THE USE OF CLASSIFICATIONS BASED ON GENDER AND MARITAL STATUS IN INSURANCE: CURRENT VERMONT LAW

Classifications by gender and marital status has long been an accepted practice of the insurance industry.[1] Recently, however, this practice has come under challenge. Challenges have been initiated through administrative,[2] judicial,[3] and legislative channels.[4] The United States Supreme Court has ruled that gender classifications used in employer sponsored insurance programs violate Title VII of the Civil Rights Act of 1964.[5] Those persons not covered by employer sponsored insurance programs and who seek insurance on their own lack such protection and must find other means to challenge the classifications.[6]

A 1975 amendment to Vermont's Unfair Trade Practices in Insurance Act includes unfair discrimination based on sex or marital status in its definitions of unfair trade practices.[7] The amendment prohibits the use of classifications based on sex or marital status in insurance underwriting standards, underwriting practices, eligibility requirements, and rates.[8] However, the use of these classifications in rates includes an exception (section 4656) which appears to deprive the individuals insured of any real protection from the discrimination sought to be abolished.[9] This note will analyze the 1975 amendment and related statutes and will consider the protection that the amendment provides and why it should provide more.

I. The Text of the 1975 Amendment

The language of the 1975 amendment raises several questions

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1. Arizona Governing Comm. v. Norris, 463 U.S. 1073, 1107 (1983) (O'Connor, J., dissenting).

2. *See* Note, *Strategies for the Elimination of Sex Discrimination in Private Insurance*, 20 Harv. C.R.-C.L. L. Rev. 211, 227-36 (1985).

3. *Id.* at 236-52.

4. *Id.* at 252-66.

5. *Norris*, 463 U.S. 1073; Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978). Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating on the basis of gender. 42 U.S.C. §§ 2000e-2000e-17 (1982).

6. *See* Note, *supra* note 2, at 212.

7. 1975 Vt. Laws 180 (codified at Vt. Stat. Ann. tit. 8, § 4724(7)(B) (1984)).

8. Vt. Stat. Ann. tit. 8, § 4724(7)(B) (1984).

9. *Id.*

unanswered by the legislature. The statute prohibits the following:

> (B) Making or permitting unfair discrimination against an applicant or an insured, on the basis of the sex or marital status of the applicant or insured, with regard to:
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> (i) underwriting standards and practices or eligibility requirements; or
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> (ii) rates; however, nothing in this subdivision shall prevent any person who contracts to insure another from setting rates for such insurance in accordance with reasonable classifications based on relevant actuarial data or actual cost experience in accordance with section 4656 of this title.[10]

It is important to note that section 4656 was a section of chapter 127 of title 8, governing insurance rating organizations-within the state.[11] Chapter 127 was repealed in 1983[12] and was superseded by chapter 128,[13] relating to property and casualty insurance. Although the legislature stated that the provisions of chapter 128 superseded those of chapter 127, it did not amend section 4724 to refer to any new section.[14] Therefore, section 4724(7)(B) makes reference to a section (4656) which no longer exists.

Also, although the legislative history following section 4724 refers to the repeal of section 4656, it fails to mention whether any new provision applies.[15] This leaves unanswered the question whether chapter 128 qualifies the exception in section 4724.

In analyzing the protection provided by section 4724, the language of the statute raises the following questions: (1) what does "making or permitting unfair discrimination" with regard to underwriting standards mean; (2) what does "making or permitting unfair discrimination" with regard to rates mean; (3) how did section 4656 apply to the exceptions for actuarial data and cost experience; and (4) whether, in light of the subsequent legislation, any sections of chapter 128 apply and, if so, what is their effect.

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10. *Id.*

11. VT. STAT. ANN. tit. 8, § 4656 (1970).

12. 1984 Vt. Laws 238 § 2.

13. 1984 Vt. Laws 238 § 3(b).

14. VT. STAT. ANN. tit. 8, § 4724 (1984). However, 1984 Vt. Laws 238 § 3(b) does state that references elsewhere in title 8 to former chapter 127 should be "construed to refer to corresponding provisions" of chapter 128.

15. *Id.*

A. Making or Permitting Unfair Discrimination with Regard to Underwriting Standards

The first question raised by the language of the 1975 amendment is how to define "making or permitting unfair discrimination" within the provided statutory context. No specific language defines unfair discrimination in underwriting standards, practices, or eligibility requirements. However, section 4655, a section of chapter 127 which was repealed in 1983, required insurance companies to file rates, rules, regulations, and forms.[16] Furthermore, section 4656 of the same chapter stated that no insurer authorized to do business in the state could make rates, rules, regulations, or forms which discriminated "unfairly between risks within this state of essentially the same hazard."[17] The question still remained as to what made discrimination fair or unfair. Whatever the sections of chapter 127 meant, the legislature has since repealed them.

Chapter 128, added in 1983, supersedes chapter 127. The new chapter covers property and casualty insurance and includes section 4685, entitled "Rate standards"[18] and section 4686 entitled "Rating methods or criteria."[19] These sections apply solely to rates so, once again, questions concerning unfair discrimination in underwriting standards, practices, and eligibility remain unanswered.

Without any legislative or judicial interpretation, the 1975 amendment can be interpreted in two ways: (1) classification based on sex or marital status is unfair discrimination per se or, (2) classification based on sex or marital status is unrestricted. If the language of the 1975 amendment means that the use of classifications based on sex or marital status in underwriting or eligibility requirements is unfair discrimination per se, the statute takes a positive step toward making equivalent insurance coverage available to individuals, regardless of sex or marital status.

Conversely, without restrictions on the use of sex or marital status in underwriting procedures, insurance companies may use these classifications to limit the availability of certain types of coverage. The companies may either refuse or restrict coverage to those individuals "classified" as high risk because of their sex or

16. VT. STAT. ANN. tit. 8, § 4655 (1970) (repealed 1983).
17. VT. STAT. ANN. tit. 8, § 4656.
18. 1983 Vt. Laws 238 § 1 (codified at VT. STAT. ANN. tit. 8, § 4685 (1984)).
19. VT. STAT. ANN. tit. 8, § 4686 (1984).

marital status.[20] For example, disability insurance coverage has frequently been unavailable to females in certain situations while available to males in comparable circumstances.[21] Alternatively, insurance companies may limit the terms of coverage to females while not limiting the terms to males.[22] The insurance industry justifies these classifications on stereotypic conceptions of gender, such as women taking off more time from work because they prefer to be at home.[23] Courts have found that these justifications violate equal protection upon a finding of a state action.[24]

If section 4724 means that insurance companies may not use classifications based on gender or marital status in the availability and terms of coverage, both males and females will be protected in obtaining insurance from discrimination based on immutable characteristics.[25]

B. Making or Permitting Unfair Discrimination with Regard to Rates

In the context of rate setting, the question again arises whether the use of gender or marital status in the setting of rates would be an unfair trade practice per se under the 1975 amendment, had the exception to section 4724 not been included. The language of the statute provides no answer to the question.

1. Defining the Exception, Section 4656

The next inquiry is to determine how the exception affects the use of the classification in the establishment of rates.[26] Specifically,

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20. Comment, *Gender Classification by the Insurance Industry*, 75 COLUM. L. REV. 1381, 1383-87 (1975).

21. *Id.* at 1383-84.

22. *Id.*

23. *Id.* at 1386.

24. *See, e.g.*, Stern v. Massachusetts Indem. & Life Ins. Co., 365 F. Supp. 433 (E.D. Pa. 1973). Generally, however, courts do not deem that the actions of state regulated agencies constitute state action. Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); Murphy v. Harleysville Mut. Ins. Co., 282 Pa. Super. 244, 422 A.2d 1097 (1980), *cert. denied*, 454 U.S. 896 (1981).

25. For a discussion of the use of immutable characteristics in automobile insurance rates, see Abramoff, *Rating the Rating Schemes: Application of Constitutional Equal Protection Principles to Automobile Insurance Practices*, 9 CAP. U.L. REV. 693, 694 (1980).

26. VT. STAT. ANN. tit. 8, § 4724(7)(B)(ii). Other sections of the title refer to this section in general and define discrimination for certain types of insurance. However, none mention classifications based on gender or marital status. *See, e.g.*, VT. STAT. ANN. tit. 8, § 4083

the initial consideration is whether section 4656 applies to actuarial data and cost experience or solely to cost experience. As mentioned earlier,[27] section 4656 provided that a rate "not discriminate unfairly between risks within this state of essentially the same hazard."[28] This statement does not shed light on the inquiry. From the statute itself, it is hard to classify the requirement as either specifically relating to cost experience or extending to actuarial data because the language does not specify how risks are determined.

A subdivision within section 4656 states that "[s]uch rates shall be reasonable, just and adequate, taking into consideration all the factors reasonably attributable to the classes of risks involved."[29] This statement is also ambiguous as to whether it refers to both cost experience and actuarial data or simply cost experience.

Nevertheless, the subdivision of 4656 goes on to give consideration to cost experience and to "all other relevant factors within and outside the state."[30] Thus, the statute specifically refers to cost experience at one point. However, the prior reference to risks and hazards[31] implies that this section also refers to actuarial data, if classifications of risks include both actuarial data as well as cost experience, thus defining the entire exception to section 4724. If section 4656 defined the full exception, the next step is to determine how the superseding sections, if applicable, affect the exception.

2. *New Sections, 4685 and 4686*

The corollaries of section 4656, sections 4685[32] and 4686,[33] address rating methods and criteria in the area of property and casualty insurance. The introductory subdivision to section 4685 states that "[r]ates shall not be excessive, inadequate or unfairly discriminatory."[34] Section 4685(b)(i) defines excessiveness and states that

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(1984).

27. *See supra* text accompanying note 17.
28. VT. STAT. ANN. tit. 8, § 4656(a) (1970).
29. *Id.* § 4656(b).
30. *Id.*
31. *Id.* § 4656(a).
32. VT. STAT. ANN. tit. 8, § 4685 (1984).
33. VT. STAT. ANN. tit. 8, § 4686 (1984).
34. *Id.* § 4685(a).

no rate in a competitive market is excessive or unfairly discriminatory.[35] This statement is followed two subdivisions later by a definition of unfair discrimination.[36] Nowhere does the statute integrate or explain the relationship between the subdivisions.

The only explicit definition of unfair discrimination in section 4685 is that "[u]nfair discrimination exists if . . . price differentials fail to reflect equitably the differences in expected losses and expenses."[37] Although the statement deals specifically with cost experience, further provisions in this subdivision deal with classification and allude to actuarial data.[38] Different premiums for classes with "like loss exposure but different expenses or like expenses but different loss exposures" are not unfairly discriminatory if they are reasonably accurate.[39] Also, rates averaged broadly among persons under a group or mass marketed plan are not deemed unfairly discriminatory.[40] These distinctions between loss exposure and expense are valid as long as loss exposure means actual loss exposure, rather than stereotypic classification.

Classification by the intended use of a car or the extent of mileage driven provides an example of actual loss exposure classification. The more miles driven, the more loss exposure. Also, logically, if a person did not drive frequently but had an accident causing expense to the insurance company, that person's rate could be higher for a given period of time than someone in the same mileage classification who had not caused the company expense. However, if classifications for loss exposure include broad categorizations based solely on sex or marital status, the statute loses credibility. Gender and martial status do not cause expense or increase or decrease exposure to loss.[41]

In addition to section 4685, section 4686, defining rating methods and criteria, sets up basic factors and rates similar to those set out in section 4656.[42] These factors include loss and expense experience, profits, trends and "all other relevant factors."[43] Like sec-

35. *Id.* § 4685(b)(i).
36. *Id.* § 4685(d).
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *See* Hartford Accident & Indem. Co. v. Comm'r, 65 Pa. Commw. 249, 442 A.2d 382 (1982), *aff'd*, 505 Pa. 571, 482 A.2d 542 (1984).
42. VT. STAT. ANN. tit. 8, § 4686(1).
43. *Id.*

tion 4656, this subdivision is ambiguous as to whether it defines the use of gender or marital status as classifications for rates.

The next subdivision of the section does refer to classifications.[44] The text of the subdivision reads as follows:

> (2) Classifications. Risks may be classified in any lawful or reasonable way for the collection of statistics or the establishment of rates. Rates may be modified for individual risks in accordance with rating plans or schedules which provide for recognition of probable variations in hazards, expenses or both.[45]

If this subdivision applies to the exception in section 4724, it appears that few or no limitations exist on the use of gender or marital status in rate setting, unless their use is deemed unlawful or unreasonable. Section 4724 does not define such classifications as unlawful per se. The question remains whether such classifications are reasonable, either for the collection of statistics or for the establishment of rates.

II. The Use of Sex or Marital Status as Unreasonable Classifications

The use of gender and marital status for the purpose of providing a simple, objective means of classification for the collection of statistics appears reasonable. However, the same use of gender and marital status for the establishment of rates can be challenged as unreasonable.[46] Gender is an immutable characteristic and marital status is not readily changed, and its use as a classification should not be encouraged by the insurance industry.[47] Gender and marital status are not necessarily related to loss exposure or expense.[48] Their use as classifications should be limited to those situations in which they directly affect loss exposure or expense, such as maternity benefits, or not be allowed at all.[49] The insurance industry could use alternative classifications which would not be based on immutable characteristics. The insured would then have control over these characteristics and the classifications would re-

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44. *Id.* § 4686(2).
45. *Id.*
46. *See* Abramoff, *supra* note 25, at 694.
47. *Id.*
48. *See Hartford Accident & Indem. Co.*, 65 Pa. Commw. 249, 442 A.2d 382.
49. *See* Comment, *supra* note 20, at 1390.

late more directly to loss exposure and expense.[50]

Recent legislative enactments in other states have abolished the use of gender for classifications in automobile insurance rates.[51] One state has abolished the use of gender or marital status in the establishment of any insurance rate.[52] In North Carolina, along with invalidating rate classifications based on gender or age, the legislature specifically revised the allowable classifications for different rates based on the use of the automobile and on the driving experience of the insured.[53] These classifications relate directly to the exposure to loss of the insured.[54] These classifications also create an incentive for the insured to drive more carefully and to reduce expenses.

With respect to life insurance and annuities, classifications based on individual risks can be and are being used in place of gender based mortality tables.[55] Thus, a female who smokes may have a higher premium than a male who does not smoke for similar life insurance coverage.[56] Classifications based on individual risks do not pose the equal protection implications of classifications based on immutable characteristics, and they do not promote stereotypic misconceptions.[57]

Although gender based classifications generally provide lower rates for women in automobile and life insurance, they generally create higher rates in health insurance (excluding pregnancy coverage), disability insurance and annuity payments.[58] Classifications based on individual risks would better serve all individuals.

Conclusion

The 1975 amendment to section 4724, based on a plain reading of the language, prohibits the use of gender or marital status in regard to underwriting standards, practices or eligibility requirements, but provides little protection from the use of sex or marital

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50. *See* Abramoff, *supra* note 25, at 713.

51. *See, e.g.*, N.C. Gen. Stat. § 58-30.3 (1982); Mass. Gen. Laws Ann. ch. 175, § 113B (West Supp. 1985).

52. Mont. Code Ann. § 49-2-309 (1983).

53. N.C. Gen. Stat. §§ 58-30.3, -30.4, -30.5 (1982).

54. *Id.* § 58-30.4.

55. Gray & Shtasel, *Insurers are Surviving Without Sex*, 71 A.B.A. J. 89, 90 (1985).

56. *Id.*

57. *Id.*

58. *See* Note, *supra* note 2, at 214.

status in the establishment of insurance rates. The exception for rates can be viewed as a protection of the insurance industry in and the perpetuation of the use of classifications based on gender or marital status. Although protection is available to insureds in obtaining insurance and not suffering from discrimination in coverage or eligibility requirements, reform is needed before classifications based on immutable characteristics will be removed from the establishment of rates. The legislature should amend the Vermont statute to define reasonable classifications or should remove the exception from section 4724 completely. Thus, the use of gender or marital status in the establishment of rates would be an unlawful trade practice per se.

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