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ENDING SEX DISCRIMINATION IN INSURANCE: THE NONDISCRIMINATION IN INSURANCE ACT

INTRODUCTION

Sex discrimination has existed since the time men and women first realized that there were differences between them. Numerous federal acts have addressed this issue,¹ yet in the absence of an Equal Rights Amendment² sex discrimination is still prevalent in our society. This discrimination is blatant in the insurance industry. Women, as a group, live longer than men.³ Men, as a group, have more automobile accidents than women.⁴ Being female, however, does not guarantee longevity anymore than being male causes collisions. Factors more accurate and reliable than sex are available for determining insurance premiums. Yet based upon these statistical generalizations, insurance companies have long pursued a policy of discrimination which would clearly be illegal if based upon categorizations recognized as discriminatory, such as race or religion.

The Nondiscrimination in Insurance Act (H.R. 100) is designed to eliminate inequities in insurance. Introduced on January 3, 1983 by Representative John Dingell (D-Mich.),⁵ and currently pending debate on the House floor, H.R. 100 provides:

It shall be unlawful discriminatory action for any insurer because of race, color, religion, sex, or national origin of any person or any group of persons . . . to treat such applicant or insured differently than the insurer treats or would treat any other applicant or insured with respect to the terms, conditions, rates, benefits or requirements of such insurance contract.

1. *See, e.g.*, Civil Rights Act of 1964, Pub. L. No. 88-352 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C. (1976 & Supp. V 1981)); Equal Credit Opportunity Act, Pub. L. No. 93-495, 88 Stat. 1521 (codified as amended at 15 U.S.C. §§ 1691-1691f (1976 & Supp. V 1981)). Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified as amended at 5 U.S.C. §§ 5108, 5314, 5315, 5316; 42 U.S.C. §§ 2000e-1 to e-6, 2000e-8 to e-9, 2000e-13 to e-17 (1976)).
2. 872 FACTS ON FILE (1983). On November 15, 1983, the House of Representatives narrowly defeated the proposed Equal Rights Amendment to the U.S. Constitution. The majority vote was just six shy of the two-thirds majority needed to send the amendment to the states for ratification.
3. In 1979 female life expectancy was 77.6 years compared with 69.9 years for males. U.S. NATIONAL CENTER FOR HEALTH STATISTICS, VITAL STATISTICS OF THE UNITED STATES STATISTICAL ABSTRACT OF THE UNITED STATES 71 (1982-83) [hereinafter cited as VITAL STATISTICS]. These conclusions are based on statistical evidence taken from actuarial tables.
4. *See* U.S. DEPT OF TRANSP., FEDERAL HIGHWAY ADMIN., THE EFFECTS OF EXPOSURE TO RISK ON DRIVING RECORD, JUNE 1973 reprinted in *Nondiscrimination in Insurance Act of 1983: Hearings on H.R. 100 Before the Subcomm. on Commerce, Transportation and Tourism of the House Comm. On Energy and Commerce*, 98th Cong., 1st Sess. 1001 (1983) [hereinafter cited as *Hearings*].
5. 129 CONG. REC. H42 (daily ed. Jan. 5, 1983).

It shall be an unlawful discriminatory action for any insurer to utilize any statistical table (whether of mortality, life expectancy, morbidity, disability, disability termination, or losses) or any other statistical compilation as a basis for any action which is contrary to this section.⁶

The effect of this bill is to make the current industry practice of using sex as a basis for setting insurance premiums illegal. No longer would insurance companies be able to charge young men higher auto and life insurance premiums solely because of their sex. The use of sex-based actuarial tables to determine life insurance premiums and pension plan benefits would also be prohibited. In essence, similarly situated men and women would no longer pay dissimilar insurance premiums or receive dissimilar benefits simply because of their sex.

While much debate⁷ has centered around the effects of H.R. 100 on all types of insurance, including health, disability, life, and auto insurance, and pension plans, the scope of this note is limited to a discussion of the effect H.R. 100 would have on the structure of pension plans and auto insurance policies.

PENSION PLANS

Approximately forty-six million people nationwide participate in 460,000 pension plans.⁸ Participants usually receive their benefits in one of three forms: the single life annuity, joint and survivor annuity, or lump sum payments.⁹

Under a single life annuity plan, the recipient receives periodic payments for life, normally on a monthly basis.¹⁰ Joint and survivor annuities are similar to the single life annuity with an additional provision that entitles the recipient's designated survivor, usually the spouse, to receive benefits for life.¹¹ With lump sum benefit plans, the recipient receives a single payment comprising the total benefit.¹²

These three basic benefit forms are usually offered under either defined benefit or defined contribution plans.¹³ Twenty-nine percent of private pension plans are defined benefit plans, whereby an employer provides employees with a specified level of retirement benefits in a particular form.¹⁴ The employer accomplishes this by making "contributions [which] are actuarially determined based on predicted benefits payable in the future."¹⁵ The remaining seventy-one percent are de-

6. H.R. 100, 98th Cong., 1st Sess., § 4(a), (b), 129 CONG. REC. H42 (daily ed. Jan. 5, 1983).

7. *Hearings*, *supra* note 4, at 669-963.

8. *Hearings*, *supra* note 4, at 60 (statement of Timothy Ryan, Solicitor, Department of Labor).

9. Ryan, *Nondiscrimination in Pension Plans*, 34 LAB. L. J. 201, 202-03 (1983).

10. *Id.* at 203.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. M. Connerton, *Cost Study of the Impact of an Equal Benefits Rule on Pension Benefits*, 7 (1983) (unpublished report prepared for the Office of Regulatory Economics, U.S. Dep't of Labor) (available at offices of *Journal of Legislation*).

financed contribution plans.¹⁶ Under these plans, employers make annual contributions to individual accounts established for each employee.¹⁷

Neither of these structures is inherently discriminatory.¹⁸ The problem arises under defined contribution plans when benefits are converted from their original form to an optional form, usually a life annuity.¹⁹ The lump sum benefit that the retiree is entitled to is "converted into a life annuity on the basis of its actuarial value measured by the life expectancy of the retiree."²⁰ Industry custom relies on tables which include sex as a factor in calculating life expectancy.²¹ Since women, as a group, live longer than men,²² their benefits are projected to be spread out over a longer period of time.²³ Therefore, each woman receives lower monthly payments than each man receives. When converted into life annuities, two equal lump sum benefits will result in a female retiree receiving a lower monthly income than her male co-worker will receive.

Defined benefit plans present the mirror image of defined contributions plans. Employees, rather than employers, contribute to the pension fund. Under these direct benefit plans, women must make greater monthly contributions than men in order to receive equal monthly benefits upon retirement.²⁴ The result of using sex-based actuarial tables is that women make greater total contributions than men in order to receive equal monthly benefits, or receive lower monthly benefits for equal total contributions.

Although the "average woman" outlives the "average man," it is inherently discriminatory to reduce the pension of a female retiree to a level below that of a similarly situated male simply because statistics show that females as a group outlive males. The United States Supreme Court espoused this position when it struck down state-managed pension plans which discriminated in this manner.²⁵

TRADITIONAL BASES FOR INDUSTRY PRACTICES

The insurance industry determines rates by using actuarial mathematics, which is a combination of probability and statistics.²⁶ Insurance companies group individuals according to the risk they represent.²⁷ Risk classification enables insurers to accurately predict

16. Ryan, *supra* note 9, at 203.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. AMERICAN COUNCIL OF LIFE INSURERS, LIFE INSURANCE FACT BOOK 93 (1981).

22. VITAL STATISTICS, *supra* note 3.

23. *Id.*

24. City of Los Angeles Department of Water and Power v. Manhart, 435 U.S. 702 (1978).

25. See *infra* notes 39-48 and accompanying text.

26. Brief for the American Academy of Actuaries, as *amicus curiae*, at 3, Arizona Governing Committee v. Norris, — U.S. —, 103 S. Ct. 3492 (1983) [hereinafter cited as American Academy Brief].

27. Brief for the American Council of Life Insurers, as *amicus curiae*, at 8, Arizona Governing

cost and promotes competition by placing policyholders in groups whose members present similar loss potential.²⁸

Risk classification determines policy rates by which premiums adequate to assure industry solvency are established.²⁹ According to the American Council of Life Insurance, "[a]ccurate risk classification is essential for maintaining . . . financial solvency."³⁰ Sex, insurers maintain, is an accurate and efficient indicator of longevity,³¹ which justifies the use of sex-based actuarial tables.

Women live longer than men, and will therefore receive a greater number of monthly payments over their lifetimes. Women in the aggregate receive a greater total amount of benefits than men. "If women are to receive *equal value* for contributions paid in, then women must receive smaller *periodic* payments."³² The insurance industry contends that this practice is fair. "To provide equal periodic payments to women over their full lifetime would require a gift—not a return on accumulations they earn, but a gift."³³ Female retirees who must meet the same monthly expenses as males on a reduced income insist that this practice is inherently discriminatory. Women argue that they are not seeking "gifts" but simply equal treatment.

"Everything else being equal," women have a greater life expectancy than men, and are considered better economic risks.³⁴ Yet everything else is not equal. The difference in life expectancy between men and women can be attributed to factors relating more to overall lifestyle than to sex.³⁵ Actuarial tables indicate sex is an efficient and accurate indicator of life expectancy,³⁶ but it is only *one* factor, and one which civil rights policy mandates not be used to distinguish between persons "otherwise equal."³⁷

THE CIVIL RIGHTS ISSUE IN INSURANCE DISCRIMINATION

Classifying people by sex for the purpose of establishing insurance premiums violates the basic principles of national civil rights policy³⁸

Committee v. Norris, — U.S. —, 103 S. Ct. 3492 (1983) [hereinafter cited as American Council Brief].

28. Hatch, *Should Insurance be Blind to Sex?*, 12 BRIEF 10, 13 (Aug. 1983).

29. *Id.*

30. American Council Brief, *supra* note 27, at 9.

31. *Id.* The Council cites age and sex as the "two most significantly reliable factors statistically shown to quantify the risk of longevity."

32. *Id.* at 10 (emphasis in original).

33. *Hearings, supra* note 4, at 412 (statement of George K. Bernstein testifying on behalf of U.S. Fidelity and Guaranty Co., Firemen's Fund Insurance Co., Republic Insurance Co., and the New York State Teachers' Retirement System, in opposition to H.R. 100).

34. *Hearings, supra* note 4, at 296 (statement of the Alliance of American Insurers in opposition to H.R. 100).

35. *See infra* notes 75-81 and accompanying text.

36. AMERICAN COUNCIL OF LIFE INSURERS, *supra* note 21.

37. *Hearings, supra* note 4, at 53. (Letter from Representative John Dingell, D-Mich., to Meg Greenfield, Editorial Page Editor, The Washington Post).

38. *See, e.g.*, Civil Rights Act of 1964, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C. (1976)).

by attributing characteristics of the group to the individual. Two recent Supreme Court cases specifically addressed this issue as it applied to public employers' pension plans.

The 1978 case of *City of Los Angeles, Department of Water and Power v. Manhart*³⁹ involved a claim by female employees that the city's pension plan violated Title VII of the Civil Rights Act of 1964.⁴⁰ The Court invalidated the plan which required females to make larger contributions to the pension fund than males in order to receive equal monthly benefits upon retirement.⁴¹ Holding that the differential violated both the language and policy of Title VII which makes it unlawful for an employer to discriminate on the basis of sex, the Court found the practice discriminatory in its "treatment of a person in a manner which but for that person's sex would be different."⁴²

In *Manhart*, the Court recognized that the Civil Rights Act focuses on fairness to the individual and precludes treating individuals merely as components of a group.⁴³ Justice Stevens, writing for the majority states that "even a true generalization about the *class* is an insufficient reason for disqualifying *an individual* to whom the generalization does not apply."⁴⁴ Thus, that women as a group outlive men cannot support using sex as the sole factor in a life expectancy determination. Instead, this determination should be based on individual factors.

In the 1983 case *Arizona Governing Committee v. Norris*,⁴⁵ the Court reaffirmed the *Manhart* decision when it struck down Arizona's voluntary pension plan. The plan offered state employees the option of receiving retirement benefits from one of several state-selected insurance

39. 435 U.S. at 702.

40. The specific complaint in *Manhart* alleged violation of 42 U.S.C. § 2000e-2 (1976) which provides:

It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or *otherwise to discriminate* against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex or national origin.

(emphasis added).

The 1972 amendments and extended Title VII coverage to most federal, state, and local government employees. Pub. L. No. 92-261, § 2(1), 86 Stat. 103 (1972) (codified at 42 U.S.C. §§ 2000(e)-2 to (e)-17 (1976 & Supp. V 1981)).

41. *Manhart*, 435 U.S. 717.

42. *Id.* at 711. See also 42 U.S.C. § 2000e (1976 & Supp. V 1981) (defining "employer" and "employee"); *id.* § 2000e-2 (1976 & Supp. V 1981) (making certain employment practices unlawful).

43. 435 U.S. at 708.

44. *Id.* (emphasis added).

45. — U.S. —, 103 S. Ct. 3492 (1983). Justice Marshall wrote the 5-4 majority opinion. The Court refused to make this holding retroactive because the costs of compliance would have disrupted the plan and harmed the employees. It therefore made the ruling effective as of August. In a per curiam opinion the Court held that the Arizona plan constituted sex-based discrimination in violation of title VII. It ordered that "all retirement benefits derived from contributions made after the decision today [judgment was issued Aug. 1, 1983] must be calculated without regard to the sex of the beneficiary." *Id.* at 3493. A separate opinion of a majority of the Court, written by Justice Marshall, concurred in these decisions. A third opinion was written by Justice Powell. This opinion, expressing a unanimous position on the issue, emphasized that there was "no justification for [the] Court . . . to impose this magnitude of burden retroactively on the public." *Id.* at 3510.

companies, all of which paid women lower monthly pension benefits than men because of sex-based actuarial tables.⁴⁶ Again the Court held that the use of sex-based mortality tables violated Title VII of the Civil Rights Act of 1964.⁴⁷ The Court followed the reasoning of *Manhart*, stating "Congress has decided that classifications based on sex, like those based on national origin or race, are unlawful."⁴⁸ Both cases alleviated the use of sex-based actuarial tables in state run pension plans. *Manhart* involved a defined benefit plan and specifically addressed the issue of unequal contributions,⁴⁹ while *Norris* involved a defined contribution plan and addressed the issue of unequal benefits.⁵⁰ Yet, despite these two decisions invalidating insurance discrimination in the public sector, it remains prevalent in the private sector.⁵¹

THE NEED FOR FEDERAL LEGISLATION

House bill 100 effectively deals with this problem by making it unlawful and discriminatory to distinguish on the basis of sex "with respect to the terms, conditions, rates, benefits or requirements" of the insurance contract.⁵²

The insurance industry contends that under the McCarran-Ferguson Act,⁵³ the regulation of insurance should be left to the states and that H.R. 100 impinges upon this right.⁵⁴ The McCarran-Ferguson Act, passed in 1948, makes insurance regulation a state responsibility, and is commonly considered to prohibit the Federal Government from regulating insurance.⁵⁵ The drafters of the Nondiscrimination in Insurance Act, however, explicitly stated in section two that the Act will not affect the authority and responsibility of the states to regulate insurance as long as they do so consistently with the Nondiscrimination Act.⁵⁶ Congress' intent is manifested in section five of the Nondiscrimination Act which places primary responsibility for enforcement of the Act

46. *Id.* at 3495.

47. *Id.* at 3493.

48. *Id.* at 3498 (citing *Manhart*, 435 U.S. at 709).

49. 435 U.S. 702 (1978).

50. — U.S. —, 103 S. Ct. 3492 (1983).

51. While both *Manhart* and *Norris* involved public rather than private employers the feature which allowed the courts to apply Title VII principles was the extent of employer participation in the operations of the pension plan. The necessary degree of participation is more often found in the cases of public employers because they are often self-insured, as in *Manhart*. The principles of both cases apply equally to private employers.

52. H.R. 100, *supra* note 6.

53. 15 U.S.C. § 1011 (1982). "Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States."

54. *Hearings, supra* note 4 at 294-95 (statement of Andre Maisonpierre, senior vice president, Alliance of American Insurers).

55. 15 U.S.C. § 1011 (1982). "The business of insurance, and every person engaged therein, shall be subject to the laws of several States which relate to the regulation or taxation of such business." *Id.* § 1012. The primary purpose of this chapter was to preserve state regulation of the activities of insurance companies.

56. H.R. 100, *supra* 6, § 2(b).

with state and local authorities.⁵⁷ Only after state remedies have been exhausted does H.R. 100 allow a civil action to be brought in federal district court for damages.⁵⁸ The United States Attorney General will not bring suit on behalf of the government unless a "pattern or practice" of discrimination is established.⁵⁹

When viewed as a civil rights bill rather than an insurance bill, H.R. 100 does not interfere with the states' right to regulate insurance.⁶⁰ The congressional finding that

discrimination based on race, color, religion or national origin in the conduct of business by an insurer (1) burdens the commerce of the Nation; (2) impairs the economic welfare of large numbers of consumers who rely on the protection of such policies and contracts; (3) constitutes an unfair trade practice which adversely affects commerce; and (4) makes it difficult for employers to comply with Federal laws prohibiting such discrimination against their employees,⁶¹

demonstrates the congressional commitment to civil rights by viewing the economic issues of insurance discrimination through the same anti-discrimination lens as Congress' civil rights policy.⁶² H.R. 100 would be useful in achieving full enforcement of Title VII in the area of employee fringe benefits when insurance comprises a substantial portion

57. *Id.* § 5. Section five states, in part:

If an alleged discriminatory action occurs in a State, or political subdivision thereof, which has a State or local law prohibiting such discriminatory action and establishing or authorizing a State or local authority to grant or seek relief from such discriminatory action or to institute criminal proceedings with respect to such action upon receiving written notice of such action within one hundred and eighty days after the alleged discriminatory action occurs, the provisions of this section shall apply.

(b) It is the purpose of this Act to accord to State and local authorities the primary opportunity to enforce the State or local laws prohibiting such discriminatory action before an aggrieved person may invoke the judicial remedy provided under section 6 of this Act. Therefore, no suit shall be filed under section 6 before the expiration of sixty days after the State or local authority has received the notice specified in subsection (a) of this section, unless any proceeding begun by the State or local authority after such notice has been earlier terminated (except that such sixty-day periods shall be one hundred and twenty days during the first year after the effective date of such State or local law). The notice of the alleged discriminatory action to commence such State or local proceedings shall be filed within the time prescribed by such State or local law, provided such prescribed time is not less than one hundred and eighty days after the alleged discriminatory action occurred.

58. H.R. 100, *supra* note 6, § 6. Section six permits civil actions to be brought in state or federal district court when either:

(a) no State or local law prohibits such discriminatory acts, and therefore no procedure to redress such injury exists;

(b) if a State or local authority fails within 60 days of notice of discrimination to take appropriate action specified under Section 5 of the bill.

59. *Id.* § 7. Section seven permits the Attorney General to bring a cause of action when he reasonably believes that any person or group of persons is engaged in a "pattern or practice of resistance to [other person's] full enjoyment" of nondiscrimination, or when he reasonably believes that denial of rights granted under this act amounts to "an issue of general public importance." Section nine allows the plaintiff to recover for actual damages sustained including reimbursement for excess rates paid or inadequate benefits received. It also allows for punitive damages of amount not to exceed \$25,000 for an individual or \$800,000 in a class action.

60. The bill is not regulating insurance, it is merely prohibiting discrimination.

61. H.R. 100, *supra* note 6, § 2(a).

62. 42 U.S.C. § 20002-e (1976 & Supp. V 1981).

of employee compensation.⁶³

When the states refuse or neglect to legislate civil rights issues, the Federal Government is *obliged* to step in.⁶⁴ The discrimination practiced by insurance companies limits social and economic opportunities for women to such an extent that a federal law is needed to correct the inequities which result.⁶⁵

The cost of insurance is especially important to women who are heads of households, single, widowed or divorced.⁶⁶ Traditional stereotypes of women working out of boredom rather than necessity hampers them in the work place. These stereotypes lead to discrimination which in part causes the average woman to still make only sixty cents to every dollar earned by the average man,⁶⁷ and to pay thousands of dollars more than a man in insurance premiums over her lifetime⁶⁸ for the same benefits.

The insurance industry continues to be more concerned with their profit margin than with the protection of civil rights. During hearings on H.R. 100, an insurance company executive stated:

Insurance rate making does not exist as a force to remedy inadequate employment opportunities for women, or unequal salary levels. Nor is insurance ratemaking capable of redistributing income to assure that men and women have identical costs and income regardless of circumstances and exposure to risks. Yet, that is exactly what H.R. 100 seeks to accomplish.⁶⁹

House bill 100 is not meant to provide a panacea for all of society's ills. It will not raise female salary levels or increase their employment opportunities; however it will treat individuals equally, without regard to their sex, in determining insurance premiums.

USE OF SEX AS THE DETERMINATIVE FACTOR IN RISK CLASSIFICATION

The insurance industry argues that insurance could never have been developed if categories were not used to evaluate individual risk.⁷⁰

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63. *Hearings, supra* note 4, at 444 (statement of Clarence Thomas, Chairman Equal Employment Opportunity Commission). While Title VII speaks specifically of hiring and discharge decisions, it also prohibits discrimination in compensation, which includes fringe benefits. 42 U.S.C. § 2000e-2 (1976 & Supp. V 1981).
64. Such was the situation with the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended in scattered sections of 42 U.S.C. (1976 & Supp. V 1981)).
65. Hatch, *supra* note 28 at 10.
66. Sixty-six percent of all working women fall into this category. *Hearings, supra* note 4, at 205 (testimony of Dr. Mary Amos, National President, Women's Equity Action League).
67. Median Money Income of Year-Round, Full-Time Workers With Income, by Sex and Age, 1970-1980, VITAL STATISTICS *supra* note 3, at 438.
68. NATIONAL ORGANIZATION FOR WOMEN, INSURANCE: EACH POLICY HAS TWO PRICES: WOMEN'S AND MEN'S (1983). Over her lifetime, a woman will pay \$1,640 more for automobile insurance, \$6,662 more for medical insurance, \$4,854 more for disability insurance and \$5,856 more for life insurance pension coverage than a similarly situated man.
69. *Hearings, supra* note 4, at 409 (statement of George K. Bernstein).
70. *Id.* Individual risk is calculated on the basis of group risk.

This is true, and as a basic proposition, is not undercut by H.R. 100. The bill would not eliminate risk classification, but only classifications based on protected categories such as race, religion, sex, or national origin.

While it is true that as a group women outlive men,⁷¹ it is also true that as a group whites outlive blacks.⁷² Yet, no insurance company currently bases rates on race, or national origin. Insurers at one time did charge blacks higher life insurance rates than whites, until it was established that differences in longevity were caused by socio-economic factors rather than inherent racial characteristics.⁷³ The same arguments that were used to justify racial discrimination in insurance in the 1950's are being used today to justify sexual discrimination.⁷⁴

Why do women as a group outlive men? It may be because of some inherent genetic characteristic,⁷⁵ or because the lifestyles traditionally approved for women in culture have tended to be healthier and less stressful than those sanctioned for men. Men are more likely than females to consume alcohol,⁷⁶ and the quantity and frequency of alcohol consumption for males far exceeds that of females.⁷⁷ Males also smoke more than females.⁷⁸ The leading cause of death in this country among both men and women is heart disease,⁷⁹ to which smoking,⁸⁰ alcohol consumption, and stress are all closely linked.⁸¹ It may be this type of activity rather than "maleness" in itself which gives men as a group a shorter life expectancy.

Still, the insurance industry remains adamant in its contention that "every woman has the same statistical probability of outliving men of the same age."⁸² Any life expectancy actuarial table will verify this.⁸³

71. VITAL STATISTICS, *supra* note 3, at 72.

72. In 1979 the average life expectancy for whites was 74.4 yrs compared with 69.8 yrs for blacks. *Id.* at 71.

73. *Hearings, supra* note 4, at 24 (comments of the U.S. Commission on Civil Rights).

74. *Hearings, supra* note 4, at 52 (letter from Rep. John Dinsell to Meg Greenfield).

75. See Brilmayer, Laycock and Sullivan, *The Efficient Use of Group Averages as Nondiscrimination: A Rejoinder to Professor Benston*, 50 U. CHI. L. REV. 235, 222-49 (1983).

76. VITAL STATISTICS, *supra* note 3, at 123. In 1979, 72% of adult males consumed alcohol compared to 52% of adult females.

77. *Id.* Statistics obtained in 1977 indicate that approximately three times more men than women consume alcohol three or more times a week and approximately twice as many men consume five or more "drinks" at one sitting.

78. *Id.* at 124. 36.5% of men and 29.1% of women smoke. In addition, the men who smoke use more cigarettes per day than women.

79. *Id.* at 77.

80. FACTS ON FILE 1003 (1983).

81. The major risk factors include high blood pressure and cholesterol. WORLD ALMANAC AND BOOK OF FACTS 85 (1984). See generally Wallis, *Hold the Eggs and Butter*, TIME, Mar. 26, 1983, at 56-63.

82. American Council Brief, *supra* note 27, at 9.

83. At every age, women have a greater life expectancy than men. For an example of an actuarial table, see the following reprinted below.

The insurance industry, however, ignores the fact that after age sixty-five, eighty-four percent of male and female deaths overlap.⁸⁴ This fact means that only eight percent of all males die "early," before age sixty-five, unmatched by an equal percentage of female deaths, and that only eight percent of all females die "late," unmatched by male deaths.⁸⁵ Only eight percent of the female population experiences this "greater longevity" which the industry has attributed to all females,⁸⁶ yet the entire class must bear the financial burdens.

Few people actually live the "average" length of time. When statisticians speak of the "average person" or "average" length of time, they are attributing the mean distribution to every individual in the class.⁸⁷ "Individual" life expectancy values become merely an application of the group average to the individual.⁸⁸

When insurance companies refuse to recognize an individual woman apart from the group, they are creating an irrebuttable presumption that women outlive men. A man's lifestyle, particularly health care, may improve his life expectancy, yet his pension benefits will not decrease. Similarly, a woman's lifestyle may shorten her life expectancy without affecting her pension benefits.

The Supreme Court has rejected irrebuttable presumptions based upon sex, which it views as a protected classification.⁸⁹ In the 1976 case of *Craig v. Boren*, the Court invalidated an Oklahoma statute which

SELECTED LIFE TABLE VALUES: 1939 TO 1979

[Prior to 1960, excludes Alaska and Hawaii. Beginning 1970, excludes deaths of nonresidents of the United States. See *Historical Statistics, Colonial Times to 1970*, series B 116-125]

AGE AND SEX	WHITE						BLACK AND OTHER						Black, 1979
	1939- 1941	1949- 1951	1959- 1961	1969- 1971	1975	1979	1939- 1941	1949- 1951	1959- 1961	1969- 1971	1975	1979	
AVERAGE EXPECTATION OF LIFE IN YEARS													
At birth: Male	62.8	66.3	67.6	67.9	69.4	70.6	52.3	58.9	61.5	61.0	63.6	65.5	64.0
Female	67.3	72.0	74.2	75.5	77.21	78.2	55.5	62.7	66.5	69.1	72.3	74.2	72.7
Age 20: Male	47.8	49.5	50.3	50.2	51.4	52.3	39.7	43.7	45.8	44.4	46.3	47.8	46.4
Female	51.4	54.6	56.3	57.2	58.6	59.5	42.1	46.8	50.1	51.9	54.7	56.2	54.8
Age 40: Male	30.0	31.2	31.7	31.9	33.0	33.9	25.2	27.3	28.7	28.3	29.8	30.9	29.6
Female	33.3	35.6	37.1	38.1	39.4	40.2	27.3	29.8	32.2	33.9	36.2	37.6	36.2
Age 50: Male	22.0	22.8	23.3	23.3	24.3	25.1	19.2	20.3	21.3	21.2	22.4	23.2	22.1
Female	24.7	26.8	28.1	29.1	30.3	31.9	21.0	22.7	24.3	26.0	27.9	29.0	27.8
Age 65: Male	12.1	12.8	13.0	13.0	13.7	14.2	12.2	12.8	12.8	12.9	13.7	14.4	13.3
Female	13.6	15.0	15.9	16.9	18.1	18.7	14.0	14.5	15.1	16.0	17.5	18.4	17.2

VITAL STATISTICS, *supra* note 3, at 71.

84. Bergmann & Gray, *Equality in Retirement Benefits*, 8 CIV. RTS. DIG. 25-27 (1975).

85. *Id.*

86. *Supra* note 82 and accompanying text.

87. *Hearings, supra* note 4, at 563-64 (statement of Douglas Laycock on behalf of the American Association of University Professors).

88. *Id.* at 564.

89. Sex is a protected classification only in situations covered by Title VII. As a matter of general constitutional law, sex is considered a protected classification and distinctions based on sex will be given an intermediate level of scrutiny, as compared with distinctions based on the suspect classification of race, which will undergo strict scrutiny, and age, which must meet only a rational basis test. Distinctions based on sex will pass constitutional scrutiny where shown to be substantially related to important governmental objectives. *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982).

prohibited the sale of 3.2 beer to males under twenty-one years of age while allowing females to purchase the beverage at age eighteen.⁹⁰ The Court found that this gender-based discrimination denied males equal protection of the law.⁹¹ Despite statistics indicating that young males were involved in more alcohol-related accidents than young females, the conclusion that sex presents an accurate ground for the regulation of drinking age was held unwarranted.⁹² The *Manhart* and *Norris* holdings are based on the same rationale.⁹³ Statistical evidence that women, as a group, outlive men cannot support the conclusion that any individual woman will outlive any individual man.

AUTO INSURANCE

Sex should not be used to predict life expectancy or accident rates. The fact that men as a group have more accidents than women as a group is irrelevant to the case of an individual male with a clean driving record. Yet forty-six states currently use sex as a basis for determining auto insurance rates.⁹⁴

Women have lower accident rates than men but the statistics do not establish that women are necessarily better drivers. Statistics do reflect that women as a group drive less frequently and shorter distances than men, as a group, drive.⁹⁵ In fact, women drive an average of ten thousand miles less per year than men.⁹⁶ A 1973 Department of Transportation (DOT) report indicates that in every category of annual mileage, women have a lower accident-per-mile ratio than men.⁹⁷ Considering the overall average of the total number of miles driven and accident rates per mile, however, women have a twenty-six percent higher accident-per-mile ratio than men.⁹⁸ Thus, it appears that women rather than men are more likely to have automobile accidents.

The 1973 DOT report is misleading for a number of reasons. When the study was conducted in 1973, male drivers outnumbered female

90. *Craig v. Boren*, 429 U.S. 190 (1976).

91. *Id.*

92. *Id.* at 199-204 (1976).

93. *Manhart*, 435 U.S. 702 (1978); *Norris*, 103 S. Ct. 3492 (1983).

94. Massachusetts, Hawaii, North Carolina and Michigan have outlawed the use of sex in setting insurance premiums. The first three states have also abolished rate setting on the basis of marital status or age and have opted instead to set rates according to the number of an individual's years of driving experience. Pennsylvania has also dropped age as a rate-setting factor. *Hearings, supra* note 4, at 398 (statement of J.R. Hunter, president, National Insurance Consumer Organization).

95. *See* Chart, *infra* note 98.

96. *Id.*

97. *Id.*

98. *Hearings, supra* note 4, at 1001 (materials submitted for the record by the Alliance of American Insurers).

drivers.⁹⁹ Males also tend to be licensed at a younger age than females, resulting in a greater number of young male drivers being represented in the study.¹⁰⁰ Consequently, the male accident rate is skewed by the presence of these young drivers in the statistical sampling who have four times the number of reported accidents of the average driver.¹⁰¹ The major flaw in the DOT study results from the industry practice of attributing all accidents to the highest risk driver insured under the policy.¹⁰² Cars operated by youthful operators, the highest risk classification, have more drivers per car than cars operated by non-youthful operators.¹⁰³ A youthful operator is often covered under a parent's insurance policy.¹⁰⁴ This causes all accidents involving that car to be statistically attributed to the younger driver regardless of who was operating the vehicle at the time.¹⁰⁵

Another study, conducted by the California Insurance Department, demonstrated that on a mileage-adjusted basis, in most age groups, fe-

ACCIDENT RECORDS BY SEX AND ANNUAL MILEAGE

	MALES			FEMALES		
	(1)	(2)	(3)	(4)	(5)	(7)
Annual Mileage	Average Mileage	3 Yr. Accident Record	Average Accident Rate Per Mile*	Average Mileage	3 Yr. Accident Record	Accident Rate Per Mile*
Up to 2,499	1,480	.163	.110	1,495	.079	.053
2,500 - 4,999	3,445	.268	.078	3,323	.103	.031
7,500 - 9,999	8,274	.229	.028	8,185	.179	.022
10,000 - 14,999	11,240	.271	.024	11,026	.242	.022
15,000 - 19,999	15,860	.319	.020	15,652	.249	.016
20,000 - 24,949	20,638	.345	.017	20,839	.299	.014
25,000 - 29,999	25,437	.353	.014	25,537	.277	.011
30,000 - 39,999	31,982	.350	.011	32,041	.271	.008
40,000 - 49,999	41,592	.430	.010	42,506	.273	.006
50,000 +	70,616	.563	.008	58,926	.318	.005
Total (Avg.)	17,671	.305	.017	7,211	.163	.023

*[Column (2) + Column (1)] × 1,000; [Column (5) + Column (4)] × 1,000 (for ease of expression)

Source: U.S. Department of Transportation, Federal Highway Administration (with California Department of Public Works), *The Effects of Exposure to Risk on Driving Record*, June, 1973.

The average annual mileage for male drivers is 17,671 miles. The average accident rate per mile is .017 compared with .023 for females, who drive an average of 7,211 miles annually. *Id.*

99. *Hearings, supra* note 4, at 176-77 (statement of Wynona M. Lipman, chair, New Jersey Commission on Sex Discrimination in the Statutes).

100. *Id.*

101. *Id.*

102. *Id.* at 185.

103. *Hearings, supra* note 4, at 398 (statement of J. Robert Hunter, president, National Insurance Consumer Organization).

104. *Id.* at 408.

105. *Id.* at 185 (testimony of Wynona M. Lipman).

males had more accidents than males.¹⁰⁶ In all age groups, females had fifty-seven percent more accidents per mile and were thirty percent more expensive to insure as a group on a per-mile basis than males.¹⁰⁷ The difference between male and female accident rates on a per mile basis can be attributed to a decreasing rate of accidents per additional mile as total miles driven increase.¹⁰⁸ The accident rate differential between men and women when adjusted for age and mileage is reduced to five percent.¹⁰⁹

The use of gender classification produces ambiguous results. The National Highway Traffic Safety Association found that accident rates are highly correlated with both sex and miles driven.¹¹⁰ When sex is used as a basis for setting premiums it is merely a substitute for mileage driven. By using sex as an indicator, the insurance companies are confusing causation with correlation. The majority of people involved in auto accidents are male.¹¹¹ Nevertheless, this does not prove that sex causes the accidents, but only that the two factors are related. Another independent factor, such as mileage, is more likely to *cause* accidents. The statistics demonstrate that while sex may be correlated to accident rates, these rates are determined by other, independent factors making it clear that sex is not an accurate predictor of insurance risk. Use of sex as a substitute for factors such as mileage driven erroneously suggests that sex in and of itself determines driving ability and accident probability.

COST IMPACT OF HOUSE BILL 100

If H.R. 100 is enacted, auto insurance rates for females will in all likelihood increase.¹¹² Hardest hit among female drivers will be the sixteen to twenty-four year old principal operator.¹¹³ Similarly situated

106. *Id.* at 144 (testimony of Wynona M. Lipman). *But see Hearings* at 312-14 (statement of the Alliance of American Insurers, contradicting Ms. Lipman on the basis of the same data).

107. *Id.* at 144 (testimony of Wynona M. Lipman).

108. *Id.* at 145. Accident rates decrease as driving experience increases.

109. *Id.* at 144-45. Male adjusted rate is calculated as follows: Men at age 21 drive on average of 17,306 miles/year ($1/17,306 / (55/100)$) = .00003278088 accidents/mile; 55 = # accidents per 100 miles per 100 drivers. Females at age 21 drive an average of 7,237 miles/year, 29 = # accidents per 100 miles per 100 drivers ($1/7,237 / (29/100)$) = .0000398735 accidents/mile. *Id.* at 157.

110. *Id.* at 184.

111. U.S. DEP'T OF TRANSP., REPORT ON TRAFFIC ACCIDENTS AND INJURIES FOR 1979-1980, 61 (1981).

112. *Hearing, supra* note 4, at 216-17 (statement of Dr. Mary Gray, national president, Women's Equity Action League).

113. *Id.* at 375 (statement of the National Association of Independent Insurers, presented by Galen R. Barnes). Based on data derived from Ohio, Mr. Barnes predicted that an average 16 year old principal operator would experience an increase of 59% from \$348.20 to \$555.30. In contrast, a typical 24 year old occasional operator could anticipate a 14% increase from \$210.10 to \$239.50. Testimony of T. Lawrence Jones on behalf of the American Insurance Association supports Mr. Barnes' predictions and provides additional data pertaining to selected other states. *Id.* at 326-57.

males will experience rate decreases.¹¹⁴ Males and females in the over-twenty-four age group who only drive occasionally will experience the least change in their insurance premiums.¹¹⁵ Use of independent factors will cause costs to shift from good drivers to bad drivers on an individual basis, and only incidentally from men to women.¹¹⁶ Women will not lose any decisive advantage through the enactment of H.R. 100. Although males in every age group have an accident rate 1.43 times that of women, only young men are presently surcharged for their poor driving records.¹¹⁷ Any "gain" to young women through reduced insurance premium's is lost in subsidizing men's lower rates for the remainder of their driving lives¹¹⁸ when premiums equalize.

The battle which has been fought over equalizing pension benefits has resulted in a barrage of statistics from both sides. If insurers are required to "top up" pension plans by increasing benefits of the lowest paid sex to the current level of the higher paid sex, the insurance industry estimates that the cost will exceed three billion dollars a year.¹¹⁹ The Department of Labor places the cost at 1.7 billion dollars.¹²⁰ The arguments of both sides became moot when a compromise was reached in the House which would make the Nondiscrimination in Insurance Act applicable only to future insurance contracts and pension plans.¹²¹ This compromise dissipates any possible objections under the Contract Clause of the United States Constitution.¹²²

Finally, H.R. 100 presents the problem of ambiguity surrounding state enforcement. Section five of the Nondiscrimination Act gives the states the primary opportunity for enforcement but without guidance as to which state agency will have jurisdiction.¹²³ Confusion could arise over whether the claim should be handled by a state insurance commis-

114. *Hearings, supra* note 4, at 375 (statement of the National Association of Independent Insurers, presented by Galen R. Barnes).

115. *Id.*

116. *Hearing, supra* note 4, at 216 (statement of Dr. Mary Gray).

117. *Hearings, supra* note 4, at 262 (statement of Judy Goldsmith, president, National Organization for Women).

118. *Id.*

119. *Hearings, supra* note 4, at 507 (statement of the American Academy of Actuaries).

120. M. Connerton, *supra* note 15, at 3. The difference can be partly attributed to the fact that the insurers included all railroad retirement participants and other workers whose plans are already gender neutral. See also *Hearings, supra* note 4, at 53 (Letter from Representative John Dingell to Meg Greenfield).

121. Press conference on H.R. 100, with Representative James J. Florio, D-N.J. (Oct. 27, 1983) (available at offices of *Journal of Legislation*).

122. "No State . . . shall pass any . . . law impairing the obligation of contract." U.S. Const. art. I, § 9. The argument has been made that if H.R. 100 applied to existing contracts it would alter the obligations and expectations of insurers, violating the obligation of contracts. *Hearings, supra* note 4, at 34 (memo from Congressional Research Library Service to Representative John Dingell). Due to the compromises, the Act will only apply to future contracts of insurance. The cited argument emphasizes that H.R. 100, if enacted retroactively, could violate the "obligation of contracts component of the due process clause of the Fifth Amendment." *Id.* It would not infringe on the Contracts Clause, because that clause relates only to states, and not to the Federal Government.

123. H.R. 100, § 5, *supra* note 6. See also *Hearings, supra* note 4, at 27 (statement of the Civil Rights Commission).

sion or a state civil rights agency.¹²⁴ The United States Civil Rights Commission urged that judicial preference be given to a state insurance department with an alternative forum in the civil rights agency should the former fail.¹²⁵ This decision, if left to the individual states, creates the risk of a potential cause of action falling through the cracks of a state bureaucracy. Section five should be specifically amended to provide that the state insurance commissioner has the first priority in bringing a suit to enforce the Nondiscrimination Act.

CONCLUSION

House bill 100 should not be viewed as a bill to regulate the insurance industry but rather as a civil rights bill. While much debate has focused on the use of accurate actuarial statistics, this debate obscures the central issue of sex-based discrimination, which is the violation of individual rights through certain classifications.

This note has demonstrated that sex is neither a fair nor accurate indicator of risk in pension plan or auto insurance calculations. Sex does not determine life expectancy or accident rates. Independent factors, such as lifestyle, medical history, mileage and driving experience, are the true indicators of risk and the appropriate factors for group classification.

In 1920, women in this country outlived men by an average of only one year.¹²⁶ Today women as a group outlive men by nearly seven years.¹²⁷ Female longevity is a modern phenomenon which cannot be dismissed as genetic,¹²⁸ but is rather a product of medical advances and increased attention to personal health.¹²⁹ The dramatic increase in life expectancy between the sexes indicates that sex is not an accurate predictor¹³⁰ of life expectancy but is instead only one factor in a complicated equation. Today's life expectancy predictions based on sex will likely be outdated by the middle of the next century. Present knowledge of life expectancy trends is necessarily based on those who have already died, and thus, these figures do not reflect modern changes in lifestyle.

Life expectancy is a statistical probability which can be increased on paper by changing one's marital status, religion, or residence. Women as a group do outlive men, but no one can predict which individual woman will outlive which individual man. It is time that the insurance industry be prevented from continuing to make individuals

124. *Hearings, supra* note 4, at 27 (statement of the Civil Rights Commission).

125. *Id.*

126. *Hearings, supra* note 4, at 579 (statement of Douglas Laycock on behalf of the American Association of University Professors). *See also* VITAL STATISTICS, *supra* note 3, at 72.

127. *See* VITAL STATISTICS, *supra* note 3, at 71.

128. *Hearings, supra* note 4, at 579 (statement of Douglas Laycock on behalf of the American Association of University Professors).

129. *Id.*

130. *Id.* at 580.

pay for the "sins" of the group, which is precisely the type of practice modern American civil rights law has sought to eliminate. H.R. 100 will extend this constitutional policy to the insurance industry, where women have long felt and paid for its inequities.

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