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Note: Messrs. Anderson and Daskais submitted the following supplementary comments.

EXPRESSION OF OPINION BY THE SOCIETY: THE MANHART BRIEF

by Richard Daskais

On January 10 of this year, seven actuaries wrote to the Supreme Court asserting that a brief on behalf of the Society of Actuaries, jointly with the American Academy of Actuaries, was not properly a brief of the Society because it is an "expression of opinion."

Reasons for the Letter

I believe the motives of the signers of the letter were in two general areas.

First, there was concern about Article X. The signers were dismayed to learn that the procedures specified in the Constitution for expression of opinion were not followed. The signers believe that the brief, like any other expression of opinion is inappropriate for a "learned society."

Second, there was concern on the substance of the brief. The brief did not treat fairly the issues of the Manhart case. It advanced facts or arguments favorable to the petitioners (the City of Los Angeles) but did not advance, as well or with equal vigor, facts or arguments favorable to respondents.

What I felt that characterized the brief as "largely an actuarial opinion" was the substantial concentration on *selection* (both by the annuitant and the *insurer*) involving *individual choice* situations with almost the entire emphasis upon the differences between male and female *mortality*. To me, the Manhart Case itself represented an *employee* benefit plan, *not insured*, involving *compulsory* membership *without* the opportunity of *individual choice*, and involving employer contributions which are affected to a much greater extent by factors such as *turnover and salary increases* than by the difference between male and female mortality.

The two areas are related. The failure to follow the Article X procedures was not merely a technical defect. The lack of balance perceived by the signers, we believe, is a direct result of the failure to follow the procedures designed to produce balanced opinions.

Is the Brief an "Opinion"?

The President of the Society, as well as some other members of the Board and the task force, have indicated that the brief is not an opinion—that it is merely a statement of relevant facts.

I believe that the brief is clearly an expression of opinion of the type contemplated by Article X. When one selects which facts are relevant to an issue, or when one identifies, "the issue" in a controversy, one cannot help but express an opinion on the controversy.

The key introductory paragraph of the brief reads, in full:

"We believe, accordingly, that we are in the unique position of being able to offer the Court information that will supply a contextual background that should be helpful in its consideration of this case. We shall, for the most part, leave to the parties and the other amici discussion and analysis of the legal materials that bear upon the proper interpretatio in this context of the prohibition in Title VII of the Civil Rights Act of 1964 of discrimination against any individual "with respect to his compensation, terms, conditions or privileges of employment because of such individual's . . . sex. . . ." Actuaries have no special expertise to offer in this regard. We can, however, help to inform the Court about the extent to which the sex of covered employees is and will continue to be taken into account in the administration of retirement plans, about the manner and extent to which present practices might have to be changed if all or some sex classification were prohibited in connection with the fixing of contribution rates and benefit levels, what the principal effects of requiring such changes would be, and in general what the impact of the Court's decision might be in an area that affects hundreds of thousands of employers and many millions of employees. We shall, in the course of that discussion, try to expose as fully as possible the premises that have been accepted by actuaries and which are in substantial part the bases for the opinions and recommendations that they have offered to plan sponsors and to insurance companies in the past."

The body of the brief does, as promised, discuss future effects and consequences such as "chaotic" results, "most serious problems", "most severe" competitive impacts, and a "monumental and very probably impossible task." This is clearly opinion. No one knows what will be the consequences of any particular decision of the Court. Any actuary's p diction of consequences is opinion, even if it proves to be rig on the mark.

Even if most of the words of the brief are facts in support of the opinions, the brief as a whole is opinion. For example, this article is mostly facts, but the article as a whole is opinion.

Expression of Opinion by Learned Society

The purpose of the Society of Actuaries is stated in Article II of its Constitution: "Its objects are to advance the knowledge of actuarial science and to promote the maintenance of high standards of competence and conduct within the actuarial profession. In furtherance of these ends, it shall hold meetings, publish papers, discussions, and studies, make or sponsor investigations, promote educational activities for students and members, and undertake such other activities as may seem desirable."

These objectives can be distinguished from two other types of objectives:

(1) To advance the personal and business interests of the members of a profession. These are often the objectives of a professional association whose functions do not include the major portion of education of members of the profession or their certification.

(2) To advance the business interests of the employers or clients of the members of the profession. These are often objectives of a trade association.

If the Society expresses opinions which appear to be directed toward furthering the business or personal interests of actuaries, or of our employers and clients, the Society will lose respect as a learned society. This concern, coupled with a fear that the Society would express opinions that would

make it appear to be a trade association of the major employers of actuaries (i.e. life insurance companies), was an important argument opposed to the adoption of Article X. Other arguments against the adoption of Article X, which were listed in President Moorhead's information memorandum before the 1970 vote on adoption, included:

"(2) Public expressions should be left in the hands of the two national actuarial bodies—the American Academy of Actuaries and the Canadian Institute of Actuaries respectively.

"(3) Expressions on controversial issues can be divisive and hence can impair the ability of the Society to achieve the primary purposes set forth in its Constitution.

"(4) Public expressions should be restricted to position papers setting forth the arguments on both sides of any issue.

"(5) Members who depend upon their Society designation for their livelihood can be embarassed by an expression with which they disagree. The normal procedure of resigning is not open to them except at severe personal sacrifice. This applies also to Associates who will have had no voice in the decision."

However, the strict conditions on expression of opinion in Article X were cited by proponents of Article X's adoption.

The signers of the letter sent it to the Supreme Court, and publicized it, in the earnest belief that the publicity will deter future transgressions of the spirit and letter of Article X.

I take great pride in the Society as a learned society. It is quite successful in attaining its objectives—"to advance the knowledge of actuarial science and to promote the maintenance of high standards of competence and conduct within the actuarial profession." I do not want to see these objectives compromised with any pursuit, by the Society as such, of the personal and business interests of its members or of the business interests of its members' employers and clients. Actuaries should pursue these interests through other organizations (actuarial and otherwise) and as individuals.

A CRITIQUE OF THE MANHART BRIEF

by Arthur W. Anderson

Whether the Society violated its Constitution by co-sponsoring the *Manhart* brief would be of purely academic interest if the brief were indeed just an exposition of actuarial concepts with which all members of the Society could agree. I suggest that the lack of logical precision in the brief does not reflect favorably on the Society as a whole. It is to this criticism that I address myself.

The brief is divided into five main sections entitled respectively, "Interest of the Amici Curiae", "Introduction and Summary", "Argument", "Conclusion", and "Appendices." I shall comment on certain of those sections under the same headings.

"Introduction and Summary"

After a brief review of the number and extent of non-OASDI pension plans and description of certain technical terms (defined benefit, defined contribution, etc.) the brief present its major thesis:

"Women, as a class, live longer than men, as a class. A group made up of a reasonably large number of women will survive for a greater number of years than will an equal number of men, if all other factors that affect longevity, primarily age distribution and health, are identical. The difference is substantial."

But the importance of this statement is unclear because an equally valid statement would be the following:

"Persons in good health, as class, live longer than those in ill health, as a class. A group made up of a reasonably large number of persons in good health will survive for a greater number of years than will an equal number of persons in ill health, if all other factors that affect longevity, primarily age distribution and sex, are identical."

Both statements are really just corollaries to the obvious fact that longevity is a function affected by a number of variables—health, age, sex, etc.—and if all of the variables but one are held constant, the remaining variables will have a marginal effect.

It would have been helpful to the Court, I think, if some indication had been given as to the relative importance of the various factors affecting longevity. The 1976 Reports issue of the *Transactions*, for example, shows that for standard insured persons mortality of females is about 63% of male mortality, but the Build and Blood Pressure Study of 1959 indicated that certain medical impairments can cause mortality rates on the order of 500% of standard. A 1976 paper by John M. Bragg presented to the 20th International Congress of Actuaries (Tokyo, 1976) implies that socio-economic class is at least as important a factor as sex. We also know that occupation and hobbies such as aviation are important, as are habits such as smoking and drinking. A more scholarly and dispassionate presentation to the Court would have included some of these facts, and would have reminded them that if we consider each of the variables that are correlated with longevity on a marginal basis we will find some (health, for instance) more influential than sex.

"Argument"

This segment of the brief opens with a discussion of pooling and classification of risks, concentrating on a hypothetical example of 10,000 persons, each with $100,000 in savings and a desire to form an annuity pool. It develops the actuarial principle that "each member of the group should be charged in proportion to the risk that he or she contributes to the pool . . ." The brief argues that this "actuarial equity" is necessary in any such arrangement because (1) if the arrangement is set up as a business, there would be anti-selection if benefits were not proportional to risks, and (2) equity among individuals is a desirable goal even if no insurance product is involved. The brief notes, however, "that it is not only impossible to quantify the risk contributed by each individual, it is also not necessary to extend the classification process to the ultimate limit." Rather, classes with relatively small differences in risk may be ignored as may those "classifications which may be perfectly feasible from an actuarial standpoint (but which) may be barred by others for reasons of social policy. For example, black persons . . ."

This honest review of the subject is, however, concluded with the following puzzling remark:

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