IV. Conclusions

A. In order to allow industry to evaluate and economically tolerate the level of liability inherent in initial space industrialization, it is submitted that the administrator of the National Aeronautics and Space Administration should recommend to Congress, through the President, as provided by 42 U.S.C. section 2476(b),[42] that:

1) Legislation be enacted to establish a program of joint private insurance and governmental indemnification for third-party and international liability arising out of National Space Transportation System-related activity;

2) Legislation be enacted to establish a federally underwritten program of special space life and property insurance to provide no-fault excess property and life insurance for users of the National Space Transportation System until such time as the private insurance industry makes such coverage commercially available;

3) Legislation be enacted to establish special exclusive jurisdiction and venue in the United States Court of Appeals for the District of Columbia for claims arising out of National Space Transportation System-related activity. Such jurisdiction should require exhaustion of administrative remedies as a prerequisite to any action.

B. It is also submitted that the Administrator of the National Aeronautics and Space Administration should:

1) Establish an administrative tribunal to settle claims arising out of National Space Transportation System activity; and

2) Commission agents with the authority to quickly settle claims of third parties out of the funds provided by the joint private insurance and governmental indemnification scheme.

C. It is also proposed that the aerospace industry should internally fund studies to determine how much industry can afford to pay for insurance in an initial program of space industrialization.

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42. 42 U.S.C. § 2476(b) (Supp. I 1971), which provides that "[a]ny report made under this section shall contain such recommendations for additional legislation as the Administrator or the President may consider necessary or desirable for the attainment of the objectives described in section 2451(c) of this title."

THE IRRATIONAL TREND TOWARD MANDATORY MATERNITY COVERAGE*

*Thomas J. Gillooly,† Edwin T. Holmes†† and John R. Hurley†††***

I. INTRODUCTION

During the past fifteen years, the interest of all branches of government in the economic status of women has become manifest. When Congress enacted the Equal Pay Act of 1963[1] and then followed it by the passage of the Civil Rights Act,[2] including Title VII, in the succeeding year, the basis was laid for a fundamental reconsideration of employment practices, including compensation, in relation to the sex of the individual. In 1967 an executive order of the President[3] added sex as a prohibited basis of discrimination to race, color, religion and national origin for all parties to federal contracts.

In March 1972, the proposed 27th amendment to the United States Constitution—the Equal Rights Amendment—was approved by Congress.[4] This amendment provides that "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." The Equal Rights Amendment (ERA) hovers only a few states shy of the necessary 38 for ratification, but it is not clear whether that goal will be realized. Whether or not ratification is obtained, merely keeping the ERA in the forefront of national publicity has focused federal and state legislative, administrative and judicial attention upon a variety of related issues.

Sex-based differentiation is only one of several means used to classify risks

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1. 29 U.S.C. § 206 (1963).
2. 42 U.S.C. § 2000e (Supp. II 1972).
3. Exec. Order No. 11246, 3 C.F.R. 169 (Sept. 28, 1965), amended by Exec. Order No. 11375 (Oct. 17, 1967).
4. H.R.J. Res. 208, 92nd Cong., 2d Sess. (1972).

by insurers, yet it involves every branch of the life and health insurance business to some degree, particularly the rating aspect. The business of private health insurance in particular has had its sex-based practices subjected to increasing governmental scrutiny. For example, the National Association of Insurance Commissioners in 1975 adopted a model regulation dealing comprehensively with sex discrimination in insurance.[5]

Traditionally, in private insurance, maternity coverage was provided in the family type policy and then only if both husband and wife were insured. In individual disability income contracts, generally disability due to pregnancy has not been covered. Pregnancy has been considered by insurers to be a normal condition and not in the accepted sense either an accidental bodily injury or disease. It has been assumed to be substantially within the control of the insured and therefore a planned for or voluntary event. Underwriters have, accordingly, not felt that it was properly an insurable event and that, absent complications, it could be anticipated and thus be an event for which one could budget.

Maternity benefits are widely available, especially in group contracts, in both disability and medical expense insurance; nevertheless, they are not offered by all insurers in every contract. In addition to the traditional attitude of insurers as to the nature of the coverage, steadily mounting costs for all health coverages have compounded the problem.

Against the above background, there has been an increasing tendency on the part of both state legislatures and state and federal governmental agencies to mandate coverage either by employers in employee benefit plans or by insurers in some or all of their contracts. The purpose of this Article is to outline current legal developments relevant to mandated maternity benefits and to examine how fundamental insurance concepts central to such health insurance coverage are affected. Finally, the impact of mandatory maternity coverage on the private health insurance industry in light of a general climate of changing social and business practices with respect to sex will be discussed.

In our opinion the terms "pregnancy" and "maternity" are often used interchangeably in legislative, administrative and judicial proceedings with deceptive simplicity and inadvertent confusion. A body of law on this subject has quickly developed and cannot be isolated from the context of private health insurance, which is a product rich in vocabulary and concepts foreign to many lawyers and legislators. First, we will define pregnancy and maternity coverage. State mandatory maternity laws and regulations will be noted. Significant litigation in state courts will be mentioned with particular emphasis on human rights commission litigation. In addition, federal maternity litigation and legislation will be examined. Finally, the conflicting arguments basic to the issue of mandatory pregnancy and maternity benefits will be weighed, including considerations of the private health insurance industry.

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5. I NAIC PROCEEDINGS 502-04 (1976).

II. Insurance Aspects of Mandatory Maternity Coverage

A discussion of mandatory maternity benefits must begin with a brief explanation of the insurance principles applicable to the coverage of pregnancy and childbirth. The reader should bear in mind that the insurance principles discussed in this section determine the insurability and appropriateness of all health insurance coverages, not just that of maternity benefits.

Health insurance is simply defined as insurance against loss by sickness or accidental bodily injury.[6] Pregnancy is defined in a general dictionary as the "condition of being with young: gestating."[7] The medical profession, while stating that pregnancies do cause a "variable degree of disability," states that "pregnancy is a physiological process."[8] A medical dictionary describes it as ". . . the state of being pregnant: the development of the fertilized ovum within the maternal body."[9] These definitions reveal an insurer's dilemma. Pregnancy is not a sickness, illness, injury or abnormality of the human body, and cannot be assessed for risk purposes as such.

There is a degree of voluntariness to the condition of pregnancy which is unlike any other significant condition covered by health insurance. An insurable risk has the following characteristics:

> 1. It must be represented by a group of exposed units sufficiently large and homogeneous to permit accurate prediction of average loss.
> 2. It must produce a loss that is definite in time and place.
> 3. It must produce a loss that is accidental in the basic sense of the expression, that is, the loss to the insured must be fortuitous, unexpected and unpredictable in time and place.
> 4. It must produce loss that does not affect all or a large section of the insured group at the same time, that is, there should be no catastrophic hazard.[10]

It logically follows that the risk to be insured by health insurance must possess those basic characteristics of insurability in order for it to be underwritten on a sound basis. The voluntariness and the predictability of pregnancy renders it an uninsurable risk in the classic sense.

The concept of voluntariness needs explanation, if only to deal with such a charge as that made in the dissenting opinion in *Gilbert v. General Electric Co.*, that other "voluntary" disabilities are routinely covered by health insurance.[11] A meaningful method of distinguishing disabilities listed in the *Gilbert* dissent from pregnancy is to call the former "voluntarily-entered activities."

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6. Health Insurance Association of America, Principles of Group Health Insurance I 287 (1976) [hereinafter cited as Principles of Group Health Insurance].
7. Webster's New International Dictionary 2013 (2d ed. 1950).
8. Statement of American College of Obstetricians and Gynecologists, March, 1974, [hereinafter cited as Statement], *cited in* Geduldig v. Aiello, 417 U.S. 484, 500 n.4 (1974).
9. Dorland, Pocket Medical Dictionary 512-13 (21st ed. 1968).
10. Faulkner, Health Insurance 72 (1960).
11. Gilbert v. General Elec. Co., 97 S. Ct. 401, 415-16 (1976) (Brennan, J., dissenting).

Among such things as "sport injuries, attempted suicides, venereal disease, disabilities incurred in the commission of a crime or during a fight, and elective cosmetic surgery,"[12] all but the last can be considered activities where the actor began the activity more or less of his own free will, but did not expect to become disabled. Pregnancy is different because the disability is completely foreseen. As the American College of Obstetricians and Gynecologists points out, the degree of pregnancy disability varies, but disability always occurs.[13]

The cosmetic surgery example is distinguishable from pregnancy on several counts. First, insurance plans which cover elective cosmetic surgery as a disability are rare. Second, most disabilities due to such surgery may not last any longer than the standard seven-day waiting period before benefits can be paid. Third, the number of claims for such a disability would be *de minimis* in comparison with claims for pregnancy disability, so the effect of exclusion or inclusion of such a disability would not seriously disadvantage any group. Therefore, we call pregnancy a voluntary-result condition, distinguishing it from other voluntarily-entered activities, most of which have results that are not voluntarily experienced, that are not foreseen or desired and that are insurable.[14]

A good example of this distinction is coverage for complications of pregnancy. While pregnancy is a voluntarily-entered condition with a voluntary result of some disability, complications of pregnancy are not the results commonly foreseen. The majority of health insurance contracts cover complications of pregnancy on the same basis as other illnesses. The Health Insurance Association of America (HIAA) approved "complications of pregnancy" definition is one which has been adopted for use in several states.[15]

> *Complications of pregnancy means*:
>
> (1) conditions, requiring hospital confinement (when the pregnancy is not terminated), whose diagnoses are distinct from pregnancy but are adversely affected by pregnancy or are caused by pregnancy, such as acute nephritis, nephroses, cardiac decompensation, missed abortion and similar medical and surgical conditions of comparable severity, but shall not include false labor, occasional spotting, physician prescribed rest during the period of pregnancy, morning sickness, hyperemesis gravidarum, pre-eclampsia and similar conditions associated with the management of a difficult pregnancy not constituting a nosologically distinct complication of pregnancy; and
>
> (2) non-elective cesarean section, ectopic pregnancy which is terminated and spontaneous termination of pregnancy, which occurs during a period of gestation in which a viable birth is not possible.

Complications of pregnancy can be insured like any other illness because conditions like those described in the definition are those which fit the characteristics

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12. *Id.*
13. Statement, *supra* note 8.
14. *See* Schair, *Sex Discrimination: The Pregnancy-Related Disability Exclusion*, 49 ST. JOHN'S L. REV. 684 (1975) for a full discussion of this distinction.
15. *See, e.g.*, ARK. INSURANCE DEPARTMENT RULE AND REGULATION 19; NEW YORK INSURANCE DEPARTMENT REG. 62; Ga. S. 244 (1977).

of an insurable risk and ought to be covered by health insurance. The health insurance industry made this position clear in its 1974 resolution on sex discrimination.[16]

According to the private health insurance industry's statistics,[17] somewhere in the range of 70% of all persons insured by group insurance contracts in the United States had some medical expense maternity coverage.[18] Of those persons with maternity coverage, 67% had a maximum benefit of $300 or more, 35% had $500 or more, and 11% had $750 or more. Eighty percent of the companies provided maternity coverage for single female employees, while 90% of the companies did not require that a female employee insure her spouse for maternity coverage to be in force.[19]

Most companies which offer maternity coverage in either group or individual contracts do so as a standard contract benefit and in a flat limited benefit format. It is rarely offered as an option because the benefit is subject to severe antiselection.[20] The limit to the benefit is a device to enable the company to predict with some accuracy the amount of claim dollars to be expended for the benefit.

There are several negative results when insurers attempt, or are forced to attempt, to cover normal pregnancy on the same basis as an illness or injury.

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16. HIAA/ALIA Board of Directors Resolutions of April, 1974 states:
Classification of Risks and Availability of Coverage

> We reaffirm the need for insurers to be permitted to classify insureds for rating purposes according to expected risk of loss based upon relevant information, including mortality and morbidity experience by sex.
>
> We do not oppose legislation or regulation prohibiting arbitrary and unfair discrimination among members of the same class of risk who share an equal expectation of loss. We also do not oppose the adoption of legislation or regulation prohibiting discrimination based solely on sex with respect to availability of coverage.

Maternity Coverage

> Pregnancy, as opposed to sickness or injury as the result of an accident, can generally be planned or avoided. For these reasons pregnancy, a normal physical condition, is generally not treated in the same manner for health insurance purposes as a sickness or injury resulting from accident. Therefore, we believe that benefits payable for normal pregnancies should not be mandatory in either group or individual health insurance coverages.
>
> We recognize that complications of pregnancy are usually unpredictable and therefore not budgetable. Consequently, we should not oppose the adoption of legislation or regulations requiring the inclusion of health benefits payable for treatment of pregnancy complications in insurance or employee benefit plans. We do oppose, however, the adoption of laws or regulations requiring the inclusion of health benefits for normal pregnancy.

Minutes of HIAA Board Meeting on April 28, 1974, and Minutes of ALIA Board Meeting on May 23, 1974.

17. HEALTH INSURANCE ASSOCIATION INSURANCE STATISTICS, SOURCE BOOK OF HEALTH INSURANCE STATISTICS 39 (1976-77).

18. Health Insurance Association of America, Survey of Group Insurance Coverages (unpublished report, 1974).

19. PRINCIPLES OF GROUP HEALTH INSURANCE, *supra* note 6, at 39. A plan that provides maternity coverage to a female insured only if she insures her husband as a dependent under the plan is known as a "switch maternity" plan.

20. *See* Memorandum of Law of Plaintiff at 10, HIAA v. Harnett, No. 453/77 (Sup. Ct. New York County, New York, June 2, 1977) [hereinafter cited as HIAA Memorandum of Law].

First, available statistics show that almost all who receive temporary disability benefits for illnesses and injuries return to work, but a substantial number of pregnant employees will never return to work with the same employer.[21] This makes the disability benefit a form of severance pay, which is not the function of insurance. Second, in the case of mandatory maternity legislation or regulation, antiselection factors are predicted by actuaries to dominate to the point that, in individual health care insurance, a grossly disproportionate number of persons who plan to become pregnant will buy the policy, obtain the benefits, and let the policy lapse.[22] Third, again in the case of mandatory maternity legislation or regulation, persons are forced to buy coverage which they do not desire or require. On one hand, persons in religious orders, sterilized persons and persons well past the normal childbearing age, must buy health insurance with maternity benefits or not buy any insurance at all. Even though the premium increase to them due to the maternity benefit may be small, it is hard to justify any increase in premiums to a retired person living on a small, fixed income, or to a person who, because of physical, lifestyle or religious factors, may never become pregnant. On the other hand, to carry insurance rating principles to the absolute extreme, only the age groups and sex classifications most at risk should carry the cost burden of the benefit.[23] The result of this allocation would be to price the individual health insurance of a woman of twenty-two to twenty-eight so high that virtually none of them could afford it.[24] Fourth, the most practical problem related to employee group health coverages relates intrinsically to the way in which group insurance is sold and the purposes it serves. Most fringe benefit plans, of which group insurance is a primary example, are sold to employers to increase employee morale, loyalty and efficiency. Thus the employer must discover what coverages will most benefit his employees as a whole within the limited dollar expenditure available for fringe benefits. The imposition of mandatory maternity or pregnancy benefits on an employee welfare benefit plan "grossly distorts the allocation of benefits under existing disability plans."[25] Also, many fringe benefit plans are bargained for on a collective basis with employee organizations, again attempting to maximize the benefit for all with available funds. Mandatory pregnancy benefits requirements render this significant effort less than effective.[26]

It is this most practical problem, that of the importance of employee fringe

21. Brief of American Life Insurance Association, Health Insurance Association of America, and American Insurance Association as Amicus Curiae at 32, General Elec. Co. v. Gilbert, 97 S. Ct. 401 (1976).

22. HIAA Memorandum of Law, *supra* note 20, at 11.

23. Affidavit of Charles P. Hall, HIAA v. Harnett, No. 453/77 (Sup. Ct. New York County, New York, June 2, 1977). Such age and risk allocations are made by insurers along these lines, but the ranges of groupings vary widely.

24. Affidavit of Peter M. Thexton, HIAA v. Harnett, No. 453/77 (Sup. Ct. New York County, New York, June 2, 1977).

25. Letter to Thomas J. Gillooly from Roy G. Shubert, General Counsel, Provident Life Insurance Company of Philadelphia (January, 1977).

26. HIAA Memorandum of Law, *supra* note 20, at 11 n.8.

benefit plan integrity, which the legislatures and the courts have had to reconcile with the strong policy enunciated by Title VII and state human rights laws to eliminate employment discrimination. As indicated in section VII *infra*, the results of their efforts have been varied.

III. State Maternity Statutes

A number of states have enacted statutes concerning health insurance benefits for pregnancy and maternity. These laws may be classified as follows: a) statutes mandating coverage for normal pregnancy; b) statutes mandating coverage for complications of pregnancy; c) statutes mandating maternity coverage regardless of marital and dependency status; and d) statutes mandating the availability of maternity benefits.

A. *Mandatory Coverage of Normal Pregnancy*

Insurance laws mandating coverage for normal pregnancy affect either medical expense insurance or disability income insurance. Four state laws concern medical expense insurance and one state law concerns disability income insurance.

1. *Laws Affecting Medical Expense Insurance*

To date New York Senate Bill 10536, enacted during 1976 and effective January 1, 1977, is the most significant statute applicable to medical expense coverage. Senate 10536 added section 162-a and 164-a and amended section 253 of the New York Insurance Law to require that health policies which provide hospital, surgical or medical coverage shall provide coverage for maternity care, including hospital, surgical or medical care, to the same extent that coverage is provided for illness or disease under the policy.[27]

Under the Connecticut Health Care Act, "disease or injury" is defined to include pregnancy and resulting childbirth or miscarriage.[28] However, the Health Care Act provides that a qualified plan shall limit benefits with respect to each pregnancy, other than a pregnancy involving complications, to a maximum of $250.[29]

The Hawaii Prepaid Health Care Act requires that a qualified prepaid health care plan must include: ". . . Maternity benefits, at least if the employee

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27. N.Y. Ins. Law § 162-a, § 164-a, § 253 (McKinney Supp. 1976). Under the New York law, maternity care coverage, other than complications, may be limited to reimbursement of covered expenses for maternity care for a period of four days of hospital confinement and to those persons covered under the policy for a period of ten months, or for a lesser period if the pregnancy commenced while the insured was covered. This law applies to all policies and contracts "written, altered, amended, or renewed on or after . . . [January 1, 1977]." *Id.* § 162-a.

28. 1976 Conn. Pub. Acts 76-399, § 2.(q) (1976).

29. *Id.* § 3.(b)(4). In addition, the Act provides that a preexisting condition exclusion may exclude coverage of pregnancy existing on the effective date of coverage. *Id.* § 3.(b)(6)(c).

has been covered by the prepaid health care plan for nine consecutive months prior to delivery."[30] Yet the Hawaii Prepaid Health Care Act does not define "maternity benefits."[31]

In Maryland, insurers providing hospitalization benefits for normal pregnancy in a group, individual or blanket health insurance policy issued or delivered to a person in the state, are required by statute to provide benefits for the cost of hospitalization for childbirth to the same extent as the hospital benefit provision for any covered illness.[32]

2. *Laws Affecting Disability Income Coverage*

Maryland mandates the availability of disability income coverage for pregnancy and maternity. Every insurer writing a group or blanket health insurance policy—issued or delivered within Maryland or covering Maryland workers or residents—which provides any temporary disability benefits must offer benefits for temporary disability caused or contributed to by pregnancy or childbirth.[33]

B. *Mandatory Coverage of Complications of Pregnancy*

Statutes in seven states concern mandatory coverage for complications of pregnancy: California, Colorado, Connecticut, Georgia, Idaho, Michigan and Nevada. No disability policy issued, amended, delivered or renewed in California on or after July 1, 1976, may contain exclusions, reductions, limitations, deductibles or coinsurance provisions related to involuntary complications of pregnancy—unless such provisions apply generally to all policy benefits.[34] In Colorado all accident and sickness policies providing indemnity for disability due to accident and/or sickness must provide disability benefits resulting from complications of pregnancy in the same manner as any other accident or sickness is covered.[35] Likewise, any accident and sickness policy providing coverage for sickness on an expense incurred basis shall provide coverage for complications of pregnancy and childbirth on the same basis as any other sickness.[36] Under the Connecticut Health Care Act, a qualified health care plan may not limit

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30. HAW. REV. STAT. § 393-7(c)(5) (Supp. 1975).
31. *Id.*
32. MD. ANN. CODE art. 48A, §§ 470H and 477I (Supp. 1976).
33. *Id.* §§ 470K and 477N (Supp. 1977). Such benefits must be the same as benefits for any other covered disability, except that disability income benefits for normal pregnancy or childbirth may be limited to six weeks. *Id.*
34. CAL. INS. CODE § 10119.5 (West Supp. 1977). There are two exceptions to this rule: a) individual noncancellable and guaranteed renewable policies issued or delivered before July 1, 1976; and b) a group disability policy written subject to an applicable collective-bargaining agreement effective before July 1, 1976. *Id.* The California statute states its own definition of complications of pregnancy. *Id.*
35. COLO. REV. STAT. § 10-8-122(1) (Supp. 1976).
36. *Id.* § 10-8-122(2). This statute applies to individual policies issued on or after January 1, 1976, and to all group policies or contracts issued, renewed, or reinstated on or after January 1, 1976. *Id.* (editor's note).

benefits with respect to complications of pregnancy.[37] A Georgia statute mandates coverage for complications of pregnancy for all group policies which provide major medical coverage and maternity benefits.[38] No individual, group or blanket disability policy may be issued, amended, delivered, or renewed in Idaho on or after January 1, 1977, if it contains any exclusion, reduction, or other limitations, deductibles or coinsurance provisions applicable to complications of pregnancy—unless such provisions apply generally to all benefits under the policy.[39] Under the Michigan Unfair Trade Practices Act, complications of pregnancy may not be treated differently from any other illness or sickness; and in Nevada, all hospital and medical expense policies providing maternity benefits must cover pregnancy complications like an illness.[40]

C. *Mandatory Maternity Coverage Regardless of Marital or Dependency Status*

Another type of statute, which has been enacted in Maine, Maryland, Minnesota and Oregon, requires that where maternity coverage is already provided by the insurance policy, such coverage must be provided to women regardless of their marital or dependency status.[41]

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37. 1976 Conn. Pub. Acts 76-399, § 3.(b)(4) (1976). In addition, the Health Care Act contains a definition of complications of pregnancy. *Id.* § 2.(r).

38. GA. CODE ANN. § 56-2443(b) (Supp. 1977) (approved April 5, 1977). This law contains a definition of both complications of pregnancy and major medical coverage. *Id.*

39. IDAHO CODE § 41-2140(2) (1976). This statute also provides its own definition of complications of pregnancy. *Id.*

40. MICH. STATS. ANN. § 500.2027 (1976). The Michigan Unfair Trade Practices Act has been amended to incorporate the National Association of Insurance Commissioners' model regulation on sex discrimination. The National Association of Insurance Commissioners' Model Regulation to Eliminate Unfair Sex Discrimination is discussed in section IV *infra*. *See also* I NAIC PROCEEDINGS 502-04 (1976); Nev. H. 120 (1977) (approved April 21, 1977).

41. The Maine statute requires that all group or blanket health policies must provide the same maternity benefits for unmarried women policyholders and the minor dependents of policyholders with dependent or family coverage, as is provided married policyholders with maternity coverage and wives of policyholders with maternity coverage. 24-A ME. REV. STAT. § 2832 (Supp. 1976). *See* 24-A ME. REV. STAT. § 2741 (Supp. 1976) which establishes the same requirement for individual health policies. *See also* 24-A ME. REV. STAT. § 2833 (Supp. 1976) which provides that all group or blanket policies issued in compliance with 24-A ME. REV. STAT. § 2832 shall provide unmarried women policyholders with optional coverage of their children from date of birth on the same basis as children of married policyholders.

A Maryland statute applies to group or blanket health policies providing disability or medical expense maternity benefits for employees, members or dependents of employees and members. MD. ANN. CODE art. 48A, § 477J (Supp. 1976). Identical maternity benefits must be provided to covered employees, members and covered dependents of employees and members, regardless of marital status. *Id.*

In Minnesota, all individual and group health policies issued or renewed after June 4, 1971, are required to provide the same maternity benefits to unmarried women and minor female dependents as are provided for married women. MINN. STAT. § 62A.041 (Supp. 1976). Each individual and group policy must also provide the same coverage for medical expense for sickness for the child of an unmarried mother as that provided for dependent children of employees. *Id.* In the Minnesota statute, "maternity benefits" do not include elective abortion. *Id.*

The Oregon statute states that each health insurance policy shall provide: 1) the

D. *Mandatory Availability of Maternity Benefits*

An additional section of the Maryland Insurance Code involves not only marital status but the concept of mandatory availability of maternity benefits as well.[42] Mandatory availability of maternity benefits means simply that, instead of having to include maternity benefits in a particular health insurance policy, the insurer must make available maternity benefits in connection with that health policy. The person or persons to be insured under the policy have the freedom to decide whether or not to purchase the maternity benefits. Besides Maryland, Ohio has enacted a statute embracing the concept of mandatory availability of maternity benefits.[43]

E. *State Human Rights Commission and Employment Laws*

In addition to state insurance laws on pregnancy and maternity, there are state human rights commission and state employment laws which cover maternity. Extensive treatment of human rights commission and employment laws is beyond the scope of this Article; nevertheless, some of these laws are noted in the discussion of state human rights commission litigation in Section VI D *infra*.

IV. State Maternity Regulations

Besides state maternity statutes, one must acquaint oneself with a number of state insurance department regulations. There are two types of relevant regulations: a) regulations similar to the National Association of Insurance Commissioners (NAIC) Model Regulation to Eliminate Unfair Sex Discrimination;[44] and b) regulations different from the NAIC model regulation. Before mentioning specific state regulations, we offer the following observations about the NAIC model.

A. *NAIC Model Regulation to Eliminate Unfair Sex Discrimination*

Paragraph 6 of the preamble to the NAIC Model Regulation says that sev-

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same maternity benefits for unmarried women as it provides for married women, including wives of insured persons choosing family coverage; and 2) the same coverage for the child of an unmarried woman that the child of an insured married person choosing family coverage receives. Or. Rev. Stat. § 743.037 (1973).

42. Md. Ann. Code art. 48A, § 470I (Supp. 1976). This statute requires that insurers providing maternity benefits in any policy form customarily issued on an individual or family basis must offer such benefits to individuals regardless of marital status. *Id.*

43. Ohio Rev. Code Ann. § 3901.21(O) (Supp. 1976). When offering maternity benefits under any individual or group health policy, under the Ohio Unfair Trade Practices Act it is an unfair trade practice to refuse: to make maternity benefits available to the policyholder for the individual or individuals to be covered under the policy to be issued, including family members if the policy otherwise provides coverage for family members. *Id.* The maternity benefits offered must be calculated to indemnify the insured for hospital and medical expenses fairly and reasonably associated with the pregnancy and childbirth. *Id.* § 3901.19(C). And insurers may utilize a waiting period not exceeding 270 days. *Id.* § 3901.21(O).

44. I NAIC Proceedings 502-04 (1976).

eral states have adopted regulations similar to the NAIC model "with little or no opposition."[45] Paragraph 6 states further that "[t]he major insurance industry trade associations have actually taken a public position of not opposing adoption of such regulations and many insurance companies are presently in the process of voluntarily removing all sex related restrictions in their contract language and underwriting rules. . . ."[46] It is indeed the policy of the Health Insurance Association of America and the American Council of Life Insurance to support equal availability of coverage, except for coverage of normal pregnancy, and allowing for rate differentials.[47] In addition, the life and health industry worked closely with the NAIC Task Force on Unfair Sex Distrimination to develop an effective model regulation.

Paragraph 7 of the preamble states: "Since normal pregnancy is not a sickness or injury as a result of an accident and can generally be planned or avoided, the NAIC Task Force has not subscribed to the theory that such coverage should be mandated in all health insurance contracts in the name of equal availability of coverage. . . ."[48] Accordingly, the NAIC model regulation does not mandate coverage for normal pregnancy. Paragraph 7 of the preamble, however, indicates that the NAIC model does provide for mandatory coverage of pregnancy complications.[49] Subsection 6.f. of the NAIC model makes "[t]reating complications of pregnancy differently from any other illness or sickness under the contract" a practice prohibited by the regulation.[50]

Another practice prohibited by the regulation in subsection 6.c. is: "Denying maternity benefits to insureds, or prospective insureds, purchasing an individual contract when comparable family coverage contracts offer maternity benefits."[51] But the model regulation does not specifically list as a prohibited practice failing to provide maternity coverage to females regardless of marital or dependency status, when maternity coverage is provided under a health contract. Nor do we believe that subsection 6.k. of the model suggests any basis for an argument that maternity benefits already provided by a contract must be provided regardless of marital status. Subsection 6.k. generally prohibits the practice of: "Limiting the amount of coverage an insured or prospective insured may purchase based upon the insured's or prospective insured's marital status unless such limitation is for the purpose of defining persons eligible for dependents benefits."[52] However, it would seem that the following broad language of section 6 of the model regulation requires that such maternity coverage be provided to females regardless of marital or dependency status: "The amount of benefits payable, or any term, conditions or type of coverage shall not be

45. *Id.* at 502.
46. *Id.*
47. *See* note 16 *supra* for relevant resolutions by the HIAA and ALIA Boards.
48. I NAIC PROCEEDINGS 502 (1976).
49. *Id.*
50. *Id.* at 504.
51. *Id.* at 503.
52. *Id.* at 504.

restricted, modified, excluded, or reduced on the basis of the sex or marital status of the insured or prospective insured. . . ."[53] In fact, most recently promulgated state sex discrimination regulations do require that when maternity coverage is provided under a health contract, such coverage must be provided to females regardless of marital status.

B. *Sex Discrimination Regulations Similar to the NAIC Model*

The following states have issued sex discrimination regulations similar to the NAIC model: Arizona, Arkansas, Illinois, Iowa, Kansas, Nevada, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Tennessee and Wisconsin.[54]

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53. *Id.* at 503.

54. a. *Arizona*

The Arizona regulation on unfair sex discrimination closely follows the NAIC model, including provisions similar to subsections 6.c. and 6.f. of the model. ARIZ. INS. DEPT. RULE R4-14-209 (1977). In addition, the Arizona regulation prohibits: "Otherwise restricting, modifying, excluding or reducing the availability of any insurance contracts, the amount of benefits payable, or any term, condition or type of coverage on account of sex or marital status in all lines of insurance." *Id.* at § F.12.

b. *Arkansas*

While the Arkansas regulation generally follows the NAIC model, with subsections like subsections 6.c. and 6.f., the Arkansas regulation contains two different provisions regarding maternity. ARK. INS. DEPT. RULE & REG. 19 (1976). Section 3 includes an extensive definition of complications of pregnancy, which is similar to the definition contained in New York Regulation 62 and includes a spontaneous termination of pregnancy occurring during a period of gestation in which a viable birth is not possible. *Id.* at § 6. Also, the Arkansas regulation makes the following a prohibited practice: "Application of arbitrary waiting periods to maternity benefits in such a way as to exclude coverage for premature births when normal maternity benefits are included in the contract. *Id.* at § 6.c.

c. *Illinois*

Although provisions of Illinois Rule 26.04 remind one of the NAIC model regulation, the language of the Illinois Rule differs from that of the model. ILL. INS. DEPT. RULE 26.04 (1976). The Illinois Rule prohibits three maternity-related practices:

> 5. Restricting availability of maternity coverages or benefits based upon marital status; . . .
> 11. Considering that portion of treatment attributed to complications of pregnancy in a manner different than any other illness or sickness covered by the contract, certificate, notice, policy, endorsement or rider; . . .
> 13. Denying maternity coverages to an individual who has not purchased dependent or family coverage when maternity coverages are otherwise available.

Id. at § 3.A.

d. *Iowa*

The Iowa sex discrimination regulation closely follows the NAIC model and includes provisions identical to subsection 6.c and 6.f. 510 IOWA AD. CODE §§ 15.53(3) and 15.53 (6) (1976).

e. *Kansas*

Also, the Kansas sex discrimination regulation follows the NAIC model. KAN. INS. DEPT. REG. 40-1-31 (1977). A subsequent Kansas Insurance Department bulletin prohibits treating complications of pregnancy differently from any other illness or sickness under the contract. KAN. INS. DEPT. BUL. 1977-3 (1977). The same bulletin also prohibits: a) "Denying coverages for maternity benefits to single insureds when such benefits are provided to spouses of insureds;" and b) "Imposing waiting periods for maternity benefits which have the effect of excluding coverages for premature birth when normal maternity benefits are included in the contract." *Id.*

While these last two prohibitions vary from the NAIC model and are stated by

C. *Regulations Different From the NAIC Model*

Other regulations and bulletins on maternity may be grouped in three categories: a) regulations on complications of pregnancy; b) sex and marital status discrimination regulation; and c) as a catch-all, other types of regulations or bulletins.

1. *Complications of Pregnancy*

Effective January 1, 1976, the California Insurance Department struck from the list of permissible exceptions in individual disability policies "miscarriage," "complications of pregnancy" and "disorder of the reproductive or-

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a bulletin which does not have the same legal force as a regulation, a far more radical variation was then announced by the Kansas Department in a later bulletin:

> The following shall also be considered as examples of discrimination prohibited under K.A.R. [KAN. INS. DEPT. REG.] 40-1-31.
>
> Excluding from coverage normal pregnancy, childbirth, miscarriage or abortion under any accident and health coverage which otherwise provides coverage for sickness without making such coverage available to those persons desiring such coverage.
>
> Restricting, modifying, or reducing the amount of benefits payable for loss resulting from normal pregnancy, childbirth, miscarriage or abortion under any accident and health coverage when benefits for any other sickness provided under the coverage are not so restricted, modified or reduced without making such coverage available to those persons desiring such coverage. . . .

KAN. INS. DEPT. BUL. 1977-3 (1977) (Addendum).

It appeared questionable for the Kansas Commissioner to state requirements as to normal pregnancy in an administrative bulletin which does not have the legal force and effect of a regulation. In addition, health insurers raised numerous questions as to exactly what the Kansas Insurance Department intended to require regarding health insurance coverage for normal pregnancy. To clarify such questions the Kansas Insurance Department informed the Health Insurance Association that the regulations and bulletins do not require companies to offer coverage for normal pregnancy even if the company is requested to do so by the applicant for insurance; the Department contends that the issuance or nonissuance of such coverage is strictly a matter of negotiation between the company and the prospective insured but the filings of the company must permit such negotiations. HIAA INS. DEPT. BUL. KAN. 1-77.

f. *Nevada*

Titled "Elimination of Unfair Sex Discrimination," the Nevada regulation is closely patterned after the NAIC model and contains provisions identical to the NAIC model subsections 6.c. and 6.f. NEV. INS. DEPT. REG. M-7 §§ 5.3 and 5.6 (1977).

g. *New Jersey*

The New Jersey sex discrimination regulation is similar to, but not identical to the NAIC model. N.J.A.C. 11:1-4.2 (1975), Prohibiting Discrimination Based on Sex And/Or Marital Status in the Availability, Underwriting, Benefits, Cancellation of Insurance.

h. *New York*

Likewise the New York sex discrimination regulation is similar to, but not identical to, the NAIC model. 11 NYCRR 217.1 (1975).

i. *North Carolina*

Another sex discrimination regulation substantially similar to the NAIC model is that of North Carolina which also has a provision identical to subsection 6.c. of the NAIC model. Rule 11 NCAC 4.0107 (1977). Instead of duplicating subsection 6.f. of the model, the North Carolina regulation prohibits: "Denying maternity coverage to unmarried females covered under a policy or contract if maternity coverage is available to married females covered under such a policy or contract." *Id.*

j. *Oregon*

The Oregon unfair trade practices regulation on unfair sex discrimination based on sex or marital status is considered similar to the NAIC model. ORE. IC-61 (1975).

k. *Pennsylvania*

Substantially similar to the NAIC model, the Pennsylvania sex discrimination regula-

gans."[55] On August 2, 1976, the California Insurance Department withdrew authorization for issue of all individual hospital, medical and/or surgical policies or riders containing any limitations, exclusion or reduction of benefits with respect to complications of pregnancy.[56] Idaho has adopted a regulation on complications of pregnancy, which does not apply to contracts not providing maternity benefits.[57] New Jersey Insurance Department rules provide that life and health insurers may not treat "complications of pregnancy more restrictively than any other sickness or illness under any contract of insurance."[58]

2. *Sex and Marital Status*

California has a sex and marital status discrimination regulation which prohibits refusing to offer maternity coverage under individual contracts when it is available under family contracts.[59]

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tion contains provisions similar to subsections 6.c. and 6.f. of the NAIC model. 31 PA. CONS. STAT. ch. 145 (1977).

In fact, the Pennsylvania Insurance Department has been concerned with coverage of complications of pregnancy since 1974. In that year the Pennsylvania Department published a notice on sex discrimination. Pennsylvania Insurance Department Notice, *Denial of Insurance Form Approval on the Basis of Discrimination by Sex As to Availability, Coverage or Benefits*, 4 PA. BUL. 102 (Jan. 19, 1974). The notice declared that policy forms containing modifications or denials of benefits based on complications of pregnancy would not be approved. *Id.* The Pennsylvania Department formally requested an opinion from the Pennsylvania Attorney General as to whether discrimination on the basis of normal pregnancy was prohibited by Pennsylvania or federal law or could be prohibited by the Insurance Commissioner under existing Pennsylvania statutes. *See* Pennsylvania Insurance Department Notice, *Discrimination on the Basis of Sex in Insurance Rates/Discrimination on the Basis of Normal Pregnancy in Insurance*, 4 PA. BUL. 101 (Jan. 19, 1974). However, the Pennsylvania Attorney General has not yet rendered an opinion on these questions.

l. *Tennessee*

While generally following the NAIC model, the Tennessee sex discrimination regulation expands subsection 6.f. of the model to include a definition of complications of pregnancy. TENN. INS. DEPT. RULE § 0780-1-34 (1976). This definition is the same as the definition of complications found in Arkansas Insurance Department Rule and Regulation 19. *Id.* § 0780-1-34-.04f. In place of the NAIC model subsection 6.c., the Tennessee regulation prohibits: "Denying maternity benefits to unmarried females covered under a contract if maternity coverage is available to married females under such contract, provided that this shall not be construed to require that benefits must be payable for normal pregnancies under either group or individual insurance contracts." *Id.* § 0780-1-34-.04c.

m. *Wisconsin*

In June, 1976, the Wisconsin Insurance Department adopted a sex discrimination regulation similar to the NAIC model. WIS. RULE INS. 6.55 (1976). Though the Wisconsin regulation contains a section like subsection 6.f. of the model, it does not contain a provision like subsection 6.c. of the model. *Id.* at § (4)(b)5.

55. CAL. INS. DEPT. RUL. No. 204 (1976).

56. CAL. INS. DEPT. BUL. No. 76-6 (1976). In essence the California Department gave insurers the choice of amending all individual hospital, medical and/or surgical policies authorized before January 1, 1976, or withdrawing those policies from sale. *Id.*

57. IDAHO INS. DEPT. REG. No. 31 (1977). The Idaho regulation contains a definition of complications similar to that of Arkansas, New York and Tennessee. *Id.* While the regulation does not apply to individual noncancellable or guaranteed renewable contracts, the insurer must communicate the availability of the coverage of complications when negotiating any change in such contracts.

58. N.J. INS. RULES ON COMPLICATIONS OF PREGNANCY (1976). Also the New Jersey rules contain a definition of complications similar to that of Arkansas, New York and Tennessee. *Id.*

59. CAL. ADMIN. CODE tit. X, art. 15, § 2560ff (1975).

3. *Other Types of Regulations, Bulletins and Notices*

One must look to a variety of insurance department regulations and bulletins to locate all administrative utterances concerning maternity. Certainly regulations on sex discrimination, complications of pregnancy and marital status are the obvious places to begin. Nevertheless, regulations also touching upon such subjects as minimum standards and unfair trade practices are likewise potential sources of information on maternity coverages. For example, the Florida minimum standards regulation deals with exclusion of maternity coverage.[60] Definitions of complications of pregnancy are contained in the New Hampshire and New York minimum standards regulations.[61] The Oregon sex discrimination regulation is an unfair trade practices regulation.[62] In addition, an Idaho regulation concerns maternity benefits when group insurance is replaced.[63] Finally, New York Insurance Department Circular Letter No. 23 interprets the New York mandatory maternity law.[64]

D. *Effect of NAIC Model and Proposed Regulations*

Although it has been adopted by only a minority of states, the NAIC model sex discrimination regulation has had a national impact on the health insurance industry. The very existence of the model and its adoption by a few prominent states such as New York, New Jersey and Pennsylvania[65] have caused health insurers on a nationwide basis to revise their underwriting practices regarding maternity.

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60. FLA. INS. DEPT. RULE 4-37.05 Exhibit A, R-157 (1975). The Florida minimum standards regulation provides for the exclusion of pregnancy and childbirth from all types of health insurance; complications of pregnancy may be excluded from all types of health insurance, except major medical policies. *Id.* The Florida regulation also requires that family health policies shall include a termination provision that meets the following requirements:

> (g) The provision shall provide that, in the event of cancellation by the insurers, pursuant to 627.626, Florida Statutes, or refusal to renew by the insurer of a policy providing pregnancy benefits, such policy shall provide for an extension of benefits, as to pregnancy commencing while the policy is in force and for which benefits would have been payable had the policy continued in force.

Id. 4-37.05(3)(g), R-154.

61. N.H. INS. DEPT. REG. 19 § IV.A.2. (1977); 11 NYCRR 52.2(s) (1973).

62. ORE. IC-61 (1975). *See* note 54j *supra*. This Oregon regulation provides that distinctions based on sex or marital status regarding the following constitute unfair discrimination: "The availability of a particular policy coverage or type of benefit, except for those relating to physical characteristics unique to one sex." ORE. IC-61 § 2.(3) (1975). It may be argued that this type of exception may permit a restriction of maternity coverage.

63. IDAHO INS. DEPT. REG. 7 (1962). Although it is titled "Maternity Benefits Under Hospital, Surgical, and Medical Contracts in Idaho," this regulation may also be considered a group replacement regulation since it establishes liability of carriers for claims for maternity benefits under group hospital, surgical and medical contracts when a group policyholder changes from one carrier to another.

64. On December 3, 1976, the New York Insurance Department distributed a letter which does not have the legal effect of a regulation; the letter set forth specific questions and answers interpreting the New York mandatory maternity law. N.Y. INS. DEPT. CIRC. LET. No. 23 (1976).

65. New York, New Jersey and Pennsylvania are major health insurance markets.

We expect that state interest in issuing maternity regulations will continue and note that Florida, Minnesota, Nebraska and Texas have already proposed relevant sex discrimination regulations.[66] In addition, Texas has proposed a minimum standards regulation which seems to provide that no individual health policy, except accident only, specified disease and specified accident, may contain an exclusion relating to normal pregnancy.[67]

V. State Maternity Legislation

The popularity of pregnancy and maternity coverage as a state legislative issue is demonstrated by the activity regarding this subject in state legislatures during the past few years. For example, there were more pregnancy and maternity bills introduced during the 1977 state legislative sessions than during the 1976 sessions; twenty-eight state bills concerning pregnancy and maternity were introduced in 1976,[68] while forty-six comparable state bills were introduced in 1977.[69]

A bird's eye view of the types of pregnancy and maternity bills introduced in state legislatures in 1977 emphasizes not only the popularity of, but also the variety of, such bills. We have chosen to group the bills in two broad categories: 1) bills which mandate maternity coverage; and 2) bills which remove the mandate to provide maternity benefits or limit mandatory maternity coverage. Bills mandating maternity coverage may be further classified as to whether

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66. Proposed Fla. Ins. Dept. Rule 4-43.01 (1977); Proposed Minn. Ins. Dept. Rule 4-76 (1976); Proposed Neb. Ins. Dept. Rule 28 (1976); Proposed Tex. State Bd. of Ins. Rules 059.21-21.101-.108 (1976).

67. Proposed Texas Rules for Minimum Standards and Benefits and Readability for Accident and Health Insurance Policies, Texas State Board of Insurance Order No. 31704 (Dec. 16, 1976).

It is beyond the scope of this Article to discuss in detail state human rights commission and employment regulations on maternity. However, some state human rights commission regulations are mentioned in connection with litigation in Section VI D *infra*.

68. Ala. H. 583 (1976); Ala. S. 414 (1976); Ariz. H. 2326 (1976); Cal. H. 3133 (1976); Cal. H. 3338 (1976); Cal. S. 2181 (1976); Conn. S. 383 (1976); Fla. H. 2366 (1976); Hawaii H. 2074 (1976); Idaho H. 589 (1976); Iowa H. 1206 (1976); Ky. H. 460 (1976); Mich. H. 4623 (1976); Mich. H. 4962 (1976); Mass. H. 302 (1976); Mass. H. 834 (1976); Mass. H. 2313 (1976); Mass. H. 2662 (1976); Mass. H. 2851 (1976); Mass. H. 3433 (1976); Mass. S. 1341 (1976); N.Y.A. 11829 (1976); N.Y.S. 7867 (1976); N.Y.S. 10536 (1976); Ohio S. 425 (1976); S.D.H. 870 (1976); Wash. H. 1544 (1976); Wash. S. 3242 (1976). All except five of the preceding bills failed to pass. The five bills which passed and were signed into law are: Cal. H. 3338 (codified at Cal. Ins. Code §§ 10119.5, 11512.13 (West Supp. 1977)), Conn. S. 383 (codified at Conn. Gen. Stat. Ann. §§ 38-371 (q), (r), 38-373(b)(4), 38-373(b)(6)(C) (West Supp. 1976)), Idaho H. 589 (amending Idaho Code §§ 41-2140 and 41-2210, and adding Idaho Code §§ 41-3438, 41-3932, and 41-4023 (1977)), N.Y.S. 10536 (codified at N.Y. Ins. L. §§ 162-a, 164-a, 253 (McKinney Supp. 1976)), and Ohio S. 425 (codified at Ohio Rev. Code Ann. § 3901.21 (Page Supp. 1977)).

69. Ala. H. 123 (1977); Ala. H. 1161 (1977); Ala. S. 86 (1977); Ala. S. 134 (1977); Ariz. H. 2171 (1977); Colo. S. 234 (1977); Conn. S. 308 (1977); Ga. H. 244 (1977); Hawaii H. 54 (1977); Hawaii H. 548 (1977); Iowa H. 165 (1977); Md. S. 774 (1977); Md. S. 775 (1977); Mass. H. 405 (1977); Mass. H. 655 (1977); Mass. H. 1172 (1977); Mass. H. 1757 (1977); Mass. H. 1998 (1977); Mass. H. 2218 (1977); Mass. H. 2219

they mandate maternity benefits in medical expense coverage or disability income coverage.

A. *Mandatory Maternity Coverage Bills*

1. *Bills Affecting Medical Expense Insurance*

There appear to be six kinds of bills mandating maternity benefits in medical expense insurance: a) some bills would require all individual and group medical expense policies to provide "complete maternity care"[70] on the same basis as any other illness;[71] b) other bills would require less than complete coverage for maternity care;[72] c) still other bills would mandate coverage for complications of pregnancy on the same basis that benefits are provided for any other illness under a health insurance policy;[73] d) several bills would require that where maternity benefits are already provided by a policy, such benefits must be provided to females regardless of marital or dependency status;[74] e) also there are bills which would mandate some maternity benefits under the aegis

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(1977); Mass. H. 2384 (1977); Mass. H. 2502 (1977); Mass. H. 3680 (1977); Mass. S. 95 (1977); Mass. S. 112 (1977); Mass. S. 1691 (1977); Minn. H. 1015 (1977); Minn. S. 680 (1977); Nev. H. 120 (1977); N.Y.A. 175 (1977); N.Y.A. 1452 (1977); N.Y.A. 4080 (1977); N.Y.A. 5002 (1977); N.Y.A. 5419 (1977); N.Y.A. 7836 (1977); N.Y.S. 1170 (1977); N.Y.S. 3004 (1977); NY.S. 3345 (1977); N.Y.S. 3595 (1977); N.Y.S. 5101 (1977); N.Y.S. 5642 (1977); N.Y.S. 5998 (1977); Ore. H. 2982 (1977); Pa. S. 141 (1977); R.I.S. 613 (1977); Tex. H. 1844 (1977).

70. "Complete maternity care" has been defined to include: 1) voluntary control of pregnancy or reproduction; 2) normal obstetrics; 3) all complications of obstetrics; 4) prenatal care; 5) diagnosis and care of fetus; and 6) labor, delivery and puerperium of six weeks. Ala. S. 86 (1977); Ala. S. 134 (1977).

71. Ala. H. 1161 (1977); Ala. S. 86 (1977); Ala. S. 134 (1977); Mass. H. 655 (1977). A complete maternity care bill may be drafted to apply to all health insurance, including disability income policies. Ala. S. 86 (1977). Also such bills may be drafted to require complete maternity coverage for females whether on an individual or family basis including minor dependent children and without regard to marital status. *Id.*

72. Three bills would generally provide maternity coverage in medical expense policies. N.Y.A. 175 (1977); Ore. H. 2982 (1977); Tex. H. 1844 (1977). Another bill would provide maternity coverage in disability policies. Ariz. H.2171 (1977). Two bills would remove the exemption which government or public employees now enjoy from the New York Maternity Law. N.Y.A. 5002 (1977); N.Y.S. 5642 (1977). Other New York bills would amend the New York Disability Benefits Law: a) to limit exclusion of disability income benefits for pregnancy, N.Y.A. 7836 (1977); b) to provide pregnancy disability benefits limited to eight weeks, N.Y.S. 3345 (1977) and N.Y.S. 5998 (1977).

73. Ariz. H. 2171 (1977); Hawaii H. 54 (1977); Hawaii H. 548 (1977); Nev. H. 120 (1977). A Georgia bill applies only to group major medical policies which cover maternity benefits and provides a definition of complications which expands the "Arkansas-New York" definition of complications to include eclampsia and intrauterine fetal growth retardation. Ga. H. 244 (1977). This bill was approved as a law on April 5, 1977. 1977 Ga. Laws p. 1229 (codified at GA. CODE ANN. §§ 56-108, 56-2443 (Supp. 1977)). Nevada H. 120 was approved on April 21, 1977. 1977 Nev. Stats. ch. 233 (codified at NEV. REV. STAT. ch. 689A, 689B, 695B, 695C (1977)).

74. Ala. H. 123 (1977); Mass. H. 1998 (1977); Mass. H. 2218 (1977); Mass. H. 2384 (1977). A variation of this concept is found in an Alabama bill which would require provision of such benefits to dependent children regardless of the legitimacy of their birth. Ala. H. 123 (1977). And a Massachusetts bill would require provision for unmarried and/or dependent females for: a) the same benefits for expenses arising from pregnancy as are provided for a married woman; and b) the same benefits for expenses arising from pregnancy, physical injuries or mental illness due to rape as are provided for a married woman. Mass. H. 2384 (1977).

of an unfair trade practices act;[75] f) one bill would require some maternity coverage under an employment statute.[76]

2. *Bills Affecting Disability Insurance*

The remaining 1977 mandatory maternity bills mandate pregnancy disability coverage and would amend insurance, human rights or employment laws. As noted in Section III, A, 2, *supra*, a Maryland Bill was enacted which mandates the availabiilty of disability coverage for maternity in the context of the Maryland insurance laws.[77] Also in 1977, the Maryland Human Relations Commission law was amended to require employers to treat maternity as a disability under employees' health benefits plans.[78] All other 1977 pregnancy disability bills would place the burden of compliance on employers. In general such bills would amend employment laws to require that disabilities related to pregnancy and childbirth shall be treated the same as disabilities caused by any other illness under any health or temporary disability or sick leave program available to employees in connection with employment.[79]

B. *Bills Removing or Limiting Mandatory Maternity Coverage*

Several bills would provide that maternity benefits are no longer mandatory, but that instead insurers need only make maternity benefits available.[80]

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75. An Iowa bill would make certain insurance practices relating to maternity unfair claims settlement practices. Iowa H. 165 (1977). In addition, a Massachusetts bill would amend the Unfair Trade Practices Act to define "maternity benefits" and to require that premiums for insurance covering maternity and dependent children benefits be the same for all applicants. Mass. H. 2219 (1977).

76. A Massachusetts bill would amend the employment laws to mandate limited pregnancy-related hospital and medical benefits for female employees regardless of marital status. Mass. H. 1172 (1977).

77. Md. S. 775 (1977). *See* note 33 *supra*.

78. MD. ANN. CODE art. 49B § 19A (1977). The Maryland Human Relations Commission Law requires employers to treat disabilities caused or contributed to by pregnancy and childbirth in the same way they treat other disabilities under any health or temporary disability insurance or sick leave plan available in connection with employment; however, no employer need provide more than six weeks of disability benefits for normal pregnancy or childbirth. *Id.*

79. Mass. H. 405 (1977); Mass. H. 1757 (1977); Mass. H. 2502 (1977); Mass. H. 3680 (1977); Mass. S. 95 (1977); Mass. S. 112 (1977); Mass. S. 1691 (1977). One Massachusetts bill would allow for a pregnancy-related disability for not more than six weeks. Mass. S. 1691 (1977). On the other hand a Pennsylvania bill provides for a disability period from the fifth month of pregnancy to the date of delivery of the child. Pa. S. 141 (1977). And two Minnesota bills state that under the Minnesota Human Rights Act, "[w]omen affected by pregnancy, childbirth, or related medical conditions or occurrences shall receive employment opportunities and benefits commensurate with those available to other persons, according to ability or inability to work." Minn. H. 1015 (1977); Minn. S. 680 (1970). Minn. H. 1015 was approved as a law on June 2, 1977. 1977 Minn. Laws ch. 408 (amending MINN. STAT. ANN. §§ 363.01-.03 (West 1966). A Rhode Island bill similar to Minn. H. 1015 failed to pass in 1977. R.I.S. 613 (1977).

80. Two New York bills would provide that maternity benefits need only be provided on the request of the applicant or policyholder. N.Y.A. 5419 (1977); N.Y.S. 3595 (1977). A Colorado bill would provide that insurers must offer minimum moment of birth, complications of pregnancy and maternity care benefits but are no longer required to cover them in every group contract. Colo. S. 234 (1977).

Other bills exclude maternity benefits from health insurance coverages for persons not requiring such benefits.[81] Finally, one bill limits the maternity benefits payable,[82] and another deletes a mandatory pregnancy disability benefit from an employment statute.[83]

C. *The Future of State Maternity Legislation*

Unless the field of maternity benefits in health insurance should be preempted by federal statutes, either wholly or in part, we expect to see increased state legislative activity regarding this subject in the near future. There is strong public support behind state mandatory maternity legislation and such support is strengthened by vigorous lobbying by special interest groups. Not only various women's organizations, but also obstetricians and gynecologists are strong proponents of mandatory maternity legislation. Other interested groups include labor unions and right-to-life advocates. As the public becomes more concerned with maternity issues, even broader support can be anticipated for more maternity legislation.

We believe that legislation which mandates maternity coverage is imprudent for several reasons. Mandating coverages such as maternity benefits results in an irrationally fragmented health insurance product. Such fragmentation hinders the efforts of the health insurance industry to provide the public with well-balanced, comprehensive health insurance coverage. Moreover, when coverages are mandated piecemeal, the consumer is prevented from freely purchasing those health coverages which he has decided best fit his personal needs and finances. In addition, as states mandate additional coverages, the health insurance industry, which is fragile and already heavily regulated, is imperiled by an overloading of regulation. Finally, mandatory maternity legislation is also negative in effect, since it results in high costs. Not only are employers burdened by such high costs, but many women are unable to afford the price of any individual health insurance policy which must contain maternity benefits.

VI. Litigation on Mandatory Maternity Benefits

Both federal and state courts have dealt with assertions that denial of maternity and pregnancy benefits to females violates guarantees of equal protection under the United States and state constitutions[84] and statutory guaran-

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81. Two New York bills would exclude maternity benefits for those not requiring them in health insurance policies. N.Y.A. 1452 (1977); N.Y.S. 1170 (1977). Other New York bills would provide that mandated maternity coverage will not be applicable to policies issued to women 55 or older. N.Y.A. 4080 (1977); N.Y.S. 3004 (1977).

82. A New York bill would limit mandatory maternity benefits to full hospital charges for two days, 50% of hospital charges for two more days and excess of doctors' charges over $250. N.Y.S. 5101 (1977).

83. A Connecticut bill would delete a statutory provision requiring that disability or leave benefits be paid to any employee disabled as a result of pregnancy. Conn. S. 308 (1977).

84. U.S. Const. amend. XIV.

tees of equal employment opportunity.[85] Three major federal decisions, as well as recent and pending state litigation which addresses this issue will be discussed.

A. *Federal Cases on Mandatory Maternity Coverage*

The standard of scrutiny used by the United States Supreme Court for sex-based classifications in *Reed v. Reed*[86]—"a classification must be reasonable, not arbitrary and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike"—was implicitly toughened by the Court in *Frontiero v. Richardson*,[87] which stopped just short of declaring sex-based classifications "inherently suspect." The extent to which this standard is adhered to or is modified is one of the most important developments that occur in these cases, because of its bearing on the use of risk classification principles.

Several other factors appear to play important roles in each decision: 1) the similarities or differences in the facts of each case; 2) the insurance benefit (if any) at issue; 3) the constitutional provision, statute or regulation relied on by the plaintiff, as opposed to the legal standard used by the court in resolving the issue; 4) the practice complained of as discriminatory in nature or by its effect; 5) the court's determination on the question of any denial or withholding of pregnancy or maternity benefits as invidious discrimination; and 6) the court's recognition of the insurance principle which regards pregnancy as having a voluntary nature.

In *Cleveland Board of Education v. La Fleur*,[88] public school teachers who became pregnant during the school year protested the school district's maternity leave policy, which consisted of two rules: 1) a mandatory maternity leave which must begin five months before the expected childbirth, without pay, and which included a mandatory two-week leave application notice; and 2) a procedure for return to work for which eligibility could not begin before the semester after which the child was three months old. The returning teacher was not promised reemployment.[89] There was no insurance involved in the case.[90]

Since *La Fleur* was litigated before the 1972 legislative application of Title VII of the Civil Rights Act of 1964 to state and municipal employees,[91] plaintiffs brought suit under the fourteenth amendment due process clause, and the civil rights enabling statute implementing it.[92] The Supreme Court decided that

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85. 42 U.S.C. §§ 2000e, 2000e-2 (Supp. II 1972); N.Y. EXEC. LAW art. 15 (McKinney Supp. 1976).
86. 404 U.S. 71 (1971).
87. 411 U.S. 677 (1973).
88. 414 U.S. 632 (1974).
89. Cleveland Bd. of Ed. v. La Fleur, 414 U.S. 632, 635 (1974).
90. *Id.* at 650, 651. *La Fleur* was combined with Cohen v. Chesterfield County School Bd., 474 F.2d 395 (4th Cir. 1973), which had similar facts, but a different return rule which was upheld.
91. Civil Rights Act of 1964, Pub. L. 92-261, 86 Stat. 103 (1972).
92. 42 U.S.C. § 1983 (1974).

justifications which the school board made in imposing the rule did not meet the standard of scrutiny relevant to the assessment of this restriction of personal freedom;[93] that the school board was "hindering attainment of the very continuity objectives that they are purportedly designed to promote;"[94] and that such a "conclusive presumption that every pregnant teacher who reaches the fifth or sixth month of pregnancy is physically incapable of continuing,"[95] since it is neither necessarily nor universally true, fell into that class of permanent irrebuttable presumptions which "have long been disfavored"[96] by the Court.

Justice Powell's concurring opinion in *La Fleur* is more on point with the subsequent pregnancy cases in that he states the issues in equal protection terms. He all but calls the mandatory leave and return rules discrimination by sex[97] and, while not going so far as to call the discrimination invidious,[98] states that the irrationality of the rules' classification system is impermissible on equal protection grounds.

The concurring opinion in *La Fleur* becomes more important when the issue of the proper use of insurance principles, including classification by risk, enters the facts of the cases. Where the two classification issues meet is when a pregnancy-related classification is presented as both an "impermissible" sex classification and as a "reasonable" risk classification.

Five months after *La Fleur* the Supreme Court considered a state legislative classification system and upheld it. In *Geduldig v. Aiello*,[99] the State of California appealed a three-judge federal district court's ruling that exclusion of normal pregnancy and related disabilities from eligibility for benefits under the state disability insurance program violated the fourteenth amendment equal protection clause. A parallel state court decision[100] and amendatory legislation[101] narrowed the issue before the Supreme Court to whether exclusion of benefits for normal pregnancy was so prohibited.

The California system was supported totally by employee contributions to pay for benefits to persons in private employment for temporary disabilities not covered by workmen's compensation.[102] It was set up and run according to insurance principles[103] and the legislature had committed itself to maintain the contribution level at the existing rate.[104] Such rate would not have been ade-

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93. Cleveland Bd. of Ed. v. La Fleur, 414 U.S. 632, 640 (1974).
94. *Id.* at 643.
95. *Id.* at 644.
96. *Id.*
97. *Id.* at 652.
98. *Id.* at 653 n.2.
99. 417 U.S. 484 (1974).
100. Rentzer v. Unemployment Ins. Appeals Bd., 32 Cal. App. 3d 604, 108 Cal. Rptr. 336 (1973).
101. CAL. UNEMP. INS. CODE § 2626.2 (1974).
102. Geduldig v. Aiello, 417 U.S. 484, 486 (1974).
103. *Id.* at 492.
104. *Id.* at 493.

quate to cover costs of benefits for normal pregnancy.[105] The Supreme Court had ample information to support the legislature's judgment.[106]

The Supreme Court majority viewed the pregnancy exclusion as part of a legitimate system for providing social benefits that the state did not have to make more comprehensive than it already was.[107] It disagreed with the district panel's finding of invidious discrimination[108] because it saw the classification was made not among persons, but, in the usual insurance procedure, among the risks insured.[109] The majority responded to the dissent's argument that the exclusion operates solely to the detriment of women in what has become a controversial footnote:

> The dissenting opinion to the contrary, this case is thus a far cry from cases like *Reed v. Reed*, 404 U.S. 71 (1971), and *Frontiero v. Richardson*, 411 U.S. 677 (1973), involving discrimination based upon gender as such. The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed, supra*, and *Frontiero, supra*. Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition. The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes.[110]

The litigated issue—whether or not the pregnancy exclusion was a sex-based classification, and, if examined by the *Frontiero-Reed* standard, perhaps unfair discrimination—was pushed aside by the Court's recognition that the classification was also based upon insurance risk factors. The failure of the Court to impose "stricter scrutiny" on the exclusion was severely criticized by the dissent[111] because it seemed to "abandon that higher standard of review without satisfactorily explaining what differentiates the gender-based classi-

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105. *Id.*
106. *See* Brief for American Telephone and Telegraph Co. as Amicus Curiae, Geduldig v. Aiello, 417 U.S. 484 (1974).
107. Geduldig v. Aiello, 417 U.S. 484, 497 (1974).
108. *Id.* at 494.
109. *Id.* at 496, 497.
110. *Id.* at 496 n.20.
111. *Id.* at 498.

fication employed in this case from those found in *Reed* and *Frontiero*."[112] The dissenters support their argument by presenting the opinion of the medical profession that pregnancy causes disability,[113] the inclusion of "voluntary disabilities" in the program,[114] and the federal legislative and administrative pronouncements on the subject.[115] But the decision stands as an important recognition of the legitimacy of the insurance risk-bearing process, even though the standard of review the Court used in reaching the decision further darkened the waters muddied by *Frontiero* and *Reed*.

Reaction to the *Aiello* decision was expressed in strong terms by women's rights activists[116] and in a series of cases which based attacks on pregnancy benefit exclusions in private employer-employee disability benefit plans on the general statutory provisions of Title VII of the Civil Rights Act of 1964 as amended[117] and the administrative guidelines issued by the United States Equal Employment Opportunity Commission (EEOC). The EEOC interpreted Title VII to prohibit the exclusion of benefits for disabilities due to normal pregnancy.[118]

The Title VII pregnancy disability cases which were ultimately appealed to the Supreme Court for disposition[119] had major facts in common. Women employees claimed unfair discriminatory treatment because the benefit plans of their employers did not pay benefits for absence from work or disability due to the employee's pregnancy. Six courts of appeals had concluded that: in essence, pregnancy was a disabling condition; that to exclude coverage for that disability was gender-based discrimination; that the justification of increased cost as a basis for the exclusion could not stand up to the inherent policy of Title VII to eliminate all discrimination in the terms and conditions of employ-

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112. *Id.* at 503.
113. *Id.* at 500 n.4.
114. *Id.* at 499-500.
115. *Id.* at 501-02.
116. *See* Ginzburg, *Gender and the Supreme Court: The 1973 and 1974 Terms*, 1975 S. Ct. L. Rev. 1 (1975); New York Times, June 12, 1977 § E, at 3.
117. *See* note 85 *supra*.
118. (b) Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, and accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.
29 C.F.R. § 1604.10(b) (1976). *See also* 38 Fed. Reg. 35337, 35338 (Dec. 27, 1973).
119. Satty v. Nashville Gas Co., 522 F.2d 850 (6th Cir. 1975), *cert. granted*, 97 S. Ct. 806 (1977); Gilbert v. General Elec. Co., 519 F.2d 661 (4th Cir. 1975), *rev'd*, 97 S. Ct. 401 (1976); Hutchinson v. Lake Oswego School Dist., 519 F.2d 961 (9th Cir. 1975), *cert. denied in light of Gilbert v. General Elec. Co.*, 97 S. Ct. 731 (1977); Communication Workers of Am. v. American T. & T. Co., 513 F.2d 1024 (2d Cir. 1975), *judgment vacated in light of Gilbert v. General Elec. Co.*, 97 S. C.t 724 (1977); Wetzel v. Liberty Mut. Ins. Co., 511 F.2d 199 (3d Cir. 1975), *vacated on juris. grounds*, 424 U.S. 737 (1976).

ment; and that such exclusion violates Title VII.[120] The Supreme Court disposed of two of the appealed cases according to its decision in *Gilbert v. General Electric Co.*[121] *Wetzel v. Liberty Mutual Insurance Co.* was remanded because of a jurisdictional defect[122] and, as of the date of this writing, *Satty v. Nashville Gas Co.*[123] was still on the Court's docket. The case which the Supreme Court chose to settle this issue, however, was *Gilbert v. General Electric Co.*[124]

Plaintiffs in *Gilbert* contended, and the lower courts found, that a situation where a private employer denied pregnancy and maternity care benefits to female employees was distinguishable under Title VII, in the issue of standard of review, from the facts in *Aiello*, which was decided under the equal protection clause of the fourteenth amendment.[125] The *Gilbert* majority concluded that *Aiello* was relevant for a very significant reason apart from the issue of choice of standard of review. Both constitutional and statutory provisions, in order to bring their prohibitions into force, require a finding that the classification complained of is a discrimination on the basis of sex. It is in answering this threshhold question, the Court said, that *Aiello's* and *Gilbert's* "strikingly similar"[126] disability plans were related.

Quoting footnote twenty of *Aiello*,[127] the majority opinion reiterated its finding that the use of a "disability insurance system"[128] in classifying risks to choose which of a range of such risks should or should not be covered did not constitute, in and of itself, discrimination on the basis of sex.[129] Further examination by the Court revealed that there was no showing that the exclusion was one of a series of " 'distinctions involving pregnancy [that] are mere pretexts designed to effect an invidious discrimination against the members of one

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120. *See* Satty v. Nashville Gas. Co., 522 F.2d 850 (6th Cir. 1975), *cert. granted*, 97 S. Ct. 806 (1977); Gilbert v. General Elec. Co., 519 F.2d 661 (4th Cir. 1975), *rev'd*, 97 S. Ct. 401 (1976); Hutchinson v. Lake Oswego School Dist., 519 F.2d 961 (9th Cir. 1975), *cert. denied in light of Gilbert v. General Elec. Co.*, 97 S. Ct. 731 (1977); Tyler v. Vickery, 517 F.2d 1089 (5th Cir. 1975); Communication Workers of Am. v. American T. & T. Co., 513 F.2d 1024 (2d Cir. 1975), *judgment vacated in light of Gilbert v. General Elec. Co.*, 97 S. Ct. 724 (1977); Wetzel v. Liberty Mut. Ins. Co., 511 F.2d 199 (3d Cir. 1975), *vacated on juris. grounds*, 424 U.S. 737 (1976).

121. Hutchinson v. Lake Oswego School Dist., 519 F.2d 961 (9th Cir. 1975), *cert. denied in light of Gilbert v. General Elec. Co.*, 97 S. Ct. 731 (1977); Communication Workers of Am. v. American T. & T. Co., 513 F.2d 1024 (2d Cir. 1975), *judgment vacated in light of Gilbert v. General Elec. Co.*, 97 S. Ct. 724 (1977).

122. 424 U.S. 737 (1976). The Court held that the district court's order was not appealable under 28 U.S.C. § 1291 as a final decision since, even though the district court had made findings permitting entry of a final judgment under Rule 54(b), Federal Rules of Civil Procedure, that rule operates in multiple claims actions and the case was based on a single claim; and the order, in effect, granted only a partial summary judgment; also, the order was not appealable under 28 U.S.C. § 1292 authorizing court of appeals jurisdiction over interlocutory decisions. 28 U.S.C. §§ 1291, 1292 (1970); FED. R. CIV. P. 54(b).

123. 522 F.2d 850 (6th Cir. 1975), *cert. granted*, 97 S. Ct. 806 (1977).

124. 97 S. Ct. 401 (1976).

125. Gilbert v. General Elec. Co., 97 S. Ct. 401, 406 (1976).

126. *Id.* at 407.

127. *Id.*

128. *Id.*

129. *Id.*

sex or the other.' "[130] In explaining this finding the Court went to the heart of an insurer's difficulty in attempting to underwrite the risks attributable to a normal pregnancy:

> But we have here no question of excluding a disease or disability comparable in all other respects to covered diseases or disabilities and yet confined to the members of one race or sex. Pregnancy is of course confined to women, but it is in other ways significantly different from the typical covered disease or disability. The District Court found that it is not a disease at all, and is often a voluntarily undertaken and desired condition. 375 F. Supp. at 375, 377. We do not therefore infer that the exclusion of pregnancy disability benefits from petitioner's plan is a simple pretext for discriminating against women. The contrary arguments adopted by the lower courts and expounded by our dissenting brethren were largely rejected in *Geduldig* [*Aiello*].[131]

The Court acknowledged that it went to somewhat new ground when it took the issue of whether a facially neutral classification could still be found to discriminate unfairly on the basis of sex if such classifications were found to " 'invidiously . . . discriminate on . . . [some] impermissible classification.' "[132] But it found no evidence to suggest that the General Electric plan had the requisite discriminatory effect against women. The district court which decided *Gilbert* could not find that the benefits of the plan discriminated against anyone unfairly[133] and the majority opinion states that its starting point is that the benefits do accrue to both sexes[134] and that it is a less-than-all-inclusive insurance package.[135] Without any proof that the package is worth more to men than women, the pregnancy benefits exclusion does not give rise to a finding of gender-based discrimination.[136] The nature of group insurance within an employer-employee relationship is one of extra compensation, says the Court; if the premiums were converted into additional wages they would be distributed equally, so there would be no gender-based discrimination, even though women (to be covered for pregnancy as well as other disabilities) would have to pay more money than men to purchase individual disability insurance.[137] Title VII does not require the employer to pay for such additional amount, and it does not require such where there is group disability insurance by which pregnancy is not covered.[138]

Plaintiffs supported the contention that the pregnancy exclusion was violative of Title VII on its face with the specific prohibitive EEOC Guideline lan-

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130. *Id.* at 407-08, *quoting* Geduldig v. Aiello, 417 U.S. 484, 496-97 n.20 (1974).
131. *Id.* at 408.
132. *Id., quoting* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).
133. *Id.* at 409.
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.* at n.17.
138. *Id.*

guage.[139] But the Court took a dim view of the Guidelines' probative value, citing prior inconsistent EEOC rulings[140] and relevant legislative history of Title VII which showed that its drafters paid " 'especial attention' " to the Equal Pay Act of 1963,[141] thus establishing that it was the intent of Congress to clarify that Title VII should not prohibit "differences of treatment in industrial benefits plans."[142] Instead of granting them the great deference which plaintiff recommended, the Court states that the Guidelines "stand virtually alone"[143] against the history of Title VII, the regard that Title VII has for the Equal Pay Act and the determinations of the Wage and Hour Administrator who enforces the Equal Pay Act; the Court stated that the latter do not support the plain meaning of discrimination which interpretive history of the fourteenth amendment gives to that term in Title VII.

The salient points of the dissent were that: 1) pregnancy is the only condition excluded from coverage under the plan;[144] 2) General Electric's employment practices and the history of the pregnancy exclusion in those practices evidenced a "discriminatory attitude" toward pregnant female employees;[145] 3) the pregnancy exclusion was a sex-based classification on its face (this argument was made in reliance on Justice Powell's concurring opinion in *La Fleur*);[146] 4) the effects of the exclusion did weigh more heavily on the employment opportunities of women than on men; and 5) the EEOC Guidelines deserved deference due to the great amount of deliberation and factual support that went into answering a "complex economic and social inquiry that Congress wisely left to resolution by the EEOC pursuant to its Title VII mandate."[147]

Observers will find much to say for the points made by Justice Brennan in his objections to the majority decision. He is correct in observing that "discrimination is a social phenomenon encased in a social context;"[148] especially from the perspective of pregnancy exclusions in group health insurance, it is an "admittedly complex problem."[149] Both sides have sound legal and factual arguments. But the Court has, in *Aiello* and *Gilbert*, determined that reasonable classification systems affecting pregnancy were used without violating constitutional guarantees. We are of the opinion that the Court has examined these well-developed positions, for the employer and for the female employee, replete with factual support, and then attempted to balance social goals and economic priorities to arrive at a justifiable resolution of the conflict.

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139. *Id.* at 410.
140. OPINION LETTER OF THE GENERAL COUNSEL OF EEOC, OCTOBER 17, 1966, EMPLOYMENT PRAC. GUIDE (CCH) ¶ 17, 304.43 (1970).
141. 29 U.S.C. § 206 (1974).
142. 110 CONG. REC. 13663-4 (1964).
143. Gilbert v. General Elec. Co., 97 S. Ct. 401, 412 (1976).
144. *Id.* at 416.
145. *Id.* at 415.
146. *Id.* at 414.
147. *Id.* at 418.
148. *Id.* at 419.
149. *Id.*

One of the purposes of rational, objective and soundly-based insurance classification principles is to attempt to reconcile social requirements with unavoidable practical business considerations. The use of these principles has been attractive to the judicial thought process in *Aiello* and *Gilbert*—so much so that *Gilbert* did not reach the point which the aggrieved female workers had assumed was the basis of their complaint—a holding that denial of pregnancy benefits was a sex-based classification. Where insurance is not involved, in cases such as *La Fleur* or *Satty* (where sick leave, seniority and loss of vacation time were involved but no disability income plan existed) the Court does not have the risk classification factor at work and has no ready basis for determining the facial objectivity, or unrelatedness to gender, of the benefits program. The decision in *Satty* may go far toward providing a measure of the importance of these insurance principles to the Court. If the Court adopts a stricter scrutiny of the facts in *Satty*, a conclusion could be drawn to the effect that risk classifications made through a well-run insurance program might not be subject to such strict scrutiny as other classifications. Then such programs may have some fair measure of protection against arguments that such classifications discriminate unfairly, at least as they classify by gender.

B. *State Cases on Mandatory Maternity Coverage*

While the United States Supreme Court has paid great attention to the principles of insurance as they apply to pregnancy and maternity, state courts have not regarded them, or their attendant cost arguments, as a major factor in determining whether or not exclusion of pregnancy from eligibility for disability benefits violates state human rights acts or fair employment practice statutes.

As mentioned in our discussion of *Aiello, supra*, the California Court of Appeals in *Rentzer v. Unemployment Insurance Appeals Board*[150] held that a woman who suffered an ectopic pregnancy was entitled to benefits on account of disability that results from medical complications of pregnancy.[151]

In *Ray-O-Vac, Division of E.S.B., Inc. v. Wisconsin Department of Industry, Labor and Human Relations*,[152] plaintiff women employees complained of Ray-O-Vac's practice of limiting disability benefits for pregnancy and childbirth to six weeks instead of the twenty-six week limitation for all other disability benefits.[153] The Wisconsin Department of Industry, Labor and Human Relations (DILHR) found that: 1) the differing treatment of pregnancy disabilities was discrimination based on sex and violated the Wisconsin Fair Em-

150. 32 Cal. App. 3d 604, 108 Cal. Rptr. 336 (1973).
151. The result in *Rentzer* is in accord with the established position of the industry on coverage of complications of pregnancy. *See* note 16 *supra.*
152. 236 N.W.2d 209 (Wis. 1975).
153. Ray-O-Vac, Div. v. Wisconsin Dept. of Indus., Labor & Human Relations, 236 N.W.2d 209, 211 (Wis. 1975).

ployment Law;[154] and 2) Ray-O-Vac's cost defense was not a sufficient proof of "business necessity" permitted under the Fair Employment Law[155] to treat pregnancy disabilities differently from other temporary disabilities. The trial court, however, found no sex discrimination in the different treatment, apparently because it believed that pregnancy was not an illness.[156] The Wisconsin Supreme Court, in reversing the trial court, distinguished the case from *Aiello* on virtually the same grounds that the *Gilbert* lower courts found—that the statutory prohibition against discrimination in employment is a more specific command than that of the fourteenth amendment in striking down pregnancy benefit exclusions or limitations, and that "[p]regnancy is undeniably a sex-related characteristic."[157] Also relying on Title VII cases, the court found that Ray-O-Vac had not adequately furnished enough information to establish its statutory defense of business justification, but concluded that "greatly increased cost should be *considered* a factor excusing a discriminatory practice."[158]

The New York Court of Appeals in the case of *Brooklyn Union Gas Co. v. New York State Human Rights Appeal Board*,[159] held that the New York State Human Rights Law (HRL)[160] overrides the pregnancy exclusion of the disability benefits required to be provided by private employers under section 205(3) of the New York Disability Benefits Law (DBL).[161] Thus, for an employer with four or more employees to deny disability benefits due to normal pregnancy is to practice unlawful employment discrimination by reason of sex.[162] Employees were being denied disability benefits for disabilities due to pregnancy based on the exclusion of such disabilities from the mandatory benefits required by DBL. The court called both the HRL and DBL "minimum standards" type of statutes,[163] but the HRL "imposes a greater obligation;"[164] the court said that the policy of the HRL in eliminating sex discrimination takes precedence over the section of DBL which excludes coverage for pregnancy. It also determined that the economic arguments made by defendants American Airlines and Brooklyn Union Gas did not prevent the court from deciding that the mandate of HRL should be carried out literally, despite the predictions of prohibitive cost to employers for the coverage.[165]

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154. WIS. STAT. § 111.31-.37 (1975).
155. WIS. STAT. § 111.32(5)(d) (1975) (repealed and replaced by § 111.32(5)(g) (Supp. 1977)).
156. Ray-O-Vac, Div. v. Wisconsin Dept. of Indus., Labor & Human Relations, 236 N.W.2d 209, 211-12 (Wis. 1975).
157. *Id.* at 215.
158. *Id.* at 216 (emphasis added).
159. 41 N.Y.2d 84, 359 N.E.2d 393, 390 N.Y.S.2d 884 (1976).
160. N.Y. EXEC. LAW art. 15 (McKinney Supp. 1976).
161. N.Y. WORK. COMP. LAW art. 9 (McKinney Supp. 1976).
162. Brooklyn Union Gas Co. v. New York State Human Rights Appeal Bd., 41 N.Y.2d 84, —, 359 N.E.2d 393, 395, 390 N.Y.S.2d 884, 886 (1976).
163. *Id.* at —, 359 N.E.2d at 396, 390 N.Y.S.2d at 888.
164. *Id.* at —, 359 N.E.2d at 397, 390 N.Y.S.2d at 888.
165. *Id.* at —, 359 N.E.2d at 397, 390 N.Y.S.2d at 889.

C. *New York Mandatory Maternity Care Law Litigation*

A pending case which directly addresses mandatory maternity benefits requirements in hospital-surgical-medical insurance contracts, both group and individual, is *Health Insurance Association of America v. Harnett.*[166] Chapter 843 of the [New York] Laws of 1976[167] requires group, blanket and individual accident and health insurance policies to cover maternity costs on the same basis as an illness.[168] The law, affecting new and existing contracts as of January 1, 1977, does not apply to the coverage of government employees.

Plaintiff, a trade association of 320 insurance companies, and 22 of its member insurers individually, sued the New York Insurance Superintendent to have the law declared unconstitutional on these basic grounds: 1) the law, they alleged, would drive the cost of health insurance, especially individually purchased health insurance, substantially higher, thus economically depriving persons of protection; 2) the requirement was such that many persons, because of their lifestyle, age, profession or personal preference, would choose not to have maternity coverage in their contracts and they would be arbitrarily deprived of that choice; 3) the retroactive nature of the law would impair the obligations of contracts in violation of article I, section 10 of the United States Constitution, where the insurer cannot choose between termination of the contract unilaterally or increasing the premium without consent of the state; 4) the law was such that administrative problems could not be addressed fully before the effective date of the law, thus compelling companies to provide coverage without compensation for it or preventing them from marketing any health insurance in the state.[169]

In a decision dated June 2, 1977, Justice Gellinoff of the Supreme Court, New York County, upheld the rationality of Chapter 843 by referring to the bill's legislative history[170] and terming the injuries described by the plaintiffs to the insurance business to be "speculative."[171] The decision does, however, hold that the requirement to add the maternity benefit to in-force policies where the insurer has no choice but to renew at the option of the policyholder, violates the contract clause of the Constitution.[172] Finally, the question of whether the time given the companies to comply with the maternity coverage law was unreasonably short was set down for a trial on the facts.[173]

This case will be appealed by both sides. The case is important to the insurance industry, not only because of the statement of the law on retroactivity of insurance statutes, but also because the eventual decision may determine

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166. No. 453/77 (Sup. Ct., New York County, New York, filed June 2, 1977).
167. N.Y.S. 10536 (1976).
168. *See* Section III *supra* for a complete discussion of the law.
169. HIAA Memorandum of Law, *supra* note 20, at 3-5.
170. *Id.* at 2-3.
171. *Id.* at 5.
172. *Id.* at 10.
173. *Id.* at 11.

precedent for action on the numerous other mandatory coverage care bills, including mandatory maternity coverage, which have appeared in other states and will undoubtedly continue to be introduced.[174]

Insurance principles as they relate to maternity and pregnancy coverage do not fare well against what state courts consider to be a more dominant social policy of preventing sex discrimination in employment. The New York Court of Appeals in *Brooklyn Union Gas* overrode a specific statutory intent to exclude pregnancy coverage with its reading of legislative intent implied in the Human Rights Law.[175] These decisions point up the difficulty of presenting a highly technical, non-emotional side of a complex social and emotional legal issue. We believe, however, that the industry should be prepared to take these issues before the state and federal tribunals. In many cases, the courts are the only available alternative for redress for a sometimes unpopular client.

D. *State and Local Human Rights Commissions*

One of the most disturbing trends evident in state regulation of insurance is the proliferating action by state or local human rights commissions[176] against insurance companies, based on a complaint of sex discrimination, usually related to employee benefit plans. These commissions often assert that, through the sale of group insurance contracts to employers, insurers "aid and abet" or are agents of the employer,[177] or are selling insurance contracts which are "public accommodations"[178] and thus practicing sex discrimination by excluding coverage for, among other things, expenses related to normal pregnancy.

Insurers have had mixed success with traditional, well-supported legal arguments against the charges of these commissions. The commissions have claimed jurisdiction over the companies, stating that state insurance department's regulatory jurisdiction "refers to practices controlled and regulated by the Department pursuant to the [insurance] code"[179] and not to practices pro-

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174. *See* Section III *supra*.

175. N.Y. WORK. COMP. LAW art. 9, § 205(3) (McKinney Supp. 1976) lists disabilities excepted from the minimum coverage requirements of DBL; among them are disabilities "caused by or arising in connection with pregnancy."

176. The term, human rights commissions, for purposes of this Article, includes state human rights commissions, such as the New York State Executive Department Division of Human Rights; fair employment practices agencies with discrimination jurisdiction, such as the Wisconsin Division of Industry, Labor and Human Relations; and municipal agencies such as the Bloomington, Indiana, Human Rights Commission.

177. Dombrowski v. Star Paper Co., Civ. No. N-76-128 (D.C. Conn., filed April 15, 1976). *But see* Blair v. Xerox Co., Case No. VI-CS-3189-75, C-101-75 (N.Y.S. Div. of Human Rights, filed Feb. 16, 1977) and Helfant v. Chase Manhattan Bank & Metropolitan Life Ins. Co., Case No. Ia-CSF-1889-73, CSF-29616-73 (N.Y.S. Div. of Human Rights, filed April 4, 1973), where defendant insurer successfully resisted Human Rights Division's assertion of jurisdiction over its action as an insurer. Some plaintiff (and defendant) lawyers believe that if an insurer refused to sell a policy with pregnancy coverage to an employer, the insurer might be liable under the "aid and abet" theory, but we know of no case which has asserted these particulars.

178. Stathopoulos v. American Family Ins. Co., Docket No. 0194 (Bloomington Human Rights Commission, Bloomington, Indiana, filed June 14, 1976).

179. *Id.*

hibited by the human rights laws or fair employment practices codes. The commissions therefore assert that they may prosecute discrimination actions against companies doing business within the state or locality.

The industry has clear and supportable objections, in the interests of the public and fair regulation, to this recent trend. First, group insurance contracts do not create or imply an agency relationship between employer and insurers, beyond what is expressed or reasonably implied in the contract. The insurer pays benefits and collects premiums; the group policyholder bargains with the insurer for the package of benefits most advantageous to the group. Attempting to construe an intent within the contract that the insurer, as the agent of the employer, should deny benefits to pregnant women employees on behalf of the employer, is to disregard the realities of the insurance negotiating process and the legal relationship of the insurer and group policyholder. It is the employer who assumes the "responsibility of negotiating the contract and ascertaining that its terms were proper."[180] As noted in Section II *supra*, many insurers have maternity and pregnancy coverage as optional coverages for their group customers to choose. The employers' decision to purchase maternity or pregnancy coverage is motivated not by prejudice or ignorance but by the cost of the coverage relative to the benefit received by the entire group. In groups where benefits are obtained through collective bargaining, the preferences of the group are even more specifically expressed. Exclusion of pregnancy coverage is not an act of discrimination which an insurer as an agent performs for a group policyholder as a principle, but rather, a contract provision. The insurer supplies a product for the employer's use. The acts that normally trigger a finding that sex discrimination laws have been violated are not to be found in contract language, and the insurer has no power to act with respect to that contract other than in the manner prescribed by the terms of the contract, and by the insurance code. Insurers are clearly outside the scope of activity questioned by these commissions.

Second, most human rights commissions possess neither the personnel nor the expertise to evaluate an insurance contract to determine if its exclusion of pregnancy or maternity benefits does discriminate unfairly. Generally the commissions have merely based their charges on the act complained of by the charging party: "Respondent failed to compensate Complainant, otherwise qualified, equally with other employees doing the same or similar work, because of her sex, female-pregnant."[181] This standard language is entirely appropriate for a situation where a female employee is denied employment, advancement or seniority. It is not at all relevant to a case where an employer has decided not to cover maternity benefits in its group health insurance program. A fair analysis of such a benefit exclusion in a contract would entail extensive prepara-

180. E. FAULKNER, HEALTH INSURANCE 203 (1960).
181. Clifford v. Board of County Comm'rs, Complaint No. E-193-D(6-7) (Colorado Civil Rights Commission, filed Nov. 9, 1976).

tion, study and understanding of insurance principles. We are not aware that human rights commissions, in general, have been willing to make the effort to understand or are capable of understanding the insurance side of this "complex issue."[182]

Third, the purpose of administrative agencies is to regulate certain conduct through specialized knowledge and expeditious action.[183] State insurance departments have comprehensive jurisdiction over insurance transactions.[184] Human rights commissions have no such statutory directive, nor do they have the needed expertise and experience to evaluate what is or is not sound insurance practice. This holds true not only in group insurance contract problems but in sales of individual policies as well, where the insurance company might be cited directly as a party.[185]

Finally, there is great concern among insurers regarding possible conflicts, both horizontal and vertical, within the state regulatory structure. We are aware of citations against insurance companies issued by state human rights commissions and by municipal human rights commissions.[186] We are aware of cases where an insurance department has asserted its jurisdiction over a case as one involving an insurance contract and a similar case where the insurance department abdicated, in effect, its jurisdiction.[187] It takes little imagination to picture the legal and practical confusion caused if these two administrative agencies pursue the same case and reach opposite conclusions.

Insurance departments and the National Association of Insurance Commissioners have taken important and positive steps to remove unfair discrimination from the insurance process but within the context of the operation of that process.[188] These efforts have had the support of the industry, through its trade associations.[189] Intrusion of human rights commissions into this work only obfuscates the precise issues involved, and ultimately delays the implementation of reasonable and effective regulation, not only of insurance, but those assuring human rights as well.

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182. *See* Section VII *supra.*

183. JAFFE, ADMINISTRATIVE LAW 4 (1965).

184. *See, e.g.*, WASH. REV. CODE § 48.01.020 (1961), which states in part: "All insurance and insurance transactions in the state or affecting subjects located wholly or in part or to be performed in the state and all persons having to do therewith are governed by this [insurance] code."

185. Moss v. North Am. Life & Cas. Ins. Co., Case No. T-IS-13-74 (Washington State Human Rights Commission, *complaint filed* Nov. 7, 1973, *complaint dismissed* Dec. 3, 1976) and Stathopoulos v. American Family Ins. Co., Docket No. 0194 (Bloomington Human Rights Commission, Bloomington, Indiana, filed June 14, 1976).

186. *See* note 178 *supra.*

187. *Compare* Moss v. North Am. Life & Cas. Ins. Co., Case No. T-IS-13-74 (Washington State Human Rights Commission, *complaint filed* Nov. 7, 1973, *complaint dismissed* Dec. 3, 1976) *with* Stathopoulos v. American Family Ins. Co., Docket No. 0194 (Bloomington Human Rights Commission, Bloomington, Indiana, filed June 14, 1976).

188. *See* Section III *supra.*

189. HIAA-ALIA Board of Directors Resolutions of April, 1974, Minutes of Board Meeting on April 28, 1974, and Minutes of ALIA Board Meeting on May 23, 1974. *See* note 16 *supra.*

VII. Federal Maternity Legislation

Many persons considered that the United States Supreme Court's decision in *General Electric* constituted an invitation for introduction of federal mandatory maternity legislation.[190] Accordingly, it was not surprising that in early 1977 two bills were introduced in the United States Congress to amend Title VII of the Civil Rights Act of 1964.[191] H.R. 5055 and S. 995 would require employers subject to Title VII to provide disability and medical expense benefits for pregnancy on the same basis as benefits are provided for illness or accident.[192]

To lessen the severe cost impact of such legislation,[193] the life and health insurance industry recommended the following amendments to the bills: a) to remove the mandate that medical expense benefits be provided on the same basis as coverage for sickness or injury, but to require that female employees be covered at the same benefit levels as those provided for dependents of male employees; b) to require that all complications of pregnancy be treated like sickness or injury under both medical expense and disability plans; c) to require only limited benefits of up to six weeks for normal pregnancy in disability coverage; d) to allow employers to limit benefits for normal pregnancy to pregnancies occurring after the employee is covered by the benefit plan.[194]

Because H.R. 5055 and S. 995 have such broad support,[195] it is expected that they will be enacted in some form. Nevertheless, it is impossible to predict whether the amendments suggested by the American Council of Life Insurance and the Health Insurance Association of America will be adopted. Enactment of such federal legislation could, but probably will not, include preemption by Congress of the field of pregnancy and maternity benefits in employee benefit plans.[196] However, if this field is not clearly and explicitly preempted by Congress, then each state may likewise legislate in the field as long as such legisla-

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190. *See* text accompanying notes 124-49 *supra* for a discussion of Gilbert v. General Elec. Co., 97 S. Ct. 401 (1976).

191. H.R. 5055, 95th Cong., 1st Sess. (1977); S. 995, 95th Cong., 1st Sess. (1977).

192. H.R. 5055, 95th Cong., 1st Sess. (1977); S. 995, 95th Cong., 1st Sess. (1977).

193. The additional annual costs of providing these benefits are estimated to be $1.0 billion for medical expense plans (excluding Blue Cross-type plans) and $0.6 billion for disability income plans. Statement by Alan E. Lazarescu, Assistant General Counsel, Metropolitan Life Insurance Company, *Statement of the American Council of Life Insurance and the Health Insurance Association of America on Senate Bill 995*, before the United States Senate Labor Subcommittee of the Committee on Human Resources, April 29, 1977.

194. *Id.*

195. H.R. 5055 had 86 co-sponsors and S. 995 had six co-sponsors.

196. It seems unlikely that the states would be preempted by Congress from exercising their police powers regarding coverage of maternity benefits in employee benefit plans. 42 U.S.C. § 2000e-7 appears to prevent such preemption. 42 U.S.C. § 2000e-7 (Supp. II 1972). In essence § 2000e-7 as interpreted by federal and state courts appears intended to preserve state laws which parallel Subchapter VI of Title VII on equal employment opportunities. *See, e.g.*, Local 246, Utility Workers Union of Am., AFL-CIO v. Southern Cal. Edison Co., 320 F. Supp. 1262 (D.C. Cal. 1970); Weeks v. Southern Bell T. & T. Co., 277 F. Supp. 117 (S.D. Ga. 1967), *aff'd in part, rev'd in part on other grounds*, 408 F.2d 228 (5th Cir. 1969).

tion is consistent with federal law.[197] The result of similar federal and state statutes regarding pregnancy coverage under employment plans would be a surplus of laws on the subject.

VIII. Conclusion

It is evident that the issue of mandating inclusion of maternity benefits in health insurance contracts has been caught up in the larger debate over women's rights. Legislative activity at the state and federal level affecting this issue and the ill-considered nature of some of it have inevitably driven private insurers to the courts. It is there, after all, where our system is intended to provide the best chance for a litigant with an unpopular cause, especially when the question to be decided is fraught with emotion as here.

The very nature of private insurance, which is based upon classification of risks, lends itself to the charge of unfair discrimination by any who espouse a cause which is limited or excluded by the system. It is often overlooked by reformers that private insurance is a competitive business based upon principles which guarantee its soundness, but without protection of those principles, the business can be a fragile and vulnerable vehicle. Although it has proved to be remarkably flexible, private insurance can never equal social programs in responding to the social goals of the moment because government-sponsored plans need not be concerned with either profit or liquidity—as long as the taxpayers remain merely sullen, not mutinous.

Against this background, our review of state and federal government action related to mandatory maternity benefits in health insurance contracts has led us to the following conclusions:

a) The very nature of pregnancy renders it an uninsurable risk in the standard sense of the term. Insurers do provide maternity coverage for normal deliveries with limits to minimize adverse selection and to set accurate rates, while complications of pregnancy are generally fully covered because they resemble true insurable illnesses. Mandated maternity coverage has several negative consequences, including depriving consumers of the right to choose what benefits are most appropriate for their needs.

b) Both pending state maternity bills and enacted laws are striking examples of the apparently endless variety of mandatory coverages which legislators are imposing on the private health insurance industry, which is already overloaded by state regulation. Even if such legislation is directed at employers, the result is still extensive cost with questionable benefit to anyone, including pregnant women who may be in more need of other important health insurance benefits.

c) Because of the fact that an NAIC model sex discrimination regulation exists, which key states such as New York, New Jersey and Pennsylvania have

197. 42 U.S.C. § 2000e-7 (Supp. II 1972).

adopted, private health insurers have revised their underwriting practices regarding maternity coverage.

d) Even with the anticipated passage of a federal mandatory pregnancy disability law aimed at employers, it is most likely that many states will enact overlapping and redundant laws of varied designs on the same subject.

e) State and federal courts which have considered the question of whether exclusion of maternity benefits from employee fringe benefit plans violated equal employment laws have split on the issue. The United States Supreme Court has considered such an exclusion, when placed in an insurance context, not unfairly discriminatory on its face or in its effect against women. Some state courts have agreed with lower federal courts that a maternity benefit exclusion violated equal protection standards and have rejected arguments that the cost of the coverage far outweighs the benefit derived.

f) State and local human rights commissions have cited insurers when their group contracts exclude maternity coverage. These commissions have neither the jurisdiction nor the expertise to regulate insurance contracts, and create a potential for regulatory conflict.

An examination of this issue must be viewed in the light of the currently changing social values regarding the rights of women. In this context, it is entirely understandable that when a private insurance reimbursement system is under general review by governmental bodies, the traditional exclusion or limitation of coverage for the expenses of the universal experience of maternity is a most visible, obvious and emotional target. The issue which is raised is classic in that it offers an almost perfect example of a practice that appears fair and reasonable when viewed against the accepted business principles, particularly that of classifying risks, as opposed to the general public demands of a changing social policy. It is our belief that reasonable business goals and fair social change can both be accommodated with respect to mandatory maternity coverage. The genius of our governmental system is accommodation between competing values rather than the elimination of either, unless one of the fundamental rights in our constitution is necessarily involved.

It now appears that Congress may enact legislation which will negate the effect of the *Gilbert* case. Employers subject to Title VII of the Civil Rights Act then would have to provide maternity benefits in both disability and medical expense plans. If the mandated benefits were confined to temporary disability benefits and properly limited the duration of covered disability, this solution would remain costly but would accomplish its purpose without undue disruption of the insurance process, since the bill applies to employers and not to insurance contracts. There is every prospect that this enactment, if it takes place, will not be so limited. In addition, there is strong evidence that state legislatures will continue the patchwork approach to mandating maternity benefits coverage which has been outlined *supra*, often imposing unreasonable man-

datory requirements directly upon insurers, even with respect to individual contracts where such impact is particularly bizarre.

These circumstances show that consideration should be given to federal preemption of maternity benefits requirements for the sake of uniformity of regulation in this sensitive area. For example, passage of reasonable national health insurance legislation such as the Burleson-McIntyre proposal[198] would incorporate full maternity coverage on a nationwide basis, allowing a wide risk distribution that would lessen the adverse selection and cost impact factors currently at work in less-than-comprehensive laws. Until this development is realized, mandatory maternity coverage will continue to pose serious problems for insurers and insureds.

198. S. 5, 95th Cong., 1st Sess. (1977); H.R. 5, 95th Cong., 1st Sess. (1977).

THE CONSTITUTIONALITY OF NO-FAULT INSURANCE: THE COURTS SPEAK

George J. Siedel III†

No fault automobile legislation has been enacted in twenty-four states and covers over half the population of the United States.[1] Shortly after Massachusetts enacted the first no-fault statute, effective January 1, 1971,[2] the Supreme Judicial Court of Massachusetts reviewed the constitutionality of the legislation in *Pinnick v. Cleary*[3] and by late 1976, appellate courts in nine other states had considered the constitutionality of no-fault legislation.[4] The purpose of this article is to review and compare those appellate decisions.

In Part I, existing no-fault legislation will be briefly summarized. Part II will focus on the threshold question faced by many courts: What constitutional tests are to be applied in due process and equal protection challenges. In parts III, IV and V, the constitutionality of three basic no-fault reforms—mandatory first party insurance and limitations on personal injury and property damage actions—will be examined. Challenges to no-fault legislation based on "vagueness" will be summarized in Part VI. In the conclusion, a summary will be made of no-fault provisions considered by appellate courts to be constitutionally invalid.

I. No-Fault Legislation

Of the twenty-four states which have enacted no-fault legislation[5] sixteen are "true" no-fault states[6] in that the legislation limits the right of the automo-

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1. No-fault legislation has been enacted in Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Yo·k, North Dakota, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, Utah and Virginia.

2. Mass. Gen. Laws Ann. ch. 90, §§ 34*A*, 34*D*, 34*H*, 34*K*, 34*M*, 34*O*; ch. 231, § 6*D* (West Supp. 1977).

3. 360 Mass. 1, 271 N.E.2d 592 (1971).

4. Connecticut, Florida, Illinois, Kansas, Kentucky, Michigan, New Hampshire, New York and Pennsylvania.

5. *See* note 1 *supra*. Federal no-fault insurance legislation has not been enacted. The federal no-fault proposal which has come the closest to enactment, S. 354, was passed by the Senate in 1974 but subsequently died in a House committee at the end of the session. This bill provided that states would have two years to adopt no-fault systems in compliance with national standards. Any state which did not comply with the national standards would fall under a federal no-fault system which would go beyond any state legislation enacted to date in requiring unlimited benefits for work loss and no tort recovery for pain and suffering. S. 354, 93d Cong., 2d Sess. (1974).

6. Colo. Rev. Stat. §§ 10-4-701 to -723 (1973); Conn. Gen. Stat. Ann. §§ 38-319 to -351a (West Supp. 1976) Fla. Stat. Ann. §§ 627.730-.741 (West 1972) (repealed