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UNISEX AND RISK CLASSIFICATION

Moderator: RONALD E. TIMPE. Panelists: HARVEY S. GALLOWAY, JR., BARBARA J. LAUTZENHEISER, JOHN O. MONTGOMERY, WILLIAM DAVID SMITH. Recorder: KIM W. LEDBETTER

Implications of current developments regarding risk classification in the insurance industry and pension plans. Specific topics include:

1. The Norris case.
2. The Packwood bill.
3. Other federal and state legislation.

MR. RONALD E. TIMPE: I'd like to outline how we will allocate our time and then get on with the program. First, I will introduce the panel members. Next, I'll provide some background about the major legislation, court decisions, and state activities on the subject. Following that there will be a detailed discussion of House Resolution 100 (HR100), and Senate Bill 372 (S372), the federal legislation which is pending. Then the panel members will discuss the impact of the Norris decision. Hopefully, there will be time left for some audience participation. I know that many in the audience have been involved with this particular topic and want to express their views.

To introduce the panel members; on your far right is John Montgomery, Chief Actuary of the California Insurance Department. He achieved his actuarial fellowship in 1967, following a Master's Degree from Cal Tech and a Bachelor's Degree from USC. John has been very active over the years with the National Association of Insurance Commissioners (NAIC). He is on their technical actuarial group and is working with them on the unisex issue. He is also a member of the Board of Governors of the Society of Actuaries.

Next to John is Bill Smith. He is a former member of the Board of Governors. He graduated from Stanford in 1948, achieved his fellowship in 1957 and then worked for Prudential. Since 1958 Bill has been with Milliman and Robertson doing both life and pension consulting work out of their San Francisco office. You may know Bill by his activities on the Guides to Professional Conduct Committee.

The next person is Barbara Lautzenheiser. She hardly needs any introduction since she was before you this morning as President of the Society. She is also Senior Vice President of Phoenix Mutual and is responsible for their actuarial and underwriting operation. Barbara received her fellowship in 1969 and is a graduate of Nebraska Wesleyan.

The next panel member is Harvey Galloway. He has been involved in actuarial work since 1957. Currently he is Senior Vice President and Chief Actuary of the Nationwide Insurance Company and has actuarial responsibilities for all the life, health and annuity products at Nationwide and its subsidiaries. He has been active in a number of industry, actuarial and regulatory affairs, including the topic we are going to discuss today.

I am Ron Timpe from Standard Insurance Company. Based upon the members of the panel, obviously the best thing I do is select panel members, because it really is a distinguished group. I happen to also head the Group Insurance Division of Standard Insurance Company.

I would like to review, briefly, some of the background for the particular topic so, hopefully, we all get on the same wavelength.

Manhart

In 1973, Marie Manhart and the International Brotherhood of Electrical Workers, Local #18, brought a class action suit against the Department of Water and Power in Los Angeles. The retirement plan involved was a self-funded and self-administered defined benefit retirement program providing a benefit of 2% of final pay for each year of service. The plan was funded by contributions from both the employer and the employee. Females were required to provide 14.84% more in contributions than their male counterparts in order to provide equal retirement benefits. The net result was a female's take home pay was less than a similarly situated male employee because of the required contribution to the defined benefit retirement plan.

The suit was brought under Title VII of the Civil Rights Act of 1964 and the Equal Employment Opportunity Act of 1972, with the focal point being the difference in take home pay for similarly situated male and female employees. The Supreme Court concluded that Title VII bans discrimination against an individual because of sex and the Equal Pay Act prohibits discrimination with regard to pay.

There was an attempt by the court to narrow the impact of the decision because it contained the following statement:

> Although we conclude that the Department's practice violated Title VII, we do not suggest that the statute was intended to revolutionize the insurance and pension industry. All that is at issue today is a requirement that men and women make unequal contributions to an employer operated pension fund. Nothing in our holding implies it would be unlawful for an employer to set aside equal retirement contributions for each employee and let each retiree purchase the largest benefit which his or her accumulated contribution could command in the open market. Nor does it call into question the insurance industry practice of considering the composition of an employer's work force in determining the probable cost of retirement or death benefit planning.

Norris

In 1978 Nathalie Norris brought a class action suit against the Arizona Governing Committee for Tax Deferred Annuity Deferred Compensation Plans. The retirement plan under question was a voluntary deferred compensation plan with no employer contributions. The state withheld the appropriate sums from employees' wages, submitted the funds to the company designated by the employee, and provided time off for the employee to attend group meetings to learn about the deferred compensation plan. All of the companies selected by the state to participate in the plan used sex-based mortality tables to calculate

monthly retirement benefits. Sex was the only factor that the tables used to classify individuals of the same age.

On July 6, 1983 the United States Supreme Court ruled, in a five to four decision, that the use of sex-distinct actuarial tables in a life annuity option in a voluntary deferred compensation plan violates Title VII of the Civil Rights Act of 1964. Specifically, the Act prohibits an employer from offering its employees an option of receiving retirement benefits in a form which pays a woman lower benefits than it pays a man who has made the same contributions. Again there was an attempt to narrow the decision or the impact of the decision by stating that it applied only to contributions made after August 1, 1983. The Court further states:

> Our judgment will in no way preclude an insurance company from offering benefits that are calculated on the basis of sex segregated actuarial tables. All that is at issue in this case is an employment practice; the practice of offering a male employee the opportunity to obtain greater monthly annuity benefits than could be obtained by a similarly situated female employee.
>
> Neither Title VII nor the Equal Pay Act makes it unlawful to determine the funding requirements for an establishment's benefit plan by considering the sexual composition of the entire force.

Federal Legislation

S372, known as the Fair Insurance Practices Act, and HR100, known as the Non-Discrimination in Insurance Act, are being considered at the federal level. Similar legislation has been introduced in the prior two Congresses and actually came out of the Senate Commerce Committee in the closing days of the last Congress with a nine to two vote in favor of the legislation. The measures prohibit discrimination in insurance on the basis of race, color, religion, sex or national origin.

State Legislation

Section 790.03 of the California Insurance Code was amended by the 1978 Legislative Assembly to require differentials based upon the sex of the individual insured or annuitant in the rate of dividends or benefits. The requirement is satisfied if such differentials are substantially supported by valid, pertinent data segregated by sex, including but not necessarily limited to mortality data segregated by sex. This Code change was effective January 1, 1981. You might have received some recent information from the State of California about how this Section will be changed. That information will be discussed by John Montgomery later in the session.

Chapter 31 of the Montana State Code was modified by the State Legislature to become effective October 1, 1985 to state that it is an unlawful discriminatory practice for any financial institution or person to discriminate solely on the basis of sex or marital status in the issuance or operation of any type of insurance policy, plan or coverage or in any pension or retirement plan, program or coverage, including discrimination in regard to rates

or premiums and payments or benefits. The revised legislation does not apply to any insurance policy, plan or coverage or any pension or retirement plan, program or coverage in effect prior to October 1, 1985.

I think now we can get on with the rest of the participants. The first to speak will be Barbara Lautzenheiser on HR100. Before Barbara steps up I would like to refresh your memories that Barbara, her company and John Gummere have been very active at the federal level, particularly with respect to HR100 and S372. The American Council of Life Insurance (ACLI) had adopted a position, in support of at least part of those two bills, if the retroactivity features could be eliminated. Barbara and her company led a challenge to that position and it was substantially modified. I think we owe her a debt of gratitude for the work that she has done. She has been very active.

MS. BARBARA J. LAUTZENHEISER: Thank you, Ron. This is one of the precautions I have to take. What I say today is not as President of the Society of Actuaries, but as Barbara Lautzenheiser, FSA.

HR100 and S372

Earlier this year there was a major threat perceived about the passage, particularly, of HR100 as opposed to S372, and a great fear of the retroactive impact. Not until last fall was there an identification of the retroactive aspect within that bill. When it did come out of mark up, it came out with language which implied that you had to top up all benefits, and there was no way to fund those benefits. The concern for that topping up and that retroactive piece compelled the ACLI Board, initially, to take the position to agree to unisex prospectively in order to eliminate the retroactive impact. As Ron has indicated, my lobbying or talking with people on the Hill indicated that maybe that was an old perception and it still could, in fact, be turned around and so John Gummere, the Phoenix Mutual and I started that movement.

The real big benefit out of that was that it raised the awareness of the insurance industry to the level that everyone started paying attention to it. Prior to that, everybody thought that somebody else was taking care of it and no attention was really being paid. It was the grass roots level out there of people talking to their own Senators and Congressmen that got that legislation stymied and stalled. Simultaneously with the call for the special meeting of the ACLI, a Committee for Fair Insurance Rates with 14 property, casualty and life insurance companies was started. The Committee started collecting funds to develop a direct mail campaign so that direct mail would come in to the Senators and Congressmen.

The direct mail was initially targeted toward the House Committee. They began to get that mail and feel that lobbying impact of those individual companies back in their home states and opted not to mark up. At that time Senator Packwood decided to start mark up on the Senate side. He announced that one week away the Senate was going to have mark up. It may have been a week and a half, but it was not more than two weeks.

Fortunately, we had also begun direct mail campaigning on the Senate side, so we did have some direct mail going to the Senate side from the Committee for Fair Insurance Rates. We began the lobbying activity to move toward the Senate side. The Senate side did in fact go into mark up. My perception was that Senator Packwood could have in fact stopped that mark up. He knew, in my opinion, he did not have the votes to do it, yet he let it go through. At that particular mark up, a vote was taken to totally table the legislation. That failed by a vote of one; six to table permanently and seven not to table. There was a vote to table it until after the GAO study was done. That particular vote then ended up deferring the legislation.

At that point in time it was stopped at both the House and Senate. The Congress went back home for the summer. Additional mailings went out from the Committee for Fair Insurance Rates. The lobbying continued but at a much lower level. The gender gap was beginning to get a lot of visibility from the women's groups. We sensed that things were starting to pick up and heat up again, and the minute they came back from recess we heard word that the House was going to take a head count and see whether they had enough votes at that point in time. They had not had the votes before. I had started to call people and say, "Get on that Hill. Make sure what the lobbying counts are."

As our keynote speaker pointed out this morning, nothing is certain. Everything is always subject to change. In Washington, D.C. it is subject to change by the minute. I was making phone calls, and Wednesday night we began to hear about a jetliner that was missing. The next morning we heard that the Soviets had downed a South Korean jetliner. All of a sudden, no one was talking about gender gap. They were instead talking about defense, MX missiles and how we should protect ourselves. We have not heard a great deal about gender gap since then.

Out of every terrible thing sometimes some good things come. In 1973 there was an extremely high probability National Health was coming in. Watergate occurred, and by the time Watergate was done, National Health was perceived to be far too costly at any level and never moved to a catastrophic level. I don't know whether that has happened here or not. I believe that there is fair agreement that nothing is going to happen this year, but there is a possibility that something might happen next year.

My personal perception, and this is only an intuitive feeling, was that Senator Packwood, at the Committee mark up, had grown somewhat tired of the issue. He did not even attempt to rebut some of the testimony that was given. We have heard a rumor that he felt that he had been somewhat misled. Representative Dingle seemed to show some tiring of the issue some time back. Representative Florio was still pushing it at the Subcommittee level on the House side. But by and large any Congressman you talked to did not want to vote on this issue. They wanted something to vote for if the issue became hot, but they preferred not to vote. I think if at all possible, they will just prefer not to vote on this issue and may not bring it up again. In fact, even Senator Packwood and Representative Dingle may not bring it up again. They may, we do not know.

If in fact they do bring this issue up again, the position of the ACLI and the Committee for Fair Insurance Rates is opposition on the Committee's side and restriction to a codification of Norris on the prospective side from the ACLI. I think there could be several things that could trigger that.

One is publication of the General Accounting Office report. Last Tuesday a hearing was held on two Senate bills, S19 and S918. Those bills essentially are pension bills which would lower the participation age in a pension plan from 25 to 21 and give some spousal rights. The spouse has to agree at the time the joint and survivor election is opted out of. There are some benefits that Senator Kennedy is calling "nonforfeiture benefits" which give a life insurance benefit or a pension benefit to the spouse of the employee if the employee dies prior to early retirement. It is an additional death benefit on the front end of the early retirement benefit. At that particular hearing there was also a preliminary draft of the GAO report.

By and large, the GAO report is not going to be detrimental. The concern I have out of that report is that they say that the insurance industry in identification of the impact of the retroactive portion used only one assumption. That assumption was that we would not raise premiums, and in fact, we could raise premiums. We have a few difficulties, like breaking contracts and getting states to agree, but they thought raising premiums was still feasible. I think some work needs to be done on that position. I do not what the threat of that position is.

A second possibility that could occur is the National Organization for Women (NOW) groups, because the gender gap is not a high issue, will start talking about it. NOW, however, you will notice is talking more about a woman Vice Presidential candidate than the insurance industry. Third, the Department of Labor Report which, when it comes out, could extend benefits and say that Norris actually applies to group conversions and in payroll deduction plans farther than we have interpreted it. That could cause a self-fulfilling prophecy on the part of the insurance industry itself. Fourth, we tend to want to minimize risk to ourselves, so there might be a compulsion to have a codification of Norris which in and of itself could propel the legislation and get it passed. The fifth impact could be companies going unisex. That does pose a threat to the extent that Congress can say, "They did it and if they can do it, you can do it." We have all of those impacts.

Again, you cannot predict the future. I think there are two things we have to be very careful about. First, we have to continue to lobby at the local level. We need to have each and every one of you encourage your companies to do that lobbying and encourage your agents to get actual policyholders writing and talking to their Congressmen as needed. I will put in a plug for the Committee for Fair Insurance Rates. If something comes up fast and you need a fast direct mail campaign, a fast grass roots effort, that is how you get that done. It stopped it last time, and we may need it to stop it again. It is just unpredictable, but at the moment it looks like it is dead through the end of the year. We hope it does not come up in 1984. Second, it is an election year. It could be a real problem. We just do not know. We just have to, as the keynote speaker said, "be able to adapt when change does in fact come up and turn it into an opportunity as opposed to an oppression." Thank you.

MR. WILLIAM DAVID SMITH: Part of the glue holding society together is discrimination. There are a couple of kinds of discrimination, some of it is fair and some of it is unfair. The history of man is rather sordid in the subjugation of the weak by the strong, but there certainly has been progress. For instance, what we are discussing today is an incredibly subtle form of discrimination compared to what has happened in the world in the past. Even a hundred years ago, society literally would not have known what we were talking about. This problem is just much too subtle for them to have understood.

Selection

The insurance industry uses a discriminatory act called selection. There are two ways of providing protection against the contingencies of life. One is by legislative fiat. Under that system, everybody is covered. It is paid for by any method that works. The benefits can be fair or unfair. The charges can be fair or unfair. Of course, the whole system has to be perceived as fair enough by the population or it will fail on political grounds, but basically there is no requirement for selection. The other end of the spectrum is the competitive, voluntary system. Since no one is forced to enter, it won't work unless the premium is properly related to the risk or at least perceived so. Since risk is not known very precisely, judgment is applied. The underwriter must be allowed to consider all the factors, make a judgement and competition then forces a reasonable result. The effect of interfering with that judgment is, I believe, inefficiency and that is one of the risks we are running in the direction that our society is taking.

There was certainly no inconsistency in my mind with the life insurance industry and its practice of discriminatory selection through Manhart and ERISA. Manhart provided equal contributions for equal benefits in a situation where there were plenty of employer contributions to take up the slack. ERISA provides the same thing, equal benefits in equal situations. The employer is providing it. The Norris decision is fundamentally different. My view is that it is at the other end of the spectrum.

Optional Benefits

Nathalie Norris had cash available to her, so she was actually in competition in using the purchasing power of her accumulation. She and her male counterparts could use the plan or take cash and go elsewhere. That is actually complicated a little by tax considerations from taking cash out of the plan. I'll speak to that in a moment. Assume that Nathalie Norris has a brother, Nate Norris. There is no such person but we should talk about him. Let's say each of them had $100,000 in cash. Before the Norris decision, Nathalie could get $800 per month and Nate could get $1,000. Now, since we are forced to go unisex, they will both get $800 because the carrier cannot be sure that any males will make a purchase. Again, the reason is they all have cash available to them. The result of this will be that the males will go elsewhere and get $1,000 per month and Nathalie and her plan will continue to get $800.

So in a few years, Nathalie or someone like her will come back to the Supreme Court and say, "Look, you tried to fix this and it has not been fixed. I am still only getting $800 and the guy across the aisle is getting $1,000." At that point, the Supreme Court has to make a decision whether to change the way society works in the insurance field or to admit that they did not do anything in the Nathalie Norris case. That problem is complicated somewhat because in the actual Arizona plan there were significant tax consequences to a participant trying to roll over money into another medium. That does not make sense to me and it seems to me that would be changed. I do not see why the tax laws should require that a tax consequence occur merely because an individual changed the medium which was funding his annuity benefit.

Defined Benefit Plans

What are the other effects of Norris? They are largely unknown. We are in a state of flux. There is a lot of argument going on about it. Lawyers are meeting all over the United States on this subject all the time. What does it do to the defined benefit plans? There is no difference in benefits by sex for the basic benefit. However, when we take the value of the benefit to purchase an option of some kind, sex discount factors have been traditionally used for that purchase. So what happens now to those discount factors?

I am going to use the California Teachers Retirement Plan as an example. It is a large plan covering 250,000 or so active teachers in California and almost 100,000 retired teachers. They now have provided to them equal benefits in equal situations. The benefit is 2% times final salary times years of service for both males and females. If a factor is applied for a joint election, there are four sets of factors, the four combinations of sex. Age is also a consideration, but the males with female beneficiaries and females with male beneficiaries are the two ends of that spectrum. These joint benefits were allowed into the plan by promising the California Legislature there would be no additional cost to the taxpayer. So far as we have been able to determine, that is close to what has happened. That is, the application of the joint and survivor factors have left the plan without additional cost or without additional gain. That obviously cannot be precisely true, but it must be close to true as far as we can discover.

Under current conditions at the typical age of retirement, a male retiree electing a joint and 100% benefit with a female contingent beneficiary gets the benefit reduced from $1,000 to $780, to 78%. Female reduction is only 91% for a male beneficiary. If we go unisex, is it to be 85% for both? Well, that would create some cost. To do it without cost would apparently require about an 81% factor for both. That is based on the proportion of males and females having taken those options in the past. About 52% of males and 17% of females have taken these options. However, just the act of making that change is going to make it less advantageous for females to take the option. My preliminary study of this has indicated that will cut it about half, so if we guess that 52% of males and 8% of females take that option, the factor is reduced to 80% or, even worse, maybe something like 79%.

We do have some experience from the State of Idaho plan which changed to unisex factors about four years ago. Before that change, 40% of males and 15% of females took options. After the change, 44% of males and 9% of females took the option. So fewer females took the option and in that plan slightly more males did.

The question has to be asked, what have females gained from applying the Norris decision to option factors? They had an option which was useful, essentially being taken away from them. The males gained something, but because of the disparate proportion of males taking the option, the male gain was very small.

So what has society gained by all of this? I see nothing. There is a further problem. Are we going to go unisex from now on? If so, a female who was on the verge of retiring thinking of a 91% option suddenly is thrown a 79% option. She will sue, probably successfully because the Supreme Court said you didn't have to go retroactive before August, 1983. Therefore, our plans will almost certainly be forced to take accruals through July of 1983

and apply the old factors using unisex factors in the future. That, apparently, is the only safe action they can take. Again, I do not really see what society has gained from all of this.

MR. HARVEY S. GALLOWAY, JR.: Group insurance is now affected by the Manhart and Norris Supreme Court decisions and may become affected by HR100 and S372. So far the basic obligations are those of the employer or the person controlling the employee benefit plan. The insurance company is not directed by these decisions to do anything. It can continue to use current pricing parameters and other pricing and experience rating parameters that prove to be workable in pricing benefits to each policyholder. It is still controlled by the same state laws and regulations. Norris did not change the insurance company's relationship with the state insurance departments.

The insurance company probably has an obligation to inform or warn its policyholders who may be affected by these court decisions about the problems generated by these decisions. If the insurance company wants to maintain its customers and its credibility, it will provide solutions for its customers to use to protect themselves against adverse legal actions. The company may not unilaterally change its guaranteed contracts. The buyer may elect to enforce his contracts without regard to the insurance company's interpretation of the effects of Norris or the buyer may elect to fill in around his current insurance contracts with some other solutions to Norris.

Breadth of Coverage

The Norris decision was not based on constitutional issues. It simply applied the laws stated in Title VII of the Civil Rights Act of 1964 to the optional deferred compensation plan offered by the State of Arizona to its employee, Nathalie Norris, on a payroll deduction basis. It is now clear that the plan in question is an employee benefit plan and that those who are responsible for even an optional benefit under an optional employee benefit plan may not provide benefits that accrue after August 1, 1983 that vary by sex. The decision is not retroactive, and it did not cover all employee benefit plans. The underlying statute just applies to employers of 15 or more employees who are in industries affecting interstate commerce.

The criteria developed by the Norris decision may be expected to be applied to employers covered by the Federal Equal Pay Act and various state and local civil rights type laws. In the group area, most employers with more than 14 lives will be covered, and many employers with fewer than 14 lives will also be covered. Between Manhart and Norris, employers may not collect employee contributions and may not provide benefits that accrue after August 1, 1983 that vary by sex.

Group Pricing Background

In a relatively short period of time we have moved from community rating methods, or something about as primitive, to much more involved class of risk determinations. Customizing of pricing has been extended through pricing formulas, experience rating and experience refunds on to various forms of self-insurance. This continual movement has been in response to market forces. It has been market driven. The group area has been competitive for years.

The rest of the insurance areas are now experiencing what has been a way of life in group insurance. We have continued our experimentation to write more select business, to increase our market share and to leave the other company with the substandard part of the business. Successful experiments have been copied and quickly have become normal business practices. Unsuccessful experiments just lose money and tend to fade away. These experiments have taken the form of finding rating or selection factors that can be relied upon as having some predictive credibility. Sex is just one of several such factors. We can only try to understand why sex is one of credible predictive factors, but we can measure its effects, and we can use it as a predictive tool.

These credible predictive tools that we cannot totally understand are not limited to sex. I am sure all of you could list many more. Additional selectivity or the alternative risk transfer becomes more important as more select subsets of groups are identified and as the erosion of the remaining risk pool produces more risk of a substandard residual pool, the "all other" group. The end result of this competitive drive is more complete market segmentation in pricing. The ultimate segmentation is to have every group self-insured with no stoploss coverage.

The greater the risk, the more factors are used to classify and price the risk. For example, in the individual life area for small policies, rates are based on age and sex and non-medical applications are taken. Little underwriting is performed. For large amounts of coverage, all factors are used along with medicals and intensive underwriting activity. As the risk increases, the movement is from superficial, broad categories to detailed categorization and personalization. The more factors that are used, the more personalized the selection becomes. Significant details may counteract broad factors such as sex, but sex is still considered as one of the many factors for the aggregate rating of the case.

Employer Pricing

Rates to employers are usually on an average basis--usually stated in terms of per person, per unit of insurance or, for some coverage, as a function of payroll. For some small groups, age and sex distinct rates per employee are charged to the employer.

Employee Rates

Employee rates are usually employer rates which have been reduced by the employer contribution. The rates generally follow the form of the employer rates. The employer contribution usually offsets an average rate basis enough to make the plan a reasonable buy for most of the participants. Small groups may charge employee rates based on the insurance company rates that in turn may be based on age and sex. Later we will see that this could cause a problem under the Manhart decision.

What are the Effects of Norris and Manhart on Group Pricing?

The regular group insurance area is already in substantial compliance with Norris and Manhart. Employee contributions normally do not vary by sex. The amounts of insurance normally do not vary by sex. The insurance company

pricing to the employer under these decisions is not germane to the problem. In the small group area, the age and sex distinct rates charged to employees are in trouble for groups of over 15 employees and in some localities for smaller groups. For non-employee benefit groups there is no apparent problem.

State Directives

Some states have sent circular letters or bulletins to insurance companies as a result of Norris. New York has directed companies to amend both individual and group policies that are clearly subject to Norris if these policies utilize gender distinct premium calculations or benefit payments unless the insurer has reason to believe that employee contributions are equal by sex or the sponsor intends to equalize sex disparate benefits. You might question the authority of the New York Insurance Department to unilaterally force insurance companies to reform insurance contracts under a court ruling that does not directly apply to insurance companies. You might also question the legal force of the circular letter and the position of the company in relying on hearsay as the basis for unilaterally amending contracts.

Group Permanent Products

Group permanent products which use sex distinct employee rates or benefits are in trouble. They require change to unisex rates, unisex benefits and unisex settlement options for benefits accrued after July, 1983. A partial list of these products includes group ordinary, retired life reserve, group paid-up and Section 79 products. Some employee benefit related products that have been sold under a sex distinct basis such as the TIAA "Collective Life Insurance Policies" have some problems under Norris. In August TIAA sent a notice to its insureds changing benefits from sex distinct life amounts to "blended" amounts for deaths after July, 1983.

Conversion Rights

Is a conversion right an employee benefit? Is a policy issued as a conversion an employee benefit? Are settlement options in such a conversion policy an employee benefit? The Wall Street Journal on page 1 of its Tuesday, September 13 issue said in an article dealing with group conversions, " 'Businesses are liable and should put pressure on insurers to make these individual policies unisex, too.' said Wyatt Company benefit consultants." The article went on to say that Lincoln National, Metropolitan and Prudential were moving toward unisex premiums for conversion policies. States require the right to convert for an employee under certain circumstances to one of a company's regular permanent life policies. The conversion is required at a premium for the class of risk of the insured. Can class of risk be construed to allow "blended" rates and values or are male rates and values to be used for group conversion policies? Does the state law require the use of normally stated rates and values? In other words, are unisex rates required for all permanent individual life business for a group writing company? Would it be fair to force group writing companies to move to unisex rates for regular individual permanent life insurance and not force non-group writing companies to make a similar move? Or can some other solution be found?

Group health conversion problems are similar to group life conversion problems, but state laws are not as constraining. Companies using non-rate book conversion products have fewer problems in the health area.

The ACLI wrote in General Bulletin 3398 dated September 6, 1983 the following information about the conclusions of a special committee that dealt with Norris. The committee was uncertain of the application of Norris to group conversions. There were various interpretations of current state law. There was a distinct need to observe future developments. The committee recommended no change in the current conversion laws at this time.

Some companies are ignoring the conversion problem, some companies are developing special rates or rules and some companies are watchfully waiting.

One company told us that its health conversion benefits are provided through individual policies and its filings of unisex rates have been made in about 30 states. The premium rates are at or close to female rates. At least some of these states have disapproved the filings. Another company stated that its life insurance group conversion benefits were being provided by individual policies using male rates and benefits. This company's group health conversion benefits were being provided through a group trust which did not need rate approval. Therefore, the company was already proceeding to use unisex rates on these group health conversion policies. Still another company stated that male rates were being used for group life conversions, and female rates were being used for group health conversions up to age 54. This company stated that conversion benefits were provided by individual policies and the rates had been approved by about 38 states and disapproved by 4. A fourth company stated that it hopes Norris does not apply to conversions and is waiting to see what happens.

Group Insurance Under HR100

What happens to group insurance under HR100? For this area my premise is that we should consider the law in terms of the words used and how they may be interpreted, not what we are led to believe the words mean. When the Civil Rights Act of 1964 was passed, few of us could lead ourselves to believe that Title VII of the Act really meant what it could be construed to say. The Norris decision has shown us that we should not be complacent when we read frightening words in a piece of legislation simply because other people do not seem to be disturbed.

HR100 would provide retroactive effects in all insurance areas. We do not think prior claimants could come back and claim higher benefits, but maybe they could. Permanent coverages would require topping up. We would use the most advantageous rate coupled with the most advantageous benefit coupled with the most advantageous settlement options. For term coverages without values the only affect would be a change in rates. The law would provide that for rates and benefits there could be no sex based differences. We would use unisex tables for all insurance rating and benefit purposes.

There are some unsettled questions of particular importance in the group area. There is a question about the use of sex based parameters for internal insurance company use. Under HR100, could a company vary its rates to the various group policyholders based on the sex distribution of the cases? Could the company even keep statistics by sex? Could experience rating or experience refund methods be used? Although my understanding is that the Congressional

staff members say that there is no problem in the experience rating area, how do you think the courts would construe the language? There is a type of group that may escape the effects of HR100. That is a self-insured group. Would an employer with a favorable sex distribution be forced to self-insure in order to get the benefits of lower expected costs? All coverages would have unisex rates and benefits, therefore, conversions would create no special problem. In the payroll deduction area, since all coverages would be based on unisex rates and benefits, there would be no unusual problems at least for newly sold benefits.

Norris, Manhart and HR100

How do the Norris and Manhart decisions relate to HR100? The Norris and Manhart court decisions place the burden for employee benefits on the employer and treat the problems as economic issues. HR100 places the burden of compliance on the insurance industry and treats the problems as civil rights issues. The bill places severe restrictions on the fundamental freedom of business to experiment or to respond to the marketplace in a reasonable manner. The bill eliminates cost based pricing based on sex. This bill sets the stage for further pricing parameter restrictions. The bill is based on a drive to treat each person individually without regard to labels that may be useful in describing his insurance classification. By ignoring the basic concept of insurance classes, the bill may tend to create one gigantic class. This obviously defeats the very basic motivation for the bill.

You will remember that I said earlier that the extensive use of selection factors results in a more personalized result for the customer. The elimination of selection factors has to have the opposite effect to the result intended by the bill's sponsors.

In conclusion, this presentation has been vague by design. We do not know all of the effects of Norris or Manhart. These cases will be clarified over the years by courts or by new legislation. HR100 appears to clear up several matters but in a disastrous manner. Also, HR100 contains a number of unclear areas. Norris was a narrow based decision. It was very careful not to deal adversely with the insurance companies. There is a danger of overreacting, of giving up the fight without a fight. Let's not go too far in the areas of group conversions and payroll deduction plans. Let's not let Norris produce de facto unisex rating in individual insurance.

Personal Reactions to HR100 and Norris

I'd like to take a couple of minutes to make a few more subjective comments on HR100. The basic rationale for HR100 came from problems developed in the university and public employee sectors from defined contribution types of plans. This type of plan is not quickly responsive to change. It is not responsive to correction of inequity in pay. It is not responsive to the need for benefit changes due to inflation. In the university setting, the defined contribution TIAA type of plan provides for unusual mobility for the university professional staff. In this setting, both sexes profit from the mobility.

Both sexes have suffered from the effects of inflation. Women have suffered from unequal pay and long term pension effects of unequal pay. The aggrieved women tried to correct only a small portion of their problem. That is the difference in annuity purchase rates for men and women. A much more fundamental problem was the historic inequity in pay which in defined contribution types of plans created significant differences in benefits without regard to the sex based annuity pricing problems.

The aggrieved parties tried to take corrective action through both courts and through HR100-type legislation. The results have been positive through the court action for future accruals for annuity purchase rates. HR100 went beyond the economic problems and adopted the most fail safe guise for getting legislation passed which is civil rights. Neither approach really deals with the fundamental problem of unequal pay and benefit structures not sensitive to inflation. Norris negates the basic economic rationale for HR100 except for retroactivity. The retroactivity portions of HR100 are so absurd that HR100 probably would not pass in any event with retroactivity. Therefore, the real effect of the residual part of HR100 is to further disadvantage women.

If HR100 passes without retroactivity, few women will benefit and most women will suffer with respect to future insurance purchases. In spite of this unfortunate result and in spite of benefits geared to women under the Norris case, it is difficult to deal with HR100 because of the false argument over civil rights. At this point, HR100 is an answer without an underlying question. The HR100 fight is not over. It is in the danger stage. The ACLI position was changed by a tremendous effort spearheaded by Phoenix Mutual. An industry group called the Coalition for Fair Insurance Rates has been pursuing a grass roots campaign. Thousands of letters have been mailed to target groups by the Coalition and by individual companies. Response has been good. The bill was a sure winner in February, it is now on hold. It is easy to be complacent now that it is on hold. We almost lost the battle early this year through complacency. We could repeat that error if we are not careful.

Actuaries are logic based people. We expect the rest of the world to act logically. Occassionally it does. The politician's logic base is power. This causes the politicans to act in ways we really do not understand. To win the political fight we have to get outside of ourselves, outside of our logic structure, and deal with politicians in terms they understand, not in terms of our traditional logic structure.

MS. LAUTZENHEISER: I want to pick up on what Harvey talked about in regard to individual contracts in the payroll deduction area. That area plus group conversions are the two pieces that were totally unexpected implications of the Norris case.

Group Conversions and Payroll Deduction Plans

The Supreme Court, at least my perception from reading their decision, did not think in terms of life insurance contracts. They did not think in terms of life insurance contracts for funding of pension benefits, nor did they think of life insurance contracts in regard to group conversions and payroll deduction plans. On the group conversion side, most companies did not move toward modifying their entire individual portfolio. I understand that the state laws require a customary form. I was pleased that New York took a

major lead in that particular area by suggesting that the customary form be a customary Norris form. As a result, either a unisex policy or a series of unisex policies will be required. An extremely broad interpretation which can be made out of the Norris decision would literally not require S372 or HR100. It would require, if you did sell any kind of group insurance, that you change your whole individual portfolio to a unisex basis. I believe Pennsylvania and some other states took positions similar to New York's.

The other area is the payroll deduction area. The payroll deduction language that is in the Norris case has to do with privilege of employment, and what is a privilege and what is not. In the payroll deduction plan it gets very difficult because you do not know what a privilege is. The closer you get to the employer actually giving a privilege the more likely it is that Norris applies. Is it a privilege simply that you are able to pass out forms? Is there a privilege involved when, in fact, you take some of the employer's time or the employer allows you to come in? If the employer does, in fact, help subsidize the premium, it is a pretty clear privilege. If some sort of free insurance is given, that might be a privilege. The more the employer does, the closer you get to a privilege.

The Free Market System

The other part of the Norris case has to do with the free market system. In the Norris case, the fact that there were several plans available and in those plans there were both life contingency and non-life contingency benefits did not constitute a free market system because the Governing Committee in the Norris case had selected only companies with non-unisex benefits. It may be that in some of the payroll deduction plans you can identify an actual free market system. These pieces are not clear. This is the piece that could be impacted by what the Labor Department does. The Labor Department can come out and say these are or are not included. Company reactions to this and/or employer reactions could actually impact it.

Most companies are taking a wait and see approach because it can fall out even into split dollar plans. You can go into far reaching things. Ken Clark came up with a very good phrase I would like to say here, "As you go back and implement these in your companies, try to make sure that you do not sew an overcoat on the button."

MR. TIMPE: I am going to make a few more comments on individual insurance, and then we will turn it over to John Montgomery who will speak to the regulatory matters and then finally to some comments from the audience.

The Norris decision will have considerable impact on employer sponsored retirement plans funded by individual life insurance and annuities. It should be remembered that the Norris decision relates to an employment practice, and the responsibility for compliance rests with the employer. The employer must not offer a male employee the opportunity to obtain greater monthly annuity benefits than could be obtained by a similarly situated female employee. However, since insurance companies must provide employers with the products, administration and advice for compliance, the responsibility rests heavily with insurance companies.

Defined Contribution Retirement Plans

Under defined contribution retirement plans, it is clear that separate records must be kept for contributions before and after August 1, 1983. This may create some administrative difficulties, but males retiring during the next few years could suffer a substantial reduction in benefits if contributions made before August 1, 1983 are used to purchase an annuity under unisex pricing rather than under male annuity purchase rates.

It is clear that annuity purchase rates must be sex neutral for all contributions made on or after August 1, 1983. I believe that most actuaries are assuming that the purchase rates will not reflect the sex composition of each retirement plan because defined contribution plans frequently involve relatively few employees. Also, many plans have a lump-sum retirement option, and this would allow males to avoid purchasing annuity benefits based upon female mortality rates. The lump-sum amount can be withdrawn and used to purchase annuity benefits outside the retirement plan which are based upon male mortality. Also, the development of unisex annuity purchase rates should not be based upon the male-female mix of current retirees under sex distinct pricing because it is likely that unisex pricing will impact the utilization of annuities involving life contingencies.

Individual life insurance policies under tax qualified retirement plans create some special problems. Newly issued life insurance policies must be sex neutral and the thrust will probably be a universal life type of product. I anticipate a sex neutral universal life product will be available only as it is required in tax qualified retirement plans. The greatest problems are going to come from policies in force and dealing with the future premiums to those policies. Life insurance policies issued prior to August 1, 1983 will need to be modified. Premiums on such policies which are paid after that date must be applied on a sex neutral basis so the existing policies must:

(1) be modified so as to comply by selecting the most favorable of the male and female premium rates, dividends, cash values and settlement options,

(2) be converted to paid-up status so that subsequent premiums could be applied to a new policy or

(3) be rolled over to a sex neutral universal life policy.

Defined Benefit Retirement Plans

Defined benefit plans funded by individual life insurance and annuities seem to present fewer problems than defined contribution plans. However, the fewer problems are more subtle and more complex. There would appear to be no need for a sex neutral life insurance policy under a defined benefit retirement plan unless retirement income endowment policies are used and the resulting maturity values provide different benefits for males and females.

The primary difficulty in defined benefit plans will be the factors for converting from one form of annuity benefit to another form. These factors must be sex neutral, and there can be difficulty in converting from factors which are not sex neutral. Care must be taken to assure that the plan sponsor

understands the funding impact in moving to sex neutral conversion factors. Also, there could be problems with curtailment of benefits, particularly if a lump-sum option is selected. This is best illustrated using a lump-sum optional form. If sex distinct factors have been used, new factors based on any blend of male and female mortality rates will produce a lower benefit to females and thus be construed as a benefit reduction.

A final point is that defined benefit plans with a lump-sum option can cause funding problems. If the lump-sum amount is calculated based on annuity factors with a high female content, this could provide a lump sum to a male which exceeds the funding level. Under these circumstances it will be attractive for the male to take a lump-sum benefit and purchase an annuity outside the retirement plan.

The Norris decision requires sex neutral settlement options and life insurance products in employer-sponsored retirement plans. This seems reasonable to me as it relates to employment practices and the relationship between employers and employees. The decision creates two opportunities for companies. First, I believe many companies have written small amounts of business in employer sponsored retirement plans and have struggled to provide the necessary related services. The Norris decision provides them an opportunity to withdraw from the marketplace rather than complicate their product offerings. The second opportunity will be for companies which develop the appropriate products and replace the companies which are withdrawing.

MR. JOHN O. MONTGOMERY: There has been considerable regulatory and legislative activity since the U.S. Supreme Court decision in Arizona Governing Committee vs. Norris. On September 21, the Executive Committee of the NAIC adopted an interim measure permitting "blended" 1980 CSO and 1980 CET tables. Section 790.03(f) of the California Insurance Code was amended as of September 29, 1983 to provide for exceptions prompted by the Norris decision.

NAIC Action

For those jurisdictions who have adopted the 1980 amendments to the Standard Valuation and Nonforfeiture Laws which permit the use of the 1980 CET and CSO mortality tables and any other tables "as approved by the NAIC". the use of the tables which are a blend of the 1980 CSO and 1980 CET female and male mortality rates may be used for the determination of minimum nonforfeiture values in those jurisdictions promulgating the interim procedure adopted by the Executive Committee of the NAIC. This procedure will be proposed for ratification as a model procedure by the NAIC at its plenary session in San Diego in December of 1983. Actually, the Executive Committee can only adopt things on an interim basis, and such a matter has to be adopted by the by-laws of the NAIC at a plenary session, so that will happen in San Diego. We felt that it was important enough as an emergency matter to get this out at this time. There may be some minor changes to that at San Diego as I will point out in a minute. This model regulation is an extension of the resolution passed by the NAIC in December, 1981 regarding sex distinct rates.

Sex distinct mortality tables will continue to be used for the determination of policy reserves wherever such tables are available. This is probably the only control available on the adequacy of unisex premium rates and nonforfeiture values. This introduces the possibility of some problems with

deficiency reserves and may require modification of the standard valuation laws so as to require each company to consider such premium deficiencies in the aggregate for all policies of both sexes combined.

The requirement for blending is at the option of the company. A special committee of the Society of Actuaries chaired by Robert J. Johansen is reviewing the methodology involved in the blending process. At the present time the blending used may be subject to the review and approval of the insurance commissioner. Blending can be considered to cover all proportions from zero to 100%, but proportions approaching these limits are more likely to be questioned by regulators. For expediency sake proportions near zero or 100% may be allowed but only on an interim basis. Any company using such extremes could be subjecting itself to public criticism.

Originally we went in with a proposal which was 100% male. After discussing this with the Commissioners, a group of Commissioners got together with me. We figured that we should stay with what we had started with in New Orleans a couple of years ago and so that is how we came to this blending process. It now appears that what we may try to do is to develop three tables of 25/75, 50/50 and 75/25 and make a demonstration that any other proportions can fall in any one of those areas without doing significant variation. That way it would greatly simplify the regulation of minimum nonforfeiture values.

I also want to point out that we are not going to do anything about settlement options because that is a matter of pricing, and so we will not discuss at all any tables for settlement options. The NAIC is not intending to do anything about pricing. That is completely out of our jurisdiction.

The NAIC procedure is made retroactive to August 1, 1983 in keeping with the mandate of the U.S. Supreme Court. This is an exception to the usual rule against retroactivity.

Revision of California Insurance Code

As most of you may be aware, California Insurance Code Section 790.03(f) mandated sex distinct premium rates whenever the experience justified. This section of the Code was even mentioned in one of the minority opinions of the U.S. Supreme Court decision. This section was amended effective immediately on becoming law on September 29, 1983. It added to Section 790.03(f) the following paragraph:

> Notwithstanding the provisions of this subdivision, sex based differentials in rates or dividends or benefits, or any combination thereof, shall not be required for (1) any contract of life insurance or life annuity issued pursuant to arrangements which may be considered terms, conditions, or privileges of employment as such terms are used in Title VII of the Civil Rights Act of 1964, as amended, and (2) tax sheltered annuities for employees of public schools or tax exempt organizations described in Section 501(c)(3) of the Internal Revenue Code.

California issued Bulletin 83-3 before this amendment to the California Insurance Code, but it is still applicable in other respects. We would appreciate all companies operating in California to let us know how they are handling this problem because I believe that through their responses we can

develop some sort of regulation that would be more workable. The development of unisex rates suggested in this bulletin is that used later in the NAIC adopted interim procedure specifying the use of blended tables.

MR. TIMPE: Thank you John and other panel members. Before we open up for the audience to provide comments and ask questions, have any of the panel members thought of anything more they want to say or say anything in response to what others have said?

MS. LAUTZENHEISER: I just wanted to comment, John, that I did not mean to leave the impression that NOW is dead. At the federal level, they are mostly talking about Vice Presidential candidates. They are clearly not dead. I think their biggest impact in the future will be at the state level.

I did have a question. Harvey said something to me the other night that I think may be important having to do with how he felt in January of this year and what changed his mind. Harvey, do you want to share that?

MR. GALLOWAY: In January I had the feeling that HR100 was so ridiculous that, obviously, it would be defeated. Any reasonable person could tell that, so why should I bother myself with it? Let somebody else do it.

In March our CEO asked me to sit in for him on a special CEO task force that the ACLI had to recommend policy to the Board. I found out very quickly that this was not an open and shut case and things intensified after that. I realized that I was too idealistic and very politically naive. I probably am mostly the same now but at least I am much more worried about HR100 and am devoting a fair amount of time to fighting HR100.

MR. SMITH: John, you said the NAIC was being picketed in Tampa?

MR. MONTGOMERY: It was not exactly picketed. Supporters of unisex rates made a very vigorous presentation of their cause.

MR. SMITH: What were you doing?

MR. MONTGOMERY: They knew this resolution was coming up on how we would handle minimum nonforfeiture values in light of the Norris decision and that is what they were talking about.

MR. SMITH: How did they think that was going to affect them? I just do not follow it.

MR. MONTGOMERY: It was just the general philosophy of the NAIC. I think they were also lobbying for HR100, too. The NAIC has taken a certain position on this. I think they were talking about the position taken by the NAIC at its meeting in St. Louis, which went along with the other criticisms.

MR. TIMPE: Anything else from the panel members? I would like comments from the audience.

MR. PAUL E. BARNHART: I think one of the panelists mentioned earlier that HR100 and S372 came to the verge of passage because of our complacency or perhaps insurance industry complacency. I think the real problem was a different one. I think it was more a matter of despair than it was a complacency. I talked, for example, with several people representing Tennessee

domiciled companies. As you know, Howard Baker is the Senate majority leader. They had him at a meeting where they talked about this. He assured them that there was simply no chance at all that these bills could be defeated. As a result, they gave up and just did not pursue the things. I do not think it's a matter of complacency at all, more a matter of despair.

I want to mention that because I think we have to be careful about this kind of attitude. I think some of the people in Congress who have been in favor of this kind of legislation have been very deliberately fostering this perspective that you might as well not fight it because it is a lost cause. I think what Barbara has done through the Committee for Fair Insurance Rates has shown that just is not so. Some of that is just propaganda. I think we would make a terrible mistake if we just abandon a cause because we think it is futile.

One other thing I wanted to mention, that I suspect a lot of actuaries and maybe companies are not aware of. NOW has already identified a corollary issue that would follow unisex. They have a fact sheet that has been published that says that if HR100 or S372 were enacted into law, and this has Norris ramifications also, that quantity discount pricing structures or policy fee ratings structures would be illegal. They have already identified a corollary thing here that you can be sure they are going to attack. Those laws in themselves don't say anything about policy fees or quantity discounts, but I think you can be quite sure that somewhere along the line, maybe even in relation to Norris, certainly if one of these bills is enacted into law, they are going to mount a court challenge which is based on the concept of disparate impact as distinct from overt sex discrimination. The argument very simply is that, because women on the average buy smaller size life insurance policies than men or small size disability policies or whatever and because of policy fees or quantity discounts structures, they still pay a higher rate per thousand or higher rate per hundred. There is precedent for this kind of thing in a number of court actions that disparate impact also becomes a ground for declaring something to be illegal. I think anyone who isn't already aware of this interesting little ramification should be aware that such things as policy fees or quantity discount factors will also be under assault along with merely blended or unisex rates as such.

MR. TIMPE: Thank you, Paul. That is an interesting little step in the domino theory that we have all been hearing about.

MR. ROBERT J. CALLAHAN: I am employed by the State of New York Insurance Department.

I made a few remarks at the Actuaries Club Meeting of New York a week ago Friday on the session on unisex regulations. After listening to alleged discrimination against women, I noted the discrimination against men in the retirement system that I am in. I am in a defined benefit plan. I noted the situation of a woman employee the same age as myself, retiring, and the two of us having spouses of the same ages as we are and we both choose joint and survivorship options and that she and her spouse would get a greater benefit than I and my spouse would get. Dr. Mary Gray, one of the panelists, noted that this, in fact, did benefit women because this had the effect of raising the benefits for female spouses.

You mentioned the New York Department's Circular Letter. We are not trying to put the companies out of business. New York happens to be one of the

prior approval states. The industry came to the Department to talk about an expedited policy form approval procedure which the Department then put out in Circular Letter 14. Such expedited policy form approval procedure is only to be used for Title VII situations. It is not to be used where the filing is made as a result of Norris but involves non-Title VII situations as well. If, as a result of Norris, an insurer decided to unisex its entire portfolio, it would have to go a regular prior approval procedure route.

There already is one company in New York which has received approval of forms to unisex its individual portfolio. There is another company in New York that is talking about unisexing its individual portfolio, and it currently has some plans on the 1980 CSO table. As an interim measure, it would use the higher of the male or female cash values and then convert from cash value into amount of reduced paid up or into extended term insurance using the female mortality.

I was one of the proponents as an interim measure of adopting 1980 CSO male. Thursday, John, we'll discuss the ramifications to what the NAIC adopted at Tampa. From what I understand of it now, it could be a real administrative nightmare, not only for the companies but also for the insurance departments. I support the 1980 CSO male as an alternative only as a temporary stop gap measure until a committee headed up by Bob Johansen can come out with a blended table. Then I would support a blended table or a limited number of blends.

New York Department's Circular Letter Number 14 puts the obligation upon an insurer to look at its portfolio of business and then to justify the keeping in force any program wherein the benefits or premiums are sex disparate. One of the things which I had advocated before that letter went out is that we put a deadline for the companies to report back, but the letter does not contain any deadline for the reporting back, and we are still awaiting the reports.

In case of group conversion, you point out a question as to whether you had to unisex your individual portfolio if you unisexed your conversion policy. In the health insurance area, we require the mid-point rate between male and female because in the health insurance area we do have minimum loss ratios. In the life insurance area, we do not currently have rate control, and we advised the companies that we would accept the male only rate. We did not feel that language in the law about class of risk required that an insurer unisex its individual portfolio as that language could be interpreted as meaning the class of convertees, at least those who are subject to Title VII.

MR. DONALD S. GRUBBS, JR.: The members of our profession think independently and reach differing conclusions. As has been pointed out, actuaries use logic, and fortunately eight members of this Society speaking as individuals presented logic to the court and that seems to have been the key to the court reaching the decision it reached in the Norris case.

The key element of the decision seemed to be lifted almost directly out of the group of actuaries' amicus brief in indicating that if Nathalie Norris wanted to get an equal amount of monthly income she had to contribute more. She would have less take home pay than a similarly situated man, exactly the situation that the court had already concluded was contrary to Title VII in the Manhart case.

There are also differing views on the effect of the Coalition's effort in Washington. Speaking as one who has been consulted from time to time by the staffs of both the House and Senate Committees involved, I think I have been able to observe a different side of the effect. Senator Packwood expressed a viewpoint which some other Congressmen shared about rage, feeling that they had been betrayed. They had worked in good faith with leaders of the insurance industry in trying to work out a compromise. They had looked at the problems that were being raised by the insurance industry. I was one who opposed retroactivity and one who was aware there were other serious technical problems in the bill. We had members of Congress who were willing to work on those problems, try to resolve them, and reach a compromise decision. Suddenly, they felt they were undercut and are now rather bitter about the level of pressure brought upon them. That level of pressure of a political nature may make it more difficult for the insurance industry to get a satisfactory eventual solution of this matter or with other matters relating to the regulation of the insurance industry.

With respect to defined benefit plans, use of a unisex basis has never been any particular problem. Years ago most of us shifted our early retirement factors away from actuarial equivalent factors that differed by sex to factors that did not differ by sex. In fact, I always had difficulty in explaining to anyone other than an actuary why the early retirement benefit for a male of 55 was less than for a female of 55 since the male was not expected to get the payments as long. But I could always convince actuaries of that. So long ago we scrapped that for most plans. It is no more difficult to do that with respect to the option factors in a defined benefit plan. Indeed many plans have done it, and many did it long before the Norris case came down the pike.

With respect to defined contribution pension plans, it is quite possible to use conversion factors to convert into a life annuity for a large size case; difficulties exist in the small case. There are life insurance companies, at least one major insurer that I am aware of, who were issuing group annuities on a unisex basis in defined contribution pension plans prior to the Norris case. Others are now doing it. The problems can be faced. The problems can be solved.

MR. RICHARD J. MINCK: I'd like to offer a couple of comments, fleshing out some of the actions and motives that have been attributed to the ACLI Board earlier this year and make one modest observation at the end.

First of all, I don't think that it was either fright or the other emotions that led the ACLI Board to their earlier position or to their revised position. If you look at the situation earlier this year from the Board's point of view, HR100 had come in a form that for the first time it was clear would apply retroactively to life insurance companies and to contracts that had been in force. They were also looking at the Norris case, which was certainly going to be decided during this year, as it would apply to employer coverage. They were looking at a series of bills that were going to be introduced at the state level, I think there were eight this year, and the prospects of perhaps bills being introduced and passed in several states before an effective defense could be mounted. That does happen in the state legislatures where there is a very short session. They then looked at the impact of these bills upon themselves and their clients.

I think the conclusion they reached in February was that as far as employee benefit plans are concerned, to the extent that Title VII did not apply to all benefit plans, there was very little reason to oppose a bill that would extend its application to other employee benefit plans. An employer who had 14 lives one year, 15 the next, 12 the next--being in and out of Title VII requirements--made no particular sense or certainly was not a principle that was worth fighting for very hard. So the position they took was that as long as a bill was not applicable to benefits accrued before a given date, they would not oppose a bill that would require employers to provide benefits to their employees on a unisex basis. As far as individual contracts were concerned, where there was no employer relationship, the position they took at that point was that no existing contract should be affected by such a statute and that left them with the question about new contracts. I think they were looking at whether it was a business risk worth taking to simply oppose any legislation and run the risk that you would lose on its application to existing contracts. That is a matter of judgment, and judgment can be wrong.

The position after the Board meeting in May was changed simply to one of opposing the application to any new contracts. The rest of the position was identically the same. I think that I would probably dissent from Harvey's observation that Congress could not be stupid enough to pass a bill that would apply retroactively. Again, a matter of judgment, Harvey. I am not quite that confident.

I think that I would also point out that while the National Organization for Women has received a fair amount of publicity, they have not in fact been the proponents of the bill over the four or five years that it has been before Congress. There is quite a wide group of women's organizations, civil rights organizations and some of the labor unions involved. While they do not show up and demonstrate, in fact, they have a lot more pull in Congress than the National Organization for Women does at this point.

I think that where we are now in the legislature is that the General Accounting Office report will probably come out at the end of this month. I think that what has been holding up action on either side was that on the House side they haven't decided what form of amendments they want to have on this bill. On the Senate side, I think we probably have more votes than Senator Packwood does. I do not think anything much will happen during the balance of this year. I would not take inactivity this year to mean that nothing is happening on the House side. I think it would be a mistake to reduce our level of activities on that assumption.

Finally, my one observation, and this is a personal one, though I am quoting an actuary who was a member of our Board but no longer there. It is perhaps unfortunate that the court cases, namely Manhart and Norris, under which we have taken an approach to defend the right of risk classification and the importance of the process, involve in each case annuities where the only factors that we take into account are age and sex and we do not pay any attention to physical condition or any of the other parts of our risk classification process.

MR. RICHARD E. BAYLES: What is the probability that in 1993 we will have a session on uni-age and risk classification?

MS. LAUTZENHEISER: NOW is already proposing it. One of the things that they are saying is that it is unfair that these young drivers have to pay so much more for their automobile insurance and it should be equalized. It is there. It has been talked about before. I think the concern that I have is that it is not propelled by logic but by various power sources. Dick points out that not just NOW affects Congress but other women's groups, too. Groups like the Gray Panthers and the age people have a significant impact on Congress. I think in spite of the fact that we would today say it is ridiculous, it could in fact be a real threat.

MS. ANNA M. RAPPAPORT: Our clients are primarily employers. They have choices to make. The kinds of choices they have to make are whether to use insurance company contracts as vehicles for funding and offering those benefits or whether to go some other way. My impression is that our clients are not going to be enormously happy about taking legal risks in offering some of these benefits. In the Norris case it is really the employer and not the insurance company that is at risk. I think there is a danger from the point of view of the insurance companies that if they do ot have the products that allow the employers to offer the benefits on a risk free basis, either the employer is going to find another way to offer the benefit or maybe discontinue it entirely. That should be taken into consideration in terms of your decisions.

MR. SMITH: I would like to comment briefly on this age problem. The eight actuaries that gave the amicus curiae brief have been lecturing that there is something fundamentally different between sex and age as a contingency in that everybody ultimately dies of age but nobody ever ultimately dies of sex. No joke intended. I would like to take exception to that. We do not really do much insuring at the very old ages. Most insurance is done at earlier ages. I certainly do not see anything fundamentally different between the estimate of mortality related to sex and age for one year of life insurance at age 35. That is more nearly where the insurance industry actually does its insuring.

MR. DEAN A. WAHLBERG: I wish to make two or three observations. First, I believe when Congress introduces or considers bills that are ridiculous, we should try to fight Congress and not sit back. I am reminded that the banking industry fought Congress tooth and nail on the withholding question. The banks won, and yet I don't see any real cutback on the deregulation of the banking industry going on at this time. The second point I wish to make is that my company (Minnesota Mutual Life) happened to be a company which was mentioned in the Norris decision as having instituted a unisex plan for a defined contribution annuity program prior to the passage of Norris and, if so, why cannot everybody do it? I want to remind the audience that that particular plan, while it was a defined contribution plan, was a plan under which a lump-sum option was not permitted. There is a big difference. That is the whole crux of the matter right there.

Finally, I want to second something that Barbara mentioned earlier and that is speak up. If those of us who have some kind of knowledge about the effect of these bills on our industry and on employers do not speak up, we deserve what we are going to get. In the Minneapolis/St. Paul community there is an organization called the Minnesota Insurance Information Center. This is basically the public relations arm of the Minnesota based companies.

This organization and our company have undertaken a joint effort to contact local women's groups--offering a speaker to present our industry's side of the unisex issue. There have been a number of positive responses to the offer, and I'm scheduled to make the first presentation in mid-November. I urge all of you to consider doing something like this. We really must speak up on this subject.

MR. TIMPE: Barbara, do you have one more comment?

MS. LAUTZENHEISER: I just want to say, Don Grubbs said that the brief of the eight actuaries was influential. I would agree with that. I would like more actuaries to file briefs and speak up. Speak up independently. Do it!