Anti-Discrimination Efforts in Insurance

Presentation by Professor Mary L. Heen

University of Richmond School of Law

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Introduction by Daniel S. Glaser, Chair, Federal Advisory Committee on Insurance:

Our next topic for discussion is the ongoing anti-discrimination efforts related to insurance. The Federal Office of Insurance (FIO) has contributed to a number of reports about issues involving gender, marital status and the need to support innovative technology in insurance balanced by basic issues and questions of fairness. Today we will hear from two national experts who have published important studies on these and related topics. Professor Mary Heen from the University of Richmond School of Law and Dan Scharcz from the University of Minnesota Law School.

Professor Heen has committed much of her career to the study of civil rights and nondiscrimination, including how these issues relate to the insurance industry. In 2014, Professor Heen published an article in the Georgia Law Review regarding nondiscrimination in insurance. A copy of this article was sent to all members last week. Among the numerous important issues that Professor Heen raised in this article is the issue of sex classifications in the insurance underwriting process. As our members know, the issue of sex and gender identity in the underwriting process is an issue that FIO identified in its 2015 annual report. Professor Scharcz’s research on insurance law and regulation spans many issues, including consumer protection. From 2007 to 2014, Professor Scharcz served as a consumer representative at the National Association of Insurance Commissioners (NAIC). Professor Scharcz has published several articles concerning anti-discrimination efforts within the insurance industry, a few of which were distributed to members earlier this month.

Professors Heen and Scharcz, thank you so much for taking the time to be with us and travel here today. Professor Heen, let us begin.
Professor Heen: Thank you very much, Chairman Glaser, Director McRaith, and Members of the Committee--I appreciate the opportunity to be here today to discuss the important issue of nondiscrimination in insurance.

My presentation will provide some historical perspective on antidiscrimination efforts in insurance and then link that history to some more current legal developments in the United States and also in the European Union. I've planned about fifteen to twenty minutes as an overview so that there will be time at the end for questions and comments. There are three main points I'd like to emphasize at the outset, and then to the extent that time permits, will develop each of those points in more detail.

1. First, we have a long history of experience with antidiscrimination efforts in insurance in this country—well over a century of it. And we've learned some important lessons from those efforts, which I'll be highlighting towards the end of my presentation.

2. Second, nondiscrimination in insurance is an important civil rights issue as well as an issue of accessibility and affordability of insurance.

3. Third, I'd like to emphasize the need for effective leadership on these issues—from state or federal lawmakers, from regulators, and/or from the industry. There are technical problems and costs caused by the lack of uniformity or variation in state laws that could be avoided with greater uniformity in nondiscrimination standards.

Next, I'll discuss each of those points, in that general order.

First, some historical perspective: I'm going to spend a fair amount of time on this as background because the history serves to introduce the key civil rights issues in this area.
My historical research has focused primarily on race and gender as factors used in limiting access to insurance and in the setting of rates and benefits, particularly with regard to life and annuity products. I’ll review some historical practices with regard to race and then turn to gender.

Race-based pricing --other than pricing during the slavery era --began to appear in life insurance markets at the end of Reconstruction following the Civil War. Several states, including Massachusetts as early as 1884, followed by Connecticut, Ohio, New York, Michigan, and a few other states, banned such discrimination under state law. In response, some companies stopped soliciting black policyholders in those states and a few stopped soliciting that business everywhere. That created some access to insurance issues.

Explicit race based pricing continued in other states. Such explicit pricing began to change in the post World War II period, under active civil rights organization pressure. And the industry itself, through national professional organizations, responded by adopting race-merged mortality tables in the early 1960s, which resulted in race neutral rates for most newly issued policies. The vestiges of that explicit race-based pricing in life insurance were later finally addressed—during the last thirty years ---with the reporting by companies of remaining race-based policies still in force and by litigation settlements —entered into as recently as in the last decade or so. And I’m sure that the Commissioners on the Committee are very familiar with some of those activities with regard to race-based pricing.

With regard to gender, the first reference I found in my research of gender-based insurance rates or benefits in this country was in 1845—in the sale of life annuities. The development and use of gender distinct mortality tables at that time resulted in higher
rates for women than for men of the same age. Annuities were then typically used to provide lifetime support for elderly or dependent family members but also to fund marriage settlements and as substitutes for dower rights. Of course, that was during coverture, and at that time, married women did not have a separate right to enter into contracts. Before the 1840s, both life insurance and annuities were sold in the United States on a unisex basis, with the use of gender-merged mortality tables.

As you know, gender-based life annuity rates and the use of separate male and female mortality tables are still prevalent today, with higher rates generally paid by women, except for employment-related annuities and retirement plans. The United States Supreme Court held in the late 1970s and early 1980s in the Manhart and Norris cases, that the use of separate male and female mortality tables to determine an individual employee’s retirement contributions or benefits constituted unlawful employment discrimination under Title VII of the Civil Rights Act of 1964. In Manhart, women received lower take home pay because of higher pension contributions, and in Norris, women received lower periodic benefits under an annuity payout option provided by the employer at retirement. Since those practices were held to be illegal under Title VII, gender-merged or unisex mortality tables have been used to compute unisex rates or benefits for employee retirement plans. However, as far as I know, only two states (Montana and Massachusetts) currently require gender-neutral rates for life annuities outside of the employment context.

In life insurance, there has been more variation in practice. After the Civil War, some companies refused to sell ordinary life insurance to women --and others imposed a surcharge on women of childbearing age. Those restrictions, on the other hand, were not applied in the industrial life insurance market, where individual policies were sold door- to
-door to low-income individuals. Industrial life insurance companies charged unisex rates and nearly half of those insured were female. In the ordinary market, by contrast, a relatively small percentage of the insured populations were female. Many companies in the industrial market, however, utilized race-based rates, charging black policyholders more or providing about two-thirds of the benefits provided to whites. Despite that different treatment, mortality data collected by the industrial companies during that time showed greater mortality for men than for women (which could have supported higher life insurance rates for white men) as well as greater mortality for black policyholders than for whites (which did result in higher rates for black men and women). So historically, there has been some lack of consistency and precision with regard to the use of gender and race as pricing factors.

The gender restrictions and surcharges in ordinary life insurance began to disappear towards the end of the nineteenth century. Life insurance was otherwise generally sold on a unisex basis until the late 1950s and early 1960s, when some companies offered women ordinary life insurance coverage at rates lower than those of men. There were some restrictions on availability of life insurance for women during that period of time in terms of coverage limits and some restrictions on amounts purchased keyed to amounts purchased by husbands. And, the change in the late 1950s and early 60s—with the offering of some lower rates—coincided with an increase in numbers of women purchasing life insurance during that time. Those lower rates were based typically on a three-year set back from a gender-merged mortality table of unknown gender proportions. Separate male and female mortality tables were not developed for general use for life
insurance until the late 1970s and early 1980s. Only one state, Montana, currently bans gender discrimination in all lines of insurance, including life insurance.

In areas of the economy other than insurance, such as in employment, housing, education, public accommodations, and credit, nondiscrimination requirements have been applied by federal civil rights law since the 1960s and 1970s. No similar comprehensive federal legislation bans discrimination in insurance. The business of insurance has sometimes been viewed as an exception to the application of civil rights principles, both at the state and federal level, particularly with regard to gender but also formerly with regard to race.

In the past decade, however, the idea of insurance exceptionalism has been in the process of changing at the federal level (as is illustrated by several developments—most notably by the gender nondiscrimination provisions for health insurance in the Patient Protection and Affordable Care Act of 2010—but also earlier with the passage of the Genetic Information Nondiscrimination Act of 2008, which bans certain genetic discrimination in health insurance). There have been earlier successful efforts at anti-discrimination at the state level, as I mentioned earlier, particularly with regard to race, religion, and national origin. For gender, much of the anti-discrimination activity at the state level began in the 1970s and 1980s, particularly in those states with Equal Rights Amendments. Some reforms were successful (particularly for auto insurance, in Pennsylvania, for example) and some regulatory changes were later successfully challenged (in Massachusetts, for example).

In Europe, there have also been very important recent developments. The Court of Justice of the European Union has mandated unisex rates and benefits for all lines of
private commercial insurance effective beginning from December 21 of 2012. That’s a very significant development, because as we’ve heard earlier today, insurance markets are global markets.

So summing up this section on the historical background--I’d like to end this section with a quote from the great jurist Oliver Wendell Holmes. Over a century ago, he said “[w]e do not realize how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind.” This has already happened with regard to explicit race-based pricing in insurance—they are not longer socially acceptable--and it is in the process of happening for gender-based pricing.

_In light of those historical practices and more recent developments, I’d like to briefly address my second point --that nondiscrimination in insurance is an important civil rights issue_  

As a result of the use of gender or race as a pricing factor, women and minorities historically have been less able to achieve financial security for themselves and for their families. The use of such classifications also preserves and reinforces traditional cultural assumptions about racial or gender groups. That poses harm to those groups, to individuals within those groups, and to society as a whole.

However, civil rights advocates and insurance experts have tended to talk past each other on fairness issues. Civil rights advocates emphasize individual fairness in pricing and insurance experts tend to focus on group or actuarial fairness and emphasize efficiency issues, sometimes even rejecting the notion of individual fairness in the insurance context, in part, I think, due to greater emphasis on efficiency than on equity concerns. In my view,
the idea of insurance exceptionalism in reaching a societal balance between fairness and efficiency is an unwarranted aberration from general civil rights principles and trends.

Civil rights principles would require that *individuals* not be charged different rates or receive different benefits on the basis of their membership in a racial or gender-defined group. Those principles have been articulated and applied by the United States Supreme Court in key employment discrimination cases, as I mentioned earlier. In those cases, the court emphasized that under Title VII, the same analysis applies to gender as it does to race. That same analysis—as a matter of civil rights principle—should also be applied to gender *outside* of the employment context.

*My third point was the need for leadership on these issues: Here, I’d like to focus on two key lessons can be learned from prior efforts:*

First—ideally, a regulatory or industry-based structure at the national level should be used to achieve uniform application of nondiscrimination rules; currently there is a great deal of variation among the states with regard to antidiscrimination in various lines of insurance – and among the states with regard to application of nondiscrimination standards. You’ll hear more about that in the next presentation in terms of the variation in regard to antidiscrimination rules at the state level.

With race, state insurance regulators and national actuarial organizations pushed for the adoption of race-merged tables in the 1960s. With gender, the industry and actuarial professionals opted instead to expand and make more consistent the use of gender-distinct mortality tables in pricing and for other purposes, and to *resist* reform at about the same time that the federal Equal Rights Amendment failed to achieve ratification
in the early 1980s. In the absence of additional reform by the industry itself going forward, additional legal changes may be necessary.

And the second lesson that I learned from some of the history of nondiscrimination efforts—if consensus can be achieved to use a centralized structure to put antidiscrimination rules into action, experience has shown that the industry can adjust its pricing policies while remaining both solvent and competitive.

We now have experience with these types of changes nationwide in the employment and health insurance context, in several states, particularly with regard to auto insurance and some other lines of insurance, and in Europe. In Montana, for example, there were some price increases and decreases for both men and women in different lines of insurance, and some upfront costs, but overall, the market seems to have adapted since the comprehensive gender nondiscrimination rules went into effect in 1985. After the Supreme Court’s nondiscrimination ruling in the Norris case in 1983, gender merged annuity tables were quickly developed and approved by the states, and the industry adjusted its practices in the employment setting.

We don’t have much information yet from the European experience, but a report issued last year by the European Commission on the implementation of the European Court of Justice ruling reported that virtually all of the member states had conformed their law to the requirements of the Court’s unisex ruling for new contracts issued from December 21, 2012. The Commission also reported, based on the information available, that the economic impact on the market appeared to be “rather neutral or very limited” and that the effect on insurance pricing overall had been “moderate or insignificant.” Under guidelines issued by the European Commission following the court’s ruling, gender may be taken into
account for calculations related to *overall* costs and reserves but not for the pricing of policies sold to or the benefits received by *individual* men or women. That same approach has been applied in the United States for purposes of the overall cost of providing benefits in the employment context. As a practical matter, therefore, the industry appears to be able to adjust to new rules.

*In summary and in conclusion,* antidiscrimination efforts in insurance are longstanding and continuing. In my view, it is an important civil rights issue that the industry should not and cannot ignore, halt, or roll back going forward. Over the years we have learned that these rules can be implemented without undue disruption, but that uniform rules are less likely to place companies at a competitive disadvantage. And finally, leadership from the industry, from states, or from the federal government is needed to ensure full civil rights protections and to improve the access to and affordability of insurance for underserved and historically discriminated-against groups.

Thank you very much.