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THE MANHART CASE

In the December issue of *The Actuary,* it was reported that the Society of Actuaries and the American Academy of Actuaries had submitted a joint brief amici curiae in the case of the City of Los Angeles et. al. vs Marie Manhart et. al. The case was argued before the Supreme Court on January 18, 1978 and decided on April 25, 1978.

The submission of the brief has raised some questions within the Society and this record is to acquaint the members with these.

The background and summary of the brief has been prepared by Donald S. Grubbs, Jr.

Manhart Case Brief Submitted By Society and Academy

Background

Title VII of the Civil Rights Act of 1964 makes it an unlawful employment practice to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of race, color, religion, sex, or national origin. The City of Los Angeles, Department of Water and Power, maintains a contributory defined benefit pension plan under which employee contributions for female employees were 15% higher than for similarly situated male employees, a provision designed to reflect the longer average life expectancy of women. Employee Marie Manhart alleged that this violated Title VII. The U.S. District Court and the U.S. Court of Appeals agreed with Manhart, and the U.S. Supreme Court agreed to hear the case.

Some actuaries were concerned that the Supreme Court might not understand the many ways in which sex differences are recognized under the wide variety of pension plans in the United States. They feared that, without such understanding, the Supreme Court might go beyond the issue of employee contributions and make a ruling in the Manhart case which would have very broad and unintended results for other types of plans. Therefore at its October 1977 meeting the Board of Governors decided the Society should submit a brief of an informational nature, to assist the court in understanding the many ways in which sex differences are recognized under pension plans and the possible implications of any decision in *Manhart.* Therefore the Board of Governors authorized the President to have such a brief prepared and submitted, if he determined it was feasible to submit such a brief with only three weeks available before the due date. A small task force was appointed under the Chairmanship of Donald S. Grubbs, Jr. The American Academy of Actuaries joined in preparation of the brief and the Academy's legal counsel was given responsibility for legal aspects.

Legal counsel prepared the final document to reflect the decisions of the task force. The brief was approved by the President of the Society and the Executive Director of the Academy and was submitted to the Supreme Court.

The brief was neutral regarding the case at hand. It did not indicate whether the court should rule for or against Marie Manhart.

The following is a summary of the brief.

Interest of the Amici Curiae and Introduction

The initial portion of the brief is a short description of the Society, the Academy and the actuarial profession. It explains the role of the actuary in the design and administration of employee retirement plans. This is followed by a bird's eye picture of pension plans in the nation. It indicates the main classifications of the plan design and of their means of funding. It summarizes briefly the differences in mortality by sex and the consequent differences in cost of benefits.

Pooling and Classification of Risks

The main body of the brief begins with a section on pooling and classification of risks. It explains concepts of treating individuals as members of a class to which they belong, and states the use of classification by age and sex. Concepts of cost of annuities are explained, as is the effect of adverse selection in situations where individuals can make elections.

Classification by Sex in Defined Benefit Plans

Most defined benefit plans are non-contributory and pay equal monthly pensions as a single life annuity at normal retirement, regardless of sex. But in the event of early retirement, deferred retirement, payment in a lump sum, or payment in an optional form of annuity, actuarial equivalent factors are often used to determine the amount of benefit. The brief explains the traditional use of age and sex in determining actuarial equivalent factors, as well as pointing out that some plans use unisex factors.

Historically, plans like that of Los Angeles were developed under the concept of the employee paying half of the cost of the benefits, and thus contribution rates varied by age and sex. But the brief notes that contribution rates differing by sex have generally disappeared, so that a court ruling only prohibiting such differing employee contribution rates by sex would not have a widespread effect.

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Insurance contract plans (plans funded exclusively with individual level premium insurance and annuity contracts) and certain other insured plans under which contributions are allocated to individuals before the annuity commencement date are discussed. Such plans always include actuarial equivalent factors which vary with age and sex. Any court order requiring elimination of such sex differences on a retroactive basis would be extremely disruptive or impossible. Even a court order outlawing such sex differences prospectively "would still present exceedingly difficult problems." Currently policies do not exist on a unisex basis. If insurers were to issue annuities on a unisex basis, the problems of anti-selection could be severe.

Classification by Sex in Defined Contribution Plans

Defined contribution plans rarely provide different contribution rates for male and female employees, except for certain target benefit plans. All contributions are allocated to individual employees and there is no pooling of risks. If the plan provides benefits only in the form of a lump sum or in the form of installments for a stated period of years, benefits are equal for males and females. But benefits for males and females differ if a life annuity is purchased.

"Guaranteeing payments for life, or as long as either the retiree or spouse lives under a joint and survivor annuity, provides an important social role in meeting the needs of retired people." Unisex annuities are not available in the market place. If it were not allowable to provide annuity payments which differ by sex, defined contribution plans could not supply the annuities. Therefore they might eliminate entirely the option to obtain life annuity payments, and require all participants to take their distributions in a lump sum payment or installments not guaranteed to last for life. Most severely affected would be defined contribution plans which do not now allow payment of a lump sum, but require the account balance to be applied to provide an annuity.

Conclusion

After citing other examples of the recognition of sex in pension plans, the brief concludes, "We believe that any sweeping decision that only numerical identity is permissible in making contributions and payment of benefits would have a deeply disturbing effect on the current method of providing retirement benefits that might adversely affect millions of participants. We respectfully suggest that this court render a decision that will not have widespread and unintended adverse effects."

Actuaries who worked on the brief included Bill Halvorson, Ernest Heyde, Steve Kellison, Barbara Lautzenheiser, Barry Watson, Mike Mahoney and Donald Grubbs.

For a copy of the brief write to American Academy of Actuaries, 1775 K Street N.W., Suite 215, Wash., D.C. 20006.

As prepared, the brief was considered by the Board of Governors as not being an expression of opinion and consequently the Board did not find it necessary to follow the procedures required by Article X of the Society's Constitution on Public Expression of Professional Opinion.

Certain members of the Society who read the brief concluded that the brief was in essence an expression of opinion and that in such circumstances the Board of Governors should have followed the procedure outlined in Article X. These members on January 10, 1978 submitted the following letter to the Supreme Court. This letter very well states the opinion of these members on this point of expressing an opinion.

Text of the Seven Actuaries Letter

"On November 17, 1977, a brief for the Society of Actuaries (the "Society") and the American Academy of Actuaries, as Amici Curiae, was submitted in this case.

"All of the signers of this letter are members of the Society. Under its Constitution, the Society can submit an expression of opinion only under the stringent conditions specified in Article X of its Constitution, which reads as follows:

(Here follows Article X as given in the Year Book)

"The manner in which the brief was prepared and submitted has been discussed with the President of the Society, other members of its Board of Governors, members of the task force which drafted the brief, and counsel for the Society. No person with whom we have discussed the matter claims that the conditions prerequisite for expression of opinion by the Society have been followed. No proposed opinion was submitted to the membership.

"(We understand from the President of the Society that it was the view of the Board of Governors that the brief would not be an expression of opinion. We believe the brief is largely an actuarial opinion. For example, on page 20, the brief states "If only numerical equal payments are deemed to be satisfactory . . . and if such a decision is made retroactive, the result—in our carefully and thoroughly considered opinion—would be chaotic . . . " A review of the discussions at the Society meetings leading to the adoption of Article X shows that the brief was exactly the type of expression contemplated by Article X).

"Therefore, it is our inescapable conclusion that counsel for the Society was not given proper authority to submit the brief on behalf of the Society. We have learned through discussion with Mr. Lawrence Latto, counsel for the Society for the brief, that the Constitutional restrictions on expression of opinion were not brought to his attention.

"We believe that if the Constitutional procedures had been followed, any brief on behalf of the Society or a Committee would have been substantially different, particularly because more views would have been expressed. The task force which drafted the brief was so small in number and of such composition that the task force may not have adequately represented the full range of actuarial opinion on the matter before the Court.

"We respectfully urge that this letter be passed through to the Justices. It is important to make clear that the brief cannot be considered a brief of the Society, because the conditions for expression of opinion by the Society have not been met.

"Any correspondence regarding this letter may be directed to all of us through Richard Daskais, 2 North Riverside Plaza, Chicago, Illinois 60606 (telephone 312/648-7422).

"We are sending copies of this letter to counsel for Petitioners, Respondents, and the Society."

The letter was signed by Arthur W. Anderson, Richard Daskais, John Hanson, Ronald Kobrine, Lawrence Mitchell, Conrad M. Siegel, and Melville J. Young. □