apparently passed that test because being female is a necessary but not sufficient condition for being pregnant.

<sup>194</sup> 435 U.S. at 723-25 (concurring opinion).

<sup>195</sup> *Id.* at 725.

<sup>196</sup> *Id.* Justice Blackmun, however, filed a concurring opinion in *Gilbert* stating that General Electric's exclusion of disability due to pregnancy is not, *per se*, a violation of Title VII. . . . 429 U.S. at 146 (Blackmun, J., concurring in part).

<sup>197</sup> 435 U.S. at 138.

<sup>198</sup> *Id.*

<sup>199</sup> *The Supreme Court, 1976 Term*, 91 HARV. L. REV. 70, 247, 249 (1977).

<sup>200</sup> *Id.* at 249.



lower for a female than for her male counterpart would be discriminatory, since females would have less protection (in the sense of lower periodic payments) for the same risk.<sup>201</sup>

While this approach appears logically useful, its application to the factual situation in *Gilbert* is fraught with difficulties. As Justice Stevens noted in a dissent to *Gilbert*, if the risk in *Gilbert* is broadly defined as insurance against uncompensated absence caused by voluntary or involuntary physical disability, subject to certain limits on the duration of the absence and the per cent of salary to be paid, then females are not fully insured against an analogous risk.<sup>202</sup> If the risk is defined more narrowly in terms of specific disabilities, there is the logical problem of determining what disabilities specific to males are risks analogous to pregnancy and thus might reasonably be expected to be excluded from the disability insurance program. The General Electric plan covered disabilities specific to males that were voluntary and disabilities that were related to procreation.<sup>203</sup> As Justice Brennan noted in a dissenting opinion in *Gilbert*, "the plan covers all disabilities that mutually afflict both sexes . . . all disabilities that are male-specific or have a predominant impact on males. . . . [A]ll female-specific and female-impacted disabilities are covered, except for the most prevalent, pregnancy."<sup>204</sup> Thus while the analogous risk test may be a useful tool in many factual situations, the problem in *Gilbert*, as Justice Stevens noted in dissent, is that "the rule at issue places the risk of absence caused by pregnancy in a class by itself."<sup>205</sup>

### C. Non-Title VII Litigation

Risk classification in private sector insurance outside the employer-employee relationship is now governed primarily by the anti-

<sup>201</sup> *Id.*

<sup>202</sup> 429 U.S. 125, 161-62 n.5 (dissenting opinion).

<sup>203</sup> *Id.* at 151-52 (dissenting opinion).

<sup>204</sup> *Id.* at 155 (dissenting opinion).

<sup>205</sup> *Id.* at 161 (dissenting opinion). Justice Stevens also made the point that if a company's rules referred only to neutral criteria such as whether the absence was voluntary or particularly costly, an analysis of the effect of the rules would be appropriate. *Id.* at 161. But in the case of the rule challenged in *Gilbert*, he concluded that "[b]y definition, such a rule discriminates on account of sex; for it is the capacity to become pregnant which primarily differentiates the female from the male." *Id.* at 161-62 (dissenting opinion). As Justice Blackmun observed in his concurring opinion in *Manhart*, Justice Stevens, in his dissent in *Gilbert*, "strongly protested the very distinction [between pregnant and non-pregnant persons as opposed to males and females] he now must make



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discrimination provisions of state Unfair Trade Practices Acts. These laws were enacted in most states in response to the McCarran-Ferguson Act,<sup>206</sup> which provides that the business of insurance is to be regulated by the states to the extent that it is not specifically regulated by the United States. The National Association of Insurance Commissioners' (NAIC) model Unfair Trade Practices Act for states contains a rather general prohibition against "[m]aking or permitting any *unfair* discrimination between individuals of the same class and equal expectation of life" in payments or benefits for annuities or life insurance.<sup>207</sup> This or a similar provision can be found in the insurance laws of most states.

In the early 1960's some states enacted statutes providing specifically that race, religion, or national origin may not be taken into account in the business of insurance.<sup>208</sup> During the 1970's a number of states have adopted statutes or regulations prohibiting discrimination in availability of life or health insurance because of blindness, deafness, other physical disabilities or handicaps, or the presence of genes associated with inherited disabilities.<sup>209</sup> One approach has been to continue to permit such factors to be taken into account in risk classification if rate differentials can be statistically justified.<sup>210</sup> While a number of states now prohibit differences in terms (other than rates) and availability of insurance based on sex,<sup>211</sup> these states do not prohibit the use of sex as a

<sup>206</sup> 15 U.S.C. § 1012 (1976). For the relation of state laws to the McCarran-Ferguson Act, see American Academy of Actuaries, Report on Academy Task Force on Risk Classification at 4 (Aug. 1977). See Bailey, Hutchison & Narber, *The Regulatory Challenge to Life Insurance Classification*, 25 DRAKE L. REV. 779, 780-81 (1976) for a discussion of the history of regulation of the insurance industry in the United States.

<sup>207</sup> Unfair Trade Practices Act § 4(7)(a), 1 NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS PROCEEDINGS 495 (1972) (emphasis added).

<sup>208</sup> For example, the New York law provides that there be no "distinction or discrimination between persons because of race, color, creed or national origin, as to the premiums charged for insurance policies or in any other manner whatever . . ." N.Y. INS. LAW § 40 para. 10 (McKinney 1966).

<sup>209</sup> See, e.g., CAL. INS. CODE § 10143 (West Supp. 1978); MASS. GEN. LAWS ANN. ch. 175, §§ 108A, 120B (West Supp. 1978-79); COLO. REV. STAT. § 10-3-1104(1)(f)(IV) (Cum. Supp. 1978); N.C. GEN. STAT. § 168-10 (Cum. Supp. 1977).

<sup>210</sup> Colorado, for example, permits classification according "to blindness, partial blindness, or a specific physical disability" if based upon an "unequal expectation of life or an expected risk of loss different than that of other individuals." COLO. REV. STAT. § 10-3-1104(1)(f)(IV) (Cum. Supp. 1978). But see Iowa's regulation prohibiting rate differentials based solely on blindness, partial blindness or physical disability. IOWA ADMIN. CODE, INSUR. DEPT [510] chs. 15.80-.83 (1979).

<sup>211</sup> Several states that prohibit discrimination in availability of insurance because of the presence of genes associated with inherited physical disabilities also prohibit rate differentials on this basis. See, e.g., CAL. INS. CODE § 10143 (West Supp. 1978); N.C. GEN. STAT. §§ 58-195.5, 58-251.7 (1977).

<sup>212</sup> See notes 210 & 222 and accompanying text *infra*.



risk classification factor in individual life or health insurance or in individual annuities.<sup>212</sup> A post-*Manhart* California insurance law actually *requires* the use of sex as a risk classification factor in individual life insurance and annuities.<sup>213</sup>

The body of case law challenging the use of sex in the private individual insurance market is rather meager. Actions have been brought against state insurance commissioners and/or insurance companies variously on the basis of the Equal Protection Clause of the fourteenth amendment, two sections of the Civil Rights Act of 1871, sections 1983 and 1985(3),<sup>214</sup> and state Equal Rights Amend-

<sup>212</sup> Some states have, however, attempted to prohibit the use of sex as a risk classification factor in employee group insurance through human rights statutes. For example, in May 1978, Michigan amended its human rights law to state: "An employer shall not . . . (c) segregate, classify, or otherwise discriminate against a person on the basis of sex with respect to a term, condition or privilege of employment, including a benefit plan or system." Pub. Act No. 153, 1978 Mich. Legis. Serv. 560-61 (West) (amending MICH. COMP. LAWS ANN. § 37.2202(1)(c)). New York's human rights law contains a prohibition against sex discrimination by an employer similar to that contained in Title VII. Like Title VII, the New York law does not specifically mention employee group insurance plans. N.Y. EXEC. LAW § 296(1)(a) (McKinney 1972).

<sup>213</sup> The California insurance code, like that of most states, prohibits any unfair discrimination between individuals of the same class and of equal expectation of life in the rates charged for any contract of life insurance or of life annuity or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of such contract.

CAL. INS. CODE § 790.03(f) (West 1972). In May 1978, the California legislature enacted a law stating that this provision

shall be interpreted for any contract of ordinary life insurance or individual life annuity applied for and issued on or after January 1, 1981, to require differentials based upon the sex of the individual insured or annuitant in the rates or dividends or benefits, or any combination thereof. This requirement is satisfied if such differentials are substantially supported by valid pertinent data segregated by sex, including but not necessarily limited to, mortality data segregated by sex.

Ch. 186, 1978 Cal. Legis. Serv. 496 (West) (amending CAL. INS. CODE § 790.03) (emphasis added).

<sup>214</sup> 42 U.S.C. § 1983 (1976) states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

A § 1983 claim in *Manhart* was finally dismissed on February 23, 1979.

42 U.S.C. § 1985(3) (1976) states:

If two or more persons in any State or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, . . . the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

In *Griffin v. Breckenridge*, 403 U.S. 88 (1971), a leading case interpreting § 1985(3), the Supreme Court stated that "all indicators — text, companion provisions, and legislative history —



ments.<sup>215</sup> Most of these actions have challenged differences in availability and terms of insurance by sex rather than rate differences by sex.

Subsequent to the filing of two such cases, state insurance laws in New York and Pennsylvania were amended. In Pennsylvania, the plaintiff in *Stern v. Massachusetts Indemnity and Life Insurance Co.*<sup>216</sup> alleged that the insurance company refused to sell disability insurance to women containing the same terms and conditions available to men of the same age, health, and occupation solely on the basis of sex. The district court held that the complaint was sufficient to state a cause of action under section 1983 because there was both state action and an alleged denial of equal protection.<sup>217</sup> However, the practices at issue were discontinued following a 1974 amendment to Pennsylvania's Unfair Insurance Practices Act prohibiting unfair discrimination on the basis of sex in company underwriting and eligibility requirements.<sup>218</sup>

In *Gilpin v. Schenck*,<sup>219</sup> a fourteenth amendment action filed against the New York State Insurance Commissioner, the plaintiff challenged underwriting practices that made numerous distinctions based on the sex of the applicant or policy holder.<sup>220</sup> While the case was pending, the insurance department issued a regulation prohibiting such discrimination,<sup>221</sup> and the state insurance code was amended to prohibit discrim-

point unwaveringly to § 1985(3)'s coverage of *private conspiracies*." *Id.* at 101 (emphasis added). While § 1985(3) has been used in the past for claims of racial discrimination, in *Griffin* the Supreme Court left open the possibility of using § 1985(3) for claims of sex discrimination when it stated that for the statute to apply, "there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Id.* at 102 (emphasis added).

<sup>215</sup> For example, Pennsylvania's Equal Rights Amendment provides: "Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual." PA. CONST. art. I, § 28.

<sup>216</sup> 365 F. Supp. 433 (E.D. Pa. 1973).

<sup>217</sup> *Id.* at 437-42. The court found that

here the involvement of the State is unequivocal. Not only does the State license insurance companies desiring to sell policies in Pennsylvania, it also approves such policies and classifications of risks before they can be used. No insurance company is permitted to sell any policy in the State until it has been approved by the state insurance department pursuant to authority granted by the Commonwealth. Such pervasive control by the Commonwealth establishes its intimate involvement in the alleged discriminatory conduct of defendant Insurance Company.

*Id.* at 438. But see note 223 and accompanying text *infra*. The court also found that the plaintiff had stated a cause of action under § 1985(3). 365 F. Supp. at 442-43. The question of whether Pennsylvania's Equal Rights Amendment had been violated was not reached.

<sup>218</sup> PA. STAT. ANN. tit. 40, § 1171.5(a)(7)(iii) (Purdon App. 1978).

<sup>219</sup> 4 Civ. 420 (S.D.N.Y., filed Jan. 24, 1974).

<sup>220</sup> *Id.* at 4-6.

<sup>221</sup> 116 F. Supp. 217 (Reg. No. 75) (1975).



ination in availability of insurance on the basis of sex or marital status.<sup>222</sup>

There have been a number of subsequent cases challenging practices based on sex in the individual insurance market. However, on the basis of the Supreme Court's narrow interpretation of state action in *Jackson v. Metropolitan Edison Co.*,<sup>223</sup> which held that state regulation alone is not sufficient to bring every practice of a regulated business within the scope of the fourteenth amendment, several of these claims have been dismissed. In one case, both the federal district court and, on appeal, the Third Circuit, relied on *Jackson* to dismiss a section 1983 complaint that Blue Cross-Blue Shield enrollment and rate policies discriminated against married women. The Third Circuit held that state action had not been shown to be present,<sup>224</sup> stating that "the mere fact of state regulation alone, however, does not transform what is essentially private action into state action."<sup>225</sup> Another Pennsylvania case against Blue Cross-Blue Shield was similarly dismissed.<sup>226</sup> In *Madison v. Keystone Insurance Co.*, auto-insurance rates that differ by sex were challenged by young male drivers; here again a federal district court found no state action.<sup>227</sup>

In *Reichardt v. Payne*,<sup>228</sup> a federal district court in California, relying on *Jackson*, dismissed a section 1983 claim against a number of insurance companies challenging disability insurance policies with

<sup>222</sup> "No association, corporation, firm, fund, individual, group, order, organization, society or trust shall refuse to issue any policy of insurance, or shall cancel or decline to renew such policy because of the sex or marital status of the applicant or policyholder." N.Y. Ins. Law § 40-e (McKinney Supp. 1978).

<sup>223</sup> 419 U.S. 345 (1974). In this case the plaintiff filed suit under § 1983 against a privately owned and operated utility for termination of her electrical service without notice or hearing. The Supreme Court stated:

The nature of governmental regulation of private utilities is such that a utility may frequently be required by the state regulatory scheme to obtain approval for practices a business regulated in less detail would be free to institute without any approval from a regulatory body. Approval by a state utility commission of such a request from a regulated utility, where the commission has not put its own weight on the side of the proposed practice by ordering it, does not transmute a practice initiated by the utility and approved by the commission into "state action".

*Id.* at 357.

<sup>224</sup> *Broderick v. Associated Hosp. Serv. of Philadelphia*, 536 F.2d 1, 2 (3rd Cir. 1976). Plaintiffs in this case did not rest any claim on § 1985(3).

<sup>225</sup> *Id.* at 5.

<sup>226</sup> *Jackson v. Associated Hosp. Serv. of Philadelphia*, 414 F.Supp. 315 (E.D. Pa. 1976). *aff'd mem.*, 549 F.2d 795 (3rd Cir. 1974). The § 1985(3) conspiracy claim in this case was also dismissed.

<sup>227</sup> No. 77-2559 (E.D. Pa. Sept. 21, 1978). Section 1983 claims against both the insurance company and the insurance commissioner were dismissed. A § 1985 claim was also dismissed.

<sup>228</sup> 396 F. Supp. 1010 (N.D. Cal. 1975).



shorter length of coverage, longer waiting periods, and lower ceilings on benefits for women than for similarly situated men. The court found that under the *Jackson* approach "the sale of allegedly discriminatory disability policies by the insurance companies does not arise under color of state law."<sup>229</sup> On appeal, the Ninth Circuit ordered the dismissal of a section 1983 claim against the insurance commissioner, but upheld the district court's refusal to dismiss a section 1985(3) conspiracy claim against the insurance companies.<sup>230</sup>

At least so far, cases such as those described above have not produced any far-reaching legal decisions. Whether future litigation in this area will do so remains to be seen. Meanwhile, the primary impact of these actions appears to have been to prompt changes in state regulations and legislation.

#### IV. RISK CLASSIFICATION AND SOCIAL POLICY

*Manhart's* application of Title VII requirements illustrates the conflict between social policy goals that emphasize equality among individuals of all classes and notions of actuarial equity that emphasize differences among individuals according to identifiable risk classes.

In the context of public sector programs such as Social Security the concept of social adequacy, which suggests that benefits be based on presumptive need or other socially determined criteria, takes precedence over the concept of individual equity, which suggests that there be close relationship between contributions and benefits for an individual.<sup>231</sup> In Social Security, for example, there are income transfers from one generation to another, from high earners to low earners, from single persons to one-earner couples, and from two-earner couples to one earner couples.<sup>232</sup>

<sup>229</sup> *Id.* at 1015-16.

<sup>230</sup> 591 F.2d 499, 506 (9th Cir. 1979). With regard to the § 1983 claim against the insurance commissioner, the Ninth Circuit concluded that "[m]ere state action is insufficient to support § 1983 cause of action. There must be a sufficient nexus between the state action and the private discrimination. Here the nexus is insufficient. The private carriers decided whether and to whom policies would issue." *Id.* at 502.

<sup>231</sup> R. MYERS, SOCIAL SECURITY 9-10, 23-24 (1975); J. PECHMAN, H. AARON & I. T. Social Security Perspectives for Reform 33 (1968).

<sup>232</sup> A. MINNELL, THE FUTURE OF SOCIAL SECURITY 38-39, 47-48 (1977); Parsons, Intergenerational Transfers in Social Security, in THE CRISIS IN SOCIAL SECURITY PROBLEMS AND PROSPECTS 65-86 (M. Boskin ed. 1977); Campbell, *The Problems of Fairness*, in SOCIAL SECURITY PROBLEMS AND PROSPECTS 128-32, 141-42 (M. Boskin ed. 1977).



Private sector pension plans are, however, not designed to effect income transfers for the social good, but to provide an individual the maximum retirement benefit possible for his or her contributions. Risk classification in the private sector is based on the concept of actuarial equity, according to which "it is 'fair' to take into account differences in the risk contributed by an individual or group of individuals whenever there is sufficient statistical experience to make reliable predictions about those differences."<sup>233</sup> This implies "not only that persons with similar risks be treated alike but also that persons with dissimilar risks not be treated alike."<sup>234</sup> Extending the risk classification process to its theoretical limit would mean that every identifiable, systematic and statistically significant variation in mortality rates would be taken into account; any remaining variation would, therefore, be random. Possible sources of variation in mortality rates, and thus possible risk classification factors, are sex, race, age, health, socio-economic status, habits, hobbies, life-styles and occupation.<sup>235</sup>

In practice, the concept of actuarial equity necessarily involves a value judgment in determining which classifications will be taken into account.<sup>236</sup> For example, groups with observable differences in mortality might be combined and treated as a single group if the observable differences, although identifiable and statistically significant, were relatively small.<sup>237</sup> In such a case, the actuary's best judgment might be that the subsidization involved would be relatively minor and outweighed by the added cost of treating the two classes differently. Thus, in most cases, the actuary decides where to draw the line between sharing the risk within an identifiable risk class and subsidization among groups of varying risks; that is, the actuary determines the risk classification factors to be used.

For reasons of social policy, however, certain classifications that may be perfectly sensible and useful from an actuarial standpoint may be barred. The obvious ones, besides sex, are race and age.

Race has been eliminated entirely as a risk classification factor in all forms of insurance, that is, it is not used in individual or group insurance either to estimate costs or to determine benefits.<sup>238</sup> The con-

<sup>233</sup> Actuaries' Brief, *supra* note 8, at 10.

<sup>234</sup> *Id.* at 11.

<sup>235</sup> See text at notes 50-55 *supra*.

<sup>236</sup> Anderson, *supra* note 50, at 6; see text at notes 82-88, 101-03 *supra*.

<sup>237</sup> Actuaries' Brief, *supra* note 8, at 11.

<sup>238</sup> See note 108 and accompanying text *supra*.



ventional wisdom is that while whites in general have lower mortality than blacks, race differentials in mortality are acting as a proxy for socio-economic differentials.<sup>239</sup> But, as noted above, the reasoning in *Manhart* suggests that the critical point is not what sex or race differentials reflect but whether they are legally proscribed classifications that may not be used as a basis for discrimination.<sup>240</sup>

The other factor, age, may still be used without restriction in risk classification. This means that a person retiring at age 60, for example, receives a lower monthly pension benefit than if he or she waits to retire until age 65.<sup>241</sup> Legally, there is a critical difference between age and sex, since, unlike Title VII, the Age Discrimination Act of 1967 specifically states that it is not a violation of its prohibition against age discrimination in employment "to observe the terms of . . . any bona fide employee benefit plan such as a retirement, pension, or insurance plan . . . ."<sup>242</sup> Thus Congress made an affirmative decision not to restrict the use of age as a risk classification factor in employee group insurance, a decision that it either declined to make, or made negatively, in the case of sex when it failed to exempt insurance plans from Title VII.<sup>243</sup>

The *Manhart* decision has restricted significantly, but has not eliminated entirely, the use of sex as a risk classification factor in employee group insurance. According to *Manhart*, sex may no longer be used to determine employee contributions — or, it seems likely, benefits — but it may continue to be used to calculate costs.<sup>244</sup> Insurance offered outside the employer-employee relationship is unaffected by *Manhart*. Thus the private sector insurance market is now divided into two parts: employee plans that may not have employee pension contributions (or, presumably, benefits) based on sex, and individual plans purchased directly from insurance companies that may have contributions or benefits based on sex.

Many would like to restrict or prohibit the use of sex as a risk classification factor in individual as well as employee group insurance,

<sup>239</sup> See e.g., *Retirement Benefits for Men and Women*, *supra* note 86, at 3; Lautzenbeiser, *supra* note 15, at 19.

<sup>240</sup> See *Manhart* at note 48 *supra*.

<sup>241</sup> See *Manhart* & F. KING, *supra* note 17, at 115.

<sup>242</sup> 5 U.S.C. § 624(f)(2) (1976).

<sup>243</sup> See *Manhart* & Williams, *supra* note 115, at 1219.

<sup>244</sup> See *Manhart* at notes 111-12 *supra*. See also notes 185 & 186 and accompanying text *supra*.



either through non-Title VII litigation discussed above<sup>245</sup> or through legislation. In particular, some have advocated a national, legislatively mandated unisex mortality table based on data for the population as a whole that insurance companies would apply both to employee group plans and to individual plans.<sup>246</sup> But unless the whole population were in one insured group, an arrangement that would imply a public sector rather than a private sector plan, such a scheme is not economically sensible. If private insurance companies were forced to apply a national table to their insureds, there is no guarantee that a company's insured population would resemble the national mortality table with respect to sex or any other characteristics such as health and occupation. This suggests that there would have to be experience rating, which means that differences among groups because of sex and other factors would be taken into account. If there were no experience rating, private insurance companies would have to pool all their insured populations, and all poor risks — of whatever type — would be subsidized by all good risks, which would require a public sector plan with private insurance companies acting as agents for the government.

In a competitive market the individual cannot be expected to bear risks he or she perceives as unfair. An extreme example is provided by the first life insurance companies, which were burial societies that paid their members' funeral expenses by splitting the cost of each death among the membership. Younger members realized that they were continually contributing for expenses that seldom were incurred by their contemporaries. As a result, the younger members left the society and, even more important, few new members came in. With fewer people to pay for roughly the same number of deaths, the youngest remaining members perceived a similar inequity and also dropped out, thereby creating a classic assessment spiral, in which cost becomes so great that the system eventually breaks down.<sup>247</sup> It must be emphasized that there are two conditions necessary for such an effect to occur: first, some members of the group must perceive their situation as unfair; and, second, participation in the group must be voluntary.

<sup>245</sup> See text at notes 206-30 *supra*.

<sup>246</sup> Note, *Sex Discrimination and Sex-Based Mortality Tables*, 53 B.U.L. REV. 624, 655 (1973).

<sup>247</sup> Testimony of Ardian Gill, *Peters Record*, *supra* note 45, at 917; see also M. DAVY, *INDUSTRIAL LIFE INSURANCE IN THE UNITED STATES* 3-4 (1944); S. HUEBNER & K. BLACK, *supra* note 31, at 476.



The extent to which participation is compulsory, practical alternatives, and individual perceptions of equity set the outer bounds for restricting risk classification in the private sector without revolutionizing the private insurance industry. The Title VII requirement enunciated by the Supreme Court in *Manhart* was sufficiently narrow and carefully drawn so that the decision did not constitute such a revolution. The decision may, however, point toward such a revolution in the future. At the very least, it is likely to encourage a general reexamination of practices regarding the use of sex as a risk classification factor in all forms of insurance.

In the end, however, the question is how far society either wants or is prepared to go — through state or federal legislation or through the courts — in restricting or prohibiting the use of certain statistically useful risk classification factors in private sector insurance either to implement or to conform to socially desirable goals, such as prohibiting an employer from discriminating on the basis of sex.

\* \* \*

Sydney J. Key obtained her A.B. in economics at Radcliffe College in 1966. She did her graduate work in economics at Harvard University, where she earned an A.M. in 1969 and a Ph.D. in 1973. She is an economist at the Federal Reserve Board in Washington, D.C., in the Division of International Finance. Her areas of concern have included world payments and economic activity and, more recently, international banking and regulatory matters, particularly the U.S. activities of foreign banks. She has written a number of papers on the latter subject. During the past year she has worked primarily on the implementation of the International Banking Act of 1978. Ms. Key has recently been appointed a consultant to the Organization for Economic Cooperation and Development for a forthcoming conference on the employment of women.

Over the last several years, on her own time, and unrelated to her work at the Federal Reserve Board, she has written articles on economic problems of women in the United States. Most of these articles have dealt with the federal income tax treatment of married two-earner couples (the so-called "marriage tax"), a topic on which she has testified before the House Ways and Means Committee.

This article was also written on her own time, and the analysis and conclusions contained in this paper should not be interpreted as representing the views of the Board of Governors of the Federal Reserve System or anyone else on its staff.



## Life Expectancy In Men Increases By Ten Months, Mortality Study Shows

The life expectancy of a typical 65-year-old man has increased by about 10 months during the last five years, and he may now expect to live until age 80, according to Buck Consultants, Inc. employee benefits consultants.

The mortality study, conducted by Stephen G. Peterson and Robert C. Toussaint, actuaries with the firm, covers 700,000 active employees and 150,000 retired people at 24 major industrial client companies.

It showed dramatic increases in life expectancies for both men and women at all ages. In contrast to previous trends, the improvement was greater for men than for women. However, females can still expect to live significantly longer than males.

Douglas C. Borton, Buck's chief actuary, said "the increase in life expectancies for men was surprisingly large. For example, the 10-month improvement at age 65 over the last five years was about four times larger than the corresponding increase during the previous 10 years."

During the same five-year period, female life expectancy at age 65 improved by about eight months. At that age a typical woman now may expect, on average, to live past age 84, the study showed.

"It appears that medical advances in control of heart disease and blood pressure and increased attention to personal fitness are the main reasons for the improvement in life expectancy," Mr. Borton said.

Buck periodically updates its mortality tables because of the significant effect that such statistics have on employee benefit plans. Mr. Borton said that for many corporations, pension plan costs will eventually increase to reflect the greater number of pension payments that will be made. Benefits may decrease under plans which convert fixed contributions into monthly pensions unless the contributions are increased. In contrast, costs under life insurance plans may decrease.



## State Mutual Study

*from National Underwriter*

## Smoker Death Rate Twice Non-Smoker

By MARY JANE FISHER  
Washington Correspondent

WASHINGTON—Death rates for smokers were found to be more than double those of non-smokers in a just-released study of the insured lives of both over a 15-year period by State Mutual Life.

The first such study showing the experience of insured lives in the form of actuarial tables used by the industry to measure mortality rates concluded that the differences in life expectancy between smokers and non-smokers "are too large to be ignored for individual insurance underwriting and pricing purposes."

## Results Released

Results of the study were released at a press conference Monday at the National Press Club by State Mutual President W. Douglas Bell and presented the same day by Michael J. Cowell, State Farm vice president and chief actuary, and Brian L. Hirst, associate actuary, at the annual meeting of the Society of Actuaries in Bal Harbor, Fla.

"We believe the major significance of the results of our study is it presents a comparison between two groups whose only difference is smoking," Mr. Bell told reporters. "We calculate a ratio of smokers' to non-smokers' death rates of about two to one."

The study concluded that mortality differences between smokers and non-smokers are so substantial as to require the industry to publish separate

rate mortality tables for smokers and non-smokers.

State Mutual began offering special rates for non-smokers in 1964 and started its study at that time. Since then 105,000 non-smoker policies have been sold by the company for a total face value of \$3.4 billion. Currently, non-smoking policies make up 67% of State Mutual's individual life insurance sales.

In other health-related news of interest to the industry:

- First Lady Rosalynn Carter, in a speech Monday to the Washington Business Group on Health, urged representatives of many of the largest firms in the country to provide more outpatient mental health benefits in their employee health insurance plans.

"I am deeply concerned that while many major private insurance programs provide substantial inpatient (psychiatric) benefits, they cover few, if any, outpatient services," she said. Mrs. Carter heads the President's Commission on Mental Health.

She noted, however, that "there are, to be sure, questions that still must be answered about financing of mental health care through third party payments."

Mrs. Carter urged the business leaders to support the President's voluntary hospital cost containment bill, with standby mandatory controls. It is expected to go before the House Rules Committee soon for clearance before it can go to the House floor for a vote.

She called the measure "a classic



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TABLE 4—MORTALITY OF PROMINENT WOMEN EDUCATORS\*  
COMPARED WITH WHITE FEMALES IN UNITED STATES POPULATION  
1964-75

| Attained<br>Age Group | Number<br>in 1964 | Actual<br>Deaths | Mortality<br>Ratio† |
|-----------------------|-------------------|------------------|---------------------|
| All Ages              | 539               | 86               | 64%                 |
| Under 50              | 53                | 0                | ‡                   |
| 50-59                 | 203               | 9                | 89                  |
| 60-69                 | 220               | 28               | 72                  |
| 70-79                 | 53                | 30               | 55                  |
| 80 and over           | 10                | 19               | 65                  |
| Under 70              | 476               | 37               | 74                  |
| 70 and over           | 63                | 49               | 58                  |

TABLE 5—MORTALITY OF PROMINENT WOMEN OF LETTERS\*  
COMPARED WITH WHITE FEMALES IN UNITED STATES POPULATION  
1964-75

| Attained<br>Age Group | Number<br>in 1964 | Actual<br>Deaths | Mortality<br>Ratio† |
|-----------------------|-------------------|------------------|---------------------|
| All Ages              | 395               | 113              | 87%                 |
| Under 50              | 53                | 4                | ‡                   |
| 50-59                 | 100               | 6                | 114                 |
| 60-69                 | 132               | 24               | 115                 |
| 70-79                 | 90                | 32               | 66                  |
| 80 and over           | 20                | 47               | 87                  |
| Under 70              | 285               | 34               | 126                 |
| 70 and over           | 110               | 79               | 77                  |

TABLE 6—MORTALITY OF PROMINENT WOMEN PERFORMERS AND ENTERTAINERS\*  
COMPARED WITH WHITE FEMALES IN UNITED STATES POPULATION  
1964-75

| Attained<br>Age Group | Number<br>in 1964 | Actual<br>Deaths | Mortality<br>Ratio† |
|-----------------------|-------------------|------------------|---------------------|
| All Ages              | 282               | 41               | 143%                |
| Under 50              | 171               | 8                | 228                 |
| 50-59                 | 68                | 7                | 125                 |
| 60-69                 | 28                | 13               | 169                 |
| 70-79                 | 12                | 4                | ‡                   |
| 80 and over           | 3                 | 9                | 258                 |
| Under 70              | 267               | 28               | 166                 |
| 70 and over           | 15                | 13               | 110                 |

TABLE 7—MORTALITY OF PROMINENT WOMEN BUSINESS EXECUTIVES\*  
COMPARED WITH WHITE FEMALES IN UNITED STATES POPULATION  
1964-75

| Attained<br>Age Group | Number<br>in 1964 | Actual<br>Deaths | Mortality<br>Ratio† |
|-----------------------|-------------------|------------------|---------------------|
| All Ages              | 254               | 55               | 74%                 |
| Under 50              | 28                | 0                | ‡                   |
| 50-59                 | 82                | 3                | ‡                   |
| 60-69                 | 90                | 8                | 49                  |
| 70-79                 | 41                | 19               | 66                  |
| 80 and over           | 13                | 25               | 101                 |
| Under 70              | 200               | 11               | 53                  |
| 70 and over           | 54                | 44               | 82                  |

\*Listed in the 1964-1965 *Who's Who in America* and living in the United States.

†Based on mortality rates among contemporaneous cohorts of white females in the general population of the United States.

‡Fewer than five deaths; ratio not computed.



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TABLE 8—COMPARATIVE MORTALITY OF  
PROMINENT MEN AND WOMEN BY VOCATION

| Vocational Group                                        | Mortality Ratio*            |                           |
|---------------------------------------------------------|-----------------------------|---------------------------|
|                                                         | Who's Who Women<br>1964-75† | Who's Who Men<br>1950-61‡ |
| All Groups .....                                        | 71%                         | 70%                       |
| Educators .....                                         | 64                          | 62                        |
| College professors .....                                | 56                          | 61                        |
| College presidents, deans, administrators .....         | 74                          | 74                        |
| Other educators and administrators .....                | 61                          | 58                        |
| Men and women of letters .....                          | 87                          | 89                        |
| Authors, writers, critics, historians .....             | 86                          | 84                        |
| Editors .....                                           | 90                          | 84                        |
| Correspondents and journalists .....                    | 103                         | 134                       |
| Performers and entertainers .....                       | 143                         | ¶                         |
| Business executives .....                               | 74                          | 71                        |
| Archivists, librarians, museum directors, curators .... | 46                          | ¶                         |
| Artists, illustrators, sculptors .....                  | 55                          | 71                        |
| Government officials .....                              | 45                          | 81                        |
| Political leaders .....                                 | 52                          | ¶                         |
| Community service leaders .....                         | 48                          | ¶                         |
| Scientists .....                                        | 70                          | 55                        |
| Physicians and surgeons .....                           | 86                          | 78                        |
| Judges and lawyers .....                                | 78                          | 73                        |
| Architects and designers .....                          | 81                          | ¶                         |
| Church officials and clergymen .....                    | ¶                           | 62                        |
| Engineers .....                                         | ¶                           | 76                        |

\*Women: Mortality ratios based on death rates among contemporaneous cohorts of white females in the general population of the United States.

Men: Mortality ratios based on average death rates between 1950 and 1961 among white males in the general population of the United States.

†All women listed in the 1964-1965 *Who's Who in America* and living in the United States.

‡One sixth sample of all men listed in the 1950-1951 *Who's Who in America* and living in the United States.

¶Vocational group not analyzed separately.



Thurs., March 20, 1980

## Study of Heart Disease in Women Workers Shows Risk Highest in Clerical Employees

By JERRY E. BINIOP

Staff Reporter of THE WALL STREET JOURNAL

Woman clerical workers such as secretaries, bookkeepers, bank cashiers and sales clerks are more likely to develop heart disease than professional women, housewives or male clerical workers, a new study found.

The woman clerks at highest risk of having a heart attack or related heart problems have children at home, are probably working out of economic necessity, suffer suppressed anger, have a nonsupportive boss and are unable to change jobs, the study found.

The discovery of the high risk of heart problems among woman clerks was made by federal researchers who began in 1965 to follow the medical and social histories of more than 700 women and 580 men. Their aim was to see if unemployment changed women's risk of having heart attacks, which generally has been lower than that of men.

### Hundreds Have Been Studied

The study was carried out among residents of Framingham, Mass., where the government's National Heart, Lung and Blood Institute has been following the fates of hundreds of residents for more than two decades trying to ferret out the physical, social and economic factors that lead to heart attacks. Between 1965 and 1967, the researchers collected psychological and social data on 350 housewives, 387 working women and the 580 men, all between ages 45 and 64. For the succeeding eight years the researchers kept track of the peoples' heart attacks, chest pains and other symptoms of coronary heart disease.

In the study, a working woman was defined as one who had spent at least half her adult life employed outside the home. Women who had spent less than half their employable years outside the home were designated "housewives."

The study, published in the just-released February issue of the American Journal of Public Health, confirmed several earlier findings. As a group, women continue to en-

joy a lower risk of having coronary heart disease than men. And going to work only slightly increases that risk for the women.

For example, 13% of the men in the study developed heart disease symptoms during the eight years of the study while 7.3% of the working women developed heart problems and only 5.4% of the housewives had such heart problems.

There were, however, psychological differences. "Working women experienced more daily stress, marital dissatisfaction and aging worries than either housewives or men," Drs. Suzanne G. Haynes and Manning Feinleib of the heart institute reported. The working women also were more similar to men than to housewives in terms of aggressive and ambitious behavior.

In contrast to previous studies, the new study found that the working woman who had children was at a higher risk of heart disease than either a single woman or a housewife with children. "Women who worked outside the home and had raised three or more children were twice as likely to develop coronary heart disease as housewives with the same family responsibilities," the researchers said. Earlier studies had indicated that single women had a higher risk than women who had been or were married.

"These findings suggest that the dual roles of employment and raising a family may produce excessive demands on working women," the study noted.

### Clerical Workers' Risk

The risk was most pronounced among the women working as clerks, as compared with either men or women working as professionals, proprietors and managers, manual workers and "protective and service workers."

"Among women, clerical workers were almost twice as likely to develop coronary disease as either white- or blue-collar (women) workers," the study found. About 10.6% of the women clerical workers developed heart problems during the eight years as compared with 5.4% of the housewives. The women clerical workers, moreover, had a higher risk than men clerical workers, 10.6% versus 5.8%.

The much higher risk among the women clerical workers occurred almost solely among those women clerks who had children. More than 15% of the clerk-mothers developed heart problems in the eight years, compared with only 6.3% of the women in other types of jobs.

### Economic Pressures

Economic pressures due to an increased family size could have motivated women to seek employment outside the home," the researchers speculated. "Pressures associated with a low socioeconomic status might then explain the higher incidence of coronary heart disease among working women with children," they said.

The study also found the women clerical workers who did develop heart disease were more likely to suppress hostility, that is, remain silent about their anger, to talk less about personal worries, have a "nonsupportive boss," and to experience fewer job changes.

"These findings are consistent with observations that women clerical workers may experience several forms of occupational stress, including lack of autonomy and control over the work environment, underutilization of skills, and lack of recognition of accomplishment," they suggested.



THE CITY OF NEW YORK  
THE PRESIDENT OF THE COUNCIL  
CITY HALL  
NEW YORK, N. Y. 10007

CAROL BELLAMY  
PRESIDENT

(212) 560-5200

January 25, 1979

Honorable John Ingram  
Chairman  
Accident and Health Subcommittee-Sex  
Discrimination Task Force of the N.A.I.C.  
North Carolina Department of Insurance  
Dobbs Building  
P.O. Box 26387  
Raleigh, North Carolina 27611

Dear Chairman Ingram:

This letter is in support of the proposal, now pending before the Accident and Health Subcommittee Task Force on Sex Discrimination of the National Association of Insurance Commissioners (NAIC), to adopt a model regulation prohibiting rate-setting for accident and health insurance policies on the basis of sex. While I was unable to attend your public hearing held in New York City on November 13, 1978, I hope that these comments can be considered as part of the hearing record.

I strongly support a NAIC model regulation that would preclude insurance rate-making on the basis of sex. There are several reasons why sex should not be considered a meaningful determining factor in the setting of insurance rates.

First, it is not necessarily more costly to insure women than men. At the hearing, representatives of the commercial insurance industry asserted that female disability claim costs are considerably higher than male costs, sometimes 200% higher\*, and that the number of female claims as compared with male claims is 45% greater.\*\* These statistics, however, do not provide an adequate basis for a NAIC determination that sex is a meaningful rate-setting factor.

In order to determine whether it is always more costly to insure women, I have evaluated the disability experience of two

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\* Testimony of E. Paul Barnhart P9

Testimony of Thomas J. Gillooly, National Insurance Association P10

\*\* Testimony of E. Paul Barnhart P6

Testimony of Thomas J. Gillooly P10



New York City labor unions - Locals 2,3 and 5 of the United Storeworkers Union and District Council 37 of the Association of State, County and Municipal Employees (ASCME), AFL-CIO.\*

The United Storeworkers Union represents workers in 16 department stores in the metropolitan area. Union members engage primarily in non-hazardous employment. This union has determined that it's female members have a shorter average length of disability, and a lower morbidity rate than it's male members.\*\*

Even though women account for 85-90% of the union membership, they are responsible for only 82% of the disability claims. In addition, the average length of a female disability claim is 31.58 days as compared to 34.36 days for men. (See Appendix I - Attached table and graph). The union did not keep cost data by sex but, with fewer claims and shorter disability periods, union officials conclude that female costs are indeed lower.

While the Storeworker's data demonstrates that men, in some instances, can have higher disability costs, another factor leads to the conclusion that male costs are even greater than the figures indicate. Women in retail employment, as in many other industries, are the lowest-paid workers. Since disability payments in the Storeworker's plan are linked to income, the average male claimant would be entitled to higher daily reimbursement than a lower-paid female claimant, thereby escalating the male costs even higher.

By contrast, District Council 37, a union representing 120,000 municipal employees, found that its female members had higher disability costs than its male members. While this union's male members were disabled for longer periods of time, women accounted for a larger number of claims.\*\*\* Women, representing 62% of the union membership were responsible for 77% of the union's disability claims. However, the average length of disability was 4.4 days shorter for women.

Male union members were disabled for longer periods of time because they generally suffered from more debilitating illnesses. The men had twice as many strokes, 60% as many heart attacks, and 30% more orthopedic injuries. Males also had a greater incidence of cancer. In comparison, 35% of all female disability was diagnosed as genital-urinary illness, which includes pregnancy. According to a union health plan official, the genital-urinary disabilities tend to be more limited in duration. Due to the shorter length of disability for women, the cost of the average female claim was 8% lower than the average male claim.

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\* Maternity is covered under the United Storeworkers and District Council 37 disability plans

\*\* Eleanor Tilson, Vice President and Administrator, United Storeworkers Security Plan

\*\*\* Roslyn Yasser, Administrator, District Council 37 Health and Security Plan



The data available from the two unions does not support the assertion of the commercial insurers that it necessarily costs more to insure women - one union had higher costs for men; the other had higher costs for women. Obviously, insurance costs are affected by other factors, including pregnancy (the cost of which cannot be solely attributed to women), occupation, and income level to name a few.

An important explanation for the higher costs experienced by the commercial insurers for female policyholders is the simple fact that disability insurance has never been available to women on a cost competitive basis. Since women have always paid significantly higher premiums than similarly-situated men for less comprehensive coverage, the commercial insurers have never sold disability to a broad spectrum of the female market. The higher costs for women can be at least partially attributed to adverse selection, whereby only women who feel they will use the coverage are willing to pay the high premiums. At more competitive rates, healthier women might purchase insurance, thereby lowering the cost of insuring women in the commercial market.\* The National Association of Insurance Commissioners should consider that an expanded female market, attracted by lower unisex rates, may significantly lower the cost difference between men and women for accident insurance.

Moreover, the NAIC should recognize that the thrust of recent legal developments has been to eliminate sex-related differences in employment benefit plans. These developments result from a recognition that public policy should encourage equality in the allocation of insurance costs between the sexes, even where the cost of insuring men and women are not equal. Congress has recently amended Title VII to prohibit discrimination on the basis of pregnancy in employment-related benefits, including insurance. Under the law, it would not be permissible for employers to impose the costs of the mandated maternity benefits solely on female employees. In Los Angeles v. Manhart, 46 U.S.L.W.4347, April 29, 1978, the Supreme Court ruled that Title VII prohibits an employer from charging women more for retirement pensions merely because women, as a class, live longer than men. In so ruling, the Court said:

"When insurance risks are grouped the better risks always subsidize the poorer risks. Healthy persons subsidize medical benefits for the less healthy; unmarried workers subsidize the pensions of married workers; persons who eat, drink or smoke to excess may subsidize pension benefits for persons whose habits are more temperate. Treating different classes or risks as though .

\* "Comment: Gender Classifications in the Insurance Industry" 75 Columbia Law Review P.1390 FN46 (1975); Pennsylvania Insurance Department, Insurance Commission's Advisory Task Force on Women's Insurance Problems, Final Report and Recommendations (June 1974) P.22



they were the same for purposes of group insurance is a common practice which has never been considered inherently unfair. To insure the flabby and the fit as though they were equivalent risks may be more common than treating men and women alike; but nothing more than habit makes one "subsidy" seem less fair than the other."  
Manhart at 4342.

The fact that sex classification is now prohibited in insurance policies provided as part of compensation should furnish a large impetus to eliminate sex-based insurance classifications across the board. A new model regulation, which prohibits rate-making in accident and health insurance on the basis of sex, will serve as a forceful prototype for conscientious state legislators in amending discriminatory state law, thereby impacting on the costs of insurance for hundreds of thousands of women.

I urge the NAIC to take this necessary action.

Sincerely,

Carol Bellamy

CB:CF:oh

Attachment

cc: Honorable Albert B. Lewis  
 Honorable James Sheeran  
 Honorable James Stone  
 Honorable E.J. Vorrhis



## DISABILITY BREAKDOWN BY AGE AND SEX - 01/01/77 - 12/31/77

| AGE        | FEMALE   |       |          |    | MALE     |       |          |    |
|------------|----------|-------|----------|----|----------|-------|----------|----|
|            | # CLAIMS | %     | TTL DAYS | %  | # CLAIMS | %     | TTL DAYS | %  |
| < 20       | 39       | 3     | 918      | 2  | 16       | 6     | 311      | 3  |
| 21-30      | 156      | 13    | 4,044    | 10 | 62       | 22    | 1,538    | 16 |
| 31-40      | 113      | 9     | 2,695    | 7  | 42       | 15    | 1,049    | 11 |
| 41-50      | 213      | 17    | 6,931    | 18 | 54       | 19    | 2,387    | 25 |
| 51-60      | 464      | 37    | 13,516   | 35 | 63       | 22    | 2,844    | 29 |
| > 60       | 259      | 21    | 11,184   | 28 | 45       | 16    | 1,561    | 16 |
| <u>TTL</u> | 1,244*   | (82%) | 39,288   |    | 262**    | (18%) | 9,690    |    |

\* 40 females received 26 weeks of disability

\*\* 11 males received 26 weeks of disability

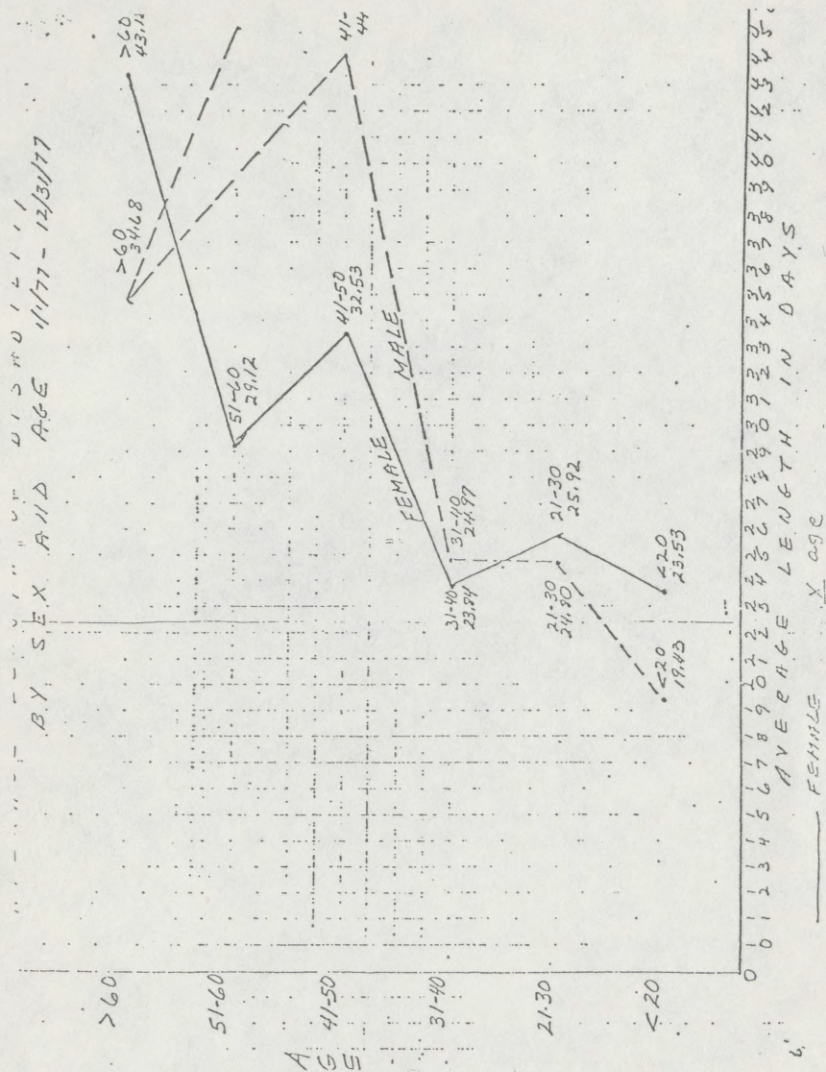
## AVERAGE LENGTH OF DISABILITY

| AGE        | FEMALE | MALE  |
|------------|--------|-------|
| < 20       | 23.53  | 19.43 |
| 21-30      | 25.92  | 24.60 |
| 31-40      | 23.84  | 24.97 |
| 41-50      | 32.53  | 44.20 |
| 51-60      | 29.12  | 45.14 |
| > 60       | 43.18  | 34.68 |
| <u>TTL</u> | 31.58  | 34.36 |

## TOTAL DISABILITY (MALE AND FEMALE)

| AGE        | # CLAIMS | %  | TTL DAYS | %  | AVERAGE LENGTH |
|------------|----------|----|----------|----|----------------|
| < 20       | 55       | 4  | 1,229    | 3  | 22.34          |
| 21-30      | 210      | 14 | 5,582    | 11 | 25.60          |
| 31-40      | 155      | 10 | 3,744    | 7  | 24.15          |
| 41-50      | 267      | 17 | 9,318    | 19 | 34.89          |
| 51-60      | 527      | 35 | 16,360   | 34 | 31.04          |
| > 60       | 304      | 20 | 12,745   | 26 | 41.92          |
| <u>TTL</u> | 1,526    |    | 48,978   |    | 32.09          |







ADDITIONAL SUBMISSIONS OF BARBARA J. LAUTZENHEISER

American Council of Life Insurance

HEALTH INSURANCE ASSOCIATION OF AMERICA

1850 K Street, N.W.,  
Washington, D.C. 20006  
(202) 862-4000

1750 K Street, N.W.  
Washington, D.C. 20006  
(202) 331-1336

June 17, 1980

Senator Howard M. Metzenbaum  
Chairman, Subcommittee on Antitrust,  
Monopoly and Business Rights  
Committee on the Judiciary  
United States Senate  
Washington, DC 20510

Re: S. 2477 ("Nondiscrimination in Insurance Act")

Dear Senator:

At the April 30 hearing, you offered to let me submit comments on the testimony of Dr. Quincalee Brown, of the American Association of University Women, whose written statement had not been available before the hearing. My following comments are submitted, as was my April 30 testimony, on behalf of the American Council of Life Insurance and Health Insurance Association of America.

I shall begin at page 1 of Dr. Brown's statement. There she implies that the industry equates unisex washrooms with unisex mortality tables in an effort to discredit the proposed legislation. Quite the contrary. Such an equation would, indeed, be absurd. The concepts of unisex mortality and sex-segregated mortality deal not with privacy or personal feelings, but with cost. And addressing "the fundamental question of fairness to individuals affected by discriminatory classes", we would emphasize that fairness is best accomplished by setting premium rates that match the expected costs for individuals, and we can come closer to that if we are allowed to vary our rates for women and men than we can if we must charge women and men the same premium rates. Thus, a bill that would require us to increase our charges for life insurance on women, or for annuities on men, would not represent a step towards "economic and social justice".

On pages 1 and 2 Dr. Brown implies that the Civil Rights Act of 1964 is applicable to insurance. There is an important distinction between the practices at which the Civil Rights Act was aimed and the practice of differentiating life and health insurance premium rates by sex. The Civil



Rights Act of 1964 was aimed directly at equal opportunity and practices which hinder that. Equal opportunity does not require that everyone be charged the same premium rate regardless of the risk they constitute. In the example given by Dr. Brown, the applicant is given the opportunity and it is possible to determine the height of an applicant for a police officer's job by measuring it. To estimate height on the basis of the applicant's sex and ignore the actual measured height would, clearly, constitute unfair discrimination. In the case of life and health insurance, however, there is no way to measure in advance when an individual will die or become disabled. If there were, there'd be no need for insurance. Individual rights and individual treatment are attained in insurance by identifying the reliable indicators of expected mortality or morbidity which most accurately describe the risk characteristics of the individual and by using these characteristics to place that individual with others having comparable characteristics and hence comparable expected costs. Among the indicators that are available and whose use is cost-effective in life and health insurance are age, sex, occupation, state of health, habits and avocations. In the absence of a means of actually measuring an individual's future lifetime or determining the actual date and duration of future disabilities, use of these indicators offers the best approach to fair, individualized treatment of individuals.

On page 2 Dr. Brown refers to the basic principle, "that individuals deserve fair, unbiased treatment" and that it "is the cornerstone of our democracy and the essence of our freedom". We agree. The identification of a person's own individual characteristics--including sex--which affect the cost of mortality, is fair, unbiased treatment. To ignore sex in determining the risk characteristics of an individual is to move away from fair treatment. Such a change would reduce the fairness that companies achieve through their underwriting process and would limit rather than encourage the growth of freedom and democracy.

Pages 2-3 of Dr. Brown's statement contain a section titled, "Women Working for Security". We thoroughly agree that "economic realities demand that more women work, that they are dependent on fringe benefits and that insurance is a necessary hedge against loss of income due to accident, illness and death". But we strongly disagree with the assertion that women are "penalized ... and ... denied the right to a secure and insured tomorrow". Life and health insurers strive to encourage women to buy needed coverage, and life and health insurance is equally available to women and men at fair and reasonable premium rates, based in each case on the expected claim costs.

The section on pages 3-4 titled, "Denial of Equal Protection," is simply inaccurate. As we pointed out on page 3 of our statement, virtually all life and health insurers make insurance equally available to women and men in all jurisdictions. Moreover, every state has an Unfair Trade Practice Act which prohibits unfair discrimination.



Pages 4-6 assert that companies "often withhold the product from women altogether". All companies that we know of are happy to sell their life and health insurance products to women. Dr. Brown's statement discusses maternity coverage and disability coverage for homemakers to substantiate the idea that women are excluded from coverage. Dr. Brown states that women bear the full cost of reproduction. On the contrary, the fact is that medical expenses in connection with pregnancy are commonly borne by the family. While only women can give birth, medical bills are paid by either the mother, the father or both. In fact, the existing policies insuring employees against the expenses related to normal pregnancies result in reimbursement of medical expenses for the wives of male employees more often than they do of medical expenses of female employees, simply because of the greater frequency of such claims.

As I explained on page 17 of my April 30 statement, many employers excluded reimbursement of the costs of normal pregnancies from the group insurance contracts that they purchased for the reason that the costs of normal maternity can be budgeted. Insurance is designed to finance security for unforeseeable and hence unbudgetable items. It is usually not a cost-effective way to pay the expenses associated with an event that is foreseeable, is largely under the control of the persons insured, is budgetable, and is, in many cases, desired. Normal pregnancies have these characteristics and are quite different from the list of risks cited by Dr. Brown as being either "male-specific" or voluntary.

In addition, the NAIC model regulation prohibits discriminatory practices by requiring that any conditions covered by a health insurance policy must be covered in corresponding fashion for both women and men. Thus, under the NAIC model any policies providing benefits to reimburse costs of the male-specific procedures listed by Dr. Brown would have to provide coverage for corresponding female-specific procedures. The procedures identified by Dr. Brown as being "voluntary" are of limited economic consequence as compared to normal maternity and may or may not be covered by insurance policies. Also, although participation in sports is voluntary, people do not normally volunteer for sports injuries, nor are the injuries foreseeable or budgetable.

We think that companies should be free to offer insurance covering normal maternity claims if they can price it in such a fashion as to make it salable. On the other hand, the requirement that all health insurance policies provide for reimbursement of such claims at a high level would be unfair to those individuals who do not need or want the coverage. Making people who do not plan to have children or who are not able to produce children pay for such coverage seems to us to be unfair. If society feels that the costs of childbirth should be spread more than they are now, a social program should be developed spreading the cost to more of society than just to those who purchase insurance. Including the cost in a product which may or may not be purchased, unduly increases the cost of that product and discourages people from purchasing it.



The maternity expenses of many American families are now reimbursed to a large extent by their employers (through group insurance or otherwise), as required by Public Law 95-555. That law requires employers of fifteen or more persons who provide benefits for illness or accident to their employees to cover the costs of normal pregnancies on the same basis as the costs of illness or accidents. The American Council of Life Insurance and the Health Insurance Association of America believe that this type of obligation should not be extended to individual owners of health insurance policies, because it is unfair to persons of either sex who do not need or want the coverage, as we stated in our April 30 testimony. We also believe that this type of obligation should not be extended to small-employer owners of health insurance policies, because of the large cost burden such action would place on them since they might not have the economic resources to provide such benefits.

With respect to disability insurance for homemakers, Dr. Brown states that they are totally excluded from disability coverage. This too is not true. There are companies which have had a product for this occupational group for some years. Dr. Brown also implies that the reason insurers do not issue this coverage is because insurers don't value the services provided by homemakers. This is another misunderstanding. The problem with disability insurance for the homemaker, female or male, is determining whether the homemaker is disabled. Disability is commonly defined as the inability to perform the duties required in one's normal employment because of illness or accident. A homemaker whose mobility is limited to some extent as the result of illness or accident may be able to perform some of her or his usual homemaking functions, while passing off others to other members of the household.

If an individual is gainfully employed, the wages that would be lost if disability occurred form a basis for establishing the benefits payable. The lack of an employer's judgment to help determine the extent of disability, as well as the lack of earned income or wages to establish an appropriate benefit level, have kept some companies from designing plans to insure homemakers against disability. Thus the question is not one of sex discrimination. Rather the question is whether a certain occupation can be insured on a sound basis. Although, as we stated earlier, a few insurers have entered the market with homemaker's disability policies, we would oppose a requirement that all companies offer this type of coverage, because of the difficult questions of benefit design and claim administration that must be solved to offer such coverage successfully. Of course, the NAIC model regulation on sex discrimination requires that any company that does offer disability insurance coverage to homemakers make it equally available to women and to men.

Dr. Brown also mentions the coverage of part-time employees. As is required by the NAIC model regulation on sex discrimination, insurers underwrite part-time workers without regard to sex. Here again the problem



is the occupational class of "part-time" and not the sex of the worker. An important consideration as to whether an insurer can insure these workers successfully is the impact on the family unit that would be felt if the proposed insured stopped working and began collecting disability benefits. If Social Security disability benefits provide virtually full replacement of take-home pay--as they do for many relatively low-paid workers--there is no need for private insurance. In such circumstances, companies are understandably reluctant to issue coverage, and most individuals do not seek additional coverage when their money could be better spent elsewhere.

Also on page 6, Dr. Brown discusses premium rate differentials between the sexes in disability insurance. Mention is made of a study in New York. As I mentioned on page 11 of my April 30 statement, a New York Insurance Department study (done in 1976) concluded that "sex is a major additional factor affecting the cost of disability income insurance." When differences in other criteria, such as occupation and income level, were eliminated, sex was found to be a valid basis to predict different claim costs.

On pages 7-8 Dr. Brown discusses sex differentials in insurance and pensions. As I explained on pages 3 and 8 of my April 30 testimony, characteristics in addition to age and sex including the smoking and drinking habits she referred to are used in determining premium rates for individual life insurance. I also explained on page 11 why age and sex are usually the only criteria used in determining the purchase rates for annuities. The court decisions mentioned by Dr. Brown were largely based on employment discrimination laws such as the U.S. Civil Rights Act of 1964. These decisions all pertain to the amounts of benefits or contributions paid under employers' pension plans--a separate question from the premium rates charged for annuities purchased from an insurance company by an employee or by a pension plan administrator.

On page 7 Dr. Brown objects to the fact that purchase rates for life insurance and annuities differ between the sexes on the grounds that women as a group live longer than men, and further states that women are penalized for their greater longevity in that all of them receive lesser monthly benefits than men of the same age regardless of their "individual life expectancies". It is true that for the same dollar amounts used to purchase annuities, all women receive lesser monthly benefits than men of the same age, regardless of their "individual life expectancies". It is also true that a woman age 65 receives lesser monthly benefits than a woman age 70, regardless of their "individual life expectancies". It is also true that two women both age 65 will pay the same amount for the same monthly benefit regardless of how much each ultimately receives in return. A woman age 65 paying \$10,000 might receive only one monthly check for \$75 before dying while another woman age 65 paying \$10,000 might receive 360 monthly checks totalling \$27,000 before dying. Similarly, one woman age 25 paying one premium of \$110 for \$10,000 of life insurance might give rise to a \$10,000 claim the very next day and another woman age 25 might pay premiums of \$110 per year for 60 years before giving rise to the \$10,000 benefit.



Insurance is not and cannot be based on "individual life expectancies". Nor can anyone determine the "life expectancy" of an individual. It is possible to predict "life expectancies"--that is, the average number of years from now to the date of death--only for groups of fairly large size and with similar risk characteristics. The ability of an insurer to pay \$10,000 with the receipt of only one premium of \$110 and to pay 360 payments of \$75 while having received only \$10,000 is dependent upon the ability to make reliable predictions of the mortality rates experienced by the group and hence the most probable predictions for each individual member of the group. Thus, despite the inability to make exact predictions as to when an individual will die, insurance companies can protect against the financial impact of early death or very long life.

At the bottom of page 7, Dr. Brown states that females statistically outlive their male counterparts by six to nine years and contrasts that difference with the three-year age setback which has been commonly used by the states to set minimum cash value and liability requirements for life insurance policies. Current population mortality studies do show a difference in life expectancy at birth between women and men in the United States population of about eight years. However, life expectancies, and the differences between them, diminish with advancing age. Furthermore, the important consideration in pricing life insurance is not the mortality experience of the general population, but rather the relative mortality rates exhibited by women and men who have been insured in the standard rating class. As stated in Appendix II of my April 30 testimony, the females in this category have exhibited mortality rates equal to about 60% of the rates of their male counterparts.

One point of confusion is the term "three-year age setback for females." Many persons use this term as though it were the method of determining female premium rates. This is not correct. The three-year setback is the adjustment permitted by some existing state laws in determining the minimum guaranteed values upon termination of a contract. Premiums and/or dividends for females on a contract are generally determined by the company's own or the industry's separate female mortality data.

The current mortality data would justify an age setback of more than the three years that has been permitted by these existing state nonforfeiture laws. These laws have prohibited the use of larger age setbacks which would result in lower minimum cash values or paid-up insurance values for women than those required by a three-year setback. Companies have, however, been able to treat women and men equitably by the premium rates they charged and dividends they paid, which appropriately reflected the levels of such values.

Although we agree with Dr. Brown that observed mortality rates would justify the use of a setback that is more than three years for determining cash values and paid-up insurance values, we disagree strongly with her proposed solution. In response to an inadequate setback, she would



prohibit any setback at all. The effect of her proposal would be to require life insurance premiums charged women to be increased up to the level charged men. In contrast, we have supported amendments to state insurance laws, which have been enacted by nearly all states within the last few years, to permit the use of a six-year age setback in determining the minimum nonforfeiture values for individual life insurance policies. We anticipate that we will support future amendments to the state laws to base nonforfeiture values on mortality tables which are entirely separate for the two sexes. Such tables have been developed by the Society of Actuaries and are currently under consideration by the National Association of Insurance Commissioners. These developments, we anticipate, will enable insurers to further refine their methods of determining premium rates as well as liabilities and nonforfeiture values, with attendant further improved equity in the treatment of individuals of each sex.

Since the NAIC model regulation prohibits sex discrimination in the availability of coverage, and since the insurers are complying with that regulation on a nationwide basis, the practices criticized by Dr. Brown on page 8 are not, in fact, occurring.

With respect to the last section of Dr. Brown's statement, titled, "A Time for Change," it may be noted that the NAIC recognized, in 1975, the need for change. The model regulation prohibits sex discrimination in the availability of coverages. It explicitly does not prohibit cost-based pricing with respect to sex and does not require that normal pregnancy coverage be included in health insurance policies.

As Dr. Brown points out, "Women represent a great potential market for smart companies looking to the future." Life and health insurers have long since recognized this, and during the 1970's their sales and sales to women increased substantially. I am confident that that trend will continue if the insurers are permitted to serve the market as efficiently as they can. Cost-based pricing and the privilege of both buyers and sellers to decide what coverages they want to include are key ingredients of market efficiency.

In summary, Dr. Brown's statement makes the following arguments:

- (1) Women are working to support their families, and they need insurance;
- (2) Women are denied coverage and charged excessive rates;
- (3) The problems are pervasive throughout the industry;
- (4) Specifically, some health insurance policies do not provide benefits for costs connected with normal pregnancies on the same basis as benefits are provided for illness or accidents; most companies do not issue disability insurance policies to cover homemakers or part-time employees; and



(5) Insurance companies charge women more for annuities than men, but they do not use a large enough age setback for life insurance policies on women.

The conclusion reached is that S.2477 is needed to respond to these problems.

We agree only with Dr. Brown's first premise. We deny Dr. Brown's second argument, regarding availability of coverage and the idea that women are being charged excessive premiums for life and health insurance. In any event, the passage of S.2477 would require companies to increase the premiums they would charge women for life insurance up to the level of the premiums that they would charge men. Correspondingly, in the case of health insurance the passage of S.2477 would increase some premiums for women and some premiums for men, depending on age and the type of coverage.

We disagree with Dr. Brown's assertion that there are pervasive problems of discrimination throughout the life and health insurance business. Companies do, in fact, make coverage equally available to both women and men. There are strong economic incentives for companies to sell as much insurance as is sound to as many people as they can, not to limit it.

The specific examples cited by Dr. Brown do not support a conclusion that discrimination by sex in availability of coverage exists. Some group health insurance contracts cover medical expenses for normal pregnancies incurred by employees whether the employees are women or men. Others do not. The decision was usually made in order to use the money available for employee benefit plans as effectively as possible. In any event, employee benefit plans covering 15 or more employees now all cover normal pregnancies on the same basis as illnesses or accidents. The examples cited by Dr. Brown of economic circumstances where disability insurance covering lost wages is not generally sold would apply to any individual regardless of race, religion, sex or national origin. Thus, no discrimination is involved.

Finally, insurance companies do charge different premium rates based on age, sex, health, occupation, avocations and habits. Such distinctions are not adopted for the convenience of the insurer as Dr. Brown speculates. They are determined by the characteristics of the risks insured (i.e., people). The companies incur the expense of proper risk classification in order to treat policyholders equitably. It would be simpler and cheaper in the short run to charge everyone the same rate, regardless of the risk they represent. Such an approach was used by so-called "assessment societies" in the last century. The result in every case was financial failure as the group aged and claim costs increased. The equal premium got to be larger and larger; people dropped out and no new ones entered the group. The lesson was severe enough to convince both insurance companies and state



legislatures of the need to charge premiums appropriate to the risk involved.

Dr. Brown urges the passage of S.2477 to improve equity for customers. However, the enactment of S.2477 would, by preventing companies from recognizing differences by sex in mortality and health and disability claim costs, result in less equitable pricing.

We have explained why the three-year age setback has been used in life insurance and how it is being superseded by more refined rating procedures which are improving the equity between the sexes. The appropriate thing to do is to encourage the further improvement in equity--not to prohibit equitable rating. We, therefore, urge that Congress not impede the equitable treatment of customers of the life and health insurance businesses by enacting S.2477.

Sincerely,

*Barbara J. Lautzenheiser*

Barbara J. Lautzenheiser

BJL:sm



## American Council of Life Insurance

HEALTH INSURANCE ASSOCIATION OF AMERICA

1850 K Street, N.W.,  
Washington, D.C. 20006  
(202) 862-4000

1750 K Street, N.W.  
Washington, D.C. 20006  
(202) 331-1336

June 17, 1980

Senator Howard M. Metzenbaum  
Chairman, Subcommittee on Antitrust,  
Monopoly and Business Rights  
Committee on the Judiciary  
United States Senate  
Washington, DC 20510

Re: S. 2477 ("Nondiscrimination in Insurance Act")

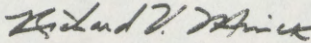
Dear Senator:

Enclosed is a memorandum in response to questions which you asked us at the April 30 hearing on the above-named bill.

The memorandum and its enclosures show, among other things, the differences between mortality rates observed among annuitants and those observed among insured lives. The memorandum also shows premium rates for individual life insurance differing by 12% or more between the sexes, and purchase rates for annuities differing by the same or less.

We will be happy to explain any aspects of this memorandum or furnish any additional information we can, should you desire.

Sincerely,



Richard V. Minck  
Executive Vice President  
American Council of Life  
Insurance

RVM:bs

Enclosure

[12 Enclosures are on file with  
the Subcommittee.]



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1850 K Street, N.W.,  
Washington, D.C. 20006  
(202) 862-4000

1750 K Street, N.W.  
Washington, D.C. 20006  
(202) 331-1336

June 24, 1980

Honorable Howard M. Metzenbaum  
Chairman, Subcommittee on Antitrust,  
Monopoly and Business Rights  
Committee on the Judiciary  
United States Senate  
Washington, D.C. 20510

Dear Senator Metzenbaum:

Re.: S. 2477, the "Nondiscrimination in Insurance Act"

The Council believes strongly that statements made in support of S. 2477 contain conclusions with regard to the findings of the Supreme Court in the Manhart case that are unsupported and unwarranted.

In support of the bill S. 2477, the "Nondiscrimination in Insurance Act," Senator Hatfield stated on the Senate floor on March 25, 1980, that recent court decisions have also begun "to chip away at the legal foundations underlying discrimination in insurance." According to Senator Hatfield:

"Last year, the Supreme Court, in the so-called Manhart\* decision, ruled it unlawful to treat 'individuals as simply components of a racial, religious, sexual or national class.' In this case, an employer-operated pension plan required women employees to make greater payments than men employees to the pension plan. According to figures filed in that case, the insurance industry's justification based on women having a longer life expectancy was a result of a distortion of the 'average' woman and the 'average' man."

Indeed, your statement on the Senate floor in support of S. 2477 is similar and reads, in part:

"The insurance industry argues that group discriminatory treatment can be justified on the basis of actuarial tables showing that females as a group live longer than males. On April 25, 1978, the U.S. Supreme Court squarely rejected this argument in the case of

\* 435 U.S. 702 (1978).



Los Angeles Department of Water and Power against Manhart. This case involved an employer-operated pension plan that required women to make greater payments than men to the pension fund. Applying title VII of the Civil Rights Act of 1964, the Court held that that act's prohibition against sex discrimination focuses on the individual. It stated that this provision 'precludes treatment of individuals as simply components of a racial, religious, sexual, or national class.' The Court also pointed out that 'there is no assurance that any individual woman (or man) will actually fit the generalization.'"

In order that the record of the hearing held by your Subcommittee on S. 2477 on April 30, 1980, be complete, we urge that the following information concerning the Manhart case be made a part of the record.

In the Manhart case, under a pension plan sponsored by the Los Angeles Department of Water and Power, female employees were required to make larger contributions than similarly-situated male employees for the same periodic pension benefit. The employer adopted this practice because women as a class live longer than men as a class, which leads to the result that the expected cost of lifetime pension benefits for a group of female retirees is greater than the expected cost of pension benefits for a group of similarly-situated male retirees. The employer also made contributions to the plan, and the plan provided equal periodic benefits for similarly-situated female and male employees. No private insurance company was involved in the administration or payment of benefits under the plan.

All that the Court ruled was that an employer may not require unequal contributions from similarly-situated male and female employees to a pension plan. In so doing, the Court recognized that the difference between female and male life expectancy has a cost impact on pensions and limited the scope of its decision so that there would not be a serious impact on traditional pension and insurance practices.

For example, the Court in the Manhart case stated:

"Although we conclude that the Department's practice violated Title VII, we do not suggest that the statute was intended to revolutionize the insurance and pension industries. All that is at issue today is a requirement that men and women make unequal contributions to an employer-operated pension fund." (Emphasis added)

Thus, the Court was not addressing the question of insurance company practices but whether employee contributions must be equal.

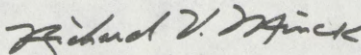


Recognizing that insurance companies charge a different price for insurance and annuities for similarly-situated men and women, the Court added further:

"Nothing in our holding implies that it would be unlawful for an employer to set aside equal retirement contributions for each employee and let each retiree purchase the largest benefit which his or her accumulated contributions could command in the open market. Nor does it call into question the industry's practice of considering the composition of an employer's work force in determining the probable cost of a retirement or death benefit plan."

The Court's language in Manhart makes it clear that the Court was concerned only with what is discrimination in an employee-employer relationship under Title VII of the 1964 Civil Rights Act with respect to mandatory unequal employee contributions, not with insurance company practices. Thus, it cannot be said that the Manhart case begins to chip away at insurance company practices for fairly pricing insurance products.

Sincerely,



Richard V. Minck  
Executive Vice President  
American Council of Life Insurance

RVM:kr



# American Council of Life Insurance

1850 K Street, N.W.  
Washington, D.C. 20006  
(202) 862-4202

Charles L. King  
Assistant General Counsel

August 19, 1980

Stewart W. Kemp, Esquire  
Subcommittee on Antitrust & Monopoly  
Committee on the Judiciary  
Room A-519, Annex  
119 D Street, N.E.  
Washington, D.C. 20510

Dear Sandy:

You will recall our memorandum responding to questions asked by Senator Metzenbaum of Barbara Lautzenheiser to which there were attached 12 enclosures.

Enclosure 3, a report of the Committee on Ordinary Insurance and Annuities, has recently been corrected by the Society of Actuaries with regard to pages 18 and 19. Copies of the corrected pages are enclosed and should be substituted for the original pages in the enclosure.

Best regards.

Sincerely,

*Charles L. King*  
Charles L. King

CLK:kr

Enclosures



TABLE 9  
COMPARISON OF MALE AND FEMALE MORTALITY EXPERIENCE  
STANDARD MEDICALLY EXAMINED ISSUES  
OBSERVED BETWEEN 1972 AND 1977 ANNIVERSARIES  
BY AGE AT ISSUE--POLICY YEARS 1-15 COMBINED  
Expected Deaths on 1965-70 Male Select Basic Table  
and 1965-70 Female Select Basic Table  
(Amounts Shown in \$1,000 Units)

| AGES AT<br>ISSUE | EXPOSED TO RISK |              | ACTUAL DEATHS* |           | MORTALITY<br>RATIO* |        | RATIO*<br>OF FEMALE<br>TO MALE<br>MORTALITY† |
|------------------|-----------------|--------------|----------------|-----------|---------------------|--------|----------------------------------------------|
|                  | Male            | Female       | Male           | Female    | Male                | Female |                                              |
| 0.....           | \$ 777,445      | \$ 350,314   | \$ 662         | \$ 173    | 85.5%               | 53.0%  | 53.1%                                        |
| 1.....           | 692,551         | 330,057      | 118            | 118       | 31.3                | 79.8   | 202.2                                        |
| 2-4.....         | 1,048,200       | 449,217      | 714            | 36        | 135.0               | 20.9   | 11.5                                         |
| 5-9.....         | 1,962,648       | 891,544      | 1,661          | 180       | 135.9               | 55.3   | 24.9                                         |
| 10-14.....       | 2,067,344       | 922,973      | 2,693          | 672       | 100.6               | 163.3  | 86.2                                         |
| 15-19.....       | 7,958,161       | 1,377,172    | 9,045          | 784       | 105.9               | 105.2  | 50.7                                         |
| 20-24.....       | 38,348,233      | 2,797,451    | 31,562         | 1,698     | 90.4                | 98.8   | 76.3                                         |
| 25-29.....       | 88,867,316      | 4,925,004    | 84,255         | 4,448     | 94.2                | 116.0  | 105.5                                        |
| 30-34.....       | 125,094,713     | 8,113,500    | 167,771        | 8,213     | 84.0                | 85.0   | 84.3                                         |
| 35-39.....       | 128,969,062     | 10,579,233   | 292,279        | 17,470    | 87.2                | 89.7   | 78.8                                         |
| 40-44.....       | 109,322,942     | 11,981,248   | 369,436        | 27,643    | 80.9                | 90.4   | 68.8                                         |
| 45-49.....       | 74,755,334      | 10,531,665   | 389,724        | 32,113    | 85.9                | 91.6   | 59.3                                         |
| 50-54.....       | 41,383,285      | 6,696,969    | 290,831        | 27,687    | 80.2                | 83.6   | 59.3                                         |
| 55-59.....       | 18,379,586      | 3,450,252    | 181,233        | 19,551    | 82.3                | 99.8   | 56.4                                         |
| 60-64.....       | 6,359,950       | 1,536,691    | 89,979         | 11,223    | 79.2                | 77.1   | 49.9                                         |
| 65-69.....       | 1,615,414       | 494,761      | 33,349         | 6,165     | 80.8                | 86.8   | 57.7                                         |
| 70 and over      | 327,103         | 129,340      | 10,271         | 2,719     | 82.0                | 68.3   | 67.1                                         |
| All ages         | \$648,829,287   | \$65,557,391 | \$1,955,583    | \$160,893 | 83.8%               | 89.0%  | 62.5%                                        |

\* Excluding war deaths.

† Female mortality ratios calculated on 1965-70 Male Select Basic Table.

TABLE 10  
COMPARISON OF MALE AND FEMALE MORTALITY EXPERIENCE  
STANDARD NONMEDICAL ISSUES  
OBSERVED BETWEEN 1972 AND 1977 ANNIVERSARIES  
BY AGE AT ISSUE--POLICY YEARS 1-15 COMBINED  
Expected Deaths on 1965-70 Male Select Basic Table  
and 1965-70 Female Select Basic Table  
(Amounts Shown in \$1,000 Units)

| AGES AT<br>ISSUE | EXPOSED TO RISK |               | ACTUAL DEATHS* |          | MORTALITY<br>RATIO*† |        | RATIO* OF<br>FEMALE<br>TO MALE<br>MOR-<br>TALITY† |
|------------------|-----------------|---------------|----------------|----------|----------------------|--------|---------------------------------------------------|
|                  | Male            | Female        | Male           | Female   | Male                 | Female |                                                   |
| 0.....           | \$ 11,362,760   | \$ 7,366,717  | \$ 6,204       | \$ 3,302 | 41.2%                | 37.1%  | 71.0%                                             |
| 1.....           | 4,494,781       | 2,770,820     | 1,758          | 821      | 63.1                 | 53.9   | 70.2                                              |
| 2-4.....         | 7,251,206       | 4,447,432     | 2,763          | 1,110    | 77.8                 | 62.7   | 64.0                                              |
| 5-9.....         | 10,583,173      | 5,501,256     | 5,684          | 1,312    | 99.2                 | 72.6   | 50.1                                              |
| 10-14.....       | 15,764,856      | 6,208,339     | 13,964         | 2,138    | 107.2                | 84.0   | 45.2                                              |
| 15-19.....       | 63,404,679      | 18,001,604    | 70,722         | 8,023    | 106.6                | 85.1   | 40.4                                              |
| 20-24.....       | 144,620,322     | 30,012,997    | 123,637        | 12,504   | 93.9                 | 72.4   | 51.5                                              |
| 25-29.....       | 112,257,200     | 23,787,289    | 105,216        | 12,912   | 96.4                 | 75.5   | 69.4                                              |
| 30-34.....       | 48,215,301      | 14,510,456    | 74,401         | 13,312   | 96.0                 | 80.6   | 71.1                                              |
| 35-39.....       | 17,480,422      | 8,072,206     | 49,317         | 13,339   | 105.8                | 92.7   | 68.1                                              |
| 40-44.....       | 3,664,896       | 3,278,559     | 15,421         | 7,081    | 105.8                | 103.4  | 63.1                                              |
| 45-49.....       | 531,872         | 340,165       | 1,687          | 903      | 69.8                 | 06.4   | 88.7                                              |
| 50 and over      | 259,182         | 48,705        | 1,550          | 148      | 82.6                 | 79.7   | 54.2                                              |
| All ages         | \$439,890,653   | \$124,346,545 | \$472,324      | \$76,905 | 97.7%                | 77.6%  | 58.2%                                             |

\* Excluding war deaths.

† Exposures not adjusted for distribution by age.

‡ Female mortality ratios calculated on 1965-70 Male Select Basic Table.



TABLE 11  
COMPARISON BY SEX OF MEDICAL AND NONMEDICAL EXPERIENCE\*  
BETWEEN 1972 AND 1977 ANNIVERSARIES  
BY AGE GROUP AT ISSUE AND DURATION (FIRST FIFTEEN POLICY YEARS)

| AGE GROUP<br>AT ISSUE                                                   | POLICY YEARS      |                           |                   |                           |                   |                           |                   |                           |                   |                           |
|-------------------------------------------------------------------------|-------------------|---------------------------|-------------------|---------------------------|-------------------|---------------------------|-------------------|---------------------------|-------------------|---------------------------|
|                                                                         | 1-2               |                           | 3-5               |                           | 6-10              |                           | 11-15             |                           | 1-15              |                           |
|                                                                         | Medi-<br>cal<br>% | Non-<br>medi-<br>cal<br>% | Medi-<br>cal<br>% | Non-<br>medi-<br>cal<br>% | Medi-<br>cal<br>% | Non-<br>medi-<br>cal<br>% | Medi-<br>cal<br>% | Non-<br>medi-<br>cal<br>% | Medi-<br>cal<br>% | Non-<br>medi-<br>cal<br>% |
| Male Experience—Mortality Ratios on 1965-70 Male Select Basic Table     |                   |                           |                   |                           |                   |                           |                   |                           |                   |                           |
| 0.....                                                                  | 91                | 28                        | 56                | 59                        | 48                | 86                        | 129               | 103                       | 84                | 41                        |
| 1-9.....                                                                | 11                | 56                        | 188               | 77                        | 79                | 99                        | 151               | 110                       | 117               | 85                        |
| 10-19.....                                                              | 96                | 108                       | 109               | 115                       | 112               | 108                       | 98                | 95                        | 105               | 107                       |
| 20-24.....                                                              | 102               | 109                       | 89                | 101                       | 87                | 99                        | 88                | 85                        | 90                | 99                        |
| 25-29.....                                                              | 130               | 109                       | 95                | 101                       | 94                | 98                        | 78                | 84                        | 94                | 96                        |
| 30-34.....                                                              | 83                | 100                       | 83                | 102                       | 85                | 98                        | 81                | 91                        | 81                | 95                        |
| 35-39.....                                                              | 84                | 126†                      | 98                | 114†                      | 89                | 102†                      | 82                | 101†                      | 87                | 105†                      |
| 40-44.....                                                              | 92                | 126†                      | 80                | 131†                      | 79                | 117†                      | 80                | 109†                      | 81                | 118†                      |
| 45-49.....                                                              | 89                | 68†                       | 85                | 67†                       | 87                | 69†                       | 85                | 94†                       | 86                | 74†                       |
| 50 and over.....                                                        | 81                | 80†                       | 75                | 104†                      | 82                | 68†                       | 83                | 74†                       | 81                | 83†                       |
| All ages.....                                                           | 88                | 97†                       | 83                | 104†                      | 84                | 100†                      | 83                | 91†                       | 84                | 98†                       |
| Female Experience—Mortality Ratios on 1965-70 Female Select Basic Table |                   |                           |                   |                           |                   |                           |                   |                           |                   |                           |
| 0.....                                                                  | 6                 | 27                        | 262               | 60                        | 38                | 73                        | 58                | 86                        | 53                | 37                        |
| 1-9.....                                                                | 65                | 52                        | 5                 | 62                        | 55                | 77                        | 67                | 83                        | 52                | 63                        |
| 10-19.....                                                              | 194               | 82                        | 100               | 79                        | 92                | 86                        | 149               | 99                        | 126               | 85                        |
| 20-24.....                                                              | 107               | 62                        | 30                | 74                        | 141               | 76                        | 104               | 89                        | 99                | 72                        |
| 25-29.....                                                              | 73                | 61                        | 159               | 76                        | 126               | 93                        | 109               | 80                        | 116               | 75                        |
| 30-34.....                                                              | 66                | 54                        | 84                | 87                        | 78                | 84                        | 105               | 97                        | 85                | 80                        |
| 35-39.....                                                              | 61                | 79†                       | 90                | 99†                       | 96                | 89†                       | 94                | 99†                       | 90                | 93†                       |
| 40-44.....                                                              | 73                | 104†                      | 95                | 109†                      | 85                | 107†                      | 98                | 113†                      | 90                | 108†                      |
| 45-49.....                                                              | 77                | 85†                       | 104               | 139†                      | 93                | 124†                      | 87                | 102†                      | 92                | 120†                      |
| 50 and over.....                                                        | 68                | 122†                      | 78                | 115†                      | 92                | 77†                       | 92                | 64†                       | 86                | 97†                       |
| All ages.....                                                           | 71                | 58†                       | 89                | 83†                       | 91                | 87†                       | 94                | 94†                       | 89                | 78†                       |
| Male Experience—Ratio of Nonmedical to Medical Mortality Ratios         |                   |                           |                   |                           |                   |                           |                   |                           |                   |                           |
| 0.....                                                                  | 31%               |                           | 105%              |                           | 179%              |                           | 80%               |                           | 47%               |                           |
| 1-9.....                                                                | 509               |                           | 41                |                           | 125               |                           | 73                |                           | 73                |                           |
| 10-19.....                                                              | 113               |                           | 106               |                           | 96                |                           | 98                |                           | 102               |                           |
| 20-24.....                                                              | 107               |                           | 113               |                           | 114               |                           | 97                |                           | 110               |                           |
| 25-29.....                                                              | 84                |                           | 106               |                           | 104               |                           | 108               |                           | 102               |                           |
| 30-34.....                                                              | 120               |                           | 123               |                           | 115               |                           | 108               |                           | 114               |                           |
| 35-39.....                                                              | 150†              |                           | 116†              |                           | 115†              |                           | 123†              |                           | 121†              |                           |
| 40-44.....                                                              | 137†              |                           | 164†              |                           | 148†              |                           | 136†              |                           | 146†              |                           |
| 45-49.....                                                              | 76†               |                           | 80†               |                           | 79†               |                           | 111†              |                           | 86†               |                           |
| 50 and over.....                                                        | 99†               |                           | 139†              |                           | 83†               |                           | 89†               |                           | 102†              |                           |
| Female Experience—Ratio of Nonmedical to Medical Mortality Ratios       |                   |                           |                   |                           |                   |                           |                   |                           |                   |                           |
| 0.....                                                                  | 450%              |                           | 23%               |                           | 192%              |                           | 148%              |                           | 70%               |                           |
| 1-9.....                                                                | 80                |                           | 1,240             |                           | 140               |                           | 124               |                           | 121               |                           |
| 10-19.....                                                              | 42                |                           | 79                |                           | 93                |                           | 66                |                           | 67                |                           |
| 20-24.....                                                              | 58                |                           | 247               |                           | 54                |                           | 86                |                           | 73                |                           |
| 25-29.....                                                              | 84                |                           | 48                |                           | 74                |                           | 73                |                           | 65                |                           |
| 30-34.....                                                              | 82                |                           | 104               |                           | 108               |                           | 92                |                           | 94                |                           |
| 35-39.....                                                              | 130†              |                           | 110†              |                           | 93†               |                           | 105†              |                           | 103†              |                           |
| 40-44.....                                                              | 142†              |                           | 115†              |                           | 126†              |                           | 115†              |                           | 120†              |                           |
| 45-49.....                                                              | 114†              |                           | 131†              |                           | 133†              |                           | 117†              |                           | 150†              |                           |
| 50 and over.....                                                        | 179†              |                           | 147†              |                           | 84†               |                           | 70†               |                           | 113†              |                           |

\* Excluding war deaths.

† Exposures adjusted for distribution by age within each five-year age group.