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Insurance, Public Policy, and Employment Discrimination

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I. INTRODUCTION

Insurance for liability resulting from illegal employment discrimination[1] is a relatively recent phenomenon.[2] It is not, however, a surprising phenomenon. Employer liability for illegal employment discrimination has been significant,[3] and em-

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1. A number of federal statutes prohibit certain types of employment discrimination. *See, e.g.*, Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1976) (prohibits certain discrimination in wage rates on the basis of sex); Age Discrimination in Employment Act of 1967, *as amended*, 29 U.S.C. §§ 621-634 (1976) (prohibits certain employment discrimination on the basis of age); Vocational Rehabilitation Act of 1973, *as amended*, 29 U.S.C. §§ 701-774 (1976) (prohibits certain handicap discrimination); Civil Rights Act of 1870, 42 U.S.C. § 1981 (1976) (prohibits certain racial discrimination); Civil Rights Act of 1871, 42 U.S.C. § 1983 (1976) (prohibits certain discrimination under color of state law); Civil Rights Act of 1964, *as amended*, 42 U.S.C. §§ 2000e to 2000e-17 (1976) [hereinafter cited as Title VII] (prohibits certain employment discrimination on the basis of race, color, religion, sex, or national origin). Most states, *see* 3 EMPL. PRAC. GUIDE (CCH) ¶¶ 20,005-29,335, and many local governments, *see, e.g.*, LINCOLN, NEB., MUN. CODE ch. 11, § 11.02-.08 (1980); MADISON, WIS., GEN. ORD. § 3.23 (1981), have similar prohibitions. This Article focuses on Title VII, the most far-reaching and comprehensive federal prohibition. C. ABERNATHY, CIVIL RIGHTS CASES AND MATERIALS 442 (1980).

2. Employer claims of insurance coverage for liability resulting from employment discrimination have created two basic issues: (1) whether the language in current liability policies covers such losses, *see* Appalachian Ins. Co. v. Liberty Mut. Ins. Corp., 507 F. Supp. 59 (W.D. Pa. 1981) (no coverage); Transport Ins. Co. v. Lee Way Motor Freight, Inc., 487 F. Supp. 1325 (N.D. Tex. 1980) (coverage); and (2) if there is such coverage under the policy, whether public policy prohibits recovery, *see* Solo Cup Co. v. Federal Ins. Co., 619 F.2d 1178 (7th Cir. 1980); Union Camp Corp. v. Continental Casualty Co., 452 F. Supp. 565 (S.D. Ga. 1978). Both of these issues, as the cases cited indicate, are of recent vintage. This Article focuses on public policy issues and not on issues of contract construction. The contract construction issues are relatively unimportant. In the absence of a public policy bar, contracts can be changed to provide or to preclude coverage for employment discrimination liability. *Cf.* Pratter & Baker, *The Status of Personal Liability and Comprehensive General Liability Insurance Coverage of Civil Rights Damages*, 48 INS. COUNS. J. 259, 266 (1981) (extent of municipalities' insurance coverage of civil rights damage awards may be negotiated).

3. During 1980, 29,000 persons received $43,000,000 in back pay and other benefits through EEOC efforts. *See* 106 LAB. REL. REP. (BNA) 70, 71 (1981).

ployers have predictably attempted to divert or at least to minimize its burdens.[4] Insurance is merely one employer strategy for accomplishing that end.[5] Because employers are in part held liable to deter future violations of the employment discrimination laws,[6] the extent to which employers can minimize their liability through insurance can undermine the deterrence goal of Title VII remedies.

This Article discusses the conflict between insurance and deterrence.[7] The conflict is interesting not only because it presents an insurance law issue—whether employers may insure against losses resulting from illegal employment discrimination, but also because it focuses on a classic but poorly understood employment discrimination issue—the nature of

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From July 1, 1979 to September 30, 1980, victims of Equal Pay Act violations obtained about $3,226,000 in benefits. *See* 107 LAB. REL. REP. (BNA) 410 (1981).

4. By obtaining insurance, employers can minimize the burden of potential employment discrimination liability by "substituting a fixed premium for larger potential losses." Comment, *Insurance Against Civil Liability for Employment Discrimination*, 80 COLUM. L. REV. 192, 192 (1980). The larger losses are then diverted to the insurer and indirectly to the pool of employers purchasing insurance. *See infra* note 97.

5. Employers have had mixed success in avoiding the burdens of employment discrimination liability. In United Steelworkers v. Weber, 443 U.S. 193 (1979), for example, the employer was "able to avoid all economic cost [for its past discriminatory activity] by diverting the loss to innocent white workers." Neuborne, *Observations on Weber*, 54 N.Y.U. L. REV. 546, 550 n.12 (1979). *See also id.* at 558. In Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77 (1981), however, the employer unsuccessfully attempted to force a labor union to absorb a portion of the loss. *Id.* at 94-95.

6. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975). *See also* International Bhd. of Teamsters v. United States, 431 U.S. 324, 324 (1977) (Congress vested courts with broad equitable powers in Title VII cases in part to prevent future discriminatory practices).

7. The conflict between insurance and deterrence has been a persistent plague on the insurance industry. In 1746, limits were placed on the issuance of marine insurance policies because such policies had not only undermined deterrence, but had also encouraged "pernicious practices, whereby great numbers of ships, with their cargoes, have either been fraudulently lost and destroyed, or taken by the enemy in time of war." Statute of George II, 1746, 19 Geo. 2, ch. 37. In France "life insurance was in early times prohibited, because it might operate as an incentive to those who would benefit by the termination of a life to hasten such termination." State *ex rel.* Attorney Gen. v. Merchant's Exch. Mut. Benevolent Soc'y, 72 Mo. 146, 158 (1880). *See also* Statute of George III, 1774, 14 Geo. 3, ch. 48. Fire insurance was also attacked as undermining deterrence, because "it was a temptation to commit arson or, at the least, to speculate." Comment, *Illegality as a Factor in Liability Insurance*, 41 COLUM. L. REV. 26, 26 (1941). Modern insurance innovations have not escaped criticism on this basis. *See, e.g.*, Pfennigstorf, *Environment, Damages, and Compensation*, 1979 AM. B. FOUND. RESEARCH J. 349 (insurance for damages caused by pollution); Note, *Limiting the Role of Insurance in Civil Rights Litigation: A Case for Re-establishing 42 U.S.C. § 1983 as an Enforcement Mechanism*, 5 J. CORP. L. 305, 337 (1980) (insurance for damages under 42 U.S.C. § 1983).

the discriminatory intent element in employment discrimination cases. The Article first describes the current, albeit inchoate, doctrine on the issue of whether employers may insure against illegal employment discrimination. The Article then critically examines the inchoate doctrine by evaluating its underlying assumptions. Finally, the Article rejects the inchoate doctrine and adopts a new approach that expands an employer's ability to insure against employment discrimination liability, while addressing more directly the potential conflict between insurance and deterrence.

II. THE INCHOATE DOCTRINE

The inchoate doctrine[8] treats the conflict between insurance and deterrence broadly by distinguishing between two general theories of discrimination—disparate treatment and disparate impact.[9] Although the inchoate doctrine prohibits insurance for liability resulting from disparate treatment discrimination,[10] it permits insurance for liability resulting from

8. This Article uses the term "inchoate doctrine" to refer to the emerging doctrine on the issue of insurance for employment discrimination liability.

9. For general discussions of the disparate treatment and disparate impact theories, see C. SULLIVAN, M. ZIMMER & R. RICHARDS, FEDERAL STATUTORY LAW OF EMPLOYMENT DISCRIMINATION §§ 1.3-1.6 (1980) [hereinafter cited as FEDERAL STATUTORY LAW]; Friedman, *The Burger Court and the Prima Facie Case in Employment Discrimination Litigation: A Critique*, 65 CORNELL L. REV. 1, 3-15 (1979).

10. Legg Mason Wood Walker, Inc. v. Insurance Co. of N. Am., 23 FEP Cases 778, 782 n.12 (D.D.C. 1980) (dicta). *See* Comment, *supra* note 4, at 199, 202-03. Two state insurance departments have also prohibited insurance for disparate treatment discrimination. In the Matter of Liability Insurance Proposed to Cover Liability for Acts of Discrimination Because of Race, Creed, Color or National Origin, Opinion of the New York Superintendent of Insurance (Sept. 26, 1963), *reprinted in* ONE HUNDRED AND FIFTH PRELIMINARY REPORT OF THE SUPERINTENDENT OF INSURANCE TO THE NEW YORK LEGISLATURE COVERING THE CALENDAR YEAR 1963 (1964) [hereinafter cited as New York Opinion]; 1945 Op. Ohio Att'y Gen. 295. Both opinions were written before the origin of disparate impact theory in Griggs v. Duke Power Co., 401 U.S. 424 (1971). Consequently, neither distinguishes between the two theories of discrimination. Both opinions discuss only insurance for discrimination liability that is based on proof of discriminatory intent. *See* New York Opinion, *supra*, at 7 ("[A] basic premise of any [discrimination] cause of action . . . is the existence on the defendant's part of some generally discriminatory attitude toward (or prejudice against) those of a particular race, creed, color or national origin."); 1945 Op. Ohio Att'y Gen. 295, 298 ("[A] violation of [Ohio's anti-discrimination statute] would not only be a crime but would necessarily amount to an intentional wrong committed against the aggrieved party."). Thus, they discuss only the issue of insurance for liability resulting from disparate treatment discrimination, and both opinions prohibit such insurance. The opinions are silent, however, on the issue of insurance for liability resulting from disparate impact discrimination.

disparate impact discrimination.[11] Proof differences between the two theories provide the rationale for the distinction.

In disparate treatment cases the crucial element is the employer's discriminatory intent.[12] Since direct evidence of discriminatory intent is rarely available,[13] the development of the law in this area has focused on the methods of proving or of rebutting inferences of discriminatory intent. In *McDonnell Douglas Corp. v. Green*,[14] for example, the Supreme Court held that an individual plaintiff could create an inference of discriminatory intent by showing:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[15]

The burden then shifts to the employer to rebut the inference by "articulat[ing] some legitimate, nondiscriminatory reason for the employee's rejection."[16] If the employer meets this burden, the plaintiff must show that the employer's "stated reason for . . . rejection was in fact pretext."[17] In attempting to prove

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11. Solo Cup Co. v. Federal Ins. Co., 619 F.2d 1178, 1187-88 (7th Cir. 1980). *See also* Union Camp Corp. v. Continental Casualty Co., 452 F. Supp. 565, 567-68 (S.D. Ga. 1978) (insurance to protect against liability from Title VII that does not cover intentional acts of discrimination is not against public policy). *See* Comment, *supra* note 4, at 199-203 (insurance is permissible if liability results from disparate impact discrimination and employer could not have prevented violation by exercising due care).

12. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981) ("[The plaintiff's] ultimate burden [is to persuade] the trier of fact that the defendant intentionally discriminated against the plaintiff."); Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577-78 (1978) ("Title VII prohibits [an employer] from having as a goal a work force selected by any proscribed discriminatory practice."); International Bhd. of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977) ("Proof of discriminatory motive is critical."). *See* FEDERAL STATUTORY LAW, *supra* note 9, at § 1.4; Friedman, *supra* note 9, at 10-11, 14; Mendez, *Presumptions of Discriminatory Motive in Title VII Disparate Treatment Cases*, 32 STAN. L. REV. 1129, 1129-30 & n.3 (1980); Note, *Section 1981: Discriminatory Purpose or Disproportionate Impact?*, 80 COLUM. L. REV. 137, 144 (1980).

13. For a rare case in which direct evidence was available, see Butta v. Anne Arundel County, 473 F. Supp. 83, 87 (D. Md. 1979) (employer told white applicant that he would prefer to fill position with a black).

14. 411 U.S. 792 (1973).

15. *Id.* at 802. *See also* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978); International Bhd. of Teamsters v. United States, 431 U.S. 324, 358 n.44 (1977).

16. McDonnell Douglas Corp. v. Green, 411 U.S. at 802. *See also* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256-58 (1981); Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24, 25 & n.2 (1979) (per curiam).

17. McDonnell Douglas Corp. v. Green, 411 U.S. at 804. *See also* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981).

pretext, the plaintiff is once again attempting to create an inference of discriminatory intent.[18] Inferences of discriminatory intent in disparate treatment cases can also be proven[19] or rebutted[20] by the use of statistics.[21]

By contrast, disparate impact discrimination focuses on the consequences of the employer's actions, not on the employer's intent.[22] The plaintiff establishes a prima facie case by proving that a facially neutral job requirement has an adverse impact on a protected group.[23] A plaintiff, for example, could establish

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18. Mosby v. Webster College, 563 F.2d 901, 903 (8th Cir. 1977) ("The plaintiff must then be given a fair opportunity to show that the reasons tendered by the employer are merely a pretext, thus demonstrating that the employer's conduct was in reality racially motivated."). *See* Friedman, *supra* note 9, at 11 ("proof of pretext translates into proof of discriminatory intent").

19. International Bhd. of Teamsters v. United States, 431 U.S. 324, 339-40 (1977).

20. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 579-80 (1978).

21. In International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977), Justice Stewart stated:

> [A]bsent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired. Evidence of longlasting and gross disparity between the composition of a work force and that of the general population thus may be [a telltale sign of purposeful discrimination].

Id. at 340 n.20 (bracketed language is from an earlier portion of the same paragraph). *See* D. BALDUS & J. COLE, STATISTICAL PROOF OF DISCRIMINATION (1980).

22. *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321, 328-29 (1977) ("The gist of [a disparate impact claim] does not involve an assertion of purposeful discriminatory motive. . . . [R]ather, [the gist is] that . . . facially neutral qualification standards work in fact disproportionately to exclude women from eligibility for employment."); International Bhd. of Teamsters v. United States, 431 U.S. 324, 336 n.15 (1977) ("Proof of discriminatory motive . . . is not required under a disparate-impact theory."); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) ("Title VII forbids the use of employment tests that are discriminatory in effect unless the employer meets [its burden of justification]."); Griggs v. Duke Power Co., 401 U.S. 424, 431-32 (1971) ("The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. . . . Congress directed the thrust of [Title VII] to the *consequences* of employment practices, not simply the motivation."). *See generally* FEDERAL STATUTORY LAW, *supra* note 9, § 1.5(a); Braun, *Statistics and the Law: Hypothesis Testing and Its Application to Title VII Cases*, 32 HASTINGS L.J. 59, 60 n.4 (1980); Friedman, *supra* note 9, at 11-13; Lerner, *Employment Discrimination: Adverse Impact, Validity, and Equality*, 1979 SUP. CT. REV. 17, 22-23; Maltz, *The Expansion of the Role of the Effects Test in Anti-discrimination Law: A Critical Analysis*, 59 NEB. L. REV. 345, 346-47 (1980); Note, *supra* note 12, at 144-45.

23. In Griggs v. Duke Power Co., 401 U.S. 424 (1971), for example, the plaintiffs established a prima facie case by presenting evidence that a high school education requirement excluded 88 percent of black males, but only 66 percent of white males. *Id.* at 430 n.6. *See also* Dothard v. Rawlinson, 433 U.S. 321 (1977), where height and weight standards operated to exclude more than 41 percent of the female population, but less than 1 percent of the male population. *Id.* at 329-30 & n.12.

a prima facie case by demonstrating that an employer's facially neutral requirement that all shipping employees weigh at least 180 pounds disqualifies a substantially greater proportion of women than men. "[G]ood intent or absence of discriminatory intent does not redeem" a requirement that has such a disparate impact.[24] Rather, the burden shifts to the employer to prove that the requirement is job related in that it bears a "manifest relationship to the employment in question."[25] The employer in the example may meet this burden by showing that all shipping employees have to lift materials weighing 100 pounds as part of their job and that generally only people weighing 180 pounds can do so. If the employer meets this burden, the plaintiff can still prevail by demonstrating that another requirement "without a similarly undesirable [sex-biased] effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.' "[26] The hypothetical plaintiff then may prove that a series of lifting tests would assure the employer that all shipping employees could lift 100 pounds but would have a less onerous impact on women.[27]

The inchoate doctrine focuses on these proof differences. Since the crucial element in disparate treatment discrimination

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24. Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

25. *Id. See also* New York City Transit Auth. v. Beazer, 440 U.S. 568, 587 & n.31 (1979); Dothard v. Rawlinson, 433 U.S. 321, 329 (1977); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).

26. Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973)). *See also* Dothard v. Rawlinson, 433 U.S. 321, 329 (1977).

27. This last burden may result in a more exact correlation between job duties and job requirements, but it probably has only a minimal impact on Title VII's goal of eliminating sex discrimination. Using the hypothetical in the text, the employer's job requirement that shipping employees must weigh at least 180 pounds does not correlate with the job duties of a shipping employee. Some persons weighing at least 180 pounds may not be able to lift 100 pounds while some under that weight may be able to lift 100 pounds. In addition, the employer's job requirement discriminates against women—the rule disqualifies a larger proportion of women than men. The plaintiff's proposed tests would assure the employer that every shipping employee can lift 100 pounds and would thus meet the correlation problem. The tests, however, may not meet, and indeed may aggravate, the sex discrimination problem. Assume, for example, that the percentage of women that can lift 100 pounds is the same as the percentage of women who weigh 180 pounds or over; assume further that the same is true for men. Under these assumptions, the plaintiff's tests will have an adverse impact on women equal to that of the employer's job requirement. The plaintiff's tests may have a slightly greater or lesser adverse impact on women than the employer's, but it is unlikely that the plaintiff's approach, at least in this hypothetical, would ever significantly lessen the adverse impact on women. Although this is a significant issue, it is beyond the scope of this Article. While this criticism does not completely undermine the desirability of this aspect of a disparate impact case, it does suggest that refinement is necessary.

is discriminatory intent, those liable are intentional wrongdoers who presumably may be deterred by the prospect of damages imposed by law.[28] Insurance, which protects these wrongdoers from damages, would undermine the deterrent effect of damages.[29] Hence, to preserve the deterrent effect, the doctrine prohibits insurance for such liability.[30] The doctrine, however, permits insurance for liability resulting from disparate impact discrimination.[31] Since liability for such discrimination is based on the consequences of an employer's actions and not on discriminatory intent, those liable are unintentional wrongdoers. Unintentional wrongdoers by definition cannot be deterred by the prospect of damages.[32] Because damages have no deterrent effect on disparate impact discrimination, there is no insurance-deterrence conflict and, therefore, no valid reason to prohibit insurance.[33]

III. ANALYSIS OF THE INCHOATE DOCTRINE

The inchoate doctrine rests on a number of assumptions about insurance, employment discrimination, and public policy. The doctrine only precludes insurance for intent-based discrimination and uses the disparate treatment/disparate impact distinction as its barometer of intent. The inchoate doctrine assumes that the disparate treatment/disparate impact distinction is an accurate and useful indicator of discriminatory intent and that discriminatory intent in employment discrimination law[34] invariably justifies a public policy restriction on insurance coverage. In addition, to the extent the inchoate doctrine

28. Indeed, deterrence is one of the primary goals of liability in Title VII cases. Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975).

29. Note, *supra* note 7, at 337-41; Comment, *supra* note 4, at 195, 199. *See also* Northwestern Nat'l Casualty Co. v. McNulty, 307 F.2d 432, 441-42 (5th Cir. 1962); Hartford Accident & Indem. Co. v. Village of Hempstead, 48 N.Y.2d 218, 227-28, 397 N.E.2d 737, 743-44, 422 N.Y.S.2d 47, 53-54, (1979); Note, *Torts—Insurance Coverage and Scope of Liability for Punitive Damages*, 58 OR. L. REV. 263, 268-73 (1979). *See generally* R. KEETON, BASIC TEXT ON INSURANCE LAW § 5.3(f) (1971); E. PATTERSON, ESSENTIALS OF INSURANCE LAW § 58, at 264 (2d ed. 1957).

30. *See supra* note 10 and accompanying text.

31. *See supra* note 11 and accompanying text.

32. Comment, *supra* note 4, at 199. *See also* R. KEETON, *supra* note 29, § 3.3(a).

33. Indeed, public policy reasons exist for encouraging such insurance. Public interests in freedom of contract, *see* Solo Cup Co. v. Federal Ins. Co., 619 F.2d 1178, 1187-88 (7th Cir. 1980); Union Camp Corp. v. Continental Casualty Co., 452 F. Supp. 565, 568 (S.D. Ga. 1978), and in equitable compensation schemes, *see infra* notes 85-100 and accompanying text, support a public policy permitting such insurance.

34. *See infra* notes 58-84 and accompanying text.

precludes insurance coverage, it assumes that the benefits of deterrence outweigh the benefits of insurance compensation. Finally, the inchoate doctrine assumes that public policy must be used to control abuses that would result from a less restrained operation of the insurance market.

A. The Disparate Treatment/Disparate Impact Distinction

The basis of the inchoate doctrine, the disparate treatment/disparate impact distinction,[35] is neither an accurate nor useful indicator of discriminatory intent. It is not accurate because disparate impact cases may be intent-based; it is not useful because it is often impossible to determine whether liability is based upon disparate treatment or disparate impact discrimination.

Despite the conventional wisdom to the contrary, disparate impact cases may be intent-based. Although Title VII plaintiffs do not have to prove discriminatory intent to establish a prima facie case of disparate impact discrimination,[36] it does not follow that discriminatory intent is always absent. Rather, it is equally, if not more,[37] plausible that discriminatory intent is present but unproven.[38] Moreover, in some disparate impact cases discriminatory intent may be clearly present. If the employer proves that the neutral criterion is job-related, the plain-

35. *See supra* notes 28-33 and accompanying text.

36. *See supra* notes 22-24 and accompanying text.

37. To establish a prima facie case of disparate impact discrimination, the plaintiff must demonstrate that a facially neutral employment criterion has an adverse impact on a protected group. *See supra* note 23 and accompanying text. Evidence of such an adverse impact may be evidence of discriminatory intent. *See* Washington v. Davis, 426 U.S. 229, 242 (1976) ("Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another."). Thus, in every successful disparate impact case, there is some evidence of discriminatory intent.

38. One rationale for a finding of disparate impact discrimination emphasizes the employer's motive in choosing a facially neutral criterion with a disparate impact:

> The theory is that if the employer chose the seemingly innocent criterion not to further his business interests but merely to satisfy his taste for discrimination (or that of his customers or workers), then the employment decision adversely affecting Negroes is not based on the innocent criterion but instead on race. Race is the "real" basis of the job allocation.

Fiss, *A Theory of Fair Employment Laws*, 38 U. Chi. L. Rev. 235, 297 (1971). Professor Fiss rejects this psychological rationale in favor of a "functional equivalence" rationale, which examines the allegedly racist criterion in terms of how closely it equals a requirement clearly based on race. *Id.* at 297-99. This latter rationale also recognizes that discriminatory intent may be present and relevant in a disparate impact case. *Id.* at 299-300.

tiff may prevail by demonstrating that another criterion would also serve the employer's legitimate interest but would have a less adverse impact on the protected class.[39] The Supreme Court has stated that such a showing "would be evidence that the employer was using its [facially neutral job requirement] merely as a 'pretext' for discrimination."[40] Since "pretext" in employment discrimination law connotes a cover-up for illegal discriminatory intent,[41] such disparate impact cases are blatantly intent-based.[42] Similarly, a plaintiff may establish a prima facie disparate impact claim by proving that a written examination forming part of the hiring process has a disparate impact on blacks. The employer may present a "bottom line" defense[43] demonstrating that, despite the effects of the written examination, the total hiring process does not have a disparate impact on blacks. This bottom line defense will be successful[44] unless the plaintiff demonstrates that the employer intentionally used the written examination to distort the hiring process.[45] Thus, discriminatory intent is again conspicuously present in a disparate impact case. To the extent that the inchoate doctrine permits insurance for disparate impact discrimination because of the presumed absence of discriminatory intent, the doctrine is imprecise.

The disparate treatment/disparate impact distinction used as an indicator of the propriety of insurance, however, is not only imprecise; it also lacks usefulness. The distinction is not useful because it is often impossible to determine whether the basis of liability is disparate treatment or disparate impact.

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39. *See supra* notes 26-27 and accompanying text.

40. Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804-05 (1973)).

41. *See* FEDERAL STATUTORY LAW, *supra* note 9, § 1.5(e), at 58, § 1.6(a), at 64.

42. *See* Friedman, *supra* note 9, at 14-15.

43. *See generally* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1191-93 (1976); Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607 (1980).

44. *See, e.g.*, Friend v. Leidinger, 588 F.2d 61, 66 (4th Cir. 1978); Rule v. Ironworkers Local 396, 568 F.2d 558, 565 n.10 (8th Cir. 1977); Smith v. Troyan, 520 F.2d 492, 497-98 (6th Cir. 1975); Kirkland v. New York State Dep't of Correctional Serv., 520 F.2d 420, 425 (2nd Cir. 1975); Brown v. New Haven Civil Serv. Bd., 474 F. Supp. 1256, 1261-63 (D. Conn. 1979); Lee v. City of Richmond, 456 F. Supp. 756, 771 (E.D. Va. 1978). *But see* Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364, 1372-73 (5th Cir. 1974); League of United Latin Am. Citizens v. City of Santa Ana, 410 F. Supp. 873, 894-95 (C.D. Cal. 1976).

45. Brown v. New Haven Civil Serv. Bd., 474 F. Supp. 1256, 1263 (D. Conn. 1979) ("[The] *intentional* use of components having a disproportionate effect on minority groups [may] establish a *prima facie* case of violation of Title VII, even if the total hiring process results in balanced results.").

The obvious example is a case that is settled out of court. Although the complaints in many suits allege both disparate treatment and disparate impact discrimination, settlements usually do not specify the basis of liability,[46] and may specifically deny that any illegal discrimination occurred.[47] In either case, the disparate treatment/disparate impact distinction is not useful. Rather, since the inchoate doctrine prohibits insurance coverage for disparate treatment discrimination but permits it for disparate impact discrimination, an employer's claim for insurance coverage would necessitate litigation of the underlying discrimination claim to determine whether such coverage is appropriate.[48]

It is often impossible to determine whether the basis of liability is disparate treatment or disparate impact discrimination even if the parties have fully litigated the case. In *Legg Mason Wood Walker, Inc. v. Insurance Co. of North America*,[49] for example, the plaintiff presented a prima facie case of disparate treatment discrimination.[50] The burden then shifted to the employer to articulate a legitimate, nondiscriminatory reason for its refusal to hire the plaintiff.[51] To meet its burden, the employer cited two facially neutral reasons for refusing to hire the plaintiff: a lack of sales experience and inadequate results on a written test which purportedly measured sales motivation.[52] The plaintiff then successfully argued that the proffered reasons were not legitimate and nondiscriminatory, because they

46. *See, e.g.*, Union Camp Corp. v. Continental Casualty Co., 452 F. Supp. 565, 566 (S.D. Ga. 1978).

47. *See, e.g.*, United Steelworkers v. Weber, 443 U.S. 193, 210 (1979) (Blackmun, J., concurring).

48. If litigation is necessary to determine the propriety of insurance coverage, the employer's motivation to settle to avoid expensive litigation is undercut. By requiring litigation of the underlying claim to determine the propriety of insurance, the inchoate doctrine may thus undermine Title VII's preference for resolving employment discrimination suits through conciliation and voluntary settlement. United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826, 837 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976); Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 498 (5th Cir. 1968).

49. 23 FEP Cases 778 (D.D.C. 1980). The court in *Legg Mason* considered the issue of insurance coverage for an employer found guilty of employment discrimination in an earlier action. The earlier case, Kinsey v. First Regional Sec., Inc., 557 F.2d 830 (D.C. Cir. 1977), considered the discrimination issue and the *Legg Mason* court relied upon it.

50. Kinsey v. First Regional Sec., Inc., 557 F.2d 830, 836, 838 (D.C. Cir. 1977). *See supra* note 15 and accompanying text.

51. Kinsey v. First Regional Sec., Inc., 557 F.2d 830, 836-38 (D.C. Cir. 1977). *See supra* note 16 and accompanying text.

52. Kinsey v. First Regional Sec., Inc., 557 F.2d 830, 836 (D.C. Cir. 1977).

had a disparate impact.[53] Thus, the plaintiff successfully used disparate impact theory to attack the employer's reasons for the adverse employment decision and thereby revived his disparate treatment claim. When the employer claimed insurance coverage, then, the issue was whether the discrimination was intentional or unintentional[54] or, stated differently, whether the basis of liability was disparate treatment or disparate impact discrimination. The court held that the basis of liability was disparate impact and, hence, that insurance coverage was appropriate.[55] Because the theories of discrimination were intertwined,[56] the court with equal justification could have ruled that the basis of liability was disparate treatment discrimination.[57]

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53. 23 FEP Cases at 783 ("[The Court of Appeals] concluded only that Legg Mason's employment practices had a discriminatory impact and that the asserted reasons for not hiring Mr. Kinsey were not sufficiently justified by business necessity.").

54. In *Legg Mason*, the insurance contract excluded coverage for intentional discrimination. 23 FEP Cases at 782. Thus, the intention issue was discussed to determine the contractual issue of whether coverage was provided. The Court recognized, however, that if the contract had not excluded intentional discrimination, the inchoate doctrine would have done so. *Id.* at 782 n.12. Consequently, resolution of the intention issue would have been necessary to determine whether the inchoate doctrine rather than the contract precluded coverage.

55. 23 FEP Cases at 783 n.13 ("An analysis of the Court of Appeals' opinion reveals that the Court of Appeals did not find intentional discrimination."). Although discussing the plaintiff's disparate treatment claim, the court evidently concluded that a disparate impact claim had been proven and that "[n]othing more was required to impose liability on Legg Mason, and nothing more was found." *Id.* at 783.

56. The *Legg Mason* opinion illustrates another reason the disparate treatment/disparate impact distinction has limited utility: the courts do not understand it. The court began its discussion by reciting the elements of a disparate treatment case. 23 FEP Cases at 783. The court then displayed its misunderstanding by stating that intent to discriminate was not an element of such a case, citing Griggs v. Duke Power Co., 401 U.S. 424 (1971), the seminal disparate impact case. Intent to discriminate is the crucial element of a disparate treatment case but is not an essential element of a disparate impact case. *See supra* notes 15-22 and accompanying text. The court further demonstrated its misunderstanding by arguing that "a finding of pretext does not necessarily mean that the discrimination was intentional." 23 FEP Cases at 783. The court never explains its novel understanding of pretext; it would have been difficult to do so since "proof of pretext translates into proof of discriminatory intent." Friedman, *supra* note 9, at 11 (citing International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977)). *See supra* notes 17-18 and accompanying text.

57. Indeed, the argument that the basis of liability was disparate treatment discrimination is stronger. The plaintiff presented a basic disparate treatment claim. Disparate impact was only used to rebut the reasons proffered by the employer for the adverse employment decision. When those reasons were rebutted, the plaintiff's basic disparate treatment claim was revived, and that claim was the basis of liability. *See supra* text accompanying notes 50-54.

B. DISCRIMINATORY INTENT

The disparate treatment/disparate impact distinction is therefore neither an accurate nor useful indicator of discriminatory intent. If a precise indicator could be found, however, the inchoate doctrine would prohibit insurance coverage for losses resulting from cases in which discriminatory intent was present.[58] Discriminatory intent in employment discrimination is not invariably the type of intent that justifies a public policy limitation on insurance coverage.

Intentional misconduct by the insured does not always justify a prohibition on insurance coverage. To the contrary, the payment of insurance is permitted for many intention-based actions. A driver who intentionally exceeds the speed limit and becomes involved in an accident will not be denied insurance coverage.[59] Nor will insurance coverage necessarily be denied for a person who commits a battery.[60] Thus, a special type of intentional misconduct is necessary to justify a public policy prohibition on insurance.[61] One commentator identified this type of intentional misconduct as "designing" intent—the insured must have committed the act creating the insured loss with the "design of producing loss under his insurance contract."[62]

Designing intent, however, is not a satisfactory description of the type of intent that may justify a public policy limitation. Assume, for example, that only the prospect of liability prevents a specific employer from engaging in employment discrimination. The employer insures against losses resulting from employment discrimination, engages in employment dis-

58. *See supra* notes 28-33 and accompanying text.

59. Messersmith v. American Fidelity Co., 232 N.Y. 161, 133 N.E. 432 (1921).

60. New Amsterdam Casualty Co. v. Jones, 135 F.2d 191 (6th Cir. 1943). *Messersmith* and *Jones* also indicate that illegal intentional misconduct does not require restrictions on insurance coverage. *See also* Zurich Gen. Accident & Liab. Ins. Co. v. Flickinger, 33 F.2d 853, 855-56 (4th Cir. 1929) (negligence in drinking illegal bootleg whiskey did not preclude insurance recovery for death); Dent v. Virginia Mut. Benefit Life Ins. Co., 226 A.2d 166, 168 (D.C. Ct. App. 1967) (recovery permitted when death of insured resulted from insured's criminal conduct).

61. *See* E. PATTERSON, *supra* note 29, § 58, at 258-59 ("It is not enough [to exempt the insurer from liability] that the insured *intended to do* the act that was a cause of the insured event; it must further be shown that he did it with the *design* of producing loss under his insurance contract."); Comment, *supra* note 4, at 196 ("The test [of whether public policy should bar insurance coverage] is not simply whether the insured acted intentionally or unintentionally, but rather whether he may have been stimulated by the prospect of indemnification.").

62. E. PATTERSON, *supra* note 29, § 58, at 258.

crimination, and is then found liable for losses resulting from that action. The employer has not acted with the "design of producing loss under his insurance contract;" the insurance proceeds will go to the victims of the discrimination, not to the employer. Rather, the employer had other motives, possibly to satisfy a desire for discrimination[63] or to maintain a contented workforce.[64] Nevertheless, the employer's intentional misconduct should preclude insurance coverage. The employer calculated that without insurance its purposes did not outweigh the potential of liability; but with insurance the employer calculated that its discriminatory purposes did outweigh the potential costs of liability.[65] Thus, the conflict between deterrence and insurance is the sharpest when this type of "calculating" intent[66] is present. It is this type of intent that justifies a public policy limitation on insurance coverage.[67]

Often a legal finding of discriminatory intent in an employment discrimination case does not ensure the presence of the calculating intent that would justify a public policy limitation on insurance coverage. In cases relying on statistical evidence,[68] a court may make a legal finding of discriminatory intent even though "the ultimate question to which the evidence is addressed does not seem to be the employer's motivation."[69] Rather, statistical evidence in a disparate treatment case[70] will

63. Fiss, *supra* note 38, at 250, 253.

64. *Id.* at 258.

65. The employer, of course, hopes that its discriminatory activities would escape detection, and hence there would be no liability under the policy. Even with insurance the employer would suffer certain adverse consequences from liability. For example, the employer's insurance premiums would probably increase in price.

66. Calculating intent should encompass every instance of designing intent and, in addition, certain other instances of intentional misconduct such as the one described in the text. *See supra* text accompanying notes 62-65.

67. There may, of course, be reasons other than deterrence for restricting insurance coverage of employment discrimination liability. Some, such as avoiding employer profit from illegal employment discrimination, may be closely intertwined with deterrence. *See infra* notes 143-46 and accompanying text. Others may be relatively independent of the deterrence rationale, for example, expressing social condemnation of illegal employment discrimination. *See infra* note 156.

68. *See supra* notes 19-21 and accompanying text.

69. T. EISENBERG, CIVIL RIGHTS LEGISLATION 603 (1981). *See also* Cohn, *On the Use of Statistics in Employment Discrimination Cases*, 55 IND. L.J. 493, 493 (1980) ("[Statistical e]vidence . . . is deemed to represent the outcome of employers' discriminatory practices, including practices the description of which does not indicate any overt discriminatory intent.").

70. This section discusses disparate treatment cases because a legal finding of discriminatory intent is a legal requisite to liability. *See supra* note 12 and accompanying text. A legal finding of discriminatory intent is not a prereq-

probably indicate a disparity between the composition of an employer's work force and that of the general population from which the employer draws its work force.[71] For example, the employer's work force may be 2 percent Mexican-American, while the general population in the area is 25 percent Mexican-American. Because the law of employment discrimination assumes that nondiscriminatory hiring practices will result in a work force representative of the racial and ethnic composition of the general population,[72] such statistics will shift the burden to the employer to explain the disparity.[73] If the employer fails to present any evidence, the statistics may result in a legal finding of discriminatory intent[74] even though the statistics fall short of convincingly demonstrating that the employer engaged in intentional discrimination.[75] Indeed, even if the statistics

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uisite for finding disparate impact liability. *See supra* note 22 and accompanying text.

71. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 339-40 n.20 (1977); Hazelwood School Dist. v. United States, 433 U.S. 299, 307-08 (1977). *See generally* Note, *Beyond the Prima Facie Case in Employment Discrimination Law: Statistical Proof and Rebuttal*, 89 HARV. L. REV. 387, 393 (1975) [hereinafter cited as *Beyond the Prima Facie Case*]; Note, *Evidence: Statistical Proof in Employment Discrimination Cases*, 28 OKLA. L. REV. 885, 887 (1975) [hereinafter cited as *Evidence*]; Note, *Employment Discrimination: Statistics and Preferences Under Title VII*, 59 VA. L. REV. 463, 469 (1973) [hereinafter cited as *Statistics and Preferences*].

72. International Bhd. of Teamsters v. United States, 431 U.S. 324, 339-40 n.20 (1977).

73. *See* D. BALDUS & J. COLE, *supra* note 21, § 1.22, at 27; FEDERAL STATUTORY LAW, *supra* note 9, § 1.8, at 80. Baldus and Cole claim that statistics have been assigned a burden-shifting function in discrimination law because of the inherent limits of statistics as a means of proving intentional discrimination. D. BALDUS & J. COLE, *supra* note 21, at 26-27.

74. *Cf.* Parham v. Southwestern Bell Tel. Co., 433 F.2d 421 (8th Cir. 1970) (statistics indicating an extraordinarily small number of black employees established a violation of Title VII).

75. Although a significant disparity gives rise to an inference that employees were not selected at random and, hence, that unlawful discrimination occurred, *see* International Bhd. of Teamsters v. United States, 431 U.S. 324, 339-40 n.20 (1977), that is not necessarily a valid inference. For example, the statistics may be based on a small sample and, therefore, chance rather than unlawful discrimination may have caused the disparity. *See id.* (citing Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605, 620-21 (1974)). Similarly, the inference may not be valid if the general population figures are drawn from an area that does not coincide with the area from which the employer draws its work force or would draw its work force in the absence of discrimination, *see* Hazelwood School Dist. v. United States, 433 U.S. 299, 310-12 (1977); *Statistics and Preferences, supra* note 71, at 469, or if the general population figures do not take into account special qualifications that are required to fill particular jobs. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 339-40 n.20 (1977); Hazelwood School Dist. v. United States, 433 U.S. 299, 308 n.13 (1977). *See generally Developments in the Law—Employment Discrimination*

were more sophisticated[76] and the existence of discrimination were quite probable, statistics themselves cannot conclusively indicate whether the discrimination was intentional or unintentional,[77] and they certainly cannot isolate the more obtuse calculating intent that would justify the prohibition of insurance coverage.[78] Such sophisticated statistics are nevertheless sufficient to support a legal finding of discriminatory intent and, hence, to trigger Title VII liability.[79]

Calculating intent may also be absent when the insured employer is found liable not for the employer's own conduct but for "an employee's act which he has not encouraged or, in-

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and Title VII of the Civil Rights Act of 1964, 84 HARV. L. REV. 1109, 1153-54 (1971).

76. This assumes that the statistics eliminate the obvious reasons for the disparity, other than discrimination, and are based on a sample size sufficient to account for the possibility of chance. *See generally* D. BALDUS & J. COLE, *supra* note 21; FEDERAL STATUTORY LAW, *supra* note 9, § 1.8(b), at 78.

77. *See* D. BALDUS & J. COLE, *supra* note 21, § 1.22, at 26 ("[E]ven under ideal conditions statistics cannot conclusively prove intentional discrimination."); FEDERAL STATUTORY LAW, *supra* note 9, § 1.8(b), at 80 ("[A] rejection of [the null] hypothesis [that the employer did not discriminate] does not mean that the employer is conclusively found to have discriminated."). *Cf. Statistics and Preferences, supra* note 71, at 479 (statistics may indicate discrimination even though the employer's policies are inadvertently rather than intentionally discriminatory.).

78. Professor Tribe has discussed the inherent inability of statistics to "prove" intent and, by necessary implication, designing intent, and the resultant tendency to emphasize those "objectively verifiable" factors that statistics can prove. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329 (1971). In the context of disparate treatment discrimination, a "soft" variable—discriminatory intent—is formally dispositive. *See supra* note 12 and accompanying text. Nevertheless, "hard" variables—statistical disparities between the racial and sexual composition of an employer's work force and the general population—have become dispositive even though they are not linked to the employer's conduct or state of mind. *See* Tribe, *supra*, at 1361-66.

79. *See, e.g.*, International Bhd. of Teamsters v. United States, 431 U.S. 324, 339-43 (1977); Sweeney v. Board of Trustees, 569 F.2d 169, 177-79 (1st Cir. 1977), *remanded*, 439 U.S. 24 (1978).

This exposition is not intended as a criticism of the use of statistical evidence in employment discrimination cases. On the contrary, since direct evidence of discriminatory intent is rarely available, *see supra* notes 59-67 and accompanying text, statistical evidence must be available as a burden-shifting mechanism if the employment discrimination laws are to have any effectiveness. Indeed, the current anti-employment discrimination effort is probably doomed to limited effectiveness even with the use of statistical evidence. *See* D. BELL, RACE, RACISM AND AMERICAN LAW § 9.13 (1980); Freeman, *Legitimizing Racial Discrimination Through Anti-discrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978). *Cf.* L. THUROW, THE ZERO-SUM SOCIETY 184-85 (1980) ("[E]qual opportunity programs have not succeeded in opening the economy to greater employment for blacks. . . . [T]here is nothing that would lead anyone to predict improvements in the near future.").

deed, which he has warned his employees against committing."[80] In that situation the employer through its agent has acted with discriminatory intent,[81] but the employer probably has not acted with the type of calculating intent[82] that would justify a public policy prohibition on insurance coverage.[83] That is, the employer did not intend to neglect its anti-discrimination duties and thereby undermine the deterrence goal of Title VII, but rather intended to insure against liability resulting from unauthorized and unexpected discrimination by employees.

A legal finding of discriminatory intent can therefore be found in a Title VII case even in the absence of any evidence relating directly to the employer's motivation. It is, however, the employer's motivation that may warrant a prohibition on insurance coverage.[84] As a result, the inchoate doctrine's reliance on intentional discrimination to justify public policy-based restrictions on insurance coverage for employment discrimination liability is ill-advised. A public policy restriction is justified only by misconduct performed with calculating intent, and employment discrimination litigation in most cases does not address that issue.

C. COMPENSATION

Compensation for the victims of illegal employment dis-

80. New York Opinion, *supra* note 10, at 201.

81. *See, e.g.*, Tidwell v. American Oil Co., 332 F. Supp. 424, 436 (D. Utah 1971) (" 'The modern corporate entity consists of the individuals who manage it, and little, if any, progress in eradicating discrimination in employment will be made if the corporate employer is able to hide behind the shield of individual employee action.' "); EEOC Decision No. 71-1442, EEOC Decisions (CCH) ¶ 6216 (1971) (quoting EEOC Post-trial Memorandum of Law at 6) (employer liable for employee's discriminatory acts even though employer disclaimed responsibility for personal bias and promised dismissal of employees who failed to conform to the company's nondiscrimination policy).

82. In some circumstances, however, the employer may have acted with calculating intent. Calculating intent may be present, for example, if the employer because of the protection afforded by insurance coverage relaxed its active, anti-discrimination supervision of employees, and that relaxation resulted in the discrimination creating the insured loss. *See infra* notes 147-48 and accompanying text. *See also* New York Opinion, *supra* note 10, at 201.

83. Public policy permits insurance coverage for an employer who is liable for an assault by an employee. *See, e.g.*, Floralbell Amusement Corp. v. Standard Sur. & Casualty Co., 170 Misc. 1003, 1008, 9 N.Y.S.2d 959, 963 (1937); Robinson v. United States Fidelity & Guar. Co., 159 Miss. 14, 21, 131 So. 541, 543 (1931). *But see* New York Opinion, *supra* note 10, at 201; Comment, *Liability Insurance and Assault and Battery: Coverage and Damages Problems*, 50 CORNELL L.Q. 506, 509-10 (1965).

84. *See supra* notes 59-67 and accompanying text.

crimination is one of the twin goals of Title VII remedies.[85] The inchoate doctrine prohibits insurance coverage for some disparate treatment discrimination and, as a result, may adversely affect the compensation goal.[86] Thus, the inchoate doctrine assumes that the compensation benefits of insurance coverage are occasionally outweighed by the adverse effect insurance coverage may have on deterrence.

There are three primary compensation benefits of insurance coverage for employment discrimination liability. The most obvious benefit is that insurance coverage would assure full compensation when an employer was insolvent or otherwise financially unable to pay for the damages resulting from its illegal discrimination. Similarly, insurance may permit compensation when in the absence of insurance it would be denied, because such compensation would have an adverse impact on innocent third parties.[87]

Insurance may also permit more adequate compensation to persons other than the direct victims of discrimination.[88] Assume, for example, that a black employee has proven illegal discrimination and is seeking retroactive seniority as a remedy. The black employee is presumptively entitled to that relief[89] even though it may undermine certain contractual rights and expectations of white employees.[90] This "sharing of the burden"[91] of past discrimination is appropriate, even though the sharing is forced upon arguably innocent[92] employees rather

85. Franks v. Bowman Transp. Co., 424 U.S. 747, 763 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975). The other goal is deterrence. *See supra* note 28.

86. The payment of a large award of back pay to a class and imposition of attorney's fees in a discrimination case conceivably could cripple the employer financially or even put the offending company out of business. Conversely, insurance against liability for discriminatory practices in employment could benefit discriminatees. Where a class of employees is entitled to back pay under a court order and the employer is financially unable to comply with the same, insurance would provide the mandated compensation.

Union Camp Corp. v. Continental Casualty Co., 452 F. Supp. 565, 568 (S.D. Ga. 1978) (footnote omitted). *See* Comment, *supra* note 4, at 200.

87. *See, e.g.*, Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 721-23 (1978); Peters v. Wayne State Univ., 476 F. Supp. 1343, 1351 (E.D. Mich. 1979). *See* Comment, *supra* note 4, at 200.

88. Situations in which compensation would not be made but for the presence of insurance coverage are presumably quite rare. *See* Union Camp Corp. v. Continental Casualty Co., 452 F. Supp. 565, 568 n.2 (S.D. Ga. 1978).

89. Franks v. Bowman Transp. Co., 424 U.S. 747, 779 n.41 (1976).

90. *Id.* at 776-79.

91. *Id.* at 777.

92. The *Franks* majority believed that the white employees were merely "arguably innocent," *id.* at 774, presumably because they received unjust bene-

than upon the employer perpetrating the discrimination.[93] If insurance were available to soften the impact on employers,[94] courts may be more willing to compensate these arguably innocent, white employees. Providing compensation would remedy the lost contractual expectations of white employees and may reduce friction between black victims and white employees who become co-workers in such circumstances.

Insurance coverage for employment discrimination liability would also provide employers with a cost spreading device. Without insurance, individual employers would initially bear the cost of employment discrimination liability.[95] Those employers would then distribute that cost among stockholders, customers, and employees.[96] The actual distribution would depend upon a complex of factors such as the market strength of the company and the strength of the employees' labor organization. If insurance were available, several employers would bear the initial cost, and it would then be spread among a much larger number of stockholders, customers, and employees.[97]

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fits from their employer's discriminatory practices. Other Justices, however, believed that the employees were "perfectly innocent." *Id.* at 788 (Powell, J., dissenting).

93. *Id.* at 787-89. *See also* Waters v. Wisconsin Steel Works of Int'l Harvester Co., 502 F.2d 1309, 1320 (7th Cir. 1974) (retroactive seniority "would be tantamount to shackling white employees with a burden of a past discrimination created not by them but by their employer").

94. Courts have not relied upon the impact on employers to justify their failure to compensate these arguably innocent white employees. The issue has simply not been presented, because the white employees frame the issue as a conflict between them and the black victims rather than as a conflict between them and their employers. Franks v. Bowman Transp. Co., 424 U.S. 747, 777 n.38 (1976). Employers should be required to compensate these white employees for their losses regardless of the availability or unavailability of insurance coverage. *See* Neuborne, *supra* note 5, at 558-59. Insurance coverage, however, may be beneficial as a catalyst for white employees to direct their legal attacks against their employers and as a method for relaxing judicial resistance to such compensation.

95. Employers may occasionally be successful in sharing this initial burden. *See, e.g.*, United Steelworkers of America v. Weber, 443 U.S. 193 (1979).

96. *See, e.g.*, Slain, *Risk Distribution and Treble Damages: Insurance and Contribution*, 45 N.Y.U. L. REV. 263, 270 (1970); Comment, *supra* note 4, at 201 & n.55.

97. This assumes that the insurance contract pools the combined risks of a number of employers. *See* R. KEETON, *supra* note 29, at 6-7 ("[Insurance] approaches the objective of reducing uncertainty by treating as a unit the combined risk of multiple ventures of a given type.") (footnote omitted). Instead of risk pooling, the employer may decide that its risk of loss is less than that of the rest of the industry and instead opt for the retrospective form of experience rating. Under this form the insurance company adjusts the premium after the policy expires in accordance with the actual losses incurred under the policy. Cahill, *Ratemaking in Liability Insurance and Related Lines*, in PROPERTY AND LIABILITY INSURANCE HANDBOOK 697-98 (J. Long & D. Gregg eds. 1965). As a re-

Spreading the costs in this manner is beneficial. The war against illegal employment discrimination is not a series of unconnected battles against individual employers.[98] Rather, it is a war to reverse the racism and sexism that pervades our society.[99] Consequently, because "our heritage of discrimination is, in the largest sense, the responsibility of the nation as a whole, the widest possible degree of cost spreading is appropriate."[100]

D. PUBLIC POLICY AND DETERRENCE

The inchoate doctrine assumes that public policy must be used to control abuses that would result from a less restrained operation of the insurance market. The only abuse that is mentioned, however, is that insurance for employment discrimination liability may "promote violations of the law."[101] Because the inchoate doctrine is designed to prevent insurance from undermining the deterrent effect of Title VII liability,[102] it should deny insurance coverage to those employers that would violate Title VII with insurance but would not violate the law absent such coverage. There are two other possible relationships between insurance and deterrence. Insurance may have a deterrence-enhancing effect, that is, insured employers may be less likely to violate Title VII than uninsured employers. Or insurance may be deterrence-neutral because employers would or would not violate Title VII regardless of the presence or absence of insurance. The effect of insurance on Title VII's deterrence goal[103] and the role of public policy in achieving that goal need to be examined.

Insurance may be deterrence-enhancing because insurers have significant incentives to engage in loss prevention activi-

sult, the employer distributes its costs over time rather than among a pool of employers. Thus, experience rating insurance would have less of a cost-spreading effect than risk-pooling insurance.

98. *See* Freeman, *supra* note 79, at 1052-57.

99. *See* Wright, *Color-Blind Theories and Color-Conscious Remedies*, 47 U. CHI. L. REV. 213, 216-19 (1980).

100. Neuborne, *supra* note 5, at 558 n.41. *But see* Comment, *Cost Allocation in Title VII Remedies: Who Pays for Past Employment Discrimination?*, 44 TENN. L. REV. 347, 376 (1977) (cost-spreading would disproportionately burden those with lower incomes).

101. Comment, *supra* note 4, at 203. *Cf.* Legg Mason Wood Walker, Inc. v. Insurance Co. of N. Am., 23 FEP Cases 778, 782 n.14 (D.D.C. 1980) (insurance policy covering intentional discrimination would likely violate public policy and thus be unenforceable); Union Camp Corp. v. Continental Casualty Co., 452 F. Supp. 565, 568 (S.D. Ga. 1978) (deterrence exists because coverage excluded for intentional or consensual acts of discrimination by insured).

102. *See* Comment, *supra* note 4, at 199-200.

103. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975).

ties.[104] With respect to insurance for employment discrimination liability, these activities translate into anti-discrimination counseling and advice which should promote compliance with, rather than violations of, the law.[105] In addition, if insurance coverage for employment discrimination liability becomes commonplace, insurance companies would deny coverage or charge higher than normal premiums[106] to employers with questionable employment practices, putting these employers at a competitive disadvantage.[107] Whether the immediacy of this competitive disadvantage would have an equal or greater deterrent effect than the more speculative prospect of an uninsured liability for employment discrimination is debatable. Nevertheless, the competitive disadvantage would undoubtedly have some deterrent effect.

Despite these potential deterrence-enhancing effects, insurance may also have adverse effects on Title VII's deterrence goal. Some employers may be motivated to engage in illegal employment discrimination because insurance would cover any resultant liability.[108] For example, insurance for employment

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104. In some types of insurance, premiums are charged in advance and are based upon the loss experience of the immediate past. In these cases, any action that prevents or reduces losses benefits insurers because of the lag between the time premiums are calculated and losses are paid. In other words, benefits result because premiums are charged for expected losses that may actually be reduced through prevention.

H. DENENBERG, R. EILERS, G. HOFFMAN, C. KLINE, J. MELONE & H. SNIDER, RISK AND INSURANCE 102 (1964) [hereinafter cited as H. DENENBERG].

In addition, insurers have competition-based incentives to engage in loss prevention activities:

> [I]f one insurer renders this type of service, insureds of other companies will feel that it is something they should have. Furthermore, if the insurer does not encourage the prevention of losses it may not be able to reduce its premium charges and thus may be at a competitive disadvantage.

Id. *See also* 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 13.5 (1956); W. YOUNG, CASES AND MATERIALS ON INSURANCE 379 (1971); McCracken, *Loss Prevention in Liability Insurance and Related Lines*, in PROPERTY AND LIABILITY INSURANCE HANDBOOK 667-69 (J. Long & D. Gregg eds. 1965).

105. *See* Comment, *supra* note 4, at 199.

106. *See Insurer Screens Out Risks*, BUS. INS., Dec. 22, 1980, at 28 (on the basis of an extensive risk assessment, an underwriter of pollution insurance may deny coverage or adjust the premium).

107. A higher than normal premium is an obvious competitive disadvantage. Other disadvantages may be less obvious. For example, an employer without liability insurance covering this type of loss may have to pay more to borrow money and may be less willing to commit available resources to capital improvement than an insured employer. *See* H. DENENBERG, *supra* note 104, at 150-51.

108. This employer is acting with calculating intent, *see supra* notes 63-67 and accompanying text.

discrimination liability may result in discrimination to satisfy an employer's personal preferences[109] or to obtain economic benefits[110] frustrated by the threat of liability.[111]

Although a public policy restriction may be necessary in such situations,[112] it is seldom used. The key to the restriction, the employer's motivation, is generally open to an innocent interpretation.[113] Moreover, the insurer bears the burden of proving that the employer's motivation was to collect insurance and, given the difficulty in proving motive[114] and the apparent prejudice against insurance companies,[115] that would not be an easy task.[116] It could thus be argued that the public policy restriction should be expanded to include situations in which an employer's calculating intent[117] cannot be proven but nevertheless may be present. The inchoate doctrine sanctions such an expansion of the public policy restriction by prohibiting insurance coverage for all disparate treatment discrimination.[118]

The expansionist approach of the inchoate doctrine should be rejected for several reasons. First, the crude expansion proposed by the inchoate doctrine is both over- and under-inclu-

109. Personal preferences may include "antipathy, a desire to preserve a certain type of social structure, or a desire to associate only with whites." Fiss, *supra* note 38, at 253.

110. *See infra* notes 143-46 and accompanying text.

111. The disparate treatment/disparate impact distinction is not useful in determining whether the presence of insurance motivated the employer to engage in illegal discrimination. Such discrimination can take either form. The employer could simply treat blacks, for example, less favorably than whites and, hence, engage in prototypical disparate treatment discrimination. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977). Or the employer could accomplish the same result by purposefully employing a criterion that screens out most blacks and thereby engage in disparate impact discrimination. *Id.*

112. *See supra* notes 59-67; *infra* notes 139-56 and accompanying text.

113. *See* E. PATTERSON, *supra* note 29, § 58, at 258-59. The employer merely has to show that the presence of insurance was not a motivating factor in the discrimination. The employer could argue, for example, that the discrimination, although present statistically, was wholly inadvertent, *see supra* note 78 and accompanying text, or that the insurance created no economic incentive to discriminate. *See infra* notes 143-46 and accompanying text.

114. *See, e.g.*, Hawkins v. Town of Shaw, 461 F.2d 1171, 1172 (5th Cir. 1972) (en banc) (per curiam) ("[I]ntent, motive and purpose are elusive subjective concepts."). *See also* Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977). *See generally* Brest, Palmer v. Thompson: *An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95.

115. *See, e.g.*, E. PATTERSON, *supra* note 29, at 259. *See generally* MCCORMICK'S HANDBOOK ON THE LAW OF EVIDENCE 479-83 (E. Cleary 2d ed. 1972).

116. *See* E. PATTERSON, *supra* note 29, at 259.

117. *See supra* notes 66-67.

118. *See supra* notes 28-33 and accompanying text.

sive. It is over-inclusive because it will prohibit insurance coverage for disparate treatment discrimination even in the absence of calculating intent.[119] It is under-inclusive because it permits insurance coverage for disparate impact discrimination even though calculating intent may be present.[120] To the extent it prohibits insurance coverage even though the insurance was not a motivating factor in the discrimination, it sacrifices the compensation and deterrence-enhancing benefits of insurance without providing any deterrence in return. To the extent the doctrine permits insurance coverage even though the insurance was a motivating factor in the discrimination, it totally fails to fulfill its deterrence-preserving mission.

Second, the expansionist approach of the inchoate doctrine is unnecessary; the private insurance market will preserve the deterrent effect of Title VII as well as the inchoate doctrine without emasculating the compensation and deterrence-enhancing benefits of insurance coverage. The inchoate doctrine is intended to protect the public's interest in deterring Title VII violations, and the insurer's interest precisely correlates with this public interest. The rational insurer will attempt to avoid providing coverage[121] to employers that view insurance as a license to discriminate. Such employers present moral hazards,[122] making it extremely difficult to assess risks and to assign premiums.[123] In addition, insurers providing coverage to these employers may be unable to compete with insurers having a better risk pool.[124] The private insurance market will thus attempt to identify such employers and to deny them insurance coverage.[125] Moreover, while identifying this type of employer is difficult, insurers may protect themselves by drafting policies

119. *See supra* notes 68-79 and accompanying text.

120. *See supra* notes 36-45 and accompanying text.

121. Alternatively, the insurer may provide coverage only at greatly increased prices. *But see* E. PATTERSON, *supra* note 29, at 226 ("Insurance is practically useful only where the probability of the occurrence of the loss is a minor fraction, rarely more than one-tenth.") (footnote omitted).

122. A "moral hazard" is generally defined as any nonphysical condition of the insured that increases the frequency or severity of insured losses. *See* H. DENENBERG, *supra* note 104, at 8; Adam, *Underwriting in Fire Insurance*, in PROPERTY AND LIABILITY INSURANCE HANDBOOK 194 (J. Long & D. Gregg eds. 1965).

123. *See* Adam, *supra* note 122, at 194-95; Ginsburgh, *Underwriting in Liability Insurance and Related Lines*, in PROPERTY AND LIABILITY INSURANCE HANDBOOK 702-03 (J. Long & D. Gregg eds. 1965).

124. *See supra* note 104.

125. It is probably self-evident that because "such insurance is legal does not mean that it will be sold to everyone." Farbstein & Stillman, *Insurance for the Commission of Intentional Torts*, 20 HASTINGS L.J. 1219, 1253 (1969).

designed to discourage the insured event. For example, the policies may use a coinsurance provision to expose the insured's finances, along with the insurer's finances, to liability for the loss.[126] Thus, the insurance market can retain the deterrence aspects of Title VII liability,[127] while furthering the compensation and deterrence-enhancing aspects of insurance[128] through coverage for the bulk of liability. The inchoate doctrine, however, totally sacrifices the flexibility of insurance in pursuit of deterrence.[129]

Third, the expansion proposed by the inchoate doctrine is an anachronism. Marine insurance, life insurance, and fire insurance have all been criticized as "generator[s] of evil."[130] Liability insurance for risks other than employment discrimination liability has been attacked because "the protec-

126. [Such c]oinsurance provisions usually take the form of a deductible policy, in which the insured must pay the initial cost of the liability up to a stated amount, beyond which the insurer is liable up to the limits of its policy. Another common form is the participating policy, in which the insured participates in the cost of the loss along with the insurer at a percentage stated in the policy.

Id.

127. Occasionally, the interests of a private insurer may not coincide with the public's interest in deterrence. For example, a private insurer may decide in a particular case that it is more important to placate an important client than it is to resist a claim that is not in the public interest. To meet this potential problem, it may be advisable to authorize the Equal Employment Opportunity Commission and/or state insurance departments to review and, if necessary, to challenge insurer decisions to pay employer claims. *See* Comment, *supra* note 4, at 202 n.62. The purpose of the review, however, would not be to insure compliance with the inchoate doctrine, but rather to insure compliance with the narrower public policy restriction proposed below. *See infra* note 157.

128. *See supra* notes 87-107 and accompanying text. This assumes, of course, that private insurers will not simply incorporate the distinctions of the inchoate doctrine into their insurance contracts. If they did so, there would be no compensation and deterrence-enhancing benefits from erasing the inchoate doctrine's distinctions from public policy, because the same distinctions would survive as private policy. It is virtually certain, however, that private insurers will incorporate more sophisticated and less restrictive distinctions into their contracts. Private insurers have not hesitated to insure other types of risks when public policy restrictions were eased, *see infra* notes 130-37 and accompanying text, and for good reason—more risks to insure means an expansion of the insurance business.

129. The deterrence argument supporting the inchoate doctrine "becomes highly specious when applied to coverage requiring the insured to pay a substantial deductible or percentage of participation." Farbstein & Stillman, *supra* note 125, at 1253.

130. Comment, *supra* note 7, at 26. *See also* State *ex rel.* Attorney Gen. v. Merchant's Exch. Mut. Benevolent Soc'y, 72 Mo. 146, 158 (1880); Statute of George II, 1746, 19 Geo. 2, ch. 37; Statute of George III, 1774, 14 Geo. 3, ch. 48 (statute limiting life insurance, because it led to " a mischievous Kind of Gaming"); Note, *supra* note 7, at 329-50 (advocates limits on insurance for damages arising from violations of 42 U.S.C. § 1983); *supra* note 7.

tion afforded the insured by the policy removes the financial deterrent against negligent and criminal acts."[131] These early, broad challenges to insurance have all been rejected. Insurance may now survive public policy challenges when the insured conduct was illegal[132] or when the conduct creating the loss was intentional.[133] Insurance is permissible even when the consequences of insurance's possible anti-deterrent effects are severe.[134] Indeed, the federal government has recently required pollution insurance in some situations[135] even though the insured conduct may be illegal and extremely damaging. The broad challenges have been replaced by narrower, more sophisticated public policy restrictions.[136] The inchoate doctrine deserves and will probably suffer a similar fate.[137]

The inchoate doctrine's assumption that public policy must

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131. Comment, *supra* note 7, at 26. The tenor of the attacks on insurance is evident in this quotation:

> [I]n those countries where it is best known and most widely practised, insurance has led to whole cycles and systems of crime and evil. . . . [I]n all its great branches, it is prone to evil. . . . [N]ot only [does it offer] bribes for the commission of sins against the law, but . . ., in thousands upon thousands of cases, those bribes have been taken and the crimes paid for have been duly committed. . . . Though to the mind of the man whose attention is occupied with his own affairs, there may appear to be no relation between the building of unseaworthy ships, the mismanagement of a friendly society, the burning of a town, and the starving of a baby, . . . all these and countless other crimes and social evils are due to one central cause—they are the fruit of diverse graftings upon one stem [of the tree of insurance].

A. CAMPBELL, INSURANCE AND CRIME 378-79 (1902).

132. *See, e.g.*, New Amsterdam Casualty Co. v. Jones, 135 F.2d 191, 193-94 (6th Cir. 1943); Todd v. Traders & Mechanics Ins. Co., 230 Mass. 595, 598-99, 120 N.E. 142, 144 (1918); Messersmith v. American Fidelity Co., 232 N.Y. 161, 164, 133 N.E. 432, 433 (1921); Brower v. Employers' Liab. Assurance Co., 318 Pa. 440, 442, 177 A. 826, 827 (1935); Sky v. Keystone Mut. Casualty Co., 150 Pa. Super. 613, 616-17, 29 A.2d 230, 231-32 (1942). *See also supra* note 60.

133. *See, e.g.*, New Amsterdam Casualty Co. v. Jones, 135 F.2d 191, 193-94 (6th Cir. 1943); Bennett Motor Co. v. Lyon, 14 Utah 2d 161, 164, 380 P.2d 69, 71 (1963).

134. The consequences of any anti-deterrent effects from automobile and fire insurance are severe. Automobile accidents claim thousands of lives each year, and arson is a national problem. Despite these severe consequences there is no broad public policy ban on these types of insurance. Rather, the restrictions are much narrower. *See infra* note 137.

135. 46 Fed. Reg. 2859-2860 (1981) (to be codified at 40 C.F.R. § 264.147). *See* Hertzberg & Jasen, *Insurers Fret Over Covering Pollution Costs*, Wall St. J., July 17, 1981, at 29, col. 3.

136. Broad approaches banning life insurance or fire insurance, for example, have been rejected for narrower public policy restrictions such as the requirement that the insured have an insurable interest in the insured event, R. KEETON, *supra* note 29, §§ 3.2-3.5; E. PATTERSON, *supra* note 29, § 22, and that the insured not act with calculating intent. *See supra* notes 63-67 and accompanying text.

137. *See infra* notes 139-56 and accompanying text.

be used to control abuses that would result from a less restrained operation of the insurance market may have some validity. A public policy restriction may be necessary to preclude insurance coverage when an employer acts with calculating intent. The interest in preserving the deterrent effect of Title VII liability, however, does not have the "overpowering weight"[138] required to justify the much broader restrictions proposed by the inchoate doctrine.

IV. INSURANCE, PUBLIC POLICY, AND EMPLOYMENT DISCRIMINATION

The inchoate doctrine does not directly address the conflict between insurance and deterrence. Rather than expanding the public policy restriction,[139] the restriction should be limited to those situations in which insurance may conflict with deterrence. The public policy restriction should thus preclude insurance coverage when the employer-insured has acted with calculating intent.[140] But what does it mean in employment discrimination cases to state that an employer has acted with calculating intent? What type of evidentiary showing is re-

138. *See* R. KEETON, *supra* note 29, at 102. Professor Keeton argues that the interests supporting public policy restrictions on insurance must have "overpowering weight," because such restrictions necessarily impair contractual freedom. *Id.* at 101-02. Professor Keeton's argument lends support to this Article's conclusion that the deterrence policy underlying the inchoate doctrine does not have the overpowering weight necessary to justify the doctrine's impairment of contractual freedom. This Article does not adopt Professor Keeton's argument because the state can and should impair contractual freedom by, for example, banning "yellow dog" contracts, *see, e.g.*, Norris-La Guardia Act, § 3, 29 U.S.C. § 103 (1976), prohibiting contracts "in restraint of trade or commerce," Sherman Antitrust Act, §§ 1, 3, 15 U.S.C. §§ 1, 3 (1976), and revising insurance contracts and other contracts of adhesion to conform with the reasonable expectations of the consumer. *See, e.g.*, Gray v. Zurich Ins. Co., 65 Cal. 2d 263, 269-71, 419 P.2d 168, 171-72, 54 Cal. Rptr. 104, 107-08 (1966); Corgatelli v. Globe Life & Accident Ins. Co., 96 Idaho 616, 619-20, 533 P.2d 737, 740-41 (1975); C & J Fertilizer, Inc. v. Allied Mut. Ins. Co., 227 N.W.2d 159, 176-77 (Iowa 1975). Although the interest in contractual freedom would provide additional support for this Article, it is not necessary to make the argument. The inchoate doctrine's overly broad restrictions cannot override the compensation and deterrence-enhancing benefits of insurance, and so it is unnecessary to consider the virtues or vices of the doctrine's interference with contractual freedom.

139. *See supra* notes 118-37 and accompanying text.

140. *See supra* notes 65-67 and accompanying text. The notion that the public policy restriction should only be as broad as the deterrence goal which it is designed to protect is not a new one. Rather, it is precisely this notion which establishes the scope of the public policy restriction for insurance coverage of risks other than employment discrimination liability. *See* E. PATTERSON, *supra* note 29, at 257-59; *supra* notes 59-67 and accompanying text. Thus, the inchoate doctrine is the new and relatively untested public policy restriction, while the public policy restriction proposed in this Article has been time-tested.

quired to prove such intent and thereby to preclude insurance coverage?

Statements or admissions by the employer would clearly provide the most persuasive and direct evidence of calculating intent. If, for example, an employer was told that certain employment practices might violate Title VII and the employer responded, "It doesn't matter, I'm insured,"[141] that evidence would be relevant and persuasive on the issue of the employer's intent. More specifically, the evidence would indicate that the employer was unconcerned about the possible Title VII violation because the insurance carrier would bear any resultant liability. Such a statement may be evidence of calculating intent and, hence, may preclude insurance coverage for Title VII liability.[142]

An inference of calculating intent may also be appropriate when the employer would obtain economic benefits through insurance coverage. An employer employing men and women to do equal or comparable work, for example, may decide that women would be willing to work for a lower wage rate than men.[143] In the absence of insurance, the employer may hesitate to lower the wage rate for women employees, because such action would violate the law,[144] and the employer, if prosecuted, would be liable to each woman employee for the difference in pay and possibly for an equal amount in liquidated damages.[145] With insurance the employer may be more likely to lower the wage rate for women employees; by doing so, the employer would reap an immediate economic benefit by paying

141. *Cf.* Herschenson v. Weisman, 80 N.H. 557, 558, 119 A. 705, 705 (1923) (Shortly before an accident the driver was cautioned about his careless driving; the driver responded, "Don't worry, I carry insurance for that.").

142. Resolution of the intent issue would come after and would be largely irrelevant to the issue of whether the employment practice violated Title VII. The employment practice may violate Title VII even in the absence of calculating intent and, indeed, even in the absence of any adverse employer intent. *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321, 328-29 (1977); International Bhd. of Teamsters v. United States, 431 U.S. 324, 335-36, n.15 (1977); Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971). Unlike the inchoate doctrine, the proposed public policy restriction prohibiting insurance if calculating intent is present does not depend upon the disparate treatment/disparate impact distinction. In the text's hypothetical, insurance coverage would be disallowed regardless of the reason the employment practices violated Title VII.

143. *See* Christensen v. Iowa, 563 F.2d 353, 354 (8th Cir. 1977).

144. Differential wage rates for men and women because women will "accept" less would violate the Equal Pay Act of 1963, § 1, 29 U.S.C. § 206(d) (1976), *see* Brennan v. Victoria Bank & Trust Co., 493 F.2d 896, 902 (5th Cir. 1974); Brennan v. City Stores, Inc., 479 F.2d 235, 241 n.12 (5th Cir. 1973), and may violate Title VII, *see* Washington v. Gunther, 452 U.S. 161, 168-69 (1981).

145. *See* Fair Labor Standards Act, 29 U.S.C. § 216(b), (c) (1976).

women less, and if the employer is later found liable for the wage disparity, the insurance would pay the damages.[146] The calculating intent standard is designed to discourage this type of employer calculation. Consequently, when an employer would obtain economic benefits through insurance coverage, a rebuttable inference of calculating intent is appropriate. An inference of calculating intent may also be appropriate when the evidence is more subtle. An employer may, for example, discontinue certain anti-discrimination efforts[147] when it obtains insurance coverage.[148] Such employer action timed to coincide with the effective date of insurance coverage would be evidence of calculating intent and may preclude insurance coverage.

There are, therefore, a number of ways to prove calculating intent. The calculating intent standard, however, is narrower than the inchoate doctrine, precluding insurance only when there is evidence of a conflict between insurance and deterrence.[149] Thus, the calculating intent standard is under-inclusive—some employers will be able to hide their calculating intent and as a result obtain insurance coverage even though insurance motivated their illegal discriminatory activities.[150] This under-inclusiveness, though unfortunate, is acceptable for two reasons. First, the interests of insurance companies correlate with the interests supporting the public policy restriction.[151] Most insurance contracts will consequently contain

146. Except for equal pay claims, the employer will seldom gain a significant economic benefit from insurance. *See generally* Fiss, *supra* note 38, at 257-58. In the ordinary hiring discrimination case, for example, the employer decides to hire white employee *A* instead of black employee *B*. *B* then files suit, claiming the decision was made on the basis of race. If the employer loses the case, it would not reap an economic benefit from insurance as it would in an equal pay case. In the equal pay case the employer was able to lower its essential labor costs by insuring against discrimination liability. In the hiring case the employer merely avoided paying double the essential labor cost.

147. The employer may discontinue anti-discrimination workshops for its supervisors or repeal an internal grievance procedure designed to handle sexual harassment complaints. *See generally* E. PATTERSON, *supra* note 29, at 258-59.

148. *See* New York Opinion, *supra* note 10, at 201.

149. The calculating intent standard precludes insurance only when there is some evidence that the employer violated Title VII, at least in part, because of the insurance coverage. *See supra* notes 118-37 and accompanying text.

150. Indeed, one commentator has argued that insurance coverage may be permitted even when there is evidence of calculating intent, because juries "are likely to give an innocent interpretation to the insured's conduct, either through prejudice against insurance companies or through unfamiliarity with the way in which insurance frauds are carried out." E. PATTERSON, *supra* note 29, at 259.

151. *See supra* notes 121-28 and accompanying text.

warranties designed to further the same deterrence goals as the calculating intent standard.[152] The warranties in private insurance contracts will thus supplement the public policy restriction. The under-inclusiveness of the calculating intent standard then is less troublesome, because the standard is a second screening device that need only be used after the primary screening device, warranties in private insurance contracts, has been bypassed.[153] In addition, the under-inclusiveness of the calculating intent standard is acceptable because of the compensation and deterrence-enhancing benefits of insurance coverage.[154]

Although a standard that is neither under- nor over-inclusive would be ideal, such a standard is unattainable. A standard which is under-inclusive is the next best alternative. Even though an occasional discriminatory act with calculating intent may escape detection, the benefits of insurance coverage will be widely available. A standard that is over-inclusive, however, provides no direct deterrence benefits[155] and, in addition, completely sacrifices the compensation and deterrence-enhancing benefit of insurance. The calculating intent standard is preferable to the inchoate doctrine because it more directly addresses the conflict between deterrence and insurance, it is workable, and it furthers the compensation and deterrence-enhancing benefits of insurance.[156]

V. CONCLUSION

The inchoate doctrine must be rejected.[157] It merely em-

152. *See* E. PATTERSON, *supra* note 29, at 259.

153. *But see supra* note 127.

154. *See supra* notes 85-107 and accompanying text.

155. An overinclusive standard will by definition deny insurance to some employers who have not been encouraged to discriminate by the presence of insurance coverage.

156. Public policy may preclude insurance coverage as a way of expressing moral indignation. Consequently, although the cases do not discuss it, insurance coverage for employment discrimination liability may be limited in part to express social disapproval of illegal employment discrimination. If this is the reason behind the public policy restriction, the inchoate doctrine, because it more broadly limits insurance coverage, would better achieve this goal than the calculating intent standard. The simplest and most direct way of achieving the goal, however, would be to provide for punitive damages and to impose restrictions on insurance coverage of the punitive damages. *See* Note, *supra* note 7, at 347-49.

157. This rejection could take many forms. Although Congress has entrusted primary control over insurance practices to the states, McCarran-Ferguson Act §§ 1-5, 15 U.S.C. §§ 1011-1015 (1976); *see also* the legislative history of the McCarran-Ferguson Act, 91 CONG. REC. 478-88, 1442-44 (1945) (Senate de-

bodies the first wave of protest that invariably greets the extension of insurance principles into a new area. The new doctrine should recognize that insurance for liability resulting from employment discrimination is not unlike, and should not be treated much differently than, liability insurance for other types of hazards. Such insurance should not be overly restricted; in that way its compensation and deterrence-enhancing benefits can be realized. Certain minimal restrictions are nevertheless appropriate; public policy can and should prohibit insurance for discrimination committed with calculating intent.

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bate); *id.* at 1085-94 (House debate); *id.* at 483 (remarks of Sen. Radcliffe) (states have right to "function freely in handling insurance"); *id.* at 485 (remarks of Sen. Revercomb) (Congress wants insurance "left in the control of the States"); *id.* at 1090 (remarks of Rep. Gwynne) ("we are as far as possible removing ourselves from the [insurance] field"), Congress can supersede state insurance regulations by a law that "specifically relates to the business of insurance." McCarran-Ferguson Act § 2, 15 U.S.C. § 1012 (1976). Congress could consequently overturn the inchoate doctrine by passing a law that specifically permits insurance for liability resulting from illegal employment discrimination except when calculating intent was present. If Congress fails to act, however, the states control the issue. States which have adopted the inchoate doctrine by interpreting state statutes, *see* 1945 Op. Ohio Att'y Gen. 295, may require legislative action to change their public policy. The majority of jurisdictions, though, have either not adopted or not considered the inchoate doctrine or have not based their adoption of the inchoate doctrine on an interpretation of a state statute. These jurisdictions should be able to consider or to reconsider the issue without the aid of legislation. *See* Farbstein & Stillman, *supra* note 125, at 1253-54.