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EMPLOYEE INSURANCE BENEFIT PLANS AND DISCRIMINATION ON THE BASIS OF HANDICAP

Dr. Larry D. Baker and Catherine Karol***

The insurance industry has generally regarded handicapped persons as undesirable risks; the corresponding reluctance to extend equal coverage has complicated the achievement of equal employment opportunities for such individuals. Regulations governing insurance practices impose restrictions and increase costs of employers, so that compliance with affirmative hiring policies mandated by the Rehabilitation Act of 1973 is difficult, if not financially prohibitive. In response to these problems, Dr. Baker and Ms. Karol offer solutions worthy of immediate consideration by those organizations confronted with suits claiming unequal protection in their employee benefits.

In 1954, a federal district court in South Carolina upheld the denial of a life insurance claim to the estate of an insured who had been killed by lightning. The insurance company denied the claim because the decedent, unknown to the company at the time the policy was issued in 1949, had lost his foot 30 years previously. The court in *Senn v. Old American Insurance Corporation*¹ found that a policy exclusion of any person who had lost any limb or sight from both eyes was valid, and that therefore no policy had taken effect since the decedent was in the excluded class. Reasoning that the insurer had the right to deny coverage for a risk which it regarded as more hazardous and less desirable than it wished to insure, the *Senn* court did not consider the utter lack of causal connection between the decedent's disability and his death.

In life, health, disability, accident, and workmen's compensation insurance, the physically and mentally handicapped have been subjected routinely to such categorization on the basis of their disabilities. Little or no regard has been given to the correlation of their

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1. 120 F. Supp. 422 (E.D.S.C. 1954). *See also* *Reed v. Traveler's Insurance Co.*, 227 Mo. App. 1155, 60 S.W.2d 59, 60 (1933), where the policy exclusion was of persons "maimed, crippled or deformed, or bereft of reason, sight or hearing." *Id.*

disabilities with the increase in risk they are perceived to represent. In fact, neither society nor the government ever have demanded any verification that such correlation exists. Historically, we have accepted as undisputed fact that a handicapped person, regardless of what the handicap may be, has a much greater risk of injury and disease, and will of course die at a much earlier age. Society on the whole never has been troubled by the exclusion of the handicapped from insurance coverage. Where coverage was extended, the possibility of higher rates was not troubling to the non-actuarial eye because there appeared to be a rational basis for such measures.

Different treatment of the handicapped by insurance companies has resulted in a double hardship for affected individuals. The most obvious is the inability to get insurance in a world which has responded to spiraling medical costs with health and disability packages, and where a program of personal savings for old age is rapidly being replaced with a program of insurance. A more subtle hardship being forced upon the handicapped individual by insurance differentiation lies in the area of employment discrimination. Employers, both well-meaning and otherwise, who offer their employees insurance coverage under a group policy, as either a fringe benefit or part of their compensation, routinely turn away handicapped applicants because of the increased insurance costs they supposedly represent.² For instance, in 1976, a Wisconsin circuit court found an employer guilty of discrimination when he refused to hire a job applicant who suffered from acute lymphocytic leukemia.³ The employer did not contend that the applicant was unable to perform duties required by the job; rather, his decision was based on the applicant's higher risk of absenteeism and the higher costs involved in insuring him. The court found the employer guilty of discrimination on the basis of handicap, but two uncomfortable questions are left unanswered. First, is the employer the real perpetrator of the discrimination, or is guilt more properly assessed against the insurance companies who control the costs? Second, are the higher costs and resultant reluctance on the part of employers discriminatory, or are they in fact rational reflections of the risk applicable to the handicapped?

The purpose of this Article is to examine the insurance coverage being offered to handicapped employees as a benefit of their

2. See, e.g., U.S. BUREAU OF LABOR STANDARDS, DEPT. OF LABOR, BULL. NO. 234, WORKMEN'S COMPENSATION AND THE PHYSICALLY HANDICAPPED WORKER 12, 13 (1961), where reasons given by employers for their refusal to hire disabled workers include safety factors, fear of higher insurance costs, and resistance by fellow workers.

3. *Chrysler Outboard Corp. v. Dept. of Indus., Labor and Human Relations*, 14 Fair Empl. Prac. Cas. 344 (Wis. 1976).

employment, and to expose the inconsistent treatment they receive. The responsibilities under the law of both the employer and the insurer will be discussed, and some possibilities for reform will be suggested.

EMPLOYER RESPONSIBILITIES TO THE HANDICAPPED

Sections 503 and 504 of the Rehabilitation Act of 1973

While society and government have always shown some concern with the physically and mentally disabled, that concern historically has been paternalistic. Unlike many other minorities, the handicapped have long been the focus of much legislation and funding from a multitude of state and private agencies. Until recently, the attention given to the handicapped has been of a charitable nature, with scant heed being paid to their status as citizens deserving equal rights. Within the past decade the trend has shifted to a gradual awareness of the handicapped as contributing members of society. While they have not been accorded coverage by the federal equal employment legislation which benefits other minorities,⁴ a number of states have included the handicapped in their fair employment acts.⁵ The federal government also has initiated legislation which, though jurisdic-

4. 42 U.S.C. §§ 2000e 1-17 to h-2 (1970).

5. Thirty-five states, the District of Columbia, and New York City now prohibit discrimination against the handicapped: *See* ALASKA STAT. § 18.80.220(a)(1) (Cum. Supp. 1976); CAL LAB. CODE §§ 1413(h), 1420(a), 1432.5 (West Supp. 1976); CONN. GEN. STAT. §§ 1-1f, 31-126(a) (Cum. Supp. 1977); District of Columbia, Regulation No. 73-22 (Nov. 11, 1973); FLA. CONST. art. I, § 2 (1968, amended 1974); FLA. STAT. ANN. § 413.08 (3) (West Cum. Supp. 1977); HAW. REV. STAT. §§ 378-1(7), -2, -9 (1968 & Supp. 1975); ILL. ANN. STAT. ch. 38, §§ 65-21, -23 (Smith-Hurd Cum. Supp. 1971); IND. CODE ANN. §§ 22-9-1-2, 22-9-1-3(q), 22-9-1-13 (Burns Cum. Supp. 1977); IOWA CODE ANN. §§ 601A.2(11), .6(1)(West 1975); KAN. STAT. §§ 44-1001, -1002(j), -1009(a)(1) (Cum. Supp. 1976); KY. REV. STAT. §§ 207.130(2), .150(1)(1977); ME. REV. STAT. tit. 5, §§ 4552, 4553.7-A, 4572 (Cum. Supp. 1976); MD. ANN. CODE art. 49B, §§ 17, 18(g), 19(a), 20 (Cum. Supp. 1977); MASS. GEN. LAWS ANN. ch. 149, § 24K (Cum. Supp. 1976); MICH. STAT. ANN. §§ 3.550(103)(b), (202) (Callaghan Statutes Release No. 10 at 761, Oct. 4, 1976); MINN. STAT. ANN. §§ 363.01, Subd. 25; .03, Subd. 1(2) (Cum. Supp. 1977); MISS. CODE ANN. § 43-6-15 (Cum. Supp. 1976); MONT. REV. CODES ANN. §§ 64-305(10), (13), -306(1)(a), -307(1) (Cum. Supp. 1975); NEB. REV. STAT. §§ 48-1102(8), -1104, -1108(1) (1974); NEV. REV. STAT. §§ 613.330, .350(1), (2) (1975); N.H. REV. STAT. ANN. §§ 354-A:3(13), -A:8 (Supp. 1975); N.J. STAT. ANN. §§ 10:5-4.1, -5(q) (West 1976); N.M. STAT. ANN. §§ 4-33-2(k), -7 (1974); N.Y. EXEC. LAW §§ 292(21), 296(1), (1-a)(McKinney Cum. Supp. 1976-1977); N.Y.C. AD. CODE ch. I, §§ B1-7.0(3a) (c), B1-7.1(1969); N.C. GEN. STAT. § 128-15.3 (Cum. Supp. 1977); OHIO REV. CODE ANN. §§ 4112.01(K), (M), .02(A) (Page Supp. 1976); OR. REV. STAT. §§ 659.400, .425 (1975); PA. STAT. ANN. tit. 43, §§ 954(p), 955 (Purdon Cum. Supp. 1977-1978); R.I. GEN. LAWS §§ 28-5-6(H), -7 (Supp. 1976); TENN. CODE ANN. § 8-4131 (Supp. 1977); TEX. REV. CIV. STAT. ANN. art. 4419e, §§ 1, 3(g) (Vernon Cum. Supp. 1978); VT. STAT. ANN. tit. 21, § 498 (Cum. Supp. 1977); VA. CODE § 40.1-28.7 (Repl. vol. 1976); WASH. REV. CODE § 49.60.180 (1976); W. VA. CODE § 5-11-9 (Cum. Supp. 1976); WIS. STAT. ANN. §§ 111.32(5)(a), (f) (West 1974 & Cum. Supp. 1976-1977).

tionally limited, demands the making of reasonable accommodations to insure that the handicapped individual enters the mainstream of society.⁶ In terms of employment, recent federal legislation has been geared toward insuring (1) that the focus in hiring a handicapped person is on the ability to do a job, rather than on the disability; (2) that when a handicapped person's ability to perform the job adequately is dependent upon some accommodation, that accommodation will be made; and (3) that a handicapped employee will be compensated in the same measure as a non-handicapped employee. In terms of insurance benefits, individual determination, reasonable accommodation and equal compensation all make some demands on the prospective employer of a handicapped applicant.

The legislation presently exerting the most impact on employment of the handicapped is the Rehabilitation Act of 1973.⁷ That part of the statute concerned with employment is essentially a policy statement, providing that anyone who contracts with the federal government to perform services shall take affirmative action to employ qualified handicapped individuals.⁸ In addition, where a program or activity receives federal financial assistance, discrimination against any qualified handicapped person is prohibited.⁹ However, the regulations thus far promulgated are much more comprehensive, and deal specifically with employment practices.¹⁰ Section 503 regulations promulgated by the United States Department of Labor require a government contractor to take affirmative action in the employment, advancement and treatment of handicapped individuals without discrimination based upon their physical or mental handicap.¹¹ With reference to employment, HEW's section 504 regulations provide

6. See The Rehabilitation Act of 1973, 29 U.S.C. §§ 701-794 (Supp. V. 1975), accompanying regulations, 41 C.F.R. § 60-741 (1977) and 45 C.F.R. §§ 84.1 to 84.61 (1977).

7. 29 U.S.C. §§ 701-794 (Supp. V. 1975).

8. 29 U.S.C. § 793(a) (Supp. V. 1975).

9. 29 U.S.C. § 794 (Supp. V. 1975).

10. Regulations for Section 503 have been promulgated by the Department of Labor, Office of Federal Contract Compliance Programs (OFCCP) 41 C.F.R. § 60.741.1 to 741.54 (1977), and for Section 504 thus far only by the Department of Health, Education and Welfare, 45 C.F.R. §§ 84.1 to 84.61 (1977). Under Executive Order 11914, 41 Fed. Reg. 17,871 (1976), HEW is required to issue general standards for other departments and agencies of the federal government to follow in promulgating Section 504 regulations. The proposed regulations were issued by HEW in January, 1978 43 Fed. Reg. No. 9 (Jan. 13, 1978). Thus, it is anticipated that regulations will be forthcoming shortly from other agencies. For the purposes of the issues dealt with in this article, the employment section of the HEW regulations and the guideline regulations are substantially the same.

11. 41 C.F.R. § 60-741, 4(a) (1977). The regulation specifically includes "rates of pay or other compensation" as an area of employment requiring treatment without discrimination.

that "no qualified handicapped person shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity to which this part applies."¹²

The provisions of this subpart are explicitly applicable to "rates of pay or any other form of compensation and changes in compensation"¹³ and "fringe benefits available by virtue of employment whether or not administered by the recipients."¹⁴ Thus, inclusion of a handicapped employee in employee insurance programs is clearly mandated by the Section 504 regulations for any employer who is a recipient of federal financial assistance. While some discussion has arisen as to whether the same mandate applies to federal contractors,¹⁵ the Office of Federal Contract Compliance Programs (OFCCP), United States Department of Labor, is covering fringe benefits under the Section 503 regulations to the same extent as the Section 504 regulations.

What then are the employer's responsibilities toward insurance benefits? The proposed Section 504 regulations issued in July, 1976, included a section, later struck, which read:

(a) In making fringe benefits available to employees, a recipient may not: (1) Administer, operate, offer, or participate in a fringe benefit plan which does not provide for equal benefits to handicapped and nonhandicapped persons and equal contributions to the plan by handicapped persons *unless any difference in benefits or contributions is justified by verifiable actuarial figures and an actual, substantial increase in cost to the recipient . . .*¹⁶

In its Analysis of the Final Regulation, HEW explained the deletion by stating: "The Department [HEW] believes that currently available data and, experience do not demonstrate a basis for promulgating a regulation specifically allowing for differences in benefits or contributions."¹⁷ HEW's position is apparently based on the assumption that, in most instances, there are no perceptible differences between handicapped and non-handicapped persons in employee benefit insurance claims, and therefore identical coverage can and should be provided to both at a comparable cost.

However, the employer's obligation with regard to fringe benefits does not end with the provision of similar insurance plans to both

12. 45 C.F.R. § 84.11(a)(1) (1977).

13. 45 C.F.R. § 84.11(b)(3) (1977).

14. 45 C.F.R. § 84.11(b)(6) (1977).

15. See, e.g., Wright, *Equal Treatment of the Handicapped by Federal Contractors*, 26 EMORY L.J. 65, 74-80 (1977).

16. 41 Fed. Reg. 29,564 (1976) (to be codified in 45 C.F.R. § 84.18) (emphasis added).

17. Appendix A - Analysis of Final Regulation, 42 Fed. Reg. 22,685 (1977).

handicapped and non-handicapped employees. Furthermore, the employer-recipient is prohibited by Section 84.11(4) of the 504 regulations from participating in a contractual or other relationship with organizations providing or administering fringe benefits to employees of the recipient, if such a relationship has the effect of subjecting qualified handicapped persons to discrimination. It would appear, therefore, that when there is discrimination among insureds by an insurance company on the basis of handicap, an employer receiving federal funds may not offer that company's plan to any of his employees.¹⁸

However, must the discrimination on the basis of handicap by the insurer be an unreasonable one to be so proscribed? Or is even an actuarially verifiable differentiation on the basis of handicap prohibited? Assuming that only unreasonable differentiation on the part of the insurer is proscribed, and that an actuarially verifiable cost increase exists with regard to a handicapped employee, is the employer's responsibility merely to make a contribution on the part of the handicapped person equal to that which he makes on the part of a non-handicapped person? Or is his responsibility to make sufficient contributions on the part of the handicapped employee to insure that the same benefits inure to him as to any non-handicapped person? Finally, where the handicapped person is deemed an uninsurable risk, what then is the employer's responsibility in light of the regulations?

INSURANCE PRACTICES AND THE FEDERAL REGULATIONS

Industry Practices

The employer's obligation under the federal regulations is to provide insurance benefits without discrimination. Yet, how employers and group insurance underwriters are to reasonably carry out this responsibility remains unclear. Some knowledge of the insurance mechanism and its functions in a free competitive system is essential to an understanding of the complexity of the problems posed.

Employers may provide employee group insurance in any of five different forms: life, accidental death and dismemberment, short-term disability, long-term disability, and health.¹⁹ The basic principle behind these forms is one of "reducing the risk and spreading the loss."

18. Thus, while the Section 504 regulations do not directly affect insurance companies in their capacity as insurer's, some leverage is provided against the insurer as well as the employer.

19. A survey of the underwriting practices of approximately 30 major group insurance underwriters was conducted by the authors. Twenty-one insurers responded and not all under-

Risk relates to the degree of probability that a loss will be incurred. Spreading the loss is then accomplished by extending insurance coverage to a sufficient number of persons so that the distribution of losses can be predicted with a high degree of certainty. Similarly, the concept of hazard is related to the value of the loss which may be experienced. Thus, the cost of insurance is a function of (1) the degree of risk, or probability, that a loss will occur, (2) the value of the hazard being insured, (3) the number of persons purchasing insurance under the plan, and (4) the overhead and operating expenses incurred by the insurance company. Any factors which would substantially alter one or more of these variables will ultimately affect the cost of insurance. In order to arrive at the rates charged to individual insureds, the insureds are classified on the basis of factors which are relevant to the expected risk of loss. Individual insureds are grouped according to the expected risk of loss so that everyone in the same rate classification has approximately the same risk of loss and is purchasing protection having the same unit value as that sold to others in the class.²⁰

While different underwriting problems are posed in each form of insurance, some of the most serious are to be found in health and long-term disability insurance. Because of soaring health care costs, a sick or injured employee often incurs medical expenses running into thousands of dollars. An extraordinary risk under a group health policy could result in losses far outweighing the value of the premiums charged for the coverage. Moreover, a group policy such as long-term disability insurance can pose an extraordinary hazard and result in extremely large claims to the insurer.²¹ For example, a critical injury to a young man in the course of his employment could result in

write every line of group insurance. Data collected in the survey indicated that the forms of group insurance most frequently underwritten are life and health. Many of the firms surveyed included coverage for accidental death and dismemberment as an integral part of their life insurance policy. Long-term and short-term disability coverage are less frequently written.

20. STATEMENT OF AMERICAN LIFE INSURANCE ASSOCIATION AND HEALTH INSURANCE ASSOCIATION OF AMERICA, CALIFORNIA INSURANCE DEPARTMENT HEARING ON INSURING VISUALLY OR PHYSICALLY HANDICAPPED PERSONS (June 22, 1976):

In the very early days of insurance it was often assumed that the fairest way to operate was to charge each insured an equal rate. [However, this] approach . . . failed to take into account the fact that new insureds who were characterized by impaired health or involvement in dangerous activities brought greater risks to the mechanism. When rates were not equitably differentiated on the basis of individual risk factors, an ever-increasing number of the better risks elected not to participate in the insurance mechanism, leading to an upward spiral of claim and premium rates and the eventual collapse of the arrangement.

21. The SOCIAL SECURITY DISABILITY INCOME PROGRAM (SSDI) is a form of long-term disability coverage. Most group insurance underwriters have found the coverage provided by this publicly funded program to be unprofitable.

payment of a claim equal to a portion of his salary for 40 or 50 years by the employer's insurance company. By the very nature of the coverage provided, both health and long-term disability insurance pose intricate problems for the insurer.²²

Life, accidental death and dismemberment, and short-term disability insurance present less of an underwriting problem. The potential loss under these forms is limited to a fixed amount for the hazards insured (in the case of life and accidental death and dismemberment insurance), or a fixed period of time (for short-term disability insurance).²³

Group Insurance: Deviations From The Regulations

In underwriting individual coverage, insurers have found it necessary to develop classifications, particularly on the basis of age and sex, in order to incorporate the principle of insurance. When underwriting group insurance, however, the insurance industry has not been permitted to use such classifications. The basic objective in group insurance is to charge an appropriate premium for the risk by assessing the risk presented by a group with a fair degree of accuracy and with a lower underwriting expense than in individual insurance. The need for accuracy in prediction of losses is reduced by the fact that in most group policies, the premium rate applies for only one year at a time, and therefore can be changed each year to reflect knowledge acquired from the group's experience under the policy.²⁴ The approach to group underwriting is to select groups on some basis other than the

22. See SOCIETY OF ACTUARIES TRANSACTIONS, 1976 REPORTS OF MORTALITY AND MORBIDITY EXPERIENCE 119-120 (1977), which shows that long-term disability insurance claims tend to increase in periods of economic recession.

The primary consideration in underwriting insurance is not the rate to be charged, but rather whether there is an insurable risk. Where an insurable risk exists, it is possible to determine a reasonable rate. This does not mean that a rate could not be determined for every risk, but rather that it is simply not feasible to insure some risks. For example, it would be possible to underwrite a thousand dollar life insurance policy for a person expected to die of cancer within the next twenty-four hours. In such a situation, the probability of loss is so great there is actually very little risk involved. Moreover, the premium for the coverage would exceed \$1,000, since it would have to include the expected loss and the insurance company's expenses for underwriting the policy.

23. Accidental death and dismemberment insurance in group coverage is the same as that known as double indemnity insurance in individual policies. If accidental death occurs, benefits in addition to the life benefits are paid to the beneficiary. Dismemberment insurance covers loss of extremities and usually loss of vision, with the benefit schedule expressed as predetermined portions of the face value of the life coverage.

24. If handicapped employees pose a greater insurance risk than non-handicapped employees, employers who are rated on the basis of experience will have higher insurance costs

individual insurability characteristics of group members. The lower cost of group insurance results from savings obtained through covering many insureds under a single policy. The rates charged an employer, however, are determined by several characteristics of the entire group, such as age, sex, hazard of the industry, and geographic location.²⁵ The profile of an entire group is used to determine the premium cost per member. If an employee is not excluded from coverage, then the rate charged for that person will be the same as that charged every other group member.²⁶

An important principle in group insurance underwriting is that the prospective insureds should have some reason for belonging to the group which is more important than the desire for insurance. For example, if the group consists of the employees of an employer, the individuals' jobs are, for most of them, the main reason why they joined the group. If this were not true there might be many individuals who had joined the group in order to get insurance which might not have been available to them at a reasonable rate had they applied for it as individuals. Those persons who were poor risks for individual insurance would cause the group as a whole to be a bad risk for group insurance.²⁷

than if they employ no handicapped workers. In the survey an attempt was made to determine work-force size at which experience rating would be initiated. The responses were extremely diverse between different lines of insurance and within each line. Some insurance companies pool the claim experiences of the employers they insure and never experience rate individual employers. In life insurance, one out of nineteen respondents do so, accidental death and dismemberment, six of nineteen, long-term disability, five of sixteen. Work force size at which experience rating was initiated varied from twenty-five to one thousand persons with the majority being at either fifty or one hundred. Two insurers based their experience rating on the amount of the annual premium charged the employer. These amounts were \$25,000 and \$65,000.

25. Regulation of insurance rates is typically restricted to individual insurance policies. In group insurance underwriting, insurers experience little if any rate control or regulation. The modernization of the NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS (NAIC), MODEL GROUP LIFE INSURANCE DEFINITION AND STANDARD PROVISION does not contain a section pertaining to rate regulation, nor does the model bill currently being used by NAIC. See notes 49-51 *infra*.

26. Survey responses reveal that none of the insurers apply a special rate to a handicapped person who is a member of a true group. For the definition of a true group, see note 34 *infra*.

27. Obviously, when the cost of insuring several handicapped individuals is ascribed to a group, any extra cost per group member will be smaller than the extra cost to each handicapped individual would be if he sought individual insurance on his own. Since about 92% of the applications for individual life insurance are accepted at standard rates, it seems fair to assume that the per-member cost of insuring a representative group of employed individuals is not much greater than the cost of insuring a group of individuals all of whom are "standard" risks. If the term "handicap" does not include health conditions such as heart disease or diabetes which sometimes necessitate higher ratings or rejection for individual insurance, then the per-member cost of insuring handicapped members of a representative group is probably quite small.

Several other requirements must also be met in order to obtain group policy coverage. A high percentage of the members of the group must be insured under the group policy—otherwise, those members who were the poorest risks would choose to become insured under the group policy, while the better risks would opt out.²⁸ In order to become insured under the group policy, a member must be actively at work on the day on which the insurance becomes effective. In order to prevent an individual who is in good health from not joining an insurance plan unless and until such a time as he may actually need it, a requirement of submission of evidence of insurability is usually imposed upon a “late entrant” (i.e., a member of a group who does not elect to join the plan within 31 days).²⁹

Customarily, group insurance protection is restricted to employees classified as full-time, which is defined generally in terms of a minimum number (twenty or thirty) of hours per week. Part-time employees are excluded not only for administrative reasons, but also to eliminate potential abuse of the group insurance program by individuals in poor health who become employed solely to gain the advantages of the insurance benefits. Both Sections 503 and 504 contain language requiring employers to make reasonable accommodations for handicapped employees of known physical and mental limitations.³⁰ While part-time employment may be used by employers to accommodate the limitations of an employee,³¹ the health condition requiring part-time employment may be the very condition an insurer wishes to avoid if it results in an extraordinary risk. Present underwriting practices of insurers typically do not allow employers to obtain coverage for their part-time workers, thereby making it impossible to meet their nondiscrimination obligations in providing benefits to those employees.

Any significant change in the composition of an insured group which increases the risk and the hazard to be insured will have to be

AMERICAN COUNCIL OF LIFE AND HEALTH INSURANCE ASSOCIATION OF AMERICA, LIFE AND HEALTH INSURANCE AND HANDICAPPED PERSONS (paper presented to the White House Conference on Handicapped Individuals) (1977).

28. In practice, high participation in a group plan is typically achieved by having the employer pay most or all of the cost of such insurance.

29. Such evidence would consist of answers to questions about health, or possibly a physical examination. However, the individual's insurability would not be assessed as rigorously as if he were applying for an individual policy.

30. 41 C.F.R. § 60-741.6(d) (1977); 45 C.F.R. § 84.12(a) (1977).

31. “Reasonable accommodation may include. . . part-time or modified work schedules. . . .” 45 C.F.R. § 84.12(b) (1977).

reflected in the cost of the insurance. The definitions of a handicapped person³² and physical and mental impairments³³ adopted in the 1974 Amendments to the Rehabilitation Act extend the nondiscrimination and affirmative action coverage under the Act to persons who have impairments not included among those persons traditionally considered handicapped. Persons with cardiovascular disease, cancer, asthma, diabetes and other debilitating conditions typically have been considered to be "sick persons," not handicapped. Therefore, using traditional principles, concepts, programs and services to serve the broader class of handicapped persons may be inadequate. In particular, the requirement that insurers and employers provide coverage to qualified handicapped employees having severe physical or mental impairments may increase the risk and losses experienced. If an increase in losses results in higher claims, experience rating requires that premiums paid by the employer increase. The question then becomes one of whether increased cost is significant and therefore unreasonable for the employer to bear—providing that the insurance industry even makes the coverage available.

In the case of small groups³⁴ some degree of individual underwriting is necessary to assure that such a small group will constitute a reasonably acceptable risk. However, members of the group usually are accepted on a more liberal basis than in individual insurance. If a handicapped person becomes employed by a small company, there is a possibility that he may be subjected to an extra premium for his specific condition, denied coverage,³⁵ or subjected to a general pre-

32. "Handicapped person" means any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment. 45 C.F.R. § 84.3(j)(1) (1977).

33. "'Physical or mental impairment' means (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." 45 C.F.R. § 84.3(j)(2)(i) (1977).

34. To prevent confusion over terms used to identify groups by size, several terms used in the industry must be explained. A true group, or large group, is a group of sufficient size that minimum restrictions are placed on extending coverage. A small group has fewer members than a true group, usually less than 10, and is not expected to reflect a normal risk pattern. Small groups also have a minimum size, but the minimum varies according to state legislation and/or individual insurance company practice. Regardless of how the minimum number for a small group is determined, the potential for adverse selection is so great that group coverage is not available. Thus, insurance for small groups is written on the same basis as are individual policies.

35. The survey results for small groups revealed that some insurers would charge a higher rate for handicapped members. About 50% of the insurers would rate handicapped persons

existing conditions limitation in the policy. Under a pre-existing conditions provision, an insured member who has received treatment for an illness or injury within six months prior to the effective date of his coverage under the group policy may not become insured with respect to that particular illness or injury until he has gone three months without treatment or has been insured for twelve months, whichever is earlier.³⁶

individually in small groups for long-term disability insurance; 20-25% for life, short-term disability and medical insurance; and less than 10% for accidental death and dismemberment insurance.

Only one insurer underwriting long-term disability insurance for small groups indicated that it classifies persons as handicapped or non-handicapped for purposes of determining the rate level of the entire group. Responses from all other insurers for the remaining four lines of insurance indicated that no such classifications would be used in determining the rates for such a group.

When asked about conditions which would result in denial of coverage, all of the respondents who specified conditions which might not be covered listed malignant diseases and alcoholism. Seventy-five percent of the respondents would not cover cardiovascular or gastrointestinal diseases, diabetes, drug addiction, epilepsy, systemic diseases (including diseases of the blood, neuromuscular, respiratory or neuropsychiatric systems) or spinal defects. Many of the conditions for which insurers would deny coverage traditionally have been considered illnesses rather than handicaps. Typical handicapping conditions such as hearing, speech and visual impairments, mental retardation, or absence of extremities were cited infrequently or not at all for purposes of coverage exclusion. All of the conditions studied were taken from the "OFCCP's Code of Handicapping Conditions (for Complaint)."

36. It is important to note that the pre-existing conditions limitation excludes initial coverage *only* for the existing illness or injury. The person is immediately insured for any other conditions, and will eventually be insured for the pre-existing condition as well.* Only one true group underwriter stated that the waiver of pre-existing limitations clauses was an important consideration when underwriting group life, accidental death and dismemberment, and short-term disability insurance. Slightly over half of the firms treated the waiver as an important consideration in underwriting long-term disability insurance, and a little over one-third stated that it was important in writing health insurance. This data suggests that the waiver is most important in those lines of insurance in which insurers are likely to incur the greatest risk of loss and value of the hazard insured. This waiver, which can be obtained with an extra cost to the employer, results in all employees receiving identical coverage, regardless of any pre-existing conditions.

Only one of the nineteen respondents offered the waiver as an option in life insurance, none in accidental death and dismemberment, and ten in health insurance. Two of the eighteen respondents writing short-term disability insurance offered the option, while six out of sixteen long-term writers did. By and large, the insurers who did not believe the waiver for the pre-existing conditions limitations was an important consideration also tended not to offer the waiver as an option. Insurers believing the waiver to be an important consideration tended to offer it as an option. These were insurers writing long-term disability and health insurance, coverages with potentially high risks and extreme hazards.

Two of fifteen responding life insurers reported 100% of their policies contained waivers; the remaining 13 reported zero percent. For accidental death and dismemberment, seventeen insurers reported zero percent and one reported 100%. One short-term disability insurer reported 30%, the other seventeen reported zero percent. Zero percent was reported by nine for long-term disability insurers, three reported 10%, and one each reported 30%, 40%, and 90%.

Little more importance was given to the waiver for the pre-existing conditions limitations clause for small groups than large groups. Only two of the insurers writing long term disability

The insurance industry's uniform application of the pre-existing conditions limitations may discriminate against persons having less severe conditions. The six month, three month and the twelve month absence of treatment requirement may not be the only time periods used by all insurers, but typically they are applied to *all* pre-existing conditions. Some health care data suggests that this is not justified.³⁷ Since some types of handicaps could have shorter or longer time periods to be commensurate with the risk present, such practices are as arbitrary as the policy exclusion in the *Senn* case.³⁸

If the insurance industry had given greater attention to the expanded definition of physical and mental impairments and used available morbidity and mortality data in response to HEW's proposed Section 504 regulations, it could have argued strongly for the existence of verifiable actuarial figures and a substantial increase in cost to employers for group insurance. The failure of the insurance industry to use available data clearly illustrating potential cost differences between handicapped and non-handicapped persons has resulted in a government expectation and employer dependence upon the insurance industry to provide equal benefits at equal cost to handicapped employees, regardless of the severity or type of handicap involved.³⁹ This expectation undoubtedly contributed to HEW's deletion of Section 84.18 from the final draft of the Section 504 regulations. This deletion poses several difficult problems if the insurance claims of handicapped persons are not substantially the same as for non-handicapped persons.

First, implicit in the deletion is an assumption that handicapped persons have substantially the same claim costs as non-handicapped

insurance stated the waiver was an important consideration in extending coverage while over one-third (five of fourteen) believed it to be important in writing health insurance for small groups.

Few insurers included the waiver in small group life, accidental death and dismemberment, and short-term disability insurance policies. The waiver is contained, however, in a small number of long-term disability and medical insurance policies.

37. See note 40 *infra*.

38. See note 1 *supra*.

39. "[T]he insurer's underwriting standards and rating classifications are not in every detail based on hard, statistical data. There are many types of health conditions whose effect on claim costs under various types of insurance coverage has not been observed in such a way as to provide a statistically significant base for insurance ratings. Accordingly, underwriting procedures are based on the application of sound actuarial principles and underwriting judgment to whatever relevant data are at hand." AMERICAN COUNCIL OF LIFE INSURANCE AND THE HEALTH INSURANCE ASSOCIATION OF AMERICA, LETTER TO THE DIRECTOR OF THE OFFICE FOR CIVIL RIGHTS, DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, September 13, 1976. In light of the data available to the insurance industry, this was a weak and inadequate response.

persons. However, a comparison of the definition of a handicapped person under the 1974 amendments to the Rehabilitation Act and data available through both HEW and the insurance industry indicates that this may be an erroneous assumption.⁴⁰ The data strongly

40. U.S. DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, PUBLIC HEALTH SERVICE, HEALTH RESOURCES ADMINISTRATION, *Limitation of Activity Due to Chronic Conditions*, Series 10, Number III, 15 (1974). Information in this report indicates that the three leading causes of activity limitations are heart condition, arthritis and rheumatism, and hypertension without heart involvement, whereas those conditions typically considered handicaps, such as paralysis, visual impairments, amputations, and mental retardation, are less limiting to activities. Another HEW study indicates that persons with chronic limitations require more medical attention and experience more restrictions in their activities than persons without chronic disabilities. For example, these age adjusted data show that such persons experience approximately two and one-half times more physician visits per person than those not so limited.

The table below is one example of the data which demonstrates potentially higher costs of insurance claims for impaired versus non-impaired persons:

HEALTH CHARACTERISTIC AGE-ADJUSTED	WITH NO LIMITATION OF ACTIVITY	WITH LIMITATION OF ACTIVITY		
		Limited But Not In Major Activity	Limited In Amount Or Kind Of Major Activity	Unable To Carry On Major Activity
Number of Physician visits in the Office per person per year	2.9	4.9	7.4	8.6
Percent of persons with one or more short-stay hospital episodes within a year of interview	8.7	14.4	22.0	41.6
Number of discharges from short-stay hospitals per 100 persons per year	10.5	18.6	31.8	81.3
Average length of stay for discharges from short-stay hospitals	6.5	8.2	9.5	19.2
Days of restricted activity per person per year	10.2	26.1	50.5	100.0
Days of bed disability per person per year	4.2	8.5	16.7	48.8

U.S. DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, PUBLIC HEALTH SERVICE, HEALTH RESOURCES ADMINISTRATION, *Health Characteristic of Persons with Chronic Activity Limitation*, Series 112, 3 (1974).

R. SINGER AND L. LEVINSON, *MEDICAL RISKS: PATTERNS OF MORTALITY AND SURVIVAL* (1976). This book is widely used by insurance underwriters and contains statistical data on mortality associated with many physical and mental impairments. Data are expressed as percentages, with normal life expectancy representing a base line of 100%. Thus, an impairment with a

suggest that the insurance mechanism will not be effective in meeting the group insurance needs of employers of the handicapped. A public benefit program, rather than an insurance benefit program may be essential for these employers to overcome the problems of adverse risk and increased hazard associated with employing certain types of handicapped persons.

Second, this increased hazard will not allow the principle of risk used in insurance underwriting to function effectively. Where the risk principle on which insurance practices are based will not function, it is not possible to simultaneously provide equal contributions and equal benefits.

Third, a paradox is created for insurance providers and employers if insurance companies are expected to underwrite a coverage which falls outside their normal limits of acceptable risk, thereby violating the principles which allow the insurance industry to function in a competitive market. Even if the employer desired to provide equal contributions and equal benefits to handicapped employees, it would not be possible under present underwriting practices of the insurance industry. Moreover, mandating insurers to violate the principle of insurance to provide employers equal coverage for all handicapped and non-handicapped workers on the basis of equal cost places insurers in the role of providing public benefits rather than insurance benefits.

INSURANCE PRACTICES UNDER STATE REGULATION

Since a contract for insurance rests upon the assent of the parties, an insurance company is not bound to accept an application or proposal for insurance, but may reject it for any reason.⁴¹ An insurer can select the risks it will insure,⁴² limit recovery to a return on the

percentage value greater than 100 indicates an above normal mortality rate. An example of the expected mortality for some of the impairments covered by the legal definition are as follows: cancer of all types, only 67% live five years or more; heart disease, 156%; hypertension between the ages of 35-45, 139 systaltic, 127% and 160 systaltic, 190%; cerebral vascular disease, under the age of 25, 1600% and over the age of 75, 360%; paraplegia over the age of 45, 111%; quadriplegia over the age of 45, 375%; mental retardation over the age of 12, 1930%; and diabetes, 212%. Persons with these impairments now protected against discrimination on the basis of handicap obviously do not have a normal mortality rate. Upon inspection, no data were found for traditional handicapping conditions such as blindness, deafness and amputation which suggests a normal, or near normal, life expectancy.

41. *See, e.g.*, *Mutual Life Ins. Co. of N.Y. v. Young*, 23 Wall 85, 23 L.Ed. 152 (1875); *United States Ins. Co. v. Headrick*, 275 Ala. 594, 157 So.2d 19 (1936); *Kimbro v. N.Y. Life Ins. Co.*, 134 Iowa 84, 108 N.W. 1025 (1906); *Cauman v. American Credit Indem. Co. of N.Y.*, 229 Mass. 278, 118 N.E. 259 (1918); *Harding v. Ohio Cas. Ins. Co. of Hamilton, Ohio*, 230 Minn. 327, 41 N.W.2d 818 (1950); *Lechler v. Mont. Life Ins. Co. of Helena, Mont.*, 48 N.D. 644, 186 N.W. 271 (1921).

42. *Ferguson v. Phoenix Assurance Co. of N.Y.*, 189 Kan. 459, 370 P.2d 379 (1962).

premium paid under certain circumstances,⁴³ or limit its liability if the insured dies within a specified time from a serious disease or illness for which he had been treated before the policy was issued. Provisions of insurance policies excepting particular losses from coverage are ordinarily valid, for the parties to a contract of insurance have the right to limit or qualify the extent of the insurer's liability in any manner consistent with statutory provisions and public policy.⁴⁴ A number of states have enacted statutes which prohibit insurance companies from discriminating between insureds of the same class.⁴⁵ Statutes also have begun to appear which specifically prohibit discrimination in accident, sickness and/or life insurance for persons afflicted with various handicaps solely on the basis of that handicap. Blindness, deafness, and mental retardation are the most often circumscribed conditions for refusal to issue a policy.⁴⁶ Typically, state

43. *Life & Cas. Ins. Co. of Tenn. v. Womak*, 26 Ala. App. 6, 151 So. 881 (1933), *cert. denied*, 228 Ala. 70, 151 So. 880 (1934).

44. *See, e.g., Kirkby v. Fed. Life Ins. Co.*, 35 F.2d 126 (6th Cir. 1929); *Equitable Life Assurance Soc'y of United States v. Arrowood*, 253 Ky. 456, 69 S.W.2d 984 (1934); *Reed v. Travelers' Ins. Co.*, 227 Mo. App. 1155, 60 S.W.2d 59 (1933).

45. CAL. INS. CODE § 10123 (West Cum. Supp. 1977); ME. REV. STAT. tit. 24-A, § 2159-A (Cum. Supp. 1977-78); MASS. GEN. LAWS ANN. ch. 175, §§ 120A-120B (West Cum. Supp. 1977); MINN. STAT. ANN. § 72A.20 (West Cum. Supp. 1978); N.C. GEN. STAT. §§ 58-251-5-58-251-7 (Cum. Supp. 1977); OHIO REV. CODE ANN. § 3999.16 (Page Cum. Supp. 1977).

46. *See, e.g., ME. REV. STAT. tit. 24-A, § 2159-A* (Cum. Supp. 1977-78). When surveyed as to how state laws or regulations influence their group insurance underwriting practices, insurers generally indicated they believed themselves to be in compliance. While a few respondents indicated that they only extend coverage based on conditions of employment, or do not seek individual evidence of insurability or set rates based on individual evidence, it is noteworthy that the majority who comply with state laws or the NAIC Model Bill typically have the right to seek individual evidence of insurability for members of true groups and small groups. *See note 49 Infra*. They may then make classifications of insurability and non-insurability and base rates on whatever factors they desire. *See note 25 supra*. The greater the consistency between state group insurance regulations and the NAIC Model Bill, the greater the opportunity for the insurer to discriminate on the basis of a handicap in group insurance underwriting.

When asked how they cope with the problem of underwriting insurance in several state with differing group insurance regulations, 16 of the 19 respondents replied that they write according to the laws of the state in which the policy is written. Two insurers said that they adopt the most liberal practices to satisfy all the different states; one respondent stated that it underwrites only on conditions of employment.

All but one of the insurers responded to a question about federal laws or regulations influencing their group insurance underwriting practices exactly as they did to the question about state regulations, without mentioning civil rights legislation and differing federal policies regarding discrimination on the basis of sex, *see note 64 infra*, age, *see note 95 infra*, and handicap. One respondent stated "the primary influence is contract compliance guidelines."

When asked to specify any new federal or state laws that they think are needed to aid employers and themselves in providing insurance benefits for qualified handicapped employees, fifteen of the nineteen respondents stated none were necessary.

Insurers also were asked what changes, if any, the insurance company could/should make in its group underwriting practices to aid employers it insures in meeting their legal obligations

laws regulating group insurance underwriters have prohibited classifications which are determined by conditions other than those pertaining to employment in order to prevent the exclusion of identifiable high-risk persons. Thus, only classifications such as management vs. labor, full-time vs. part-time and salary vs. hourly employees are possible.⁴⁷ While insurers no longer have a right to classify on the basis of important underwriting characteristics such as age and sex in order to underwrite group insurance, they still have a right to classify on the basis of physical and mental impairments which, for purposes of the Rehabilitation Act of 1973, are handicapping conditions.⁴⁸ Although the right to make a classification may be found under state statutes, both the Section 503 and Section 504 regulations would appear to prohibit federal contractors or employers receiving federal financial assistance from participating in insurance programs making use of such classifications. The insurance industry has retained the right to "exclude or limit the coverage of any person as to whom evidence of individual insurability is not satisfactory to the insurer,"⁴⁹ but a recent proposal submitted to the National Association of Insurance Commissioners (NAIC) would change the language on classification in the present model bill from "[T]he employees eligible for in-

not to discriminate on the basis of handicap in their employee benefits insurance programs. Every response was "none." The response fails to recognize that several group underwriting practices presently used conflict with employers' nondiscrimination obligations and may be illegal practices on the part of insurers as well.

47. Survey respondents were asked if there were conditions other than physical and mental impairments and size of groups which would result in their refusal to underwrite group insurance coverage for an employer having both handicapped and non-handicapped employees. While a little more than one-third of the firms responded positively and submitted explanations with regard to long-term disability insurance, only 20% of the firms answered in the affirmative and gave explanations for the other four types of insurance. The business stability of the employer seeking insurance was the condition most frequently given. Other factors which would result in a refusal to underwrite were the hazard of the industry, undefined situations or conditions that would be determined only on a case by case method, groups having an unusually high proportion of hourly versus salaried employees, certain groups not having a true employer-employee relationship, and employee groups considered ineligible because of other unspecified characteristics. Other conditions cited that are more germane to handicapped employment were individual considerations of late applicants, higher claim rates, and groups such as rehabilitation clinics, sheltered workshops, or drug or alcohol counseling centers where there is an unusual preponderance of handicapped in the group to be insured.

48. Not only do insurers express the right to exclude coverage of persons with handicapping conditions in their model legislation, but also according to the survey, approximately 10% of the insurers exercise this right in all lines of insurance except medical insurance where the figure is over 15%.

49. NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS, *Group Life Insurance Definition of and Standard Provisions*, 1956 NAIC PROCEEDINGS II, 362 (as amended, 1957 NAIC Proceedings I, 134).

insurance under the policy shall be all of the employees of the employer or all of any class or classes thereof determined by condition pertaining to their employment"⁵⁰ to "any class or classes thereof established for other than insurance purposes."⁵¹ The proposal clearly specifies that insurance companies should not be allowed to develop classifications that would be solely for insurance purposes. If this proposal was accepted, it would be impossible for insurers to manipulate the degree of risk they would experience in extending group coverage to employers having handicapped workers.⁵² This would appear to maximize the protection of handicapped persons against discrimination in any employee insurance benefit program.

The practice of classifying groups as either true groups or small groups also poses a problem for extending group insurance coverage to groups having severely handicapped persons. Although the size of a true group may vary from insurer to insurer,⁵³ the smallest true group size for each insurer is one for which it has been able to compete effectively in group insurance underwriting. Small groups pose an underwriting risk similar to that experienced in underwriting individual insurance. Below the small group minimum, the risks of adverse selection are so great that insurers are prevented from underwriting group policies either by company underwriting practices or in some states through insurance regulations. When insurers underwrite small groups, they employ a number of practices which allow them a greater opportunity to reduce the risk and spread the loss. For instance, they may require proof of insurability either by having each potential insured complete a "short form" questionnaire concerning his/her medical history and present state of health or through a medical examination.⁵⁴ Other insurers use pooling or trust arrange-

50. *Id.* at 361.

51. AMERICAN COUNCIL OF LIFE INSURANCE AND HEALTH INSURANCE ASSOCIATION OF AMERICA, Exhibit A, Suggested Modernization of the National Association of Insurance Commissioners' Model Bill 1 (November 1977).

52. Survey responses reveal that none of the insurers apply a special rate to a handicapped person who is a member of a true group.

53. The survey found that the minimum number for which insurers would write a true group policy varied according to the insurer and the type of insurance. For life, accidental death and dismemberment, short term disability and medical insurance, the most frequent true group minimum was 10 (15 out of 19 insurers). The other insurers' minimums were 50 or 100. For long term disability insurance, only four out of 16 insurers used the minimum size of 10 while the same number of insurers used 25 and 50 as the minimum. Other minimums reported for long term disability were 15, 35, 100 and 200. The larger minimums for long term disability reflect the insurer's need for larger groups to extend coverage for this high risk insurance.

54. The survey revealed evidence that insurability requirements vary with the line of insurance and that short form evidence was required significantly more often than physical exams. For life insurance, four of the thirteen insurers required no evidence, eight required short form

ments⁵⁵ for small groups to combine the experience of several small employers so that risk and losses can be spread over a larger number of insureds and gain the advantages associated with a large group.

APPLICATION OF OTHER AREAS OF LAW

As an area of employment law, the field of employment discrimination and the handicapped is still in its infant stages, and the applicable legal concepts have not yet been determined. The situation of the handicapped is admittedly different from that of other groups who are statutorily protected from employment discrimination.⁵⁶ Nonetheless, the most appropriate application of legal principles is probably found in Title VII.⁵⁷ Broad anti-discrimination concepts have been developed often in Title VII cases, providing a comprehensive body of precedent to which to refer. However, Title VII itself has provided for those instances in which good cause (either business necessity or a bona fide occupational qualification) will excuse an employer's action which would otherwise be viewed as having an illegal discriminatory impact. While strong arguments have been advanced both for and against inclusion of the handicapped under Title VII,⁵⁸ it appears reasonable to apply at least the surrounding jurisprudence.⁵⁹

evidence and one required a physical exam. For accidental death and dismemberment, seven of thirteen insurers required no evidence, five required the short form and only one required a physical exam. The figures for short term disability insurance were 3, 8 and 1, respectively. Long-term disability coverage had the most rigid requirements of evidence of insurability. Five of the seven insurers required short form and the other two a physical examination. For medical insurance, no physical exams were required, but 11 out of 14 companies required short form evidence. These data indicate that the greater the risk, the greater the need for evidence.

55. All insurers responding to the survey use pools or trusts when insuring small groups for all lines of insurance, with one exception. One of the seven firms that writes long-term disability insurance for small groups uses experience rating regardless of group size.

56. In the case of women and racial minorities, the classifying characteristic is uniform from one member of the group to the next. In all cases of employment discrimination concerning race, and many cases concerning sex, there is no correlation between that characteristic and a person's ability to perform a job. In dealing with the class of "handicapped persons," the characterizing "handicap" is unique to each member of the group, however, and can be significant in determining whether that person is indeed a "qualified handicapped individual" entitled to protection from employment discrimination under the Rehabilitation Act. Discrimination on the basis of age probably encompasses mitigating circumstances most closely resembling those found in discrimination on the basis of handicap.

57. 42 U.S.C. §§ 20003 to — (1970).

58. See, e.g., Wright, *Equal Treatment of the Handicapped by Federal Contractors*, 26 EMORY L.J. 65 (1977). Comment, *Equal Employment and the Disabled: A Proposal*, 10 COLUM. J.L. SOC. PROB. 457 (1974); Note, *Abroad in the Land: Legal Strategies to Effectuate the Rights of the Physically Disabled*, 61 GEO. L.J. 1501 (1973); Comment, *Potluck Protections for Handicapped Discriminates: The Need to Amend Title VII to Prohibit Discrimination on the Basis of Handicap*, 8 LOY.-CHI. L.J. 84 (1977): [hereinafter cited as *Potluck Protections*].

59. The U.S. Department of Labor regulations apparently apply Title VII jurisprudence in interpreting the non-discrimination obligation to mean that requirements which tend to screen

In determining whether or not an insurance program is of a discriminatory nature with regard to the handicapped, it is first necessary to assess the generalizations and classifications made by the insurer. Where such a generalization tends to exclude handicapped persons, is the insurer even justified in making it? As evidenced by the Section 504 regulations, the moving spirit behind the demand for preventing discrimination against the handicapped in employment is a desire to be free from such a classification.⁶⁰ Persons with physical and/or mental disabilities want first and foremost an *individual* assessment of their abilities, rather than a cursory generalized classification on the basis of their disabilities. Thus, the regulations prohibit pre-employment inquiries,⁶¹ use of employment criteria which tend to screen out handicapped persons,⁶² and the limitation, segregation or classification of applicants or employees in any way that adversely affects their opportunities or status because of handicap.⁶³

THE BONA FIDE OCCUPATIONAL QUALIFICATION AND BUSINESS NECESSITY TESTS

Under Title VII, the use of classifications and generalizations has been looked upon with suspicion. The bona fide occupational qualification defense included in the Act allows an employer to base his decision upon any of the covered characteristics (except race) where that characteristic is a "bona-fide occupational qualification (BFOQ) reasonably necessary to the normal operation of a particular business."⁶⁴ The existence of the BFOQ defense indicates congressional recognition that, under certain circumstances, an employer may be justified in taking into account an applicant's sex, for example, in order to determine his or her suitability for a particular job. That an employer would be justified in considering a person's handicap under

out qualified handicapped individuals must be job related and justified by business necessity, unreasonable cost, or safety. 41 C.F.R. § 60-741.6(c)(2) (1977).

Responses to queries about court decisions influencing group insurance underwriting practices showed little insight on the part of insurers into how important civil rights decisions could influence the nature and extension of coverage and the rates charged. Examples of the responses are "we don't conflict with legal precedent," "they are not applicable," and "no change since we cover handicapped employees the same as nonhandicapped employees."

60. See Burgdorf & Burgdorf, *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a "Suspect Class" Under the Equal Protection Clause*, 15 Santa Clara Law. 855 (1975).

61. 45 C.F.R. § 84.14 (1977).

62. 45 C.F.R. § 84.13 (1977).

63. 45 C.F.R. § 84.11(a)(3) (1977).

64. 42 U.S.C. § 2000e-2(e) (1970).

certain circumstances is equally logical. In the Title VII context, however, the provision has been construed narrowly, and consequently, the availability of the defense has been extremely limited.

In *Weeks v. Southern Bell Telephone and Telegraph Company*,⁶⁵ the Court of Appeals for the Fifth Circuit imposed a set of requirements which must precede the use of a classification or generalization as a bona fide occupational qualification. The court in *Weeks* found the defendant guilty of violating Title VII when it denied a switchman's job to an applicant because she was a woman. The court concluded

that the principle of nondiscrimination requires that . . . in order to rely on the bona fide occupational qualification exception an employer has the burden of proving that he had reasonable cause to believe, that is, a *factual basis* for believing, that *all* or *substantially all* women would be unable to perform safely and efficiently the duties of the job involved.⁶⁶

The court found the use of unverified generalizations to be a violation of Title VII,⁶⁷ noting that the defendant had produced no evidence of the general lifting abilities of women but had relied instead on stereotyped characterizations.

The import of the *Weeks* test to the area of handicapped employment discrimination is most obvious in terms of hiring a handicapped person. However, it may also have application to an assessment of allegations of discrimination made against an insurer's classification of, or generalizations about, a handicapped applicant for insurance coverage. Where an insurance company can factually verify the classifications and generalizations it uses and show some basis for the differentiation, then its actions most likely will be justified and the allegation of discrimination refuted. While statistical data with regard to such factors as susceptibility, higher risks, higher costs, and earlier death is available for many of the conditions which are covered by the statutory definition of "handicap,"⁶⁸ the insurance industry itself admits that "there are many types of health conditions whose effects on claim costs under various types of insurance coverage have not been

65. 408 F.2d 228 (5th Cir. 1969).

66. *Id.* at 235 (emphasis added). A corollary to the *Weeks* doctrine condemning the use of unverified generalizations arises in the footnote to that decision, where the court noted that an employer might be able to sustain his burden by showing that it would be "impossible or highly impractical to deal with women on a individualized basis." *Id.* at n.5.

67. *Id.* at 236.

68. See note 40 *supra*.

observed in such a way, as to provide a statistically significant base for insurance ratings."⁶⁹

Individual determination would appear to be a concept implicit in Title VII jurisprudence as well as in the Section 503 and 504 regulations. In applying this concept, it may well be that the question of whether insurance classifications are valid is intertwined with the question of whether assignment to those categories is determined on an individual basis. Is a handicapped person excluded or considered a high risk merely because he has been labelled generically "handicapped," or has some determination been made that this *particular* individual's handicap is one which falls within a valid classification?

In *Usery v. Tamiami Tours, Inc.*,⁷⁰ the Fifth Circuit indicated that an individual assessment in employment situations may be foregone only "if all or substantially all members of a class do not qualify, or if there is no practical way reliably to differentiate the qualified from unqualified applicants in that class."⁷¹ With regard to insurance classifications of the handicapped, it is doubtful that such a statement could ever be made. A broad spectrum of both type and severity of mental and physical disabilities is included under the heading of "handicap". The insurance companies can differentiate practically among those disabilities for insurance purposes, and it is reasonable to assume that all or substantially all members of the class of handicapped persons differ vastly from one another for such purposes.

In apparent contradiction to their central theme of individual determination, however, the Section 504 regulations make no allowance for differences among members of the class of handicapped persons in dealing with fringe benefits such as insurance. The regulations do not allow specifically for differences in benefits or contributions between those provided handicapped and non-handicapped employees. While preliminary drafts allowed individual determination of insurability and rate classification where actuarially justifiable,⁷² the final regulations may well have the effect of forcing all handicapped persons, regardless of the nature and severity of their impairment, into one broad classification. Section 504 regulations themselves, although possibly based on misleading information provided by the insurance indus-

69. Letter from American Council of Life Insurance to Secretary, Health, Education and Welfare (regarding proposed § 504 regulations) (September 15, 1976).

70. 531 F.2d 224 (5th Cir. 1976).

71. *Id.* at 236.

72. See note 16 *supra*.

try,⁷³ are inconsistent with the individual determination requirement of *Weeks*.

Individual evidence of insurability (with the possibility of exclusion from coverage or higher rates) is a real dilemma for "small group" employers. Without large numbers of insureds, the potential for adverse selection is greatly increased, and just one or two substantial losses can be devastating. A uniform group, one in which members have an equal potential for loss, is difficult to attain in "small group" situations without requiring evidence of insurability. If the insurance principle is to function effectively and insurance benefits are to be provided to small groups, then the requirement of evidence assuring the reasonableness of the risk must be regarded as a legitimate business necessity. Where pooling and trust arrangements are used, it should be pointed out that such arrangements can create financial inequities for a number of employers when one or more members of the pool take on high risk, high cost employees.⁷⁴

Insurers need to maintain their right of individual determination, so that the insurance principle remains fully workable. Since the current federal regulations appear to be in direct conflict not only with industry practices but their own underlying policies, either the courts or the legislature will have to evaluate the classification practices of group underwriters, the validity of data available on the risks of all handicapped persons with the meaning of the Rehabilitation Act and the applicability of Title VII.

A prima facie violation of Title VII is established by demonstrating that a facially neutral classification has the *effect* of discriminating against members of a defined class.⁷⁵ Absent proof of purposeful discrimination, a violation will be found where the consequences of such a classification are to "invidiously . . . discriminate on the basis of race or other impermissible classifications."⁷⁶ The very fact that a

73. See notes 39 and 40 *supra*.

74. When high risk, high cost persons are employed in large groups, only that employer pays an extraordinary premium. The critical point is that whenever persons with above normal risks are provided insurance benefits, someone has to pay the extra cost. Insurers functioning independently in a competitive market do not have the power to mandate that either a majority or all of the population participate in the program so that risks and costs can be spread over the entire population. If this were possible, the entire population could be experience-rated and a uniform rate could be charged each participant.

75. *Washington v. Davis*, 426 U.S. 229, 239 (1976); *Albemarle Paper Co. v. Moody*, 442 U.S. 405, 422 (1975); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971). Although the majority opinion in *General Elec. Co. v. Gilbert*, 429 U.S. 125, 136-37 (1976), seemed to suggest that perhaps effect may never be a controlling factor in a Title VII case, or that *Griggs* is no longer good law, four Justices specifically refuted that inference in separate opinions.

76. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

disproportionately large number of persons suffering from either a physical or mental disability are either unable to obtain insurance, can obtain it only at a considerably higher cost, or are subjected to a limitation of coverage, is in itself significant enough to warrant the application of a Title VII rationale.⁷⁷

Under Title VII the defense of business necessity is available to an employer who can show that a discriminatory classification or means of classification is job-related.⁷⁸ The test developed by the Fourth Circuit to determine business necessity requires that the practice in question be necessary for "the safe and efficient operation of the business."⁷⁹ The business purpose must be sufficiently compelling to override its discriminatory impact, and the challenged practice must carry out that purpose efficiently. Furthermore, there must be no acceptable alternative policies available which could accomplish the business purpose as well with a less discriminatory impact.⁸⁰

While insurance classification practices are at least facially neutral, they do have an adverse effect on a disproportionately large number of handicapped persons.⁸¹ Some of these practices may be justifiable by the insurance industry under a business necessity test, but it appears unlikely that all such classifications would be upheld under the scrutiny of that test. By the very nature of their industry, insurance companies are justified in not insuring certain high risks or in insuring them only at a higher cost, and are, in fact, able to verify the

77. In handicapped discrimination cases, the question of intent is often a complicated and emotional one. "Different treatment of the handicapped normally stems from benign and sympathetic rather than vicious and intolerant motives," Wright, note 15, *supra* at 101-02. The value of such paternalistic attitudes to the handicapped is highly questionable, however; and it is also open to debate how many "intolerant motives" may actually be masquerading as "benign and sympathetic" ones. To remove the question of intent and instead focus on the discriminatory effect in many cases may be the fairest and most reasonable approach to cases of discrimination against the handicapped.

78. The business necessity doctrine requires that the standard be job-related, *see, e.g.* *United States v. Georgia Power Co.*, 474 F.2d 906, 912-13 (5th Cir. 1973), and that its use be essential to the safe and efficient operation of the business, *see, e.g.*, *United States v. Bethlehem Steel Corp.*, 446 F.2d 652, 662 (2d Cir. 1971).

79. *Robinson v. Lorillard Corp.*, 444 F.2d 791, 798 (4th Cir. 1971).

80. *Id.*

81. While Title VII is not directly applicable to insurance companies and insureds because it is applied specifically to employment, the underlying rationale is a useful analogy with regard to the concept of discrimination in insurance. However, where Title VII jurisprudence is applied to Section 503 and section 504 regulations, it does not become applicable to the insurer, insofar as Section 503 regulations extend to federal subcontractors, as well as contractors, 41 C.F.R. § 60.741.1 (1977), and as Section 504 regulations prohibit a recipient from participating in a relationship with an organization providing or administering fringe benefits to employees of the recipient where that relationship has the effect of subjecting handicapped employees to discrimination, 45 C.F.R. § 84.11(4) (1977).

need for such action with sound statistical and actuarial data.⁸² However, justification does not exist with regard to *all* disabilities or individuals suffering from them. Despite the validity of the insurance company's business purpose in making them, the classifications appear to be overinclusive in many cases. A preferred alternative⁸³ may well be found in a redefinition of classes to include only those persons or risks which are *demonstrably* higher risks. By allowing disabilities not proven as higher risks to be classified with those that have, the insurance companies have created a class which is composed of nearly all handicapped individuals and is based on an invalid generalization. Since no business purpose is shown to exist as to a large portion of that class, the effect upon the class is a discriminatory one, despite the lack of intent on the part of the industry.

Where a handicapped person has the type of impairment which demonstrably does result in extraordinary risks and costs, the business necessity test should allow the insurer to reasonably respond to those factors. In underwriting group insurance for true groups, business necessity would seem to require that additional claims costs be passed along to the employer and then uniformly to all members of the group when they pay a portion of the premium.⁸⁴ This creates no greater impact on a handicapped employee than on any other employee, and would result in both equal contributions and equal benefits for all employees.

EMPLOYER'S OBLIGATION—EQUAL CONTRIBUTION OR EQUAL BENEFIT?

Despite the shortcoming of the insurance industry, the employer's responsibilities under Sections 503 and 504 remain. He may not discriminate against qualified handicapped persons in "rates of pay or other forms of compensation"⁸⁵ if he is a federal contractor, or in the provision of "fringe benefits available by virtue of employment"⁸⁶ if

82. See note 40 *supra*.

83. See note 78 *supra*.

84. Data suggests higher claims costs are likely to occur for many severe impairments. See note 40 *supra*. The Section 503 regulations excuse a contractor from making reasonable accommodations to the handicaps of its applicants or employees where the contractor can demonstrate that to do so would impose an undue hardship in the conduct of his business. Business necessity and financial cost and expenses may be considered in determining the extent of his obligation, 41 C.F.R. § 60-741.6(d) (1977). The Section 504 regulations similarly excuse a recipient from making accommodation where an undue hardship would be imposed, and allow consideration of factors concerning the recipient's facilities, employees, budget, and the nature of his operation as well as the nature and cost of the necessary accommodation.

85. 41 C.F.R. § 60-741.4(a) (1977).

86. 45 C.F.R. § 84.11(b)(6) (1977).

he receives federal financial assistance. Where an insurer's group program invidiously discriminates against a handicapped person, the regulations prohibit an employer's participation in that program. The practices most likely to be found to discriminate against the handicapped are not confined to a few insurers, however, but are in fact industry-wide. The employer is thus placed in a no-win situation until reforms are made by the insurers.

Even with the necessary reforms in insurance, however, there will remain instances where the insurance company will make a statistically and actuarially justifiable determination that an employee is either uninsurable or a higher risk insurable only at a higher premium. When the insurance company passes this substantial cost increase along to the employer, the question becomes one of what cost is he obliged to assume. It is not clear whether non-discrimination requires only that the employer make the same contribution for a handicapped employee as for a non-handicapped worker (with the handicapped employee making up the difference), or rather that the employer provide each employee, handicapped or not, with the same amount of coverage, regardless of the cost to him.

The question of what constitutes non-discrimination in the provision of insurance benefits has been addressed by both Congress and the courts, with regard to sex and age. On two different occasions, the Supreme Court has held that the denial of pregnancy benefits under employee disability plans is not a prohibited discrimination on the basis of sex. The Court found no violation of the Equal Protection Clause of the 14th Amendment in the State of California's exclusion of pregnancy-related disabilities from coverage under its employee benefits plans in *Geduldig v. Aiello*.⁸⁷ When a similar claim was brought under Title VII in *General Electric Co. v. Gilbert*,⁸⁸ the Court found *Geduldig* to be exactly on point.⁸⁹ In both

87. 417 U.S. 484 (1974).

88. 97 S. Ct. 401 (1976).

89. In holding that no violation of Title VII existed absent any indication that the exclusion of such benefits was a pretext for discriminating against women, the Supreme Court rejected the unanimous conclusion of the six courts of appeal which had previously addressed the question.

See *Communication Workers of America v. American Tel. & Tel. Co.*, 513 F.2d 1024 (2d Cir. 1975); *Wetzel v. Liberty Mutual Ins. Co.*, 511 F.2d 199 (3d Cir. 1975), vacated on *juris grounds*, 424 U.S. 737 (1976); *Gilbert v. General Electric Co.*, 519 F.2d 661 (4th Cir. 1975) reversed, 429 U.S. 125 (1976); *Tyler v. Vickery*, 517 F.2d 1089, 1097-99 (5th Cir. 1975); *Satty v. Nashville Gas Co.*, 522 F.2d 850 (6th Cir. 1975), *cert. granted*, 429 U.S. 1071 (1977); *Hutchison v. Lake Oswego School Dist.*, 519 F.2d 961 (9th Cir. 1975), *cert. denied*, 429 U.S. 1037.

Geduldig and *Gilbert*, the Court reasoned that there existed no risk from which men were protected that women were not,⁹⁰ and that in terms of the aggregate risk protection derived from the program, there was no evidence of discrimination against any definable group. Moreover, the *Gilbert* Court reasoned that simply because an employer's disability benefit plan is less than inclusive is not proof that the package is worth more to men than to women.⁹¹

The assumption that *Gilbert* is dispositive of the question of the employer's obligation with regard to a handicapped employee⁹² can be made only by ignoring a factor essential to the Court's reasoning: the fact that men and women do receive exactly the same benefits when the employer makes equal contributions.⁹³ Both the *Geduldig* and the *Gilbert* Courts relied heavily on the fact that there was no risk from which men were protected in the plans in question that women were not. A handicapped employee, however, often would not be receiving coverage for the same risks where an employer made only equal contributions. It has been argued that *Gilbert* implicitly approves the exclusion of certain handicaps, as opposed to handicapped persons, from coverage, even without actuarial justification, since "such an exclusion, distinguishing merely among medical risks rather than among persons, would not constitute handicap discrimination at all."⁹⁴ Even if *Gilbert* does not precisely approve the exclu-

90. "The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups - pregnant women and non-pregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes." *Geduldig*, *supra* note 87, at 496 n. 20. Risks as used here is synonymous with condition of insureds; whereas in insurance, risk relates to the probability that the insurer will experience a loss resulting from a condition.

91. "For all that appears, pregnancy related disabilities constitute an *additional* risk, unique to women, and the failure to compensate them for this risk does not destroy the presumed parity of the benefits, accruing to men and women alike, which results from the facially even-handed *inclusion* of risks." [emphasis in original] *General Electric Co.*, *supra* note 89, at 139.

92. See, e.g., *Wright*, *supra* note 15, at 84.

93. It is questionable whether the *Gilbert* Court was correct in its reasoning that pregnancy is an additional risk, in light of the fact that there is virtually no condition of a male which is excluded under the GE plan. Arguably, where conditions unique to the male sex received coverage, men are receiving greater coverage than women if any condition exclusive to females is simultaneously excluded. The *Gilbert* Court rejected this argument, however, and found no difference in either the contributions made or the benefits received on behalf of either sex.

94. *Wright*, *supra* note 15, at 85. Such an argument is apparently based upon the Court's finding that the GE plan was "nothing more than an insurance package which covers some risks, but excludes others." 429 U.S. at 138. The flaw in such an argument is that the condition of a handicapped person which would constitute the excludable risk would in many cases be one of the very conditions against which non-handicapped persons are being insured.

sion of risks unique to handicapped persons, it may approve the exclusion of the risk of *incurring* that handicapping condition for all persons involved.⁹⁵ *Gilbert* may well be read as condoning across-the-board exclusions of certain risks from coverage for both handicapped and non-handicapped employees.

Federal legislation on age discrimination in employment prohibits discrimination in hiring, compensation, terms, conditions or privileges of employment.⁹⁶ However, it is not unlawful for an employer to observe the terms of a bona-fide seniority system or employee benefit plan (such as a retirement, pension, or insurance plan) which is not a subterfuge to evade the purposes of the Act.⁹⁷

The employee benefits exception to the Age Discrimination in Employment Act recognizes the use of actuarially validated class-based characteristics such as the increased health problems of older workers and their reduced longevity.⁹⁸ Where the employment of a handicapped individual represents an actual, substantial increase in cost (assuming that such an increase is actuarially valid) of employee benefit plans to the employer, an approach similar to that of the Age Discrimination in Employment Act (ADEA) may well be the one most acceptable to all parties involved. As with the ADEA, the emphasis in dealing with employment and the handicapped should first

95. The distinction is whether or not the condition is a pre-existing one. Where an employee begins work with an affliction requiring treatment, it is questionable whether the continued costs of that treatment should automatically be assumed by the employer's insurance plan since the very elemental insurance concept of risk is absent. Where that affliction is significant only in terms of representing a higher risk of susceptibility to other conditions covered by the employee benefit plan, however, then *Gilbert* can probably not be read as approving merely contribution on the employer's part commensurate with what is provided for the non-afflicted employee, when the aggregate coverage is disproportionate.

96. 29 U.S.C. §§ 621-634 (1977).

97. 29 U.S.C. § 623(f)(2) (1977). To be considered bona-fide, a plan need not provide the same pension, retirement or insurance benefits to older workers as it provides to younger workers, so long as any difference between them is in accordance with the terms of a bona-fide plan. 29 C.F.R. § 860.120(a) (1976). The Wage-Hour Division of the Department of Labor permits older workers to be granted less insurance, pension or retirement benefits if payments made or costs incurred on behalf of the older workers by their employer are equal to those made or incurred on behalf of the younger workers. The Division also permits varying benefits for employees in the age group protected by the Act where the benefits are determined by a formula involving age or length of service. Wage-Hour Division, Interpretative Bulletin on Age Discrimination in Employment, 29 C.F.R. § 860.120(a). It is not clear, however, whether employees in the age group protected by the Act may be excluded entirely from plan benefits.

98. "The bill takes into full consideration . . . the problem of employers in the field of pension and other benefit plans. The bill would permit the hiring of older workers without requiring that they necessarily be included in all employee benefit plans. This provision is designed to maximize employment possibilities without working an undue hardship on employers in providing special and costly benefits." 113 CONG. REC. 3476 (1967).

and foremost be in promoting the hiring of handicapped workers on the basis of their abilities. Where costs incident to that employment, such as those arising from pension and insurance programs, become so prohibitive to the employer as to thwart that very purpose, then some alternative must be created. The ADEA has offered the employer the option of hiring an older worker without incurring those higher costs which are directly related to the person's age, and which would otherwise lessen that person's attractiveness to the employer. To hire a qualified handicapped individual without having to assume additional insurance costs directly and reasonably related to his handicap may be the most immediately viable approach to assuring that he is in fact hired on the basis of his capabilities, rather than passed over because of his disability.

Even if equal contribution by the employer on the part of both handicapped and non-handicapped persons is viewed as equal treatment, there remains the question of whether equal treatment actually represents equality to the party deriving the lesser benefit.⁹⁹ While *Gilbert* suggests that equal treatment is sufficient to avoid connotations of discrimination, Justice Brennan in his dissenting opinion stated:

The Court's belief that the concept of discrimination cannot reach disability policies effecting an additional risk, unique to women . . . is plainly out of step with the decision three terms ago in *Lau v. Nichols*,¹⁰⁰ interpreting another provision of the Civil Rights Act. There a unanimous Court recognized that discrimination is a social phenomenon encased in a social context and therefore, unavoidably takes its meaning from the desired end-products of the relevant legislative enactment, end-products that may demand due consideration to the uniqueness of "disadvantaged" individuals.¹⁰¹

99. See *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1165 (1969) [hereinafter cited as *Developments—Equal Protection*]:

Arguments about equality are thus arguments about criteria of relevance. The difficulties involved in developing such criteria have occupied philosophers for centuries. Despite the refinements that distinguish the theories of various philosophers, most such theories represent variations on two basic notions of equality, first identified by Plato and Aristotle: numerical equality and proportional equality. The contrast between the two notions is illustrated by the difference between the right to an *equal distribution* of things (property, happiness) and the *equal right* with respect to the distribution of such things. According to the former, each individual is to receive numerically identical amounts of benefits being distributed or the burden imposed in the public sector, whereas the latter means only that all will receive the same consideration in the distributional decision, but that the numerical amounts distributed may differ. [emphasis in original]

100. See note 105 *infra*.

"Equality" as a political notion is a difficult concept. In everyday usage, it connotes comparison of some common quality or attribute and takes on a meaning of sameness. Politically, however, the concept is much less meaningful, because "no ready indication is given of the common attribute with respect to which men are asserted to be equal."¹⁰² Legal arguments over equality thus become arguments over criteria of relevance: is the relevant standard distribution of benefits and/or burdens according to the individual's needs, according to his merit, or with regard only to absolute numerical equality?¹⁰³

The *Gilbert* Court apparently ascribed to the principle of distribution according to a formula of numerical equality, concluding that the differences between men and women were irrelevant characteristics so long as the burdens imposed and benefits received by both were shared equally. The Court, however, has not applied this same interpretation of equality under all circumstances. On several other occasions it has taken cognizance of differences of need for the benefit in question, and consequently focused on the effect which a distribution of a benefit or burden has upon the relative needs of its recipients. In so doing, the Court has either ignored or rejected the strict concept of numerical equality found in *Gilbert*.

A violation of the Equal Protection Clause was found in *Griffin v. Illinois*,¹⁰⁴ where, although every person convicted in a criminal trial was given a right of review by writ of error, only non-indigents were

101. 429 U.S. 159 (citations and footnotes omitted). Such a statment is particularly applicable to the situation of the handicapped. In a letter accompanying the initial version of the proposed HEW regulations for 29 U.S.C. § 794 (Supp. V. 1975), former HEW secretary David Mathews noted:

Section 504 [of the Rehabilitation Act of 1973, 29 U.S.C. § 794], however, differs conceptually from both titles VI [of the Civil Rights Act of 1964] and IX [of the Education Amendments of 1972]. The premise of both Title VI and Title IX is that there are no inherent differences or inequalities between the general public and the persons protected by these statutes and, therefore, there should be no differential treatment in the administration of Federal programs. The concept of Section 504, on the other hand, is far more complex. Handicapped persons may require different treatment in order to be afforded equal access to Federally assisted programs and activities, and identical treatment may, in fact, constitute discrimination. The problem of establishing general rules as to when different treatment is prohibited or required is compounded by the diversity of existing handicaps and the different degree to which particular persons may be affected. Thus, under Section 504, questions arise as to when different treatment should be considered improper and when it should be required.

41 Fed. Reg. 20,296 (1976).

102. *Development-Equal Protection*, *supra* note 99, at 1160-61.

103. *See* note 99 *supra*.

104. 351 U.S. 12 (1956).

actually able to take the appeal because of the requirement that a transcript be furnished to the appellate court. While such transcripts were made available to all defendants upon payment of a fee, in adherence to a concept of numerical equality, indigent defendants were found by the Court to be effectively denied access to review on the basis of their wealth. The Court vacated and remanded for further action in affording the petitioners adequate and effective review, with the effect of requiring Illinois to take account of economic inequalities not of its own creation in structuring its criminal appeals system.¹⁰⁵ Not only did the majority take a result-oriented, proportional approach to the concept of equality, they specifically found a strict numerical approach to be in itself violative of equal protection.

Similarly, the Court in *Lau v. Nichols*¹⁰⁶ focused upon equality of result rather than on equality of input, and found the failure of the San Francisco school system to provide English language instruction to approximately 1,800 non-English-speaking Chinese students to be violative of Section 601 of the 1964 Civil Rights Act.¹⁰⁷ Stating that "[i]t seems obvious that the Chinese-speaking minority receive fewer benefits than the English-speaking majority from respondents' school system which denies them a meaningful opportunity to participate in the educational program . . . ,"¹⁰⁸ the Supreme Court found a violation of Section 601 and reversed the court of appeals. Provision of the same facilities, textbooks, teachers and curriculum was insufficient under the Court's "result-oriented" concept of equality.¹⁰⁹

105. *Developments-Equal Protection*, *supra* note 99, at 1178.

106. 414 U.S. 563 (1974).

107. 42 U.S.C. § 2000d (1977). This provision excludes recipients of aid who discriminate against racial groups from participation in federal financial assistance. The Court of Appeals for the Ninth Circuit, in affirming denial of relief by the district court, found no violation of either Section 601 or the Equal Protection Clause, reasoning that "[e]very student brings to the starting line of his educational career different advantages and disadvantages caused by social, economic and cultural background, created and continued completely apart from any contribution by the school system." 483 F.2d 791, 797 (9th Cir. 1973).

108. 414 U.S. at 568.

109. The contradictory approaches to equity taken by the *Lau* and *Griffin* Courts on the one hand, and the *Gilbert* Court on the other, can possibly be explained by a distinction found in the programs involved in each of the cases. In *Lau* and in *Griffin*, denial of some additional treatment of the parties involved resulted in the denial to those parties of access to the essential process in question. Failure to provide a transcript barred the petitioner in *Griffin* from the appellate process itself; while the students in *Lau* were deprived of any meaningful benefit from the educational system through failure to provide English instruction. The female employees in *Gilbert*, however, were not denied employment, or even equal wages. Rather, their right to an additional and supplemental benefit was at issue. If, in fact, such a distinction did guide the *Gilbert* Court, then it appears unlikely that provision of equal benefits to the handicapped employee, regardless of the employer's contribution, would be mandated by that Court.

Equal contribution on the part of both handicapped and non-handicapped employees to a fringe benefit plan would be sufficient to satisfy the demands of absolute numerical equality in assessing an employer's responsibilities. The basic concepts of Sections 503 and 504, reasonable accommodation and individual determination, suggest that the result-oriented approach is preferable to a strict numerical equality approach. Section 504 regulations require that handicapped persons be provided an equal opportunity to participate and benefit from the aid, benefit, or service in question, and that different or separate services are prohibited except when necessary to provide equally effective benefits.¹¹⁰ The term "equally effective" is intended to encompass the concept of equivalent, as opposed to identical, and to acknowledge the fact that in order to meet the individual needs of handicapped persons to the same extent that corresponding needs of non-handicapped persons are met, adjustments to regular programs or provision of different programs may be necessary.¹¹¹ Reasonable accommodation is an attempt to overcome the effect of a person's handicap in order to afford him an equal opportunity to achieve equal results. Numerical equality would defeat such a purpose.

Skyrocketing medical costs make resolution of the problem of providing health insurance to the handicapped imperative. Someone must take responsibility for the health costs of the handicapped, and it is no more feasible to expect the handicapped person to rely solely on his pocketbook than it is to expect any other individual to do the same. In the event of serious illness or accident, it is a very small percentage of the entire population which would even be capable of paying all of its own expenses out-of-pocket. The needed reforms can be attained only by a joint effort among the federal and state governments, the insurance industry, and the employer.

First of all, there must be a realization that true insurance is a risk-oriented concept covering only fortuitous losses. At the same time, however, another basic tenet of insurance cannot be pushed aside—the idea of risk distribution. "[I]nsurance is illustrative of the idea of cooperation. The people bear together, and by distributing it over a period of years, it is less of a burden."¹¹² While economics dictate that the insurer should not be prohibited from reflecting the

110. 45 C.F.R. § 84.11 (1977).

111. Appendix A - Analysis of Final Regulations, 42 Fed. Reg. 22,685 (1977).

112. Address by William Jennings Bryan in front of 1914 Proceedings, National Association of Insurance Commissioners (September 18, 1914), reprinted in T. KIMBALL & H. DENNENBERG, *INSURANCE, GOVERNMENT, AND SOCIAL POLICY: STUDIES IN INSURANCE REGULATION*, at 20 (1969).

degree of risk being undertaken, social policy interjects a demand for some socialization of risk, that is, an extension of insurance coverage without necessarily involving an equitable distribution of cost, on purely social grounds rather than economic ones.¹¹³

A balancing of these two principles of insurance must then guide insurers, employers and government in providing for the insurance needs of the handicapped. Initially it should fall to the states to regulate more strictly the classification and rating practices of the insurers. Classifications should be allowed only on the basis of sound actuarial justification, not on the basis of industry speculation often resulting from unverifiable myths, generalizations and stereotypes. Price differences should be permitted, but only insofar as they reflect actual cost differences.

Where coverage of a handicapped person under an employee-benefit plan results in such a permissible increase in price, it is merely good business to allow the insurer to pass that increase along to the employer. While the employer should not necessarily shoulder full responsibility for the insurance needs of a handicapped employee where a substantial additional cost is involved, he too should be called upon to bear a portion of the responsibility for the welfare of the handicapped. Moreover, the employer can and will pass his increase along to other employees and consumers in a competitive economy.¹¹⁴ The "burden"¹¹⁵ to the shareholders, consumers, employees, and insurers resulting from passed-on costs is a not newly created one. As taxpayers, they are presently maintaining responsibility for many of the health needs of the handicapped through social welfare programs.

Society has an unquestionable obligation to provide for the needs of its disabled members, and will be assessed the cost in one way or another. By assuming the cost in a manner which allows the handicapped individual to be employed gainfully, both society and the handicapped individual would be benefitted: the dignity of the disabled individual would be preserved, and society and the economy would be receiving the handicapped person's contributions of time, effort and ability in exchange for the benefits it must otherwise confer

113. T. KIMBALL & H. DENNENBERG, *supra* note 112, at 7. "In the automobile liability field one sees tremendous pressures of this kind toward the socialization of risk by provision of insurance for everyone at a price that is reasonable in terms of what the people in question can afford to pay, or think they can afford to pay, and not in terms of the burdens imposed on society by their driving cars." *Id.* at 7-8.

114. Wright, *supra* note 15, at 83 n.61.

115. *Id.*

gratuitously. Although these underlying principles are contained in the Section 503 and 504 regulations, the purposes are not achieved, mainly because full responsibility is placed upon the employer alone.

Equitable and proportionate distribution of the costs involved may not be achievable completely if left only to economic controls. Some direct government intervention may well be necessary to assure that handicapped persons are able to meet the potential expenses of both their present and possible disabilities. Although it is beyond the scope of this Article to recommend any concrete reform packages, certain areas do merit future exploration. Insurers may be able to design programs particularly for the high-risk handicapped which are similar to the assigned-risk and pooled-risk programs which have been developed for high-risk drivers. Provisions might be enacted by legislatures modeled on the "second-injury funds" established by workmen's compensation statutes, in which liability is imposed on the employer or his insurer only for the degree of disability resulting from the injury arising out of employment with his company. The increment of disability resulting from the pre-existing impairment is compensated by the second injury fund.¹¹⁶ National health insurance programs or reforms in Medicaid and/or Medicare which would raise permissible income levels or other changes in eligibility requirements, might also be viable solutions to at least part of the problem.

CONCLUSION

Providing insurance to the handicapped under employee benefit plans is a real problem for handicapped individuals, employers and insurers. The insurance industry, however, is compounding rather than alleviating the problem, and consequently preventing others from reaching any resolution. Legislative solutions have been attempted but with disappointing results. Administrative regulations also have been disappointing because they lack clarity and have persisted in placing the full responsibility for insuring the handicapped upon the employer. A more desirable approach would place a joint responsibility among several societal interests. The purpose of the legislation, encouraging equal employment of qualified handicapped individuals, is attainable only if consideration is given to the question of who should bear the economic responsibilities which are not solved by employment, and in what proportion those responsibilities should be borne.

116. *Potluck Protections*, *supra* note 58, at 822-33.