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THE SEX DISCRIMINATION ISSUE

*Moderator: MICHAEL J. MAHONEY. Panelists: EDWARD W. BROWN, PAUL H. JACKSON, JOANN SHER**

1. Are unisex factors now required for options, early retirement reductions and other actuarial equivalents in defined benefit pension plans? If so, what table should be used? Can we use a table which reduces benefits now provided? Should we change to defined reductions? Can actuaries still use sex differentiated assumptions in calculating liabilities and costs?

2. How should benefit amounts be calculated under a money purchase pension plan with uniform contributions for both sexes?

3. Should insurance companies offer uniform purchase rates for annuities? Uniform premiums for individual life insurance? Group insurance?

MR. MICHAEL J. MAHONEY: The question of sex discrimination in employee pension plans in life insurance programs is only part of the more general issue of risk classification. Challenges to the old ways of classifying risks are not limited to pensions or to life insurance. It also impacts auto insurance, health insurance, and all other areas.

MS. JOANN SHER: My task this morning is to set the stage for the other panelists by describing significant developments in the area of sex discrimination in pension and retirement plans.

It is an issue which no one took very seriously - I'm sorry to say - just five short years ago. Today it can be described as explosive. What finally got everyone's attention? - A recent Supreme Court decision and a more recent Circuit Court decision trying to apply that Supreme Court decision to a private insurer? Perhaps the proposed guideline changes by the Department of Labor for enforcement of the Equal Pay Act and the Executive Order which governs the employment practices of federal contracts? Or maybe the spector of new powers being given to the EEOC effective in July of this year? Or the proposed anti-discrimination proposals in insurance at the federal level or the profusion of such legislation at the state level?

Before examining all these, let's briefly identify the issue and how and why it got to be an issue. Everyone in this room knows that women live longer than men - that is women on the average live longer than men on the average. Lawyers know that - the Supreme Court is taking notice of that - legislators and regulators active in this area no longer challenge that - and even female activists acknowledge that. And the greater female longevity has always been taken into account, in one way or another, in determining the cost benefits structure of retirement plans. That is fact.

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Now let's look at the recent spate of equal employment opportunity laws both at the federal and state levels. These are being interpreted by many of the Agencies administering them as banning the use of any classification which make any differentiation between males and females in the employment context. Employers who must and want to provide equal benefits to their employees find themselves confronted with the requirements of conflicting legislation as a result of the overlapping of jurisdiction of federal, state, and local agencies. Even though these laws are targeted at employers and their employment practices, there has been a spillover effect onto the practices of the pension and insurance industry.

These various statutes and regulations purport to define what fringe benefit packages may or may not include, and how they must or must not be structured. I think it is fair to say that the agencies administering these laws are well intentioned in their desire to eliminate discrimination in employment. However, their lack of understanding of some of the more technical aspects of retirement programs and insurances - especially in the area of risk selection and classification - may well result in drastic changes being imposed on the insurance industry's method of operation by administrators who are actually charged with the responsibility for regulation of other areas of our society, and who have little or no appreciation of the consequences of these regulations' impact on insurance.

When you next consider the basic insurance principle that "every insured should contribute his fair share toward the risk involved and that only applicants who are exposed to comparable risks should be placed in the same premium class" - the problem presents itself: what is the proper way to accommodate the difference in male and female life expectancy? Equity, in the insurance sense, requires classification; and Equal Employment Opportunity legislation in effect purports to say that any classification by sex is forbidden because what is true of the class is not true of every individual within the class. Since a particular female employee may or may not outlive a particular male employee of the same age, the EEOC contends that the use of sex segregated mortality tables violates Title VII of the Civil Rights Act, if such use results in either requiring higher contributions to a retirement plan by female employees or paying female employees lower periodic benefits than their male counterparts. And now this rational is starting to surface in the form of proposed amendments to unfair trade practices sections of state insurance laws as well as in proposed federal legislation aimed specifically at insurance practices.

Having defined the issue, let's take a look at the development of the legal underpinnings used by some to redress this alleged wrong. I should mention first the United States Constitution since an allegation of sex discrimination based on the 14th Amendment's equal protection clause has been made against a private employer and insurer in at least one suit that I am aware of. In a 14th Amendment case based on the Constitution the plaintiff must show two things: 1) State action - that there has been state involvement in the alleged wrong. Incidentally, State Insurance Department regulation has been held to be sufficient state action to meet this requirement; and 2) Intent to discriminate. If the plaintiff shows these two items, then presumably he will prevail in his 14th Amendment action. The particular case I am referring to has had no decision yet.

Next, in the discussion of legal underpinnings, let's turn to the Federal Equal Employment Opportunity Enactments. Four federal agencies administering various federal equal employment opportunity laws have regulations regarding equality in retirement plans and insurances - the Wage and Hour Administration, the Office of Federal Contract Compliance Programs, the Equal Employment Opportunity Commission, and the Department of Health, Education and Welfare. Since Health, Education and Welfare is involved only through the administration of Title 9 of the Higher Education Acts of 1972, I will only discuss the activities of these first three agencies. Of these three, the first agency to become involved in this issue was the Wage and Hour Administration of the Department of Labor as part of their responsibility for enforcing the Equal Pay Act of 1963. In 1964, the Wage and Hour Administrator issued the so-called either/or guideline, under which an employer who either made equal contributions for similarly situated male and female employees to a retirement program or who provided similarly situated male and female employees with equal periodic benefits during retirement would be in compliance. Under this guideline, both employers with defined contribution plans as well as employers with defined benefit plans would appear to have been in compliance.

Actually the Equal Pay Act is narrow in its focus but has had a dramatic impact on our society. The Equal Pay Act is an amendment to the Fair Labor Standards Act and it deals only with discrepancies in wages between males and females performing the same task within the same establishment. That is, it deals with wage discrepancies based on sex - not with problems in other terms and conditions of employment. It does, however, contain a provision commonly referred to as the anti-cutback provision. This says that discrimination may not be cured by lowering the wage rate of one sex to that of the other. In effect, if you have discrimination, everyone must be equalized <u>up</u>.

The next agency to address this issue was the EEOC when enforcing the Civil Rights Act of 1964. Initially, the EEOC followed the same either/or approach. Then another arm of the Department of Labor, the Office of Federal Contract Compliance, OFCCP, issued its guidelines to apply to the employment practices of federal contractors. This agency too followed the either/or approach. Until April 1972 there was a consistent, unified federal standard.

In April, 1972, the EEOC issued a new set of guidelines for Title VII which said: a similarly situated male and female must receive equal benefits. EEOC has been interpreting this to require an employer to provide equal periodic benefits in the case of retirement programs.

Let's look at the act itself. Title VII provides "It shall be an unlawful employment practice for an employer 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". It shall become apparent that the Title VII emphasis on the individual has been the eye of the storm. When EEOC issued its 1972 guidelines to the Act it stated "it shall be an unlawful employment practice for an employer to discriminate between men and women with regard to fringe benefits". The guidelines define fringe benefits to include "medical, hospital, accident, life insurance and retirement benefits, profit sharing and bonus plans, leave and other terms and conditions of employments". And finally with regard to fringe benefits, the 1972 EEOC guidelines state "it shall not be a defense to a charge of sex discrimination in benefits that the cost of such benefit is greater with respect to one sex than the other". Guidelines issued by the EEOC do not have the full force of law. The EEOC, however, now also has the power to bring suit to enforce compliance with provisions of Title VII. Generally, the issue in suits brought by the EEOC involving retirement plans is whether or not the EEOC guideline is a proper interpretation of the requirements of the Act of Title VII itself. At issue currently in several federal courts is EEOC's new definition of equal retirement benefits as only those which are periodically equal.

In an attempt to achieve a uniform federal policy on this question, President Ford in 1975 asked the Equal Employment Opportunity Coordinating Council to examine this issue and recommend a uniform approach to be followed by all federal agencies on what constitutes fair retirement benefits. The coordinating council consisted of representatives of the Department of Labor, HEW, EEOC, the Justice Department, and the United States Civil Rights Commission. On April 16th, 1976, a majority of this coordinating council recommended legislation to the President that would require periodic pension benefits to be equal for men and women electing single life annuities by January 1980. The EEOC, which one would have expected to have been pleased see an "equal periodic benefits only" position adopted, refused to endorse the recommendation because it wanted the rule to be applied to all options, not only single life options. President Carter, as part of his effort to streamline the federal bureaucracy recently abolished the Coordinating Council. On October 1, 1979, authority to insure equal employment opportunity for federal employees will be transferred to the Civil Service Commission. Effective July 1, 1979, authority to enforce the Equal Pay Act of 1963 and the Age Discrimination Act of 1967 will be transferred from the Department of Labor to the EEOC. At this time, EEOC will be assuming major <u>coordinating</u> and <u>enforcement</u> authority for equal employment opportunity laws under President Carter's Reorganization Plan. President Carter promised to review all aspects of Equal Employment Opportunity enforcement by both the Labor Department and the EEOC by 1981.

Last August the Department of Labor published notices of proposed changes in the pension guidelines for the laws it administers prior to the transfer of authority this year. These proposed changes are only in the areas of retirement and other employer-sponsored benefits, and if finalized in their proposed form, may have significant impact on the design and cost of fringe benefit packages. The proposed changes would:

1. Withdraw the either/or guideline completely; and

2. Expand the interpretation of wages to include benefits actually received. Up to this point, wages were the employer <u>contributions</u> to the benefit plan.

Lastly, the proposed changes state "a differential in benefits based upon differences between the cost to the employer of providing benefits to women as a group and the cost of providing benefits to men as a group does not qualify as a differential based on a factor other than sex for purposes of the equal pay act". In other words, this is an attempt to substitute equal in/equal out, or what some people call unisex, for the long standing either/or guideline. There seem to be an infinite number of definitions of unisex, but all hinge on the same central notion that the use of separate male, female mortality tables should be abolished, and a merged "person table" should be used in the calculation of costs and benefits. The suggestion that, regardless of what the "person table" says, women age 65 will on average continue to live longer than men age 65, thereby creating a series of other inbalances in a pension or retirement system, seems to fall on deaf ears.

The Department of Labor is also required to do a cost impact analysis before any final regulation can be promulgated. The Department had hoped to finalize the proposed changes before authority transfers to the EEOC in July but there is doubt whether they can meet that deadline.

Turning now to the courts, I'll highlight the few cases surrounding this issue which have come to any sort of resolution.

The first case was a class action suit brought in the Indiana state courts against the Indiana State Teachers Retirement Fund Board. The lower court decreed that the defendant's application of the 1971 Group Annuity Mortality tables, with a five year setback for females and the providing of greater monthly annuity payments to male and to females "based solely on sex" is discriminatory and violated both the Indiana and Federal Constitutions. I want to quote a segment of the court's option which, while I do not think it is going to find any agreement in this room, is the basis for the court's finding. "At no time will a retired female teacher have received a total lifetime retirement benefit greater than or equal to that of a comparable male all of the factors being equal." The court further reasoned that since other factors affecting life expectancy are not considered, sex should not be taken in account either. On appeal this decision was affirmed. The swing rate affirmed because there was no evidence in the record that female teachers on average have a greater life expectancy than male teachers.

In another similar case against the Oregon Public Employees Retirement Board brought in the federal courts, the lower court held that "plaintiffs are entitled to a declaration that Title VII of the Civil Rights Act of 1964 prohibits the use of sex segregated life expectancy tables in calculating refund annuity benefits to state employees". However, that court refused to order that unisex tables be used until the decision was affirmed by the Apellate court. The appeal process never was completed in this suit. After the Supreme Court rendered its decision in the now famous Manhart Case, the Oregon suit was remanded to the District Court and ultimately the suit was settled. Under the terms of the settlement, the Oregon Public Employees Retirement System can no longer use sex segregated mortality tables in calculating the refund annuity portion for employees retiring effective July 1, 1978.

The Manhart vs. The City of Los Angeles Department of Water and Power decision appears ultimately to have been a disappointment for female activists, perhaps because it was so very narrow. The Supreme Court stated: "all that is at issue today is a requirement that men and women make unequal contributions to an employer operated pension fund". The Supreme Court held that such unequal contributions violate Title VII, but stated also "although we conclude that the department practice violated Title VII, we do not suggest that the statute was intended to revolutionize the insurance and pension industry". This was, in the eyes of many commentators, a pretty clear indication that the Supreme Court did not intend to extend Manhart to the activities of independent insurers.

Some commentators have suggested that the court was saying that when an employer is dealing directly with an insurer, as for example the employee who gets the single sum distribution to be applied to the purchase of a single premium annuity from a commercial insurer, there is no Title VII problem. However, in striking down the Los Angeles Department of Water and Power Method of operating its own plans, some believe that the court in part of its opinion seems to reflect the EEOC position on the use of separate mortality tables. "All that sex segregated actuarial tables purport to predict is risk spread over a large number of people. The tables do not predict the length of any particular individual's life. In our view any use of sex segregated actuarial tables that result in the payment of different periodic benefits to males and females is highly suspect. Because actuarial tables do not predict the length of any individual's life, any claim that such tables may be used to assure equal pension payments over a life time between males and females must fail." Although the Supreme Court acknowledged in Manhart that "this case does not however involve a fictional difference between men and women. It involves the generalization that the parties accept as unquestionably, true; women as a class do live longer than men", it also said "the statutes focus on the individual is unambiguous. Even a true generalization about the class is insufficient reason for disqualifying an individual to whom the generalization does not apply".

The Manhart decision is seen by other commentators to have raised other serious implications. Most defined benefit plans provide different benefits based on sex related mortality tables and for the calculation of early retirement benefits with joint survivor annuities. Defined contribution plans provide lower periodic benefits at retirement for women under single life options. Male and female retirees are entitled to pensions that are actuarially equivalent based on sex differentiated mortality tables. Some believe that the court's rationale in Manhart leads to the conclusion that the provision of unequal periodic benefits because of the use of sex segregated tables also results in the violation of Title VII. Why then, others ask, would the court have also said that nothing in their holding "... call(s) into question the insurance industry practice of considering the composition of an employer's work force in determining the probable cost of a retirement or death benefit plan". The first federal court to have had the opportunity to apply the Manhart decision in a situation involving a private employer and insurer was the First Circuit Court of Appeals in the case of EEOC vs. Colby College and TIAA-CREF. The facts in that case are significant: Colby College, a private employer, makes equal contributions on behalf of its similarly situated employees to TIAA-CREF, an independent third-party insurer. Colby and the insurer have no written contract between them; rather the insurer issues individual contracts directly to each Colby employee. The suit charges the employer, Colby College, with a violation of Title VII but the insurer is also named as a party having an interest in the outcome of the litigation. The District Court dismissed the EEOC suit and EEOC immediately appealed to the First Circuit. Then the appeal was delayed because the Supreme Court had agreed to hear the Manhart case.

After Manhart came down, the First Circuit reversed the District Court dismissal and returned the case to the District Court for a hearing on the substantive issues involved. In doing so, the Appellate Court refused to rule that, because of Manhart, the plan was to be held illegal. But it is important to note that the Appellate Court repeated the Supreme Court statement that the focus of Title VII is on the individual but went on to note "Whether by accident or design Manhart brought to the court the case that presented fewest difficulties and the most conspicuous discrimination if discrimination there were". The Court of Appeal further noted that "This is not to say, in anticipation of returning this case to the District Court, that we do not foresee difficulties, possibly very great difficulties, that did not arise in Manhart in light of the Court's opinion that the statute was not intended to revoluntionize the industry". The First Circuit said that the thrust of the Manhart opinion envisaged the use of a unisex rate. After acknowledging that an insurance company cannot disregard the fact that women as a class live longer than men, the Court foresaw a series of difficulties that this fact will pose for the District Court. "Neither Congress nor the Court can change the forces of nature." In Manhart the U.S. Supreme Court had stated that as a class women live longer than men. The Court of Appeals, in referring to this statement, added that "even though an individual woman may prove to be short lived, to add her to the group requires a larger premium contribution than if she had been a man".

One of the proposed solutions to this equal monthly benefit issue has been that employers could make up the difference between the equal contributions of male and female employees and the amount needed to provide equal monthly benefits to both upon retirement. However, noting that in Manhart the Supreme Court said a pension plan contribution by an employer is compensation, the Court of Appeals stated that "if the employer itself makes larger contributions on account of each female employee this would seem discriminatory and impermissible per se".

On the issue of unisex, the Court of Appeals found the most complexities and potential for reverse discrimination for the new costs would fall on the male policyholders, either as a group or individually. The court pointed out that the amount of subsidy required for males would vary with the male/female composition of the pension plan participants. And such a "variable subsidy would upset the widely desired practice of definiteness in pension plan". The Court of Appeals also referred to the effects that required male subsidy might have on pre-existing annuity rights, stating that "increasing male contributions may constitute a breach of contract". In addition, the Court sees serious problems in unisex "for companies that are required by law nearly in every state in which they do an annuity business to satisfy the local insurance commissioner that their practices are financially sound". And finally, referring to the Manhart court statement that it did "not suggest the Title VII of the Civil Rights Act was intended to revoluntionize the insurance and pension industries", the Court of Appeals said it could not resolve at this stage "whether, or how, unisex insurer-operated plans can be achieved without revolutionizing the insurance industry".

Well, where are we headed? A year or so ago it was expected and hoped that the application of the various sex discrimination guidelines in the area of pension and insurance would properly be determined by the courts, and that the judges in these courts would somehow instantly, magically understand the actuarial art and realize that even in today's climate, all discrimination is not bad. But what has happened? The cases I have mentioned were argued by attorneys with little or no exposure to insurance principles. Perhaps for that reason, unfortunate precedents have been set which our industry has to live with. Applying the reasoning of these courts, it is easy to see that all classifications may be faulted. Since insurance requires averaging and groupings to function, it would appear that at least Title VII, and now possibly other proposed legislation, is on a collision course with the insurance industry's risk classification system. This logic, taken to its fullest, leads to the conclusion that no classification is permissible since it cannot be predicted when a given individual, rather than the anonymous members of the class, would suffer the particular risk insured against. Indeed, current activity and regulations appear to be aimed at the achievement of the ultimate goal that there should be no classification at all. The idea is that guaranteeing individual rights does not allow classification for any purpose, including insurance. And we are seeing this assertion translated into all kinds of proposed legislation. In life insurance, risk should be no longer classified recognizing physical or mental handicaps. In auto insurance, rates should no longer vary by age, sex or number of miles driven. Only actual driving records of individuals should be used. There is now a proposed bill in Washington, D.C. to require the use by all insurers of merged mortality tables in life insurance and retirement programs.

In conclusion I simply want to suggest that if the right to classify a risk by sex is gone, then age as a proper classification will certainly be the next to go.

MR. EDWARD W. BROWN: The New York State Employees pension plan is basically a unisex defined benefit plan. There are no employee contributions to speak of although the newly hired employees do contribute 3%. Both male and females contribute 3%. The benefit at retirement is absolutely the same - as it is with most defined benefit plans - for males and females. The place where sex does play a role - and a critical role - is in the determination of the retirement option where we do use mortality tables which vary by sex. The differences between males and females can be substantial.

All the mortality tables that we use are "constitutionally" guaranteed for the members at the time they first join the system. That is, once the mortality table is put into effect, it can never be changed. At least, it could never be reduced. If we were going to a unisex table, we would have to compare the unisex values with the existing values and pay whichever is greater or perhaps pay the greater of the male or the females values. However, I should also point out that the tables that were used, even though they vary by sex, are not what I would consider to be actuarial tables. Many people who are retiring now have their option factors based on 1921 mortality. This is hardly appropriate, but it does vary by sex. The problem that we incur in trying to update these tables is that it is hard to find a method that would improve the benefit for everybody and still remain actuarial. We have changed the tables for new members on three ocassions, 1921, 1951, and 1966.

When the unisex question first arose three or four years ago, we did consider a new table that would be a unisex table for future members and perhaps give the older members a choice, if it was better. There were two problems. First of all, even doing this just for future members, would re-. sult in another "constitutional" guarantee of that benefit. Secondly, it was not clear just how a unisex table could be calculated and applied because there are so many pending court cases and so many government agencies issuing proposals and regulations on the question. We did not want to do something that would later be reversed. This again would cause an additional cost because we cannot cutback. So we did nothing. We are still in a state of waiting to see what is going to happen.

Personally, I would not object to using the unisex table - I think that we could control it. My biggest fear is that something could happen next year or the year after that would make me change the table and, thus cause an additional cost to the state. As most of you know, the cost of state pension plans, is of major concern to state legislators as well as tax payers, and rightfully so.

In the New York state system, the pension contribution is now running over a billion dollars. Any change is looked at very carefully. In going to a unisex table, depending on how the table is defined, the cost could run as high as $50 or $60 million dollars a year. The $50 million dollars a year is an awful lot of money even if you have contributions of a billion dollars a year. It represents a little over 1% of payroll. The average pension contribution is now running about 22% of payroll which is by some standards atrocious. It is hard to recommend adding another 1% of payroll cost even if it could be justified as being actuarial sound and resulting in a more equitable benefit.

For valuation purposes we do use a unisex table. It is based on our own experience. We have the flexibility to change this table and we do change it every five years. Every year we calculate rates of contribution for the thousand participants that are both sexless and ageless.

The pension supplements that we now pay run about 20 million dollars a year to people who retired over 10 years ago. In relation to 20 million dollars for retired members, many of whom retired a number of years ago with low benefits, an additional cost of 50 million dollars for active people who already have much more generous pension benefits seems out of line.

I would hope that whatever comes about, we would not be forced to automatically, overnight, calculate retirement factors for future retirees on an unisex basis. I think that some recognition should be given to the fact that these benefits cannot change without a cost. To force an unnecessary cost on an employer is unreasonable, and, as far as I am concerned, cannot be justified. There should be some smoothing process. If this could be worked out, I would have no objection to going to a unisex table.

MR. PAUL H. JACKSON: Actuarial work in private pension plans is based on many estimates. Costs vary not only by sex but also by age, industrial hazard, investment results, pay levels, early retirement rates, withdrawal rates, disability rates, and so on. Many of the factors which could theoretically be used to break costs out - such as smoking and drinking - change over time and are not really too useful to the actuary. The actuary uses constant factors such as date of birth, race and sex. These are convenient factors for which the actuary can usually get accurate data. Therefore, costs are based on these and, presumably, this will continue to be permitted.

When I started out in the group insurance business many , many years ago, group life insurance premiums were loaded for race. That became socially unacceptable in the early 1950's, but the insurance companies felt they could not get by without that sort of load. They felt it was necessary. Eventually, the insurance industry, did find that sort of rating was not essential and used other fixed criteria such as industrial hazard or occupation.

Joann has referred to the conflict between the Department of Labor and EEOC. In 1972 the Department of Labor said that equal costs were permitted even if benefits differed. The EEOC said no. In 1975 the EEOC Coordinating Council agreed that a provision of equal benefits under life annuity was sufficient and different benefits under joint and survivor and other options would be permitted. The EEOC said no. In July of this year, the EEOC takes over. It is not very difficult for me to predict that benefits will have to be independent of sex under early retirement and all other option factors.

This is not all bad, however. Early retirement actuarial factors calculated using sex segregated mortality tables may have a peculiar pattern. If you provide a $10,000 pension to an employee, age 65, and the employee is female the value of the pension is 13.9% greater under the table that I used than if the employee is male. Comparing sex based equivalent early retirement factors, at age 55 the female benefit is 20.9% greater than the male benefit. By age 70 the female value is 7.7% greater. On a unisex basis, assuming 20% of the employees are female, the actuarial equivalent at age 55, would be 9% greater and at 70, 16% greater. So that the use of actuarial factors may inject an element of artificial confusion into the delivery of benefits. Most of the larger plans have shifted to the use of arbitrary factors such as 5% per year reduction for early retirement. In my judgement, in the long run, what we are going to end up with is unreduced benefits upon retirement at any age from 55 to 75 regardless of sex. Flexible retirement, in other words.

The same sort of illogical results come out under joint and survivor benefits. Here, however, I think is there a somewhat different argument that has not been tried. If an employee is entitled to a straight life annuity under a plan provided by his employer, and if his election of an option is a choice freely made by him presumably, because the option value has more value to him personally, I do not really see that it is discrimination. But even here sex based factors would preserve the female to male ratio at all option levels. If a benefit of $10,000 is worth 13.9% more to a female and if we use sex related tables, the female will receive 13.9% more than the male, for the elections made at 65 to a joint annuity whatever the percentage continuation to the survivor. On the other hand, if you use unisex factors, the male and female joint and 100% benefits are identical. You could generalize this. Under a joint and x% survivor benefits, the female loses x% of her advantage by electing the joint and x% option. Even so, under unisex factors, women always get a value that can be characterized as greater than or equal to the value that the male gets as determined from sex segregated tables. There are a number of plans, of course, that are offering options only by factor independent of sex.

Those individuals electing options cannot be expected to follow the standard mortality as used for the case as a whole. Even after ERISA, less than 50% of the employees retiring under plans are electing survivor options. So there is a selection by those employees in ill health. Complicating all of this is the recent Regulation 79-90, which would require private pension plans to include, in the plan document every factor that might be used to determine a benefit, otherwise, the benefit will be considered as not definite. That ruling indicated that there will be a later ruling under Section 411 as to whether a reduction can be made in those actuarial factors or option factors that appear in the plan document.

As interest rates rise, for example, joint and survivor factors will have to be increased to continue actuarial equivalence. When interest rates go down, the lump sum option factors and early retirement social security level-out option factors will have to be increased so that less than an actuarial equivalent is not granted. Thus, all option factors, in either direction will have to be set at a subsidized level in effect. The life annuity value will be the worst deal under the program. It is intriguing to consider what this means to our society. The vast number of low paid people take the life annuity options since they cannot afford to live on the reduced pension that would be required on an option basis. This could mean that these government requirements will lead to discrimination against the low paid.

Companies have been using some form of unisex factors in plans for years. I really do not know of any problems in valuing these. In complying with 79-90 it may be simpler to put the table of the current factors into the plan document rather than referring to a unisex table. A problem may occur if it appears necessary in the future to substitute one table for another. I think the entire problem of factors must necessarily lead, in the final analysis, to fewer options under retirement plans. The more options that are provided the more likely it is that a plan sponsor will find it difficult to equitably fit the options together.

I beleive that after July 1st certainly, if not now, early retirement benefits and benefits paid under private plans under all options must be independent of sex. I think the actuary can use a table or can adopt factors which would reduce certain joint and survivor options now. After the next revenue ruling, this may not be possible. Factors in the plan document may not be reducible.

I believe that actuaries can still use sex differentiated assumptions for cost purposes but I wonder why they would want to. The percentage of females for a total group is sufficient for the pricing of a pension benefit for the group. A service table for a large group will have inadequate data to breakdown by sex the rates of early retirement, rates of withdrawal, and other decrements. Salary increase assumptions varying by sex may merely be embarrassing to the plan sponsor. Male and female disability rates have been converging. For most of my programs, I use unisex tables.

I agree with Joann that age may be the next criteria to be questioned as used in the calculation of pension benefits. Fairness to individuals who may or may not live as long as other members of their class, not fairness to the class, seems to be required. It is a simple thing to put in the word "age" instead of "sex" and have the same logic applied. Obviously two people age 65 do not live for the same length of time, and equally obviously, there are some people age 65 who live longer than some people who are 55. Since people are individuals, it would seem inappropriate to toss them into a pot broken down by either sex or age. Thus, I conclude that, in the long run, pensions may be based only on service and pay. For cost reasons, some minimum age of eligibility for benefits would be necessary. All this will result in more challenging actuarial work for private pension plans and a greater need for judgment in the long run.

MR. D.RAE MACLEOD: It seems much of our difficulties are the result of our actuarial reliance on averages. The public does not see the problem clearly and expresses it that not all females live longer than all males the same age. We have failed to interpret the message that we should think of each person as an individual entitled to equitable treatment per se. We should see this as a concern quite separate from costing and valuation.

Regarding life insurance, we insist on recognizing the state of health in addition to age and sex. It was said this morning that if we lose the right to classify risks by sex, we will surely lose the right to classify by age. This would quickly kill the life insurance business. However, the inability to classify by state of health is even more critical and would mean the instant end to life insurance.

I think we must recognize the similar importance of the individual's health in the entitlements under pension plans. The topic in the program refers to early retirement reduction and other actuarial equivalents. Surely this should mean the equivalent considering all significant actuarial considerations. We know an early retirement pension to a terminally ill person, age 55, male or female, is worth much less than a pension to a healthy 65 year old.

Without any reduction for early retirement, the benefits are not equivalent and average factors based on unisex or any other mortality table aggravates the problem. How credible are we to the public when we say the reduced pension is the actuarial equivalent in this situation?

The Manhart case suggests another situation where reliance on averages can lead us into an untenable position. We could have a female with serious health problems making a higher contribution towards her pension than a healthy male the same age. How could she or the public be expected to see this as fair when, in defense, we can only say it is in accord with the male and female annuity tables.

MR. PAUL H. JACKSON: There is not much hard information on the state of an individual's health for the actuary to work with. Perhaps you could give the retiring employee a blood pressure test. But I am not sure that when at that point, the employee who gets for whatever reason feels it is unfair. From his perception it is unfair to get a similar pension because his blood pressure is good. Why should he get a lower pension because he has watched his diet and exercised faithfully?