MINUTES

MONTANA SENATE
51st LEGISLATURE - REGULAR SESSION

COMMITTEE ON BUSINESS AND INDUSTRY

Call to Order: By Chairman Gene Thayer, on February 1, 1989, at 10:00 a.m. in room 325, State Capitol

ROLL CALL

Members Present: Chairman Thayer, Vice Chairman Meyer, Senator Boylan, Senator Noble, Senator Williams, Senator Hager, Senator McLane, Senator Weeding, Senator Lynch

Members Excused: None

Members Absent: None

Staff Present: Mary McCue, Legislative Council

Announcements/Discussion: Chairman Thayer announced, "Proponents will have 45 minutes and the opponents 45 minutes in which to present their testimony. Senator Williams has requested 5 min. to close. The hearing will close at 12:00 noon. Also, because of travel conditions, we will be allowing people to submit written testimony for committee members to review. On Monday, the 4th of February, we will be taking executive action. There will not be a second hearing, but interested parties may be present for questioning by the committee."

HEARING ON SENATE BILL 205

PresePresentation and Opening Statement by Sponsor: Senator Bob Williams, Senate District 15, said he was pleased to be the chief sponsor of SB 205, but there were other Legislators sponsoring it also. He said he hoped his testimony would convince the committee that SB 205 should become law. He said passage of SB 205 would repeal what he considered an experiment that did not live up to its expectations. He said the only fair and equitable way to serve the insurance buying public in Montana was to rejoin the rest of the nation and base our insurance rates on risk rather than the emotions of unisex. He stated that not only had unisex

insurance legislation not worked, but according to the Commissioner of Insurance, it had caused a decrease of 37% in the amount of products available in Montana. He said, two years ago we passed a similar piece of legislation only to have the Governor veto the bill. He read the veto message and it stated, the evidence was clear and conclusive that statutory implementation of non-gender insurance in 1985 had significantly increased the cost of insurance for many women. It also said, that was not the issue. The legislature and the Governor found, for various reasons, why he declared it unconstitutional. He stated they would show why articles in section 4 of the Montana Constitution should not stop the passage of SB 205. He said there were numerous states who had proposed unisex laws, and the only state that passed it through the legislature was the state of Montana. (See Exhibit #2)

List of Testifying Proponents and What Group They Represent:

Helen O'Connell, House District 40, Cascade, Montana
Judy Mitel, State Farm Insurance
Reggie Good - President, Montana Association of Life Underwriters, Great Falls, Montana
Jacqueline Terrell - American Insurance Association
Harp Cote - General Manager, New York Life Insurance
Suzanne Shaffer - Insurance sales person, Helena, Montana
Lorna Frank - Montana Farm Bureau Federation
Lori Hamm - Business owner, Helena, Montana
Kim Enkerud - Montana Cattlewomen's Association
Montana Stockgrowers Association
Kay Norenberg - W.I.F.E.

List of Testifying Opponents and What Group They Represent:

Brenda Nordlund - Montana Women's Lobby Coalition - Marsha Youngman Testimony
Mike Maloy - Attorney, Helena, Montana
Tayna Ask - Montana Insurance Department
Dr. Karen Landers - Montana Council for Maternal & Child Health
Kathy Van Hook - National Organization For Women, Incorporated - Sharon Eisenberg Testimony
Margaret Davis - League of Women Voters, Helena, Montana
Paulette Bailey - Diana Talcott Testimony, Business Owner and Consumer

Non-Testifying Written Statements

Sue Steyh - Self, Bozeman, Montana (Exhibit #18)
Norma Boetel - Montana Federation of Business Women, Bozeman, Montana (Exhibit #20)
Kevin Shores - Self, Cameron, Montana (Exhibit #23)
Martha Newell - Self, Missoula, Montana (Exhibit #23)
Kathy Ames - John Hancock Insurance (Exhibit #24)
American Civil Liberties Union (Exhibit #25)

Testimony: Representative Helen O'Connell, House District 40, house sponsor of SB 205, stated she would speak on the repeal of the unisex law. She said, "In 1985 there was an unsuccessful attempt to defuse unisex before it went into effect. Perhaps the original intent of unisex was to prevent discrimination based on sex or marital status, but in reality, thousands were victimized by the discriminatory nature of its laws. By and large insurance rates increased for women, while risks for males decreased. This is discriminatory by any definition. She said parents of teenage daughters, young ladies trying to go to school, young married couples, some parents of young children, people who could not afford to carry insurance, but because of Montana law, one has to carry liability insurance. So many are now taking their insurance with out of state companies. Many can no longer afford liability insurance."

"Let's correct whatever mistakes were made in 1983 and repeal this unisex law."

Judy Mitel presented testimony prepared by State Farm Mutual. (See Exhibit #17)

Reginald J. Good presented his written testimony. (See Exhibit #5)

Jacqueline Terrell read written testimony and urged a do pass for SB 205. (See Exhibit #6)

Harp Cote said, in 1949, when he started with New York Life Ins. Co., they had insurance like what this legislation is trying to ban. It was a unisex industry 40 years ago. Everybody had unisex insurance. He said he had only one rate book, and took all the rates for everyone from that one book. As the industry became more scientific and modern, the actuaries began to compute figures which made them realize the system wasn't fair. Women had to pay the same rates as men, even though their life expectancy was longer. Forty years ago,

they lived three to five years longer, and now seven years longer.

The opponents of SB 205 would say other races of people had different life expectancies, and were rated the same. Actuaries have proven, under the same circumstances the same environment, blacks and Indians would live as long as whites, and their rates should be the same. They know women will live longer, and they also know, women between 18 and 40 have more health problems, so that age group is charged more. From age 40 on, women are charged less because they have less health problems than men. He stated it was a fact men have more stress, and more heart attacks. He said, insurance rates cannot be derived from emotions, because there are scientific facts that apply to people of each gender. If it were fair to women to consider them equal to men as far as risks were concerned, then so be it. He said women were being punished, because actuaries show them to be less of a risk. He urged the committee to pass SB 205, and let the insurance industry utilize their factual knowledge, instead of emotion, to set rates in Montana.

Suzanne Shaffer testified on behalf of SB 205, and said she would like to add her remarks on the effect of the unisex law on health insurance. (See Exhibit #7)

Lorna Frank said Farm Bureau supported SB 205, and urged a do pass recommendation. (See Exhibit #8)

Lori Hamm said she had appeared before the committee four years ago, and urged its members to repeal the, so called, unisex law. She stated her reasoning and philosophy for opposition hadn't changed. She said her gut level response was even more strongly opposed to the unfair, unjustified, and unnecessary law.

She felt there was a difference between discrimination and distinction. She said, we discriminate on the basis of age, sex, color, religion, or whatever, with the action being based on personal feelings rather than facts. She stated there were times when the same conditions did have factual, statistical, provable distinction. Women, on the average: live longer than men; teenage girls: on the average, have better driving habits than teenage boys; adults are better drivers than teenagers. Women tend to have more medical problems during certain periods of their lives than men. The unisex insurance bill has made it impossible for a consumer to purchase insurance

based on reality, the real cost of providing that commodity.

She stated, the unisex issue had been a political football for too long, and the score is decidedly in favor of narrow, special interest groups, that don't care how this bill has effected the average Montanan. She urged support of SB 205 and let the free enterprise system work.

Kim Enkerud stated her support of SB 205 and urged it's passage. (See Exhibit #9)

Kay Norenberg, affiliated with W.I.F.E., wanted to go on record in support of SB 205.

Brenda Nordlund appeared in opposition to Sb 205. She said she was representing Marcia Youngman, Director of the National Clearinghouse for Ending Sex Discrimination in Insurance, a project of the Montana Women's Lobby (See Exhibit #10).

Mike Maloy, said he appeared in opposition to SB 205 for reasons he had given at prior occasions. He said, if someone challenged the use of gender based rates prior to this legislative action of 1983, they would prevail in Montana. He said, because of Montana's new constitution, if Montana went back to a gender based rate schedule, a challenge to that change would probably be successful.

Tayna Ask appeared to give testimony against SB 205 on behalf of The State Auditor's Office. (See Exhibits #11, #12, #13, #14, #16, & #17)

Karen Landers said she opposed SB 205, and presented written testimony. (See Exhibit #14)

Kathy VanHook said she was there to read testimony for Sharon Eisenberg. (See Exhibit #22)

Paulette Bailey presented testimony, prepared by Diana Talcott, in opposition to SB 205. (See Exhibit #15)

Chairman Thayer thanked all who testified, and explained that executive action would be at 11:00 a.m. on the following Monday. All written material, from those who couldn't be at the hearing, should be submitted to the secretary, and it will be given to committee members. Anyone who wishes to make themselves available for questions at the executive action session, are welcome to be present.

Questions From Committee Members: Senator Lynch asked, if not having a unisex law was unconstitutional, why hadn't the states, who don't have unisex laws, been challenged? Ms. Nordlund said, if she understood the testimony correctly, it was because they cannot delete certain requirements of the U.S. constitution.

Senator Lynch asked Harp Cote to respond in regard to selling health insurance. Mr. Cody said they went out of the health insurance business when the unisex laws went into effect in 1985. They had began selling income disability policies. It was the same policy that was sold in 43 other states, all at the same rates.

Senator Weeding asked if the passage of SB 205 would affect group policies? Tom Hopgood stated it wouldn't because group insurance did not differentiate gender.

Senator Noble asked Reggie Good, if he thought this law was forcing women to go to out of state companies to buy insurance, why would it cost any less than buying in state? Mr. Good stated he knew of instances where life insurance policies, on female insurers, had been purchased with the application stating the policies were applied for in neighboring states. The reason they were purchased was because of the cost of that life insurance was lower using gender based insurance products available in neighboring states. This had been done, he said, both legally and illegally.

Senator Noble stated that Mr. Good had said life insurance premiums were higher in Montana, and someone else had said, that was not the case. He asked Mr. Good to defend his position. Mr. Good replied, when the non-gender based law was put into effect, the law stated, the insurance companies had to charge the same price to individuals for the same products. It did not say to come up with a blend based on all who were involved. In the majority of instances, life insurance policies in the state of Montana, women had their premium raised to the straight male rate. The affect was increased cost to Montana consumers, and windfall to the insurance companies.

Closing by Sponsor: Senator Williams stated the opposition to SB 205 represented approximately 1% of the population of Montana, and as an elected official he felt he should represent 100% of the state. The testimony, presented by the proponents of SB 205 was presented in the most straight forward manner that they would witness in a hearing. He assured the committee

the would not be so strongly in support of the passage of SB 205 if he did not believe the facts and figures of the day were firm. He read the conclusion of a report compiled by Montana Commissioners of Insurance office.

The conclusions were concerning automobile premiums between 1985 and 1988. The average premium decreased for a 20 year old male by 7%, while the average premium increased for a 20 year old female 63%. The average decrease for 40 year old males was 22% while females of 40 years increased 23%. The premium change for a 45 year old couple with a 16 year old son had a 9% increase, while the 45 year old couple with a 16 year old daughter had a 49% increase. He said the insurance buyers in Montana were spending millions of unnecessary dollars every year just so a small special interest group can prove a point.

He said the Supreme Court of Montana wasn't a bit bashful, and the legislature shouldn't be concerned over constitutional legalities of SB 205. The Supreme Court would rule on the decision if it were necessary. He thanked the committee for their time, and urged a do pass on SB 205.

DISPOSITION OF SENATE BILL 205

Discussion: None

Amendments and Votes: None

Recommendation and Vote: None

ADJOURNMENT

Adjournment At: 12:05

SENATOR GENE THAYER, Chairman

GT/ct

ROLL CALL

BUSINESS & INDUSTRY COMMITTEE

DATE 2/1/89

51st LEGISLATIVE SESSION 1989

NAME	PRESENT	ABSENT	EXCUSED
SENATOR DARRYL MEYER	✓		
SENATOR PAUL BOYLAN	✓		
SENATOR JERRY NOBLE	✓		
SENATOR BOB WILLIAMS	✓		
SENATOR TOM HAGER	✓		
SENATOR HARRY MC LANE	✓		
SENATOR CECIL WEEDING	✓		
SENATOR JOHN"J.D."LYNCH	✓		
SENATOR GENE THAYER	✓		

Each day attach to minutes.

EXHIBITS WERE MISNUMBERED. THERE IS NO EXHIBIT NO. 1 FOR THIS DAY.

SENATE BUSINESS & INDUSTRY
EXHIBIT NO. 2
DATE 2/1/89
BILL NO. SB205

Bill Summary
Business & Industry
February 1, 1989

Prepared by Mary McCue

SB 205: This bill repeals the unisex insurance statute, section 49-2-309, MCA.

> **49-2-309. Discrimination in insurance and retirement plans.** (1) It is an unlawful discriminatory practice for any financial institution or person to discriminate solely on the basis of sex or marital status in the ~~issuance or~~ operation of any type of insurance policy, plan, or coverage or in any pension or retirement plan, program, or coverage, including discrimination in regard to rates or premiums and payments or benefits.
>
> (2) This section does not apply to any insurance policy, plan, coverage, or any pension or retirement plan, program, or coverage in effect prior to October 1, 1985.

It replaces the present law with language that prohibits an insurer from refusing to insure or limiting the amount of insurance coverage on the basis of sex or marital status. The bill allows an insurer to consider sex and marital status when setting rates for insurance if the insurer can show differences in risk or exposure.

SENATE BUSINESS & INDUSTRY
EXHIBIT NO. 3
DATE 2/1/89
BILL NO. SB 205

STATEMENT OF STATE FARM MUTUAL

AUTOMOBILE INSURANCE COMPANY

IN SUPPORT OF MONTANA SENATE BILL NO. 205

State Farm represents more than 150,000 auto insurance policyholders and approximately 14,000 ordinary life insurance policyholders in Montana. We also have a significant number of agents and employees who live and work in this state.

State Farm supports Senate Bill No. 205. The bill will eliminate the rate increases required by the 1985 Montana "Unisex" law for a number of our insureds and it is likely to increase the amount of competition in the insurance market in Montana. The proposal will also increase fairness and equity in insurance rating. Certainly, the proposed bill will be of financial benefit to many women.

The major argument of the opponents of this bill is that the use of sex and marital status are "socially unacceptable" as insurance rating criteria. There is no question that we do have a responsibility to consider the civil rights implications of the use of sex and marital status in making distinctions. There has been a healthy and positive move in this country to discourage discrimination based on these classifications when there are other bases for distinguishing between individuals within the

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class. For example, a woman's application to do construction work or become a firefighter should not be refused if she can demonstrate that she has adequate physical ability to do the work. But insurance rating presents an entirely different situation. Evaluating a job applicant and predicting an individual's future loss potential are not analogous tasks. It is an inherent characteristic of insurance that we have to look at large groups in order to get accurate pricing for individuals. In the insurance context the use of an actuarial analysis of group experience results in more individualized treatment, not less. Nor is the use of these rating classifications based on stereotypes and prejudice. It is based on actual historical costs.

Pricing insurance is a prediction of the future. Insurance companies must establish a price for our product in advance of any absolute knowledge of the cost of delivering it to a specific individual. Thus, the pricing system is based on the proposition that each policyholder should pay an amount proportionate to the risk of loss that he or she presents. This amount can only be determined by an actuarial analysis of group experience.

It is ironic that the elimination of sex and marital status in automobile and life insurance rating (the major lines sold by State Farm in Montana) inure most to the benefit of men. If you ask a member of the public whether sex and marital status should

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be used as insurance rating criteria, the answer to that question would probably be "no." But what if you asked the same members of the public whether older drivers, married drivers, female drivers and the elderly should help pay the costs of accidents caused by young, single male drivers? Most people answer "no" to this question also.

There is no doubt that young, unmarried men are much more accident prone than any other group. The effects of sex and marital status show up clearly in insurance company claim figures. For example, State Farm received 94 property damage liability claims per 1,000 insured vehicles driven principally by unmarried young males; 80 claims per 1,000 insured vehicles driven by young unmarried females; 55 claims per 1,000 from young married men and 35 claims per 1,000 from adults. Young single male drivers also tend to have more expensive accidents. The average property damage claim for cars driven by young single males was 18% more costly to State Farm than the average adult claim. The fact that young men are more accident prone than any other group is also confirmed by statistics collected outside the insurance industry. For example, studies by the California Department of Motor Vehicles show a significantly greater accident involvement by young, unmarried men.

If the sex and marital status of the driver are once again allowed to be used as rating factors, there will be changes in

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State Farm's auto rates that could involve rate decreases of 18% or $108 for some young women. Young married men will also benefit and may enjoy rate decreases of more than $132. The likely effects on State Farm rates are summarized in the attachments to this statement.

These rate changes represent only the short term benefits of moving back to cost-based pricing of insurance in Montana. Other results may include the elimination of adverse marketplace effects caused by the current prohibitions. The exact impact of the unisex law in Montana is difficult to analyze, however, Montana's experience with its unisex law indicates that some market effects may have been created which now could be eliminated. The potential positive long-term benefits are:

1. An decrease in the average price of insurance in general;

2. Some companies that may have avoided selling auto and life insurance to men and that were encouraged to focus marketing efforts to the exclusion of one group or another will once again compete in the entire market.

3. The number of uninsured drivers may decrease. As the premiums for certain people decrease, some of them will be able to purchase it once again.

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4. The number of uninsured people will decrease. An underinsured person is one who does not have enough insurance to cover the injured person's damages. As premiums decrease for certain persons, many will be able to buy more insurance.

5. Increased regulatory efforts and costs to assure reasonable rates and equal availability of insurance can be relaxed. In other states that have prohibited sex and marital status as rating criteria in auto insurance, governments have attempted to regulate rates and restrict insurers' ability to underwrite. The lesson from the experience in other states it that once the government heads down this particular regulatory road there is no end to the process if it is to carry out its mandate for social rather than economic pricing.

Unisex insurance laws have been considered and rejected by the U.S. Congress and several other state legislatures. No state except Montana has implemented a unisex insurance law in the last five years.

Opponents of the bill argue that other classifications can be successfully substituted for sex. The commonly suggested alternatives are driving record and miles driven. These alternative rate classifications have been thoroughly analyzed

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and will not work. Mileage is not an effective substitute for sex since females have a demonstrably lower accident rate than males within each category of miles driven. Driving record is not a sufficient substitute for either sex or marital status, even though more income is generated through accident and violation surcharges from young males than any other group, because the amount of accident surcharge would have to be unreasonably large to generate the same amount of premium. Many authorities believe that exclusive reliance on driving record as an auto insurance rate classification could work only if a time span of 10 to 20 years is used and inexperienced drivers are classified toward the top of the rating scale. Use of driving record is also dependent on law enforcement practices and record keeping within the jurisdiction.

Rating based strictly on accident or violation involvement is not statistically justified. Some proponents argue that premiums should be calculated only on the basis of actual individual experience for traffic violations or accident involvement. But the typical auto, insured for all coverages, will generate an insurance claim of some kind only once every seven to twelve years. Also, the quality of Department of Motor Vehicle records varies widely from state to state and no state has complete records accessible for the necessary time period. The occurrence of accidents and violations is a useful predictor of the likelihood of future loss. However, the absence of an accident

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or traffic violation on an insured's record does not fully reflect that the person is a relatively safe driver. Correlation to future loss based on sex, marital status and other factors are much greater and are necessary to achieve accuracy in pricing.

The legislature and the courts and public must at some point decide what are fair practices in the context of insurance rating. There are no objective tests which can differentiate with certainty an individual's insurance risk from that of a group with similar risk characteristics. It is precisely this uncertainty that leads to the need for insurance. If the analysis of group experience to set rates is determined to be "socially unacceptable" then this simply means that the sale of insurance is also socially unacceptable. Therefore, some aspects of fair practices applicable in other contexts may not be appropriate or possible in the insurance context. It is the position of the State Farm Insurance Companies that insured individuals are treated fairly if they are charged prices which reflect the value of the risk they transfer to the insurance pool. We believe that this is true not simply as a matter of theoretical preference, but as an important condition to the sound operation of insurance programs. Determining the value of the risks transferred necessarily involves the use of averages and classification variables, making the use of ~~averages and class groups essential~~ to the insurance business. Consideration

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of what is fair or unfair should take place within this conceptual framework.

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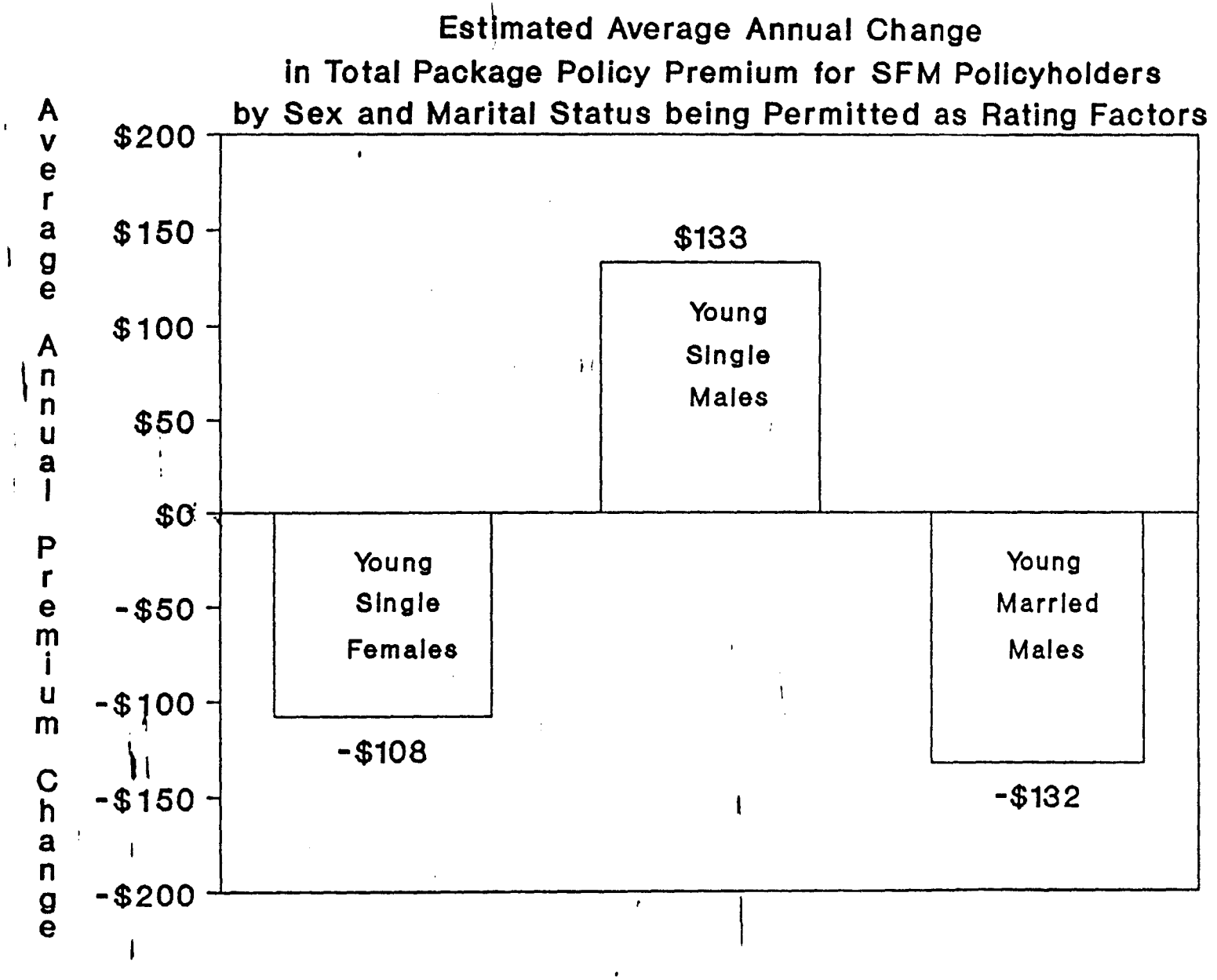
Estimated Average Annual Change
in Total Package Policy Premium for SFM Policyholders
by Sex and Marital Status being Permitted as Rating Factors
Average Annual Premium Change
$200
$150
$100
$50
$0
-$50
-$100
-$150
-$200
$133
Young
Single
Males
Young
Single
Females
-$108
Young
Married
Males
-$132

Ex. 3
2/1/87

MONTANA

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, BLOOMINGTON, ILLINOIS

Examples of the Effect of Permitting Sex of Driver as a Rating Factor

	Single Female Age 16-18 Principal Driver				Single Male Age 16-18 Principal Driver			
	Current Unisex Premium	Approximate Annual Change	Approximate Annual Premium*	% Change	Current Unisex Premium	Approximate Annual Change	Approximate Annual Premium*	% Change
Billings	$1,224	-$361	$863	-29%	$1,224	+$145	$1,369	+12%
Helena	1,213	- 357	856	-29	1,213	+ 144	1,357	+12
Missoula	1,036	- 305	731	-29	1,036	+ 123	1,159	+12

These examples are for a 1987 Ford Escort GL 2 door, with the following coverages:

25/50/25 BIPD Liability
$5,000 Medical Payments
Full Comprehensive
$100 Deductible Collision
25/50 UM

* Reflects the Use of Sex and Marital Status of Driver as Rating Factors.

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MONTANA

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, BLOOMINGTON, ILLINOIS

Examples of the Effect of Permitting Sex of Driver as a Rating Factor

	Single Female Age 19,20 Principal Driver				Single Male Age 19,20 Principal Driver			
	Current Unisex Premium	Approximate Annual Change	Approximate Annual Premium*	% Change	Current Unisex Premium	Approximate Annual Change	Approximate Annual Premium*	% Change
Billings	$1,021	-$158	$863	-15%	$1,021	+$348	$1,369	+34%
Helena	1,012	- 156	856	-15	1,012	+ 345	1,357	+34
Missoula	865	- 134	731	-15	865	+ 294	1,159	+34

These examples are for a 1987 Ford Escort GL 2 door, with the following coverages:

25/50/25 BIPD Liability
$5,000 Medical Payments
Full Comprehensive
$100 Deductible Collision
25/50 UM

* Reflects the Use of Sex and Marital Status of Driver as Rating Factors.

Ex. 5

2/1/89

MONTANA

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, BLOOMINGTON, ILLINOIS

Examples of the Effect of Permitting Sex of Driver as a Rating Factor

	Single Female Age 21,22 Principal Driver				Single Male Age 21,22 Principal Driver			
	Current Unisex Premium	Approximate Annual Change	Approximate Annual Premium*	% Change	Current Unisex Premium	Approximate Annual Change	Approximate Annual Premium*	% Change
Billings	$737	-$171	$566	-23%	$737	+$55	$792	+7%
Helena	731	- 170	561	-23	731	+ 54	785	+7
Missoula	625	- 145	480	-23	625	+ 46	671	+7

These examples are for a 1987 Ford Escort GL 2 door, with the following coverages:

25/50/25 BIPD Liability
$5,000 Medical Payments
Full Comprehensive
$100 Deductible Collision
25/50 UM

* Reflects the Use of Sex and Marital Status of Driver as Rating Factors.

Ex. 3 2/1/89

MONTANA

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, BLOOMINGTON, ILLINOIS

Examples of the Effect of Permitting Marital Status of Driver as a Rating Factor

	Married Male Age 19,20 Principal Driver				Single Male Age 19,20 Principal Driver			
	Current Annual Premium	Approximate Annual Change	Approximate Annual Premium*	% Change	Current Annual Premium	Approximate Annual Change	Approximate Annual Premium*	% Change
Billings	$1,021	-$298	$723	-29%	$1,021	+$348	$1,369	+34%
Helena	1,012	- 295	717	-29	1,012	+ 345	1,357	+34
Missoula	865	- 252	613	-29	865	+ 294	1,159	+34

These examples are for a 1987 Ford Escort GL 2 door with the following coverages:

25/50/25 BIPD Liability
$5,000 Medical Payments
Full Comprehensive
$100 Deductible Collision
25/50 UM

* Reflects the Use of Sex and Marital Status of Driver as Rating Factors.

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MONTANA

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, BLOOMINGTON, ILLINOIS

Examples of the Effect of Permitting Marital Status of Driver as a Rating Factor

	Married Male Age 16-18 Principal Driver				Single Male Age 16-18 Principal Driver			
	Current Annual Premium	Approximate Annual Change	Approximate Annual Premium*	% Change	Current Annual Premium	Approximate Annual Change	Approximate Annual Premium*	% Change
Billings	$1,224	-$501	$723	-41%	$1,224	+$145	$1,369	+12%
Helena	1,213	- 496	717	-41	1,213	+ 144	1,357	+12
Missoula	1,036	- 423	613	-41	1,036	+ 123	1,159	+12

These examples are for a 1987 Ford Escort GL 2 door, with the following coverages:

25/50/25 BIPD Liability
$5,000 Medical Payments
Full Comprehensive
$100 Deductible Collision
25/50 UM

* Reflects the Use of Sex and Marital Status of Driver as Rating Factors.

Ex. 3
2/1/89

MONTANA

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, BLOOMINGTON, ILLINOIS

Examples of the Effect of Permitting Sex of Driver as a Rating Factor

	Single Female Age 23,24 Principal Driver				Single Male Age 23,24 Principal Driver			
	Current Unisex Premium	Approximate Annual Change	Approximate Annual Premium*	% Change	Current Unisex Premium	Approximate Annual Change	Approximate Annual Premium*	% Change
Billings	$636	-$70	$566	-11%	$636	+$156	$792	+25%
Helena	630	- 69	561	-11	630	+ 155	785	+25
Missoula	539	- 59	480	-11	539	+ 132	671	+24

These examples are for a 1987 Ford Escort GL 2 door, with the following coverages:

25/50/25 BIPD Liability
$5,000 Medical Payments
Full Comprehensive
$100 Deductible Collision
25/50 UM

* Reflects the Use of Sex and Marital Status of Driver as Rating Factors.

SEN'T
EXHIBIT 4
DATE 2/1/89
BILL NO. SB 205
Margaret Davis

LEAGUE OF WOMEN VOTERS OF MONTANA 1 FEB 89

Joy Bruck, president
1601 Illinois, Helena, Montana 59601

SB 205: An act to revise the laws relating to discrimination in insurance and retirement plans...

The League of Women Voters of Montana opposes SB 205.

Gender free insurance rates are appropriate to this state's strong protection of individual rights. Moreover, rolling back the non-gender insurance laws of Montana would not serve the interests of Montana consumers. For example, I am currently comparing various health coverage plans. As a person who is neither covered by employer benefits nor eligible for group plans, I learned that rates for individual commercial health policies have dropped an average of 16% since the adoption of the gender free insurance law. For someone in my age group, the average savings per year would be $153. Health coverage is particularly important for women because many work at full or parttime jobs that offer no or limited benefits.

Margaret S. Davis
816 Flowerree
Helena, Montana 59601
443-3487

SENATE BUSINESS & INDUSTRY
EXHIBIT NO. 5
DATE 2/1/89
BILL NO. SB 205

My name is Reginald J. Good. I am a Licensed Consultant in the areas of Life and Disability insurance. I am also a Chartered Life Underwriter (CLU), a Life Underwriter Training Council Fellow (LUTCF), and a Chartered Financial Consultant (ChFC). I am here today in my capacity as President of the Montana Association of Life Underwriters to represent them. Let me preface my remarks by pointing out that in the field of insurance, there are two separate realms. They are insurance on things and insurance on people. My comments will be restricted to the realm of people insurance, which includes life insurance, medical insurance, accident and health insurance, annuities, and other such products.

I'll start by quoting someone familiar to us all. "The evidence is clear and conclusive--statutory implementation of non-gender insurance in 1985 has significantly increased the cost of insurance for many women." I reference former Governor Ted Schwinden.

In checking one company's term life insurance rates for a 45 year old female, the rates are 42% to 58% higher than they would be without our current law. One of this company's permanent plans charges 24% more now. Another company charges women 28% more for "non-gender" insurance. The majority of the life coverage available for women in Montana today follows this pattern, with the only variable being the percentages. This increased cost for life insurance in Montana has caused some policies to be issued that were supposedly written in other states. Montana therefore loses premium tax dollars.

Ex. 5
2/1/89

Many companies have products available in other states which are not available in Montana. One company marketed disability products in Montana, prior to October 1st, 1985, for white collar and blue collar workers alike. Since that date, the white collar products have been re-introduced with unisex rates. The blue collar products have not been made available, even though they are available outside Montana. I have personally found it to be almost impossible to find decent, reasonably priced disability insurance for lower income men or women.

In the medical insurance field, sex distinct rates are openly marketed by poorly funded out-of-state trusts. These trusts are able to sell individual policies under the guise of group coverage.

Arguments against repeal of the non-gender insurance law are based in part on the premise that using sex distinct rates is a form of discrimination against individuals in the exercise of their civil or political rights on account of sex. Purchasing insurance is not a civil or political right. If it were, it would be illegal to refuse coverage for any reason.

Impassioned arguments of the combatants aside, this is an economic issue. When a person applies for insurance, they are offering to purchase a product. The transaction is not complete until the terms are agreeable to both the company and the individual. When the public buys only the products it wants, the unwanted products disappear.

In insurance, the level of risk should determine the cost. On average, women outlive men by 10%. Why should they not be allowed

Ex. 5
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to pay less for life insurance?

In attempting to legislate equality with regard to the privilege of purchasing "people" insurance, we have made Montanans unequal to their counterparts throughout the nation. This has been an economic detriment to our residents. We have too many economic crosses to bear. I urge you to vote to repeal the non-gender insurance law.

Thank-you.

52 pgs.

STATEMENT OF
AMERICAN INSURANCE ASSOCIATION
BY
JACQUELINE N. TERRELL
RE SENATE BILL 205

Mr. Chairman and members of the committee:

My name is Jacqueline Terrell. I am a lawyer from Helena and a lobbyist for the American Insurance Association. The American Insurance Association is a national trade association that promotes the economic, legislative, and public standing of its some 180-member property-casualty insurance companies. The Association represents its participating companies before federal and state legislatures on matters of industry concern.

The American Insurance Association supports Senate Bill 205.

Throughout the debate on the nongender requirement presently codified in Montana law, you have heard that the Montana Constitution mandates the present statutory provisions. Montana's Constitution contains the unique provision prohibiting both public and private discrimination "against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas." Art. II, Sec. 4. Governor Schwinden, in fact, while acknowledging the detrimental impact on nongender insurance on women, in 1987 vetoed the bill to amend the present law on an equal protection basis. But equality is exactly what nongender insurance denies to women.

Insurance is a business that operates on the principle of matching a particular risk to a compensatory rate and premium. By requiring rates to be equal regardless of gender, we are

requiring women in many instances to pay higher premiums for lower risk and ultimately subsidizing rates for men. The reverse, men subsidizing woman, also sometimes occurs. That is not equality.

Equality means that you bear the responsibility or enjoy the benefit of the actual risk you present to the industry. If, because as a class, you present a lower casualty risk you should be entitled to pay a lower premium. Likewise, if as a class you live a longer life than men, your life insurance premium should reflect that. But what we are requiring with nongender insurance is one class, women, who present a demonstrably different risk, to subsidize the risk presented by another class. That is not equal protection and in fact denies women their property right in insurance without their constitutionally protected right to due process.

Two legal opinions have been written on this subject. One by Mr. Donald A. Garrity, a Helena attorney, and the other by Mr. Greg Petesch, presently the director of legal services of the Legislative Council. Both concluded there was no such constitutional mandate.

Mr. Garrity's opinion is especially important to this issue. Mr. Garrity was hired specifically to provide a legal answer to the question "Does the individual dignities clause, Article II, Section 4, of the Montana Constitution mandate nongender treatment in insurance matters?" If the answer was "Yes," then it would be useless to mount a time-consuming campaign to repeal or amend Montana's nongender statute. Mr. Garrity was

specifically instructed that he was not to write an advocacy brief on the insurance industry's behalf. Rather, he was to research the question and provide an opinion that would guide the industry and others in their decision whether to pursue repeal or amendment of the nongender law. Mr. Garrity concluded that the Montana Constitution permits gender-based classifications in insurance if there is a rational basis for such classifications. (See Mr. Garrity's Opinion at page 12, attached to this testimony for your convenience.)

Mr. Garrity's opinion was submitted to the Joint Interim Subcommittee No. 3 in 1984. Not content with his opinion, the subcommittee asked Mr. Petesch to determine 1) whether the enactment of the Unisex law was mandatory, and 2) whether the repeal of the Unisex law would make the practice of considering gender in insurance classifications unconstitutional. Again, Mr. Petesch, as Mr. Garrity, concluded that nongender classifications in insurance were not mandatory. Further, Mr. Petesch concluded that the use of gender in setting insurance rates would be permissible if the nongender law were repealed. See Mr. Petesch's opinion at 19, 26.

There is little doubt about the soundness of these two decisions. The Montana Supreme Court cases are clear. For example, in the case of In the Matter of the Will of Cram, the decedent's will set up a trust for boys only. The Montana court found that Mr. Cram's scholarship trust indeed discriminated on the basis of sex, but that private discriminatory conduct was permitted.

Another case of importance, and more recent than either Mr. Garrity's or Mr. Petesch's opinions, is Stone v. Belgrade School District No. 44, ___ Mont. ___, 703 P.2d 136 (1984). In that case, the Belgrade School District decided to hire a female counselor. The School District already employed a male counselor. Because female students had indicated that they would not counsel with a male counselor in some situations because of embarrassment or inhibitions, the School District decided it would not consider males for the position. The plaintiff, Mr. Stone, was excluded from consideration for the position. The Montana court held that an employer could discriminate on the basis of gender when the reasonable demands of the position required sex discrimination. The supreme court affirmed the district court, which had overruled the human rights commission on the issue.

Subsequent to the veto of the bill that would have amended Montana's prohibition on gender-based classifications, Mr. Ed Zimmerman reanalyzed case law from all states. Published in the Journal of Insurance Regulation, Mr. Zimmerman's opinion also concluded that the Montana Constitution, regardless of its unique individual dignities provision, did not mandate "unisex insurance."

There is another legal argument that follows something like this: proof of liability insurance when licensing and driving a motor vehicle is mandated by Montana law, therefore it is a

constitutional or civil right that such insurance be made available without regard to gender based classifications. The argument misses several important steps.

Although proof of liability insurance is required to license a vehicle, driving on the highways of this state is a revocable privilege, not a right. Because it is a privilege no constitutional or civil rights flow from it and there is no civil right to obtain insurance. See State v. Skurdal, ___ Mont. ___, ___ P.2d ___, 45 St. Rptr. 2394, 2396-97 (1988); State ex rel Majerus v. Carter, ___ Mont. ___, 693 P.2d 501, 505 (1984).

I particularly direct your attention to the human rights statutes presently codified in Title 49. (Copies of 49-2-303 to -311, and 49-3-103, MCA, are attached to this testimony for your convenience.) These statutes implement Article II, Section 4, of the Montana Constitution. Note that in every situation in which discrimination is addressed by these statutes--employment, public accommodations, housing, finance and credit transactions, education, and state action--distinctions based upon the reasonable demands of the position, upon bona fide occupational qualifications, or upon reasonable grounds are permitted. Only the statute pertaining to discrimination in insurance and retirement plans fails to contain such a qualification. It stands as an anomaly in our Code.

If the Montana Constitution mandates nongender insurance and permits no reasonable distinctions based on sex, as has been argued, then all discrimination laws which permit distinctions based upon reasonable demands, reasonable grounds, or

occupational qualifications are unconstitutional. The cases discussed in the opinions by Mr. Garrity, Mr. Petesch, and Mr. Zimmerman demonstrate that this absurd conclusion simply is not the case.

And, in fact, this body does not believe it to be so. You have already passed legislation this session permitting discrimination on the basis of age to provide a benefit to senior citizens, because such discrimination is "reasonable." (HB 16).

Finally, I respectfully call to your attention that the only proper forum to finally determine the constitutionality of any given Montana statute is the Montana Supreme Court--not the newspaper editor's office, not the Governor's office, nor even this body. It is the function of this body to set policy to benefit Montana's citizens. Governor Schwinden, in evaluating the veto of the nongender amendment last session carefully examined all of the financial and economic information on this issue. He was unable to say in his veto message what the proponents of unisex insurance hoped he would say: he could not say that unisex insurance benefits women. Governor Schwinden conceded:

> The evidence is clear and conclusive--statutory implementation of nongender insurance in 1985 has significantly increased the cost of insurance for many women.

I encourage you to allow women at all times both to bear the responsibilities and to enjoy the privileges of their gender-in equality. On behalf of the insurance industry and those consumers

of the industry who have been adversely affected by the nongender insurance requirement, I urge you to give this bill a do pass recommendation.

Submitted to Senate Business and Industry Committee for hearing on Senate Bill 205, February 1, 1989.

Respectfully submitted,

Jacqueline N. Terrell

Jacqueline N. Terrell

Exhibit # 6 2/1/89
SB 205

DONALD A. GARRITY
ATTORNEY AT LAW
[illegible]
HELENA, MONTANA 59601
(406) [illegible]

To: Mr. Glenn Drake, Mr. Lester Loble, Mr. Bob James and Mr. Pat Melby

From: Donald A. Garrity

Subject: The Validity of Gender Based Insurance Classifications Under Article II, Section 4, of the Montana Constitution

Date: August 29, 1984

The 1983 Montana Legislature enacted legislation providing that: "It is an unlawful discriminatory practice for any financial institution or person to discriminate solely on the basis of sex or marital status in the issuance or operation of any type of insurance policy, plan, or coverage or in any pension or retirement plan, program, or coverage, including discrimination in regard to rates or premiums and payments of benefits." Chapter 531, Laws of Montana, 1983, codified as Section 49-2-309, MCA.

The validity of this legislation is assumed. You wish to know if such a prohibition is mandated by the provisions of Article II, Section 4, of the Montana Constitution, which states:

> Individual Dignity. The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the State nor any person, firm, corporation or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.

(Emphasis supplied.)

This provision is unique among the sixteen State Constitutions which prohibit discrimination on the basis of sex in that it is the only one which explicitly prohibits such discrimination by individuals and private associations.[1] Similarly, the proposed Equal Rights Amendment to the Federal Constitution by its terms applies only to government.[2]

The language of the Montana Individual Dignity provision clearly seems to prohibit sexual discrimination by private persons and associations. But, as former California Chief Justice Traynor has said, "Plain words, like plain people, are not always as plain as they seem."[3] Our Supreme Court had the opportunity to construe the reach of Article II, Section 4, in 1980 when it construed the will of a sheep rancher which established a trust for payments to members of the Future Farmers of America or the 4-H Club who were boys between the ages of 14 and 18, Montana residents, and children of American born parents. In the Matter of the Will of Cram, 186 Mont. 37, 606 P.2d 145 (1980).

[1] The other fifteen states are Alaska, Colorado, Connecticut, Hawaii, Illinois, Maryland, Massachusetts, New Hampshire, New Mexico, Pennsylvania, Texas, Utah, Virginia, Washington and Wyoming. The text of the various provisions is set forth in Annotation, Construction and Application of State Equal Rights Amendments Forbidding Determination of Rights Based on Sex, 90 A.L.R.3d, 164-65.

2 That proposed amendment reads: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." H.J.Res. 208, 92d Congress, 2d Session (1972).

[3] Traynor, No Magic Words Could Do It Justice, 49 Cal. L. Rev. 615, 618 (1961).

A female member of the Future Farmers of America, who was of the age set by the trust, challenged its provisions as unconstitutionally discriminatory on the basis of sex. The Supreme Court held the trust did indeed discriminate on the basis of sex, but that private discriminatory conduct was not prohibited. Unfortunately, in its analysis the Court did not mention Montana's Constitutional provision but discussed only cases involving the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution.* That clause has consistently been interpreted as prohibiting discrimination only when there is "State action." See, e.g., Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), in which it was held that a private club, even though licensed by the State to serve liquor, could refuse to serve blacks without violating the Equal Protection Clause.

In the many cases involving Article II, Section 4, which the Montana Supreme Court has decided since the adoption of Montana's 1972 Constitution, it has consistently used traditional Federal Equal Protection analysis, allowing discriminatory government action when it is based on a rational

* However, the briefs filed with the Court did argue Montana's Constitutional provision.

classification.[4] The only case other than the Cram will case which has squarely presented our Supreme Court with a question of sexual discrimination since the adoption of Article II, Section 4, is State v. Craig, 169 Mont. 150, 545 P.2d 649 (1975). There a male convicted of rape argued that the statute defining the offense violated this Section because it applied only to males having sexual intercourse without consent with females. The Court indicated that because historically and now "the vast majority" of sexual attacks have been by men upon women, the classification was reasonable.

Thus, it appears that the Montana Supreme Court, at least to date, has effectively read out the last sentence of Article II, Section 4, and confined its scope to the traditional equal protection of the laws. The committee report on this provision stated that it was intended to eradicate "public and private

[4] See, e.g., McMillan v. McKee & Co., 166 Mont. 400, 533 P.2d 1095 (1975) (granting attorneys' fees to successful workers' compensation claimants but not to successful defending insurers does not violate equal protection); State v. Jack, 167 Nibt, 456, 539 P.2d 726 (1975) (requiring non-resident hunters to be accompanied by licensed guide invalid because not supported by rational basis); State v. Craig, 169 Mont. 150, 545 P.2d 649 (1976) (statute prohibiting sexual intercourse without consent only by males does not offend Article II, Section 4); State v. Gafford, 172 Mont. 380, 563 P.2d 1129 (1977) (statutory discrimination against ex-felons is reasonable and does not violate Montana's equal protection provisions); Emery v. State, 177 Mont. 73, 580 P.2d 445 (1978) (permissible to deny voting rights to inmates of state prison); McLansthan v. Smith, 186 Mont. 56, 606 P.2d 507 (1979) (difference in treatment of claimants with dependents under workers' compensation law valid because supported by a rational basis); Tipco Corporation v. City of Billings, ___ Mont. ____, 624 P.2d 1074 (1982) (city ordinance prohibiting residential solicitors but exempting local merchants invalid because not supported by rational basis); Oberg v. City of Billings, ____ Mont.____ , 674 P.2d 494 (1983) (statute prohibiting lie detector tests for employees except employees of public law enforcement agencies denies equal protection to law enforcement employees).

discriminations based on race, color, sex, culture, social origin or condition, or political or religious ideas."[5] It also noted that the proposed Federal Equal Rights Amendment "would not explicitly provide as much protection as this provision."[6] However, the committee report qualified the language somewhat by noting that it was not their intent that the prohibition against discrimination on the basis of political or religious ideas permit persons who supported the right to work in principle to avoid union membership.[7]

The Convention debate on this provision is more confusing. Delegate Habedank moved to delete the words "any person, firm, corporation, or institution," saying that he was a member of the Sons of Norway which, he feared, would not be able to limit its membership under this provision.[8]

Delegate Dahood responded that the section was only intended to cover discrimination in "matters that are public or matters that tend to be somewhat quasi-public. With respect to a religious organization, with respect to the Sons of Norway or the Sons of Scandinavia, of course, there would necessarily be qualifications that an individual would have to meet before he would be admitted to membership. That type of private organization is certainly not within the intendment of the

[5] Proceedings of the Montana Constitutional Convention, Vol. II, P. 628.

[6] Ibid.

[7] Ibid.

[8] Proceedings of the Montana Constitutional Convention, Vol. V., pp. 1642-43.

committee in submitting Section 4."[9] He also answered a question from another delegate concerning the right of women to join strictly men's organizations by saying, ". . . no, that is not our intent. There are certain requirements, certain qualifications, certain matters, I suppose, that might fall within the term of legitimate discrimination that are not covered by this particular section. Anything that falls within the realm of common sense--I think you've indicated situations where common sense would have to indicate that the qualifications that would be set for membership are proper, and in those circumstances I would not expect Section 4 to have any effect."[10]

The one exchange in the debate which seems to justify the Supreme Court's reading of this provision as a traditional equal protection clause is that between delegates Loendorf and Dahood. Loendorf stated: ". . . it's my understanding that . . . everything you have after the word 'equal protection of the law' would really be subsumed in that first provision and everything you've said after that would really be unnecessary . . .." Dahood replied that Loendorf was correct but defended the additional wording as "the sermon that can be given by the Constitution, as well as the right, ..."[12]

[9] Id. at 1643.

[10] Id. at 1644.

[11] Id. at 1643.

[12] Ibid.

It was after this discussion that the motion to delete the words "any person, firm, corporation or institution" was defeated.[13]

Conceivably, it is this history which the Supreme Court has relied upon to interpret Article II, Section 4, as a simple equal protection clause not applicable to private persons and allowing discrimination based on reasonable classifications.

Had it chosen to fully articulate its reasons for so construing this section of our Constitution, the Montana Supreme Court might also have relied on the principle that a statute or a state constitutional provision must, if possible, be construed in such a manner as to uphold its constitutionality.[14] If Section 4 were literally interpreted, a religious body could not limit its priesthood or ministry to males, Democrats could not bar Republicans from participating in their caucuses, atheists would be entitled to participate in private religious services and the Sons of Norway, Daughters of the American Revolution, et al., would cease to exist as

[13] Id. at 1645-46.

[14] North Central Services, Inc., v. Hafdahl, ___ Mont. ___, 625 P.2d 56 (1981); Harrison v. City of Missoula, 146 Mont. 420, 407 P.2d 703 (1965); City of Philipsburg v. Porter, 121 Mont. 88, 190 P.2d 676 (1948). The same rules of construction apply to constitutional provisions as apply to statutes. Keller v. Smith, 170 Mont. 399, 553 P.2d 1002 (1976).

distinctive organizations. At least some of these results would clearly violate the United States Constitution.[15]

Another alternative rationale for our Supreme Court's interpretation of Section 4 would be a restrictive interpretation of the words "civil or political rights." In the debate on this section, it was stated that civil rights are "things that the Legislature has to deal with"[16] and that "at this time in American we [do not] have an all-inclusive definition of civil rights." [17]

Montana's Supreme Court has defined "right" as "any power or privilege vested in a person by law."[18] There are rights vested by the constitution, such as freedom of religion, due process, bail, trial by jury, and the right to vote, to name a few. Section 4 of Article II, like the Equal Protection Clause of the Federal Constitution, merely provides that the rights of all persons must rest upon the same rule under similar circumstances,[19] but it does not require things which are different in fact to be treated in law as though they were the same.[20]

[15] See, e.g., Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976) holding that churches are free to establish their own rules for internal government and the State may not interfere.

[16] Proceedings of the Montana Constitutional Convention, Vol. V, P. 1644.

[17] Ibid.

[18] Waddell v. School District No. 3, 79 Mont. 432, 257 P. 278 (1927).

[19] Louisville Gas & Electric Co. v. Coleman, 277 U.S. 32 (1928).

[20] Norvell v. Illinois, 373 U.S. 420 (1963).

As I stated at the outset of this paper, I assume Section 49-2-309, MCA, which prohibits different insurance rates based on sex, was within the power of the legislature to enact. But the differences in life expectancy between the sexes are real ones.[21] There is also apparently a real difference between the automobile accident records of young (under 25) male and female drivers, as well as between married persons under 25 and young single persons.[22] These differences constitute a rational basis for classification by sex and marital status and thus are not prohibiited by Article II, Section 4, of the Montana Constitution. Similarly, they would not offend the statutory prohibition against "unfair discrimination between individuals or risks of the same class" contained in Section 33-18-210, MCA.[23]

In summary, it is my opinion that Article II, Section 4, of the Montana Constitution applies only to "state action," not purely private discrimination, and that classifications based on sex are not prohibited thereby if there is a rational basis for such classifications. While I do not believe the

[21] The average white male born in 1980 had a life expectancy of 70.7 years while the average white female born in that year had a life expectancy of 78.1 years. A white male who was 35 in 1980 had a life expectancy of an additional 38.6 years while a 35 year old white female could expect an additional 44.9 years of life. 1984 Statistical Abstract of the United States. See also: Note, Sex Discrimination and Sex Based Mortality Tables, 53 Boston University Law Review 624 (1973).

[22] Florida Dep't of Insurance v. Insurance Services Office, 434 So.2d 908 (Fla. 1983); Insurance Services Office v. Commissioner of Insurance, 381 So.2d 515 (La. 1979).

[23] Ibid.

regulation of insurance companies by the State converts their discriminatory acts into "state action,"[24] resolution of that question is unnecessary since the State itself is free to make such classifications on a rational basis.[25]

In answer to your question, it is my opinion that the provisions of Chapter 531, Laws of Montana, 1983, are not required by Article II, Section 4, of the Montana Constitution.

[24] Life Insurance Co. of North America v. Reichardt, 591 F.2d 499 (9th Cir. 1979) and Murphy v. Harleysville Mutual Insurance Co., 282 Pa. Super. 244, 422 A.2d 1097 (1981) so hold.

[25] As an employer subject to the Federal Equal Employment Opportunities Act, Montana may not discriminate in the terms of pension plans for its employees on the basis of sex, in spite of the difference in longevity between men and women. 42 U.S.C. §2000e-2; Los Angeles Dep't. of Water and Power v. Manhart, 435 U.S. 702 (1978); Arizona Governing Committee v. Norris, ____ U.S. ____, 77 L.Ed.2d 1236, 103 S. Ct. 3492 (1983).

Exhibit # 6 2/1/89
SB 205

Montana Legislative Council

State Capitol
Helena, MT. 59620
(406) 444-3064

October 29, 1984

TO: Joint Interim Subcommittee No. 3

FROM: Greg Petesch, Staff Attorney GP

RE: Gender-Based Insurance Classifications

Section 49-2-309, MCA, enacted by Chapter 531, Laws of 1983, provides:

> 49-2-309. Discrimination in insurance and retirement plans. (1) It is an unlawful discriminatory practice for any financial institution or person to discriminate solely on the basis of sex or marital status in the issuance or operation of any type of insurance policy, plan, or coverage or in any pension or retirement plan, program, or coverage, including discrimination in regard to rates or premiums and payments or benefits.
>
> (2) This section does not apply to any insurance policy, plan, coverage, or any pension or retirement plan, program, or coverage in effect prior to October 1, 1985.

You have asked me to investigate two issues: (1) whether enactment of this legislation was mandatory in light of Article II, section 4, of the Montana Constitution; and (2) whether repeal of this legislation would make the current practice of

considering gender in insurance classifications unconstitutional.

Article II, section 4, of the Montana Constitution provides:

> Section 4. Individual dignity. The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.

Montana's is the only equal rights amendment which specifically prohibits discrimination by any person, firm, corporation, or institution, i.e., private discrimination.[1]

The Bill of Rights Committee of the Constitutional Convention stated in its committee report the following:

COMMENTS

> The committee unanimously adopted this section with the intent of providing a Constitutional impetus for the eradication of public and private discriminations based on race, color, sex, culture, social origin or condition, or political or religious ideas. The provision, quite similar to that of the Puerto Rico declaration of rights is aimed at prohibiting private as well as public discriminations in civil and political rights.

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[1]Construction and Application of State Equal Rights Amendments Forbidding Determination of Rights Based on Sex, 90 A.L.R. 3d, 164-65.

Considerable testimony was heard concerning the need to include sex in any equal protection or freedom from discrimination provisions. The committee felt that such inclusion was eminently proper and saw no reason for the state to wait for the adoption of the federal Equal Rights Amendment, an amendment which would not explicitly provide as much protection as this provision.

The word culture was incorporated specifically to cover groups whose cultural base is distinct from mainstream Montana, especially the American Indians. "Social origin or condition" was included to cover discriminations based on status of income and standard of living.

Some fears were expressed that the wording "political or religious ideas" would permit persons who supported right to work in principle to avoid union membership. Such is certainly not the intent of the committee. The wording was incorporated to prohibit public and private concerns discriminating against persons because of their political or religious beliefs.

The wording of this section was derived almost verbatim from Delegate Proposal No. 61. The committee felt that this proposal incorporated all the features of all the Delegate Proposals (No.'s 10, 32, 50 and 51) on the subjects of equal protection of the laws and the freedom from discrimination. The committee is well aware that any broad proposal on these subjects will recuire considerable statutory embellishment. It is hoped that the legislature will enact statutes to promote effective eradication of the discriminations prohibited by this section. The considerable support for and lack of opposition to this provision indicates its import and advisability. (emphasis supplied)[2]

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[2]Proceedings of the Montana Constitutional Convention, Vol. II, p. 628.

As pointed out by Mr. Garrity, the convention debate on Article II, section 4, is confusing.[3] Delegate Harper did ask, "Aren't civil rights things that the Legislature has to deal with?"[4] Delegate Dahood responded that basically that was correct.[5] At the time the Constitution was adopted, section 64-301, R.C.M. 1947, provided:

> 64-301. Freedom from discrimination as civil right -- employment -- public accommodations. The right to be free from discrimination because of race, creed, color, sex, or national origin is recognized as and declared to be a civil right. This right shall include, but not be limited to:
>
> (1) The right to obtain and hold employment without discrimination.
>
> (2) The right to the full enjoyment of any of the accommodation facilities or privileges of any place of public resort, accommodation, assemblage or amusement.

That section is now codified as 49-1-102, MCA.

This section points out that the issue of sex discrimination was addressed by the Legislature even prior to the adoption of Article II, section 4.

With this background, it appears that the Constitutional Convention delegates intended that the Legislature embellish Article II, section 4, with statutory enactments. The question presented, however,

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[3]Garrity, pp. 5-6; Proceedings of the Montana Constitutional Convention, Vol. V, pp. 1642-1646.

[4]Ibid., p. 1644.

[5]Ibid.

is whether the Legislature is required to enact legislation regarding this area.

It has long been recognized that the Constitution does not grant power to the Legislature but merely limits the Legislature's exercise of its power. In St. ex rel. DuFresne v. Leslie, 100 M 449, 453, 50 P.2d 959 (1935), the Montana Supreme Court stated:

> It is very clear that, except for the limitations placed upon the power of the legislature, first by the Constitution of the United States, and second by the Constitution of the state, the will of the legislative body may be freely exercised in all legislative matters unrestricted.[6]

It is inherent in the concept of the separation of powers provision of the state Constitution, Article III, section 1, that if a power is reposed in one department, the other two may not encroach upon or exercise that power, except as expressly directed or permitted in the Constitution. Mills v. Porter, 69 M 325, 222 P. 428 (1924). The courts have no power to compel the Legislature to pass an act, even though the Constitution expressly commands it, nor restrain it from passing an act, even though the Constitution expressly forbids it.[7]

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[6]See also Board of Regents v. Judge, 168 M 433, 543 P.2d 1323 (1975); Hilger v. Moore, 56 M 146, 182 P. 477 (1919); St. ex rel. Evans v. Stewart, 53 M 18, 161 P. 309 (1916); and St. ex rel. Toi v. French, 17 M 54 (1895).

[7]See cases cited in Annotation, Power and duty of court where legislature renders constitutional mandate ineffectual by failing to enact statute necessary to make it effective or by repealing or amending statute previously passed for that purpose, 153 A.L.R. 522-528.

> The lawmaking body may or may not, as it chooses, pass laws putting into effect a constitutional provision, and if, in its efforts to give effect to a constitutional provision, the statute is not broad and comprehensive enough to cover all subjects that it might, we know of no reason why it should not be valid as far as it goes.[8]

49-2-309 { It is apparent that the Legislature is never required to enact a statute or particular piece of legislation. Therefore, in answer to the first question presented, the enactment of Chapter 531, Laws of 1983, was not mandatory. I am unaware of any method of compelling a legislative enactment, other than that used to gain passage of Chapters 2 and 3, Ex. Laws of 1903. *

The second question presented is whether the repeal of Chapter 531, Laws of 1983, would render the use of gender in classifying individuals for insurance purposes unconstitutional.

The courts generally recognize the power of the Legislature to repeal a statute enacted in compliance with a provision of the Constitution even where the Constitution makes it the duty of the Legislature to enact such a law to effectuate the constitutional provision, and the repealer would result in frustrating the purpose evidenced by the Constitution.[9]

If the framers of the Constitution do not feel that the Legislature will carry out a constitutional mandate,

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[8] Arizona Eastern R. Co. v. Matthews, 180 P. 159 (Az. 1919).

[9] See Myers v. English, 9 Cal. 342 (1858) and 153 A.L.R. supra at 525.

they may make the constitutional provision self-executing. As stated in St. ex rel. Stafford v. Fox-Great Falls Theatre Corp., 114 M 52, 74, 132 P.2d 689 (1942):

> A provision is self-executing when it can be given effect without the aid of legislation and there is nothing to indicate that legislation is contemplated in order to render it operative; * * * constitutional provisions are self-executing when there is a manifest intention that they should go into immediate effect, and no ancillary legislation is necessary to the enjoyment of a right given, or the enforcement of a duty imposed.

The court went on to point out that the test for determining whether a provision is self-executing is whether it is directed to the courts or the Legislature.

During the debate on Article II, section 4, Delegate Robinson asked whether the provision would be nonself-executing and would require complete legislative implementation to make it effective. Delegate Dahood responded that in his judgment that was not true.[10] But also note that the committee report states that "The committee is well aware that any broad proposal on these subjects will require considerable statutory embellishment."[11] Unfortunately, conflicting conclusions as to the self-executing nature of Article II, section 4, can be reached from these remarks.

In Keller v. Smith, 170 M 399, 409, 553 P.2d 1002 (1976), the Supreme Court stated that " . . . the

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[10] Transcripts, supra at 1644-1645.

[11] Supra, Note 2.

collective intent of the delegates can best be determined by application of the preceding rules of construction [i.e., general rules of statutory construction] to the ambiguous language used". The court pointed out that it had specifically refrained from using the Convention proceedings to determine intent as they could be used to support either position.

The problem then becomes one of predicting how the Montana Supreme Court would interpret a case brought challenging the use of gender classifications in setting insurance rates. As pointed out by Mr. Garrity, a challenge based on private sex discrimination under the alleged reach of Article II, section 4, was brought before the court in In the Matter of the Will of Cram, 186 M 37, 606 P.2d 145 (1980). The court did not mention Article II, section 4, but upheld the private discriminatory trust based upon a lack of "state action". The requirement of "state action" for discrimination to be prohibited is taken from cases interpreting the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.[12]

The Montana Supreme Court has consistently applied federal Equal Protection analysis to cases involving Article II, section 4.

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[12]See Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972), wherein it is stated that "where the impetus for discrimination is private, the State must have 'significantly involved itself with invidious discriminations', in order for the discriminatory action to fall within the ambit of the constitutional prohibition".

Federal analysis, at least in the areas of economic and social legislation, allows governmental classification when it has a rational basis, i.e., it is not arbitrary.[13] The federal analysis applies a "strict scrutiny" test to so-called suspect classifications such as race.[14] In those areas a state must show a "compelling interest" in the classification.[15] The U.S. Supreme Court has recently adopted a so-called "middle test" in areas involving gender classifications. In Mississippi University for Women v. Hogan, 458 U.S. 710, 724 (1982), the court said:

> The party seeking to uphold a statute that classifies individuals on the basis of gender must carry the "exceedingly pursuasive justification" for the classification. The burden is met only by showing at least that the classification serves "important governmental objectives and that the discriminatory means employed" are "substantially related" to the achievement of those objectives.[16]

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[13] See Royster Guano Co. v. Virginia, 253 U.S. 412, 40 S.Ct. 560, 64 L.Ed. 989 (1920). This test was applied in St. v. Craig, 169 M 150, 545 P.2d 649 (1975).

[14] Loving v. Virginia, 388 U.S. 1, 87 S.Ct. 1817 (1967).

[15] See San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 36 L.Ed.2d 16, 93 S.Ct. 1278, reh. den., 411 U.S. 959 (1973). This strict scrutiny test requiring the showing of a compelling state interest was applied in White v. St., ____ M ____, 661 P.2d 495 (1983).

[16] This middle test was first articulated in Craig v. Boren, 429 U.S. 190 (1976), involving an Oklahoma statute providing differing legal drinking ages for males and females. The U.S. Supreme Court struck down the law saying the state was using maleness as a proxy for the regulation of drinking and driving. A quote from this case that may be of particular interest to this committee is found on page 204. "It is

The Montana Supreme Court has only been squarely presented with two sexual discrimination cases: Cram, involving private discrimination, and St. v. Craig, 169 M 150, 545 P.2d 649 (1975), where the court held that there was a rational basis for classifying by sex under the sexual intercourse without consent statute. In a case involving a dissolution of marriage, Vance v. Vance, ____ M ____, 664 P.2d 907, 40 St.Rep. 836 (1983), the court stated that the trial court's recognition of the present relative economic status of men and women with respect to income earning potential and the distribution of marital assets accordingly did not violate a former husband's constitutional right of equal protection.

It is interesting to note that Article II, section 4, has been referred to in an Alaska decision. In U.S. Jaycees v. Richardet, 666 P.2d 1008 (Alaska 1983), Richardet argued that the prohibition against sex discrimination in Article I, section 3, of the Alaska Constitution, was in effect as broad as Montana's Article II, section 4, which explicitly prohibits both private and governmental discrimination, because the Alaska Human Rights legislation implementing the Constitution prohibits private as well as public discrimination. The Alaska Supreme Court stated in note 15, "However, the Legislature's construction of a

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16 (continued) unrealistic to expect either members of the judiciary or state officials to be well versed in the rigors of experimental or statistical technique. But this merely illustrates that proving broad sociological propositions by statistics is a dubious business and one that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause."

constitutional provision is, of course, not binding upon this court." The court went on to hold that "state action" is a necessary predicate to application of the Equal Protection Clause of the Alaska Constitution.[17]

The case closest to the situation under consideration here is Murphy v. Harleysville Mutual Insurance Co., 422 A.2d 1097 (Pa. super. 1980), wherein a class action was brought on behalf of three groups that had purchased automobile insurance from the defendant: (1) all males; (2) all unmarried persons; and (3) all persons under 30 years of age. The plaintiff alleged that the premiums charged constituted a violation of the Pennsylvania ERA as to the first group and the federal Equal Protection Clause as to the other two groups. The Pennsylvania court found no state action as to the alleged federal violations. In its discussion of the alleged state ERA violation, the court quoted extensively from Lincoln v. Mid-Cities Pee Wee Football Assoc., 576 S.W.2d 922 (Tex. Ct, App. 1979), a case involving a girl's attempt to be allowed to participate in a private nonprofit corporation's all-male youth football league. Both states' ERAs prohibit discrimination "under the law". Both courts held that "state action or private conduct that is

[17]This case was decided prior to Roberts v. U.S. Jaycees, 52 L.W. 5076 (1984), where the U.S. Supreme Court held that under Minnesota's Human Rights Act, Ms. Roberts could not be excluded from membership in the organization. The court stated, "Assuring women equal access to the goods, privileges, and advantages of a place of public accommodation clearly furthers compelling state interests." (emphasis supplied)

encouraged by, enabled by, or closely interrelated in function with state action"[18] is required before a discriminatory practice is prohibited.

The courts stated: "Had the amendment been intended to proscribe private conduct, we believe this proscription could and would have been clearly expressed to apply to all discrimination, public and private."[19] Following Murphy, the Pennsylvania Insurance Commissioner used the ERA as an aid in interpreting his powers and duties under the Rate Act 40 P.L. §§1181-1199, to disapprove the use of sex as a classification basis for automobile insurance rate differentials. The Commissioner's decision was upheld in Hartford Accident and Indemnity Co. v. Insurance Commissioner of Pennsylvania, 442 A.2d 382 (Pa. Comwlth. 1982), where the court held that the Commissioner did not exceed his statutory authority. The Commissioner's action was recently upheld by the Pensylvania Supreme Court.[20]

In light of these cases, it appears that if the Montana Supreme Court could be persuaded to follow the rationale regarding private discrimination referred to in the Texas and Pennsylvania decisions, the use of gender as a classification factor in setting insurance rates could be held unconstitutional if Chapter 531, Laws of 1983, were repealed.[21] However, so long as the

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[18]Murphy at 1103.

[19]Ibid.

[20]Hartford Accident & Indemnity Co. v. Insurance Commissioner, Docket No. J-76-1984, (Pa. Sup. Ct. 1984).

[21]This seems unlikely in light of the recently decided In the Matter of C.H., ____ M ____, 683 P.2d 931, 41 St.Rep. 997, 1005 (1984), where the court stated, "The Fourteenth Amendment of the United States

court applies traditional federal Equal Protection analysis to claims of alleged private discrimination, there would be no "state action", and the use of gender in setting insurance rates would be permissible if Chapter 531, Laws of 1983, were repealed.[22]

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21(continued) Constitution and Article II, section 4, of the 1972 Montana Constitution guaranty [sic] equal protection of the laws to all persons. The equal protection provisions of the federal and state constitutions are similar and provide generally equivalent but independent protections." Citing Emery v. St., 177 M 73, 580 P.2d 445, cert. den., 439 U.S. 874, 99 S.Ct. 210, 58 L.Ed.2d 187 (1978). The court goes on to explain when it applies the various tests to the type of classification involved.

[22]See Note 20, but the court could address a gender classification under Article II, section 4, in the recently argued case of Miller-Wohl Co., Inc. v. Commissioner of Labor and Industry, No. 84-172.

GP1EE/hm/Gender-Based Insurance

under this chapter or because he has filed a complaint, testified, assisted, or participated in any manner in an investigation or proceeding under this chapter.

History: Ap.p. Sec. 2, Ch. 283, L. 1974; amd. Sec. 2, Ch. 121, L. 1975; amd. Sec. 3, Ch. 524, L. 1975; amd. Sec. 7, Ch. 38, L. 1977; Sec. 64-306, R.C.M. 1947; Ap.p. Sec. 9, Ch. 283, L. 1974; amd. Sec. 10, Ch. 524, L. 1975; Sec. 64-312, R.C.M. 1947; R.C.M. 1947, 64-306(9), 64-312(2); amd. Sec. 4, Ch. 177, L. 1979.

49-2-302. Aiding, coercing, or attempting. It is unlawful for a person, educational institution, financial institution, or governmental entity or agency to aid, abet, incite, compel, or coerce the doing of an act forbidden under this chapter or to attempt to do so.

History: En. 64-312 by Sec. 9, Ch. 283, L. 1974; amd. Sec. 10, Ch. 524, L. 1975; R.C.M. 1947, 64-312(1); amd. Sec. 5, Ch. 177, L. 1979.

Cross-References
When accountability exists, 45-2-302.
Inchoate offenses, Title 45, ch. 4.

49-2-303. Discrimination in employment. (1) It is an unlawful discriminatory practice for:

(a) an employer to refuse employment to a person, to bar him from employment, or to discriminate against him in compensation or in a term, condition, or privilege of employment because of his race, creed, religion, color, or national origin or because of his age, physical or mental handicap, marital status, or sex when the reasonable demands of the position do not require an age, physical or mental handicap, marital status, or sex distinction;

(b) a labor organization or joint labor management committee controlling apprenticeship to exclude or expel any person from its membership or from an apprenticeship or training program or to discriminate in any way against a member of or an applicant to the labor organization or an employer or employee because of race, creed, religion, color, or national origin or because of his age, physical or mental handicap, marital status, or sex when the reasonable demands of the program do not require an age, physical or mental handicap, marital status, or sex distinction;

(c) an employer or employment agency to print or circulate or cause to be printed or circulated a statement, advertisement, or publication or to use an employment application which expresses, directly or indirectly, a limitation, specification, or discrimination as to sex, marital status, age, physical or mental handicap, race, creed, religion, color, or national origin or an intent to make the limitation, unless based upon a bona fide occupational qualification;

(d) an employment agency to fail or refuse to refer for employment, to classify, or otherwise to discriminate against any individual because of sex, marital status, age, physical or mental handicap, race, creed, religion, color, or national origin, unless based upon a bona fide occupational qualification.

(2) The exceptions permitted in subsection (1) based on bona fide occupational qualifications shall be strictly construed.

(3) Compliance with 2-2-302 and 2-2-303, which prohibit nepotism in public agencies, may not be construed as a violation of this section.

History: En. 64-306 by Sec. 2, Ch. 283, L. 1974; amd. Sec. 2, Ch. 121, L. 1975; amd. Sec. 3, Ch. 524, L. 1975; amd. Sec. 7, Ch. 38, L. 1977; R.C.M. 1947, 64-306(1), (2); amd. Sec. 1, Ch. 279, L. 1983; amd. Sec. 1, Ch. 342, L. 1985.

Cross-References
Work-study program, 20-25-707.
Equal pay for women for equivalent service, 39-3-104.

Exhibit # 6 2/1/89
SB 205

LEGAL MEMORANDUM REGARDING MON CONCERNING ARTICLE II, SECTION 4 OF THE MONTANA CONSTITUTION SUBSEQUENT TO THE LEGAL OPINION OF DONALD A. GARRITY DATED AUGUST 29, 1984

Prepared by Randall H. Gray, James, Gray & McCafferty, 615 Second Avenue North, Great Falls, Montana

March 31, 1987

In reviewing Montana case law, I have found six Montana cases citing Article II §4 of the Montana Constitution subsequent to the 1984 opinion rendered by Donald A. Garrity. That opinion addressed the validity of gender-based insurance classifications under Article II §4 of our Constitution. I offer the following synopsis of those six cases:

1. O'Shaughnessy v. Wolfe, 41 St. Rptr. 1557, 685 P.2d 361 (1984). This case involved a question of retroactive application of a statute which increased the rate of interest on delinquent property taxes. The appellant argued that Article II §4 prohibited the retrospective application of the November 1981 amendment. The Court rejected that argument, holding that the statute applies without discrimination to all persons in the same class equally. There is no gender issue involved in this case. It is inapplicable to the issue of whether gender-based insurance is constitutionally-mandated in Montana.

2. Miller/Wohl Co., Inc. v. Commissioner of Labor and Industry and Tamara Buley, 41 St. Rptr. 2445, 692 P.2d 1243 (1984). This case involved the validity of

Montana Maternity Leave Act (MMLA). The District Court held the Act was invalid. Our Supreme Court reversed and held MMLA to be valid. The Court found that the employer's no-leave policy created a disparate effect on women who became pregnant, compared to men, who do not become pregnant. The no-leave policy therefore appeared to the Court to be gender-based discrimination in violation of Title VII of the Civil Rights Act of 1964 as amended on 1979 by the Pregnancy Disability Act. It is interesting to note that this case essentially upholds preferred treatment to pregnant women. The result of this case was affirmed by the United States Supreme Court in a companion case that reached the U.S. Supreme Court prior to the Montana case reaching that Court. The companion case was California Federal Savings and Loan v. Guerra (55 U.S. L.W. 4077) which was decided January 13, 1987. In that case, the U.S. Supreme Court upheld the California Fair Employment and Housing Act which required employers to provide leave and reinstatement to employees disabled by pregnancy. That act is very similar to the Montana Maternity Leave Act.

3. Nick v. Montana Department of Highways, _____ Mont. _____, 711 P.2d 795 (1985). A disabled veteran appealed the District Court decision that the Veteran's Preference was not a constitutionally-protected property right and that retroactive repeal in a newer

statute did not deny him equal protection. The Montana Supreme Court affirmed the trial court decision. The case does not involve any questions of gender and is not applicable to the issue of whether a unisex law is constitutionally-mandated in Montana.

4. Pfost v. Montana, _____ Mont. _____, 713 P.2d 495 (1985). This case held §2-9-107 MCA, which was passed by the 1983 legislative session, to be unconstitutional. That statute limited governmental liability for damages in tort to $300,000.00 per claimant and $1 million per occurrence. The case does not involve any issue of gender and is not applicable to the constitutional issue on unisex.

5. Butte Community Union v. Lewis, 43 St. Rptr. 65, 712 P.2d 1309 (1986). This case involved an appeal from an injunction prohibiting SRS from implementing part of a 1985 law which would have restricted welfare general assistance benefits for able-bodied persons. Our Court held that while our Constitution does not establish a fundamental right to welfare, a classification which abridges welfare benefits is subject to heightened scrutiny. The case does not involve any issue of gender and is not applicable to the constitutional issue on unisex.

6. Drinkwalter v. Shipton Supply Co., 44 St. Rptr. 318 _____ Mont. _____, _____ P.2d _____, which was decided February 23, 1987. This case held that a

plaintiff with a sexual harassment charge against her employer could bring a tort action in district court without first receiving a right to sue letter from the Human Rights Commission. The Court further held that the Montana Human Rights Act is not an exclusive remedy for a sexual harassment case.

SUMMARY

None of the foregoing cases modify the analysis of Don Garrity's opinion from 1984 concerning the validity of gender-based insurance classifications under the Montana Constitution. The Garrity opinion is still legally sound.

Exhibit # 6 2/1/89
SB 205

Counterpoint Non-Gender Insurance: A Perspective

*Edward J. Zimmerman**

Abstract

Since 1978, a variety of legal issues have emerged regarding non-gender insurance. The author traces these developments, particularly in the annuity, life, and accident and health insurance lines of the business. He examines in detail the experience in Montana which requires non-gender insurance for all lines and concludes that public policy decisions on this important subject seem to be shifting to administrative arenas, rather than remaining with elected legislative bodies.

"The evidence is clear and conclusive—statutory implementation of non-gender insurance in 1985 has significantly increased the cost of insurance for many women."

–Ted Schwinden, governor
State of Montana
April 9, 1987

The year 1988 marks the 10th anniversary of the landmark Supreme Court decision in *Los Angeles Dep't of Water and Power v. Manhart*[1] in which the Court held that Title VII of the Civil Rights Act of 1964[2] prohibits employers from requiring females to contribute higher periodic contributions than males to a defined benefit pension plan in order to assure equal benefits upon retirement. This decision was the opening salvo in a decade-long debate over the use of gender by insurers and employers to determine the level of rights or benefits for insurance products or employee benefit plans.

The discussion which follows addresses the nature of the debate, the recent history of this debate, the experience in the one jurisdiction which

* A.B., Wittenberg University; J.D., Indiana University. The author is Senior Associate General Counsel of the American Council of Life Insurance.

1. 435 U.S. 702 (1978).
2. Civil Rights Act, 42 USCA § 2000e (West 1981).

Ex. #6
2/1/89

dictate the future of litigation strategy. The Montana legislature next convenes in regular session in 1989. Whether another effort to modify the non-gender insurance law will be considered is at best speculative.

The most critical development in the near future will be the progress of litigation challenging the Massachusetts unisex regulation. While the central factual issues of this controversy are essentially unchanged from the prior legislative and judicial activity, the underlying mechanism—administrative rulemaking—is a radical departure. There is little doubt that the non-gender insurance debate is based upon public policy concerns. The *Manhart* and *Norris* cases were judicial interpretations of one of the most important pieces of social policy legislation in our history—the Civil Rights Act of 1964. The United States Congress and over 20 state legislatures have each considered as a matter of policy whether insurance companies should be permitted to consider gender in determining rates or benefits. Each of those legislative bodies, including the Montana legislature, heard the debate in the full light of day and rejected a non-gender insurance mandate, as a matter of public policy. On the other hand, the Massachusetts insurance commissioner, an appointed official, has undertaken to determine the public policy of the entire state. Moreover, this determination flies directly in the face of virtually all existing precedent and was undertaken by means of the often arcane administrative rulemaking process.

> **Creation of public policy through administrative action thus intensifies the long-standing debate and places the controversy on a considerably different plane. Not only must the industry concern itself with addressing public policy concerns before public policymakers, it must squarely and vigorously confront the spectre of administrative agencies setting the course of public policy.**

SENATE BUSINESS & INDUSTRY
EXHIBIT NO. 7
DATE 2/11/87
BILL NO. SB205
Shaffer

Suzie Shaffer
Agent - Northwestern Mutual
Testimony Favoring Revision of
Montana Non-Gender Insurance Law

Mr. Chairman, members of the Committee, my name is Suzie Shaffer. I am an insurance agent for Northwestern Mutual. I sell life and health insurance. I would like to add my remarks to those made by Marie Doenier on the effect of the unisex law on health insurance.

We hear a lot about how unisex has benefited women in health insurance. Those statements are greatly exaggerated.

The unisex law does not affect group insurance and it does not affect Blue Cross or Blue Shield policies. It affects only individual health policies sold by private insurers. Those policies are held by approximately 3.2% of Montana's population.

If we assume that one-half of that 3.2% are women, the effect of unisex on women's health insurance applies to only 1.6% of Montana's population.

Further, according to the Insurance Commissioner's 1987 study, insofar as there has been a drop in women's premiums, there has been an increase in men's premiums. There is almost a dollar for dollar correlation.

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2/1/89

I would also like to point out that under a gender-rated system, as women grow older, their premiums, when compared to men's premiums, are lower.

Thus, as to older women, the non-gender law has the effect of artificially raising premiums.

SENATE BUSINESS & INDUSTRY
EXHIBIT NO. 8
DATE 2/1/89
BILL NO. SB 205

MONTANA FARM BUREAU FEDERATION
502 South 19th • Bozeman, Montana 59715
Phone: (406) 587-3153

BILL # SB 205 ; TESTIMONY BY: Lorna Frank

DATE Feb. 1, 1989 ; SUPPORT Yes ; OPPOSE _____

Mr. Chairman, members of the committee, for the record my name is Lorna Frank, representing 3600 Farm Bureau members throughout the state.

Farm Bureau supports SB 205. Since unisex was first introduced in Montana we have opposed the law and would work for its repeal.

It has raised the rates for women to subsidize the rates for men, but has not changed the fact that men are worse drivers or that their life expectancy is shorter.

This is not equality its discrimination and we urge this committee to give SB 205 a do pass recommendation.

SIGNED: Lorna Frank

SENATE BUSINESS & INDUSTRY
EXHIBIT NO. 9
DATE 2/11/89
BILL NO. SB205

MONTANA STOCKGROWERS ASSOCIATION, INC.

P.O. BOX 1679 — 420 NO. CALIFORNIA ST. — PHONE (406) 442-3420 — HELENA, MONTANA 59624

Enkerud

SB 205 - UNISEX

I am Kim Enkerud, representing the Montana Stockgrowers Association and the Montana CattleWomen's Association.

We are very much in support of SB 205 to revise the insurance laws of our state. We have supported this type of legislation for the past several legislative sessions since we have resolutions to that effect from our organizations. We sincerely hope that you will give a "do pass" to this bill.

Thank you for the opportunity to express support of this bill.

SENATE BUSINESS & INDUST.
EXHIBIT NO. 10
DATE 2/1
BILL NO. SB 205

FOR ENDING SEX DISCRIMINATION IN INSURANCE

Lost in Committee Hearing

1214 W. Koch • Bozeman, Montana 59715 (406) 587-5704

February 1, 1989

TESTIMONY IN OPPOSITION TO SB 205

to: Senate Business and Industry Committee

by: Marcia Youngman, Director of the National Clearinghouse for Ending Sex Discrimination in Insurance, a project of the Montana Women's Lobby

I deeply regret not being able to appear before you this morning as I did two years ago, but the road between Bozeman and Helena is barricaded closed due to snow. Carloads of testifiers and other interested women from cities including Great Falls, Missoula, and Bozeman are all unable to come because of the weather.

I represent the Montana Women's Lobby, a non-partisan coalition of 50 organizations representing over 8,000 individuals from all over Montana who unite in support of Montana's landmark non-gender insurance law. A dozen other statewide groups are also on record in support of the law, and you'll hear from some of them today. I direct the National Clearinghouse for Ending Sex Discrimination in Insurance for the Women's Lobby, a project established in response to the tremendous interest of other states in Montana's law.

In the 1987 hearing on repeal of the non-gender insurance law, your committee had several major concerns. I am pleased to be able to report that we now have information that puts essentially all of these concerns to rest. Those of you who have been on this committee for a while may feel you've heard everything there is to be said about this issue, but much more information is available now than was two years ago, and dramatic developments in other states on this issue also change the picture in ways beneficial to Montanans.

Key concerns expressed by senators in 1987 or during this session include the impact of the law on cost and availability of insurance to consumers, the law's impact on Montana's business climate, and the problems of being the only state with a non-gender insurance law.

Other states: In 1987, Montana was the only state to have comprehensively

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2/1/89

insurance rate setting. Legislators were concerned that Montana represented such a small market share to the insurance industry that it was not worthwhile to companies to do a careful rate adjustment process just for Montana or to offer a full range of gender-free products. This is no longer an issue. A Massachusetts regulation prohibiting sex discrimination in all lines of insurance and annuities was promulgated by the Insurance Department after extensive public hearings. It took effect September 1, 1987. The regulation is similar to Montana's law but even stronger. In Pennsylvania, litigation against sex discrimination in auto insurance based on the state's Equal Rights Amendment was successful in April, 1988. The state insurance commissioner is requiring companies to end sex discrimination in all lines of insurance by spring of this year. The Commonwealth Court's decision is under appeal by the industry, but this will not delay implementation; and since the lower court found the Pennsylvania Constitution and relevant state laws irrefutably clear in prohibiting sex discrimination, with no exception for insurance, it is expected that the state Supreme Court will draw the same conclusions. It should be noted that Montana's Constitutional prohibition of sex discrimination is even stronger than Pennsylvania's.

Massachusetts and Pennsylvania are populous, important markets for the industry, and Montana no longer stands alone. More states will soon follow. Groups and legislators in 35 additional states have made it a high priority to end insurance discrimination, and most will be acting legislatively in 1989. This is compared to 7 states which were pursuing the issue in 1987. Groups in every single state have expressed new interest in the issue. Chairman Thayer was sent letters by enthusiastic legislators in a representative sampling of six states--Iowa, Illinois, Oregon, New York, New Jersey, and Massachusetts--which are meant to be part of the written testimony for this hearing.

Business climate: Montana's law has not caused any harm to the state's business climate or the insurance industry. I say this because data Tanya Ask of the Montana Insurance Department will be presenting in this hearing proves it. The law has been good for business. If any individual companies have lost customers due to the law--and we have seen no proof of this--it would be either because the company adjusted their rates uncompetitively or because misleading company written statements or agent comments aroused consumer concern about the law. It should be noted that when states began requiring companies to end the

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use of race in setting rates and benefits, companies made the same claims about economic dislocations and company hardship that they now make about eliminating gender. When companies commonly ended the practice of using race in the 1960's, these claims proved to be false. It should also be noted that when ending sex discrimination in insurance was raised in Congress several years ago, companies claimed that the blended non-gender life insurance rates they would have to charge men and women would seriously harm companies and bankrupt many. According to Elizabeth Morrison, one of the top insurance brokers in the country and president of the Baltimore Life Underwriters Association, the rates life insurance companies are charging both men and women now are half again lower than the rates they said would bankrupt them. Industry claims on this subject have to be taken with a grain of salt.

Consumer impacts: According to the Montana Insurance Department, the law is causing literally no availability problems in any line of insurance. Any attempts on the part of industry representatives to claim this are efforts to mislead you. Reductions in certain product lines have not affected availability--a huge range of products and prices are currently available in all lines of insurance. Furthermore, these reductions are generally unrelated to the non-gender law. In health insurance, for instance, industry concerns about the Montana court system have been the primary factor affecting product lines.

Even though there has never been an availability problem, the picture further improved for Montanans on January 1. When life and health insurance companies revised their rate books at this time, they generally brought Montana products in line with Massachusetts products affected by that state's recent non-gender insurance regulation, positively impacting rates, paybacks, and number of product lines in Montana. This development is not reflected in the Insurance Department's most recent rate survey, which you will hear about this morning, since it took place before January

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over $20,000 more than similarly situated men in higher premiums and lower payouts. These same policies sold to women after the law took effect improved $22,000 in lifetime value. This change has a significant positive impact on the overall affordability of insurance and the potential economic security of Montana women and families.

Legislators have told me it's hard to tell who to believe regarding economic impacts of the law, and that data is easy to misuse. There are several factors you may wish to take into account when considering our data. One is that, unlike the insurance industry, we have no vested financial interest in this issue. Our primary concern is that women and men be fairly treated as Montana's Constitution mandates, resulting in economic justice for women, men, and families. We have no motive to misuse our data.

Second, our data has stood up to industry and legislative scrutiny in every state in which we have been called upon to testify in the past two years. It has never been demonstrated that we have misused our data or misrepresented the law in any way. The industry cannot make the same claim. From misleading customers about economic impacts of the law in premium inserts to quoting Insurance Department data out of context, certain companies and industry representatives have repeatedly been shown to put a poor value on accuracy regarding the law.

The validity of our rate study was recently verified in a surprising way by the American Council of Life Insurance. Edward Zimmerman of ACLI wrote an article on the Montana experience for last fall's Journal of Insurance Regulation that referred to our study. Mr. Zimmerman's only two criticisms of our data were invalid. He questioned our conclusions regarding the improved value of whole life insurance to women because he mistakenly assumed we had not considered the time value of money, whereas we had. He also questioned the validity of using lifetime impact charts, since few women can afford to buy all the affected types of insurance. We do feel that calculating the overall impact on all types of insurance is legitimate, since it provides a composite picture of impacts on women, but our charts also break down lifetime impacts by each category of insurance, illustrating that a woman buying any two types of insurance would be benefited by the law.

Third, the industry has not conducted the same kind of detailed and

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increases in atypically large policies few Montanans can afford to carry.

I do not have time to go over each of the major economic impacts of the law this morning, but I would be most glad to answer any questions about impacts on auto, health, disability, and life insurance and annuity impacts during your executive session question period on Monday. Except for Senator Noble, you have all participated in past hearings on this issue, so you may already feel familiar with most of our findings on these impacts.

I would like to mention just a couple of highlights.

*Since only 37% of Montanans are covered by employer-provided health insurance, and less than half of these are women, affordable commercial health insurance is important to Montana women and families whatever the health insurance association may claim to the contrary. Many are now able to buy health insurance for the first time due to the significant decreases caused by the law. Rates dropped an average of $221 annually for a single mother with two children, for instance.

*Furthermore, since one impact of the non-gender law is that maternity coverage must now be included, the law has an additional important pro-family impact. The insurance industry claims that pregnancy is a voluntary condition and that the cost should therefore not have to be shared by all insurees. Many conditions routinely covered by health insurance, from sports injuries to alcohol-related health problems, are voluntary conditions, so this argument is ridiculous. We assert that pregnancy can hardly be considered a voluntary condition anyway, since not all pregnancies are planned; and, moreover, we would have no future society and workforce if women did not have children. The purpose of insurance is to share risk, and there is no more important risk for insurees to share the cost of than pregnancy. The industry claims that having to provide maternity coverage will be expensive, especially to small businesses. Massachusetts eliminated maternity coverage discrimination several years ago and reports only a one percent increase in most affected policies that might be related to this change. Also, since it is Montana's employment discrimination statute that prohibits maternity coverage discrimination, repeal of the non-gender law would have no impact on the mandate to small businesses to provide this coverage.

*Term life insurance premiums went up an average of $9 annually for women,

Ex. #10
2/11/89

settlement options on men's life insurance also benefits women. Traditionally, men have bought life insurance to protect their spouse and family's economic security. If a man dies and a wife is the beneficiary, a common choice is to convert the life insurance to a life annuity. When gender-based, the man paid more in up front and the woman received less per month during the payout phase than a man would. This was a double whammy of cost to the family.

*Auto insurance rose for young women far more than any impact the non-gender law could cause, and we still claim that some companies were involved in political ratemaking designed to upset consumers about the law, a claim automobile actuary Robert Hunter concurs with. Consumer complaints have essentially died out on this subject since the furor in 1987, which was stirred up in large part by company misinformation to customers. If legislators are still concerned about this, however, corrective legislation is possible that would address this without repealing the non-gender law. Repeal would eliminate important positive impacts on health, disability income, life insurance, and annuities for women, families, and men that there have never been consumer complaints about, and would not solve the problem with auto insurance costs that repeal discussions tend to focus on.

No company has promised to drop auto insurance rates back to what they were before, and none will. Costs have risen steadily in all neighboring states, as well as in Montana, and we can't turn back the clock. If the legislature wants to act to improve the cost of insurance to the small percentage of drivers who are young women and young marrieds, repealing the law is not the way. There are several other simple alternatives, such as requiring that companies more accurately use the rating factors for which gender is just a convenient proxy, driving record and mileage. This would be fairer to safe driving young women and men. Or companies could be required to redefine the age of adult driver to 23 or 24, thus including almost all young marrieds in lower rates.

Ending sex discrimination in insurance has always been a civil rights issue fundamentally. Montana's Constitution prohibits this practice just as it prohibits the use of race. Review of the insurance industry's former use of gender shows that there is no proven causal relationship between gender and risk and that it was just an easy, unscientific proxy poorly used by companies, according to renowned life insurance actuary Arthur Anderson. Furthermore,

Ex. 10
2/1/89

women. This is not science, this is blatant discrimination. Also, according to the U.S. Supreme Court in decisions on this subject related to corporate insurance benefits to employees, generalizations about gender do not justify discrimination against individuals who do not fit the male or female stereotypes. The industry's argument that it should be legal to use gender if it's an actuarially sound basis for ratemaking fails to hold up against any of these points.

Montana's landmark non-gender insurance law is fair, is working well, and is benefiting most insurance consumers. It has vital positive impacts on the ability of women and families to protect their health and economic security. The law is starting to work even better now that other states are joining us. The Montana Women's Lobby urges this committee to oppose SB 205 and to move on to the weighty new issues currently facing the legislature.

If you have any questions about this testimony or our facts and findings, I hope you will ask me on Monday in executive session. There is not one claim on the part of the insurance industry that I have not been able to refute completely in any hearing in other states on this issue in the past two years, and I hope you will give me the opportunity to do this Monday, since closed roads prevent me from participating today. Thank you.

Ex. 10
2/1/87

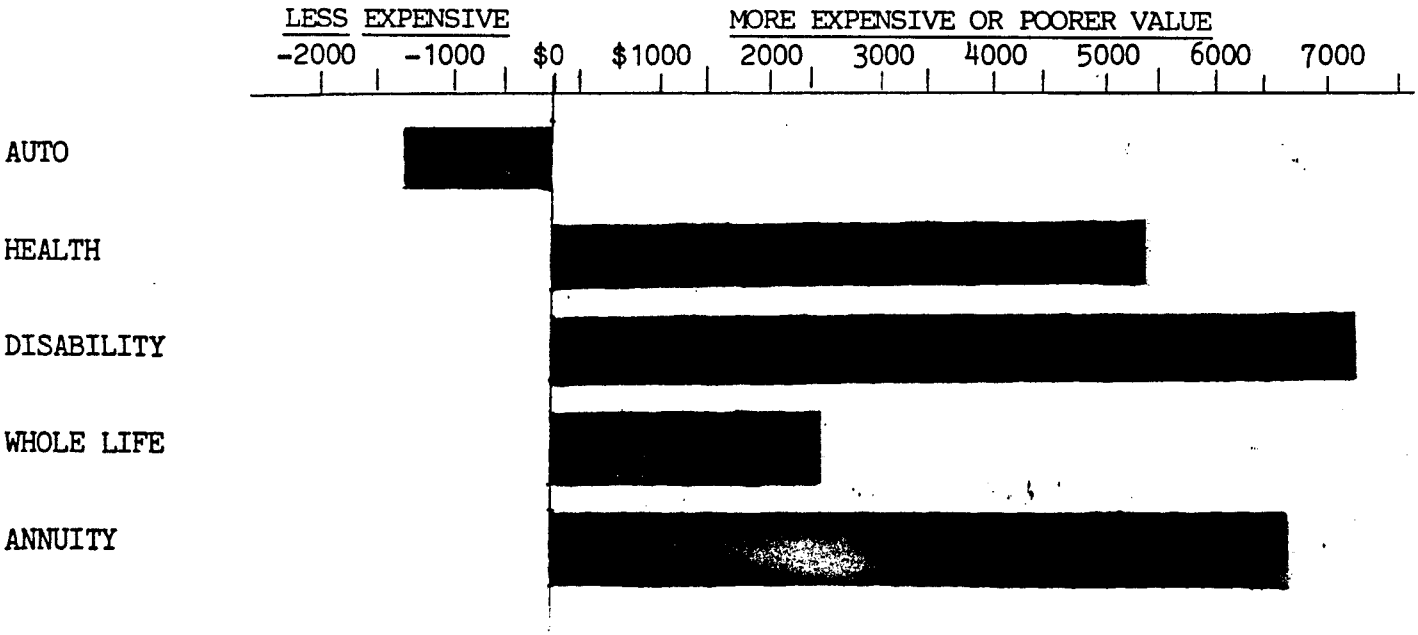
LIFETIME COST TO WOMEN OF SEX DISCRIMINATORY INSURANCE RATES AND BENEFITS

Prepared by the Non-Gender Insurance Project of the Women's Lobbyist Fund, 1214 W Koch, Bozeman, Montana 59715 (406) 587-5704; Marcia Youngman, director

Before Montana's non-gender insurance law took effect in October 1985, women paid more or received less in paybacks than similarly situated men for every type of insurance listed below except auto insurance for young drivers. In 1986, a study was conducted for our organization on insurance policy rates and benefits before and after the law went into effect. Data was collected from the insurance companies doing the majority of business in Montana on actual commonly carried policies.

The lifetime impact figures below were calculated after tabulating the data on all comparable policies to determine average costs and benefits. No data received in response to our survey was excluded, so the results are neither slanted nor extreme. The economic impact on women of sex-discriminatory coverage was severe. Women paid (and received in paybacks) the following average amounts:

$ - 1,443	less than men for auto insurance for the typical 9-year gender-based period, ages 16-25
+ 5,256	more for 34 years of major medical insurance, $500 deductible
+ 7,100	more for 34 years of disability income insurance
+ 2,543	$100,000 whole life provided this poorer value (counting premiums, dividends, and cash values); $50,000 came out at +$1,297
+ 6,720	received this much less from a 10-year certain annuity converted from the whole life policy
$ + 20,176	A lifetime of auto, health, disability income, and whole life insurance and annuity coverage cost women this much more than men in higher premiums and lower paybacks.



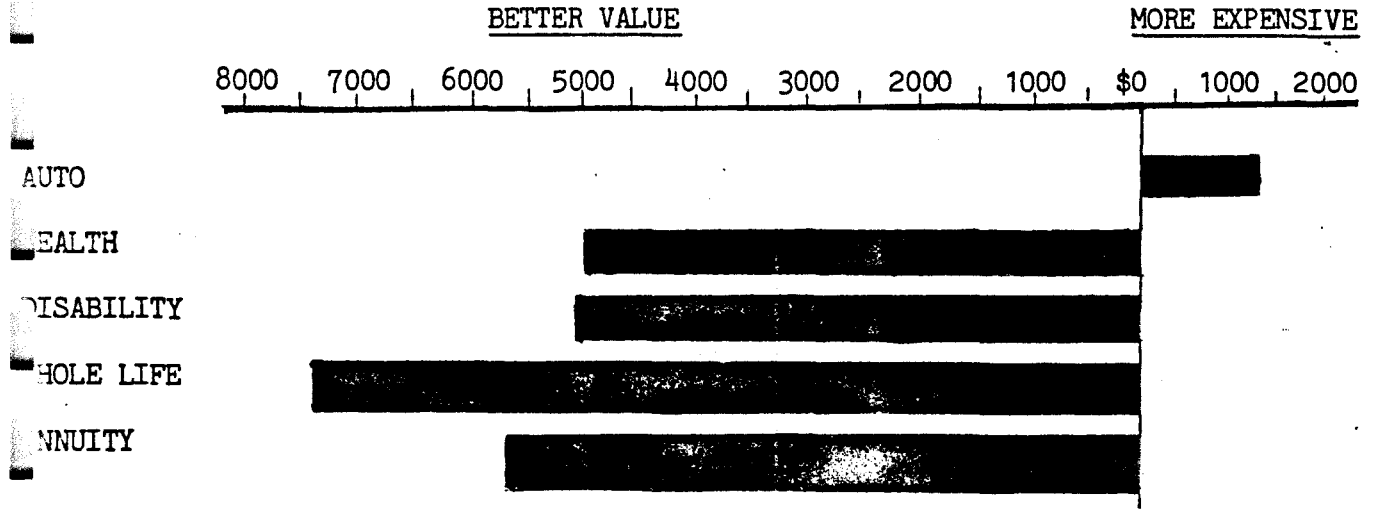
Ex # 10
2/1/89

LIFETIME BENEFICIAL IMPACTS OF THE MONTANA NON-GENDER INSURANCE LAW ON WOMEN

The following are lifetime average costs or savings to women for policies sold since the non-gender insurance law took effect October 1, 1985. The data base is the same economic impacts study used to prepare the chart on lifetime impacts of sex discrimination. Information was collected from the insurance companies doing the majority of business in Montana on commonly carried, moderate-size policies.

Women benefit substantially in every category of insurance shown below except for auto insurance for young drivers. Most companies passed on rate increases unrelated to the law at the time it took effect (for inflation, company loss experience, etc.), or the law's positive financial impact on women represented by these figures would show as even greater. Also, some companies used a poor rate adjustment process in combining men's and women's rates, and some auto insurers even may have raised rates excessively to negatively influence public opinion. Despite all this, the following figures show tremendous economic gains for women (underlined numbers represent savings in premiums or better value policies considering both premiums and paybacks):

$ 1,458	auto insurance will cost young women this much more for the 9-year period under 25
4,980	major medical, $500 deductible, will cost this much less for 34 years coverage
5,000+	disability income insurance will cost at least this much less, possibly averaging as high as $7,000; (data not yet as complete as it is for other categories)
7,457	whole life, $100,000 policy, will be worth this much more counting premiums, dividends, and cash values
5,880	annuities will provide this much more in paybacks on a 10-year certain policy; ($7,680 for a 20-year certain policy)
$21,859	Women will gain at least this much over a lifetime in lower premiums and/or higher paybacks.



DEAR MONTANA POLICYHOLDER:

THE MONTANA LEGISLATURE HAS APPROVED H.B. 358 WHICH NO LONGER PERMITS THE USE OF GENDER AND MARITAL STATUS IN RATING AUTOMOBILE COVERAGES ON AND AFTER OCTOBER 1, 1985.

YOUR INSURANCE PREMIUM REFLECTS THIS CHANGE. a small rate increase adjustment

IF YOU HAVE ANY QUESTIONS, PLEASE CONTACT YOUR FRIENDLY "AUTO CLUB" AGENT.

WE APPRECIATE SERVING YOU.

AUTOMOBILE CLUB INSURANCE COMPANY

OUR POLICY AUTO CLUB INSURANCE YOUR PROTECTION

(10/85)

SENATE BUSINESS & INDUSTRY
EXHIBIT NO. 11
DATE 2/11/89
BILL NO. HB 358

Ex. #11
2/11/89

On October 1, 1985, UNISEX RATING becomes law in Montana. As a result, many state residents will see dramatic changes to their automobile insurance rates as required by this law.

Ætna, like all insurance companies in Montana, has no choice but to comply with Unisex Rating. Those receiving the greatest impact will be women.

INCREASED RATES FOR WOMEN

Unisex Rating mandates insurers to price insurance for men and women without regard to gender. Therefore, distinctions such as the fact that women, as a group, are safer drivers would no longer apply (fewer accidents translate into lower premiums). In practice, women, as a group, end up *subsidizing* men and bearing the cost for losses they do not create.

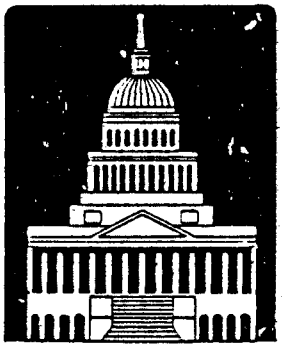
In addition, Ætna has long been giving single women between the ages of 30 and 49 (if they are the only driver in the household) even lower rates because of their good driving experience. Unisex Rating will prohibit Ætna from giving this group of women lower rates for their lower risk.

LOSS OF THE MARITAL DISCOUNT

The Unisex law would also prohibit differential treatment for married versus single drivers. Families will no longer benefit from lower rates applicable to married men and women. Now, married men will be charged the same rates as single men. Likewise, married women will be charged the same rates as single women. Their rates will increase.

If you have questions about your automobile insurance bill, please contact your insurance agent.

Ex. 11
2/11/89



IMPORTANT PRICING INFORMATION for Drivers Under 25

If you're a young driver, then you know that unmarried women and married couples under 25 pay less for their auto insurance than young male drivers.

However, the Montana Legislature has mandated a change. Automobile insurance companies can no longer use sex or marital status for rating purposes.

This means that in most cases unmarried men under 25 will pay less for their auto insurance, while some married couples and most unmarried women will have to pay more . . . sometimes a lot more.

If your bill's gone up, both the Company and your Farmers Agent regret the effect this new law has on you.

So we suggest you check with your Farmers Agent as soon as possible about some ways we might be able to help you reduce the cost of your insurance.

"We'll be glad to help."

Farmers Insurance Group of Companies

25-1781 6-85

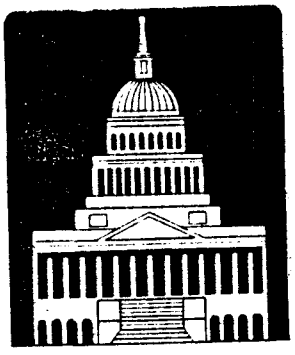
Ex. 11
2/1/89

NOTICE TO OUR MONTANA AUTOMOBILE POLICYHOLDERS...

On August 31, 1985, Ætna implemented rating changes to comply with the Unisex Rating law passed by the Montana legislature. At the same time, in response to rising claim costs, Ætna also introduced a base rate increase.

Increases in your automobile premiums renewing between August 31, 1985 and March 1, 1986 were due to either the new Unisex Rating or the base rate increase, or both.

Of course, changes that you make in your coverages may also affect your premium. Therefore, should you have a specific question regarding your automobile premium or insurance coverage, please contact your agent. He or she will be happy to assist you.



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If your bill's gone up, both the Company and your Farmers Agent regret the effect this new law has on you.

So we suggest you check with your Farmers Agent as soon as possible about some ways we might be able to help you reduce the cost of your insurance.

"We'll be glad to help."

Farmers Insurance Group of Companies

25-1781 6-85

Dear Montana Policyholder:

Montana Law no longer permits the use of gender and marital status in rating automobile coverages on or after October 1, 1985.

This change may or may not affect your premium.

If you have any questions, please contact your friendly "Auto Club" agent.

Also, the company has received a rate adjustment which may increase your premium.

We appreciate serving you.

AUTOMOBILE CLUB INSURANCE COMPANY

(12-85) Amended Form

Testimony
Senate Bill 205
Submitted by Tanya Ask
Montana Insurance Department
February 1, 1989

I am here today speaking on behalf of State Auditor and Commissioner of Insurance Andrea "Andy" Bennett. Montana, like all states, has law prohibiting discrimination based on race, color, sex, social origins, political ideology and religion. We also have the unique distinction of prohibiting by law sex and marital status as criteria upon which insurance rates or policy benefits can be based.

The law has put Montana at the forefront of the fight for economic equality, an enlightened decision. Not all that long ago we believed race was no longer a factor determining the amount of premium an individual paid for life insurance. December 1987 the American Civil Liberties Union brought to our attention that premiums for some companies were still being collected based on a person's race. As of August 1988, there were still 22 companies nationally who reported collecting premium on a race distinct basis. The practice of actually writing and rating based on race continued up into this decade. A shorter life expectancy could be shown actuarily shown. We find this practice to be repugnant. Companies cannot be relied on to correct these socially unacceptable practices, and that is why this office opposes Senate Bill 205, the repeal of Montana's Nongender Law.

The Nongender Insurance Law has not unilaterally favored one sex over the other in its application. Men certainly benefited from lower auto rates at younger ages while women have clearly benefited on the health side, and, a longer term benefit, have seen increased cash values on certain life purchases.

In 1983, when this law was adopted, we were warned of an impending exodus of insurers from the state of Montana. The news was taken to heart, and the legislature gave the new law a two year delayed implementation. The law remained, and there was no mass exodus.

Our office has frequently been asked what impact has the Nongender Law had on the number of insurers in Montana. The number of companies authorized since October 1, 1985, the date Nongender became effective, is 128. These companies knew when they requested a Montana license knew that Montana was a nongender insurance state. 63 of those companies are authorized for property/casualty coverage and 62 for life and health insurance. Three companies are licensed to sell title insurance only. Four of the companies are classified as reinsurers only and are, therefore, not affected by the Nongender Law.

Ex. #12
2/1/89

The number of companies which have left the state during the same time period is 44. You should know 34 of those companies had their license revoked either for failure to meet our minimum statutory capital/surplus standards or because they were insolvant and liquidated by their home state. Six of the companies had their licenses terminated because they merged with other insurers. The last four failed to pay their annual license renewal fee.

One misperception is the life insurance market would lag in Montana. Life premium volume has risen from around $177 million in 1985 to over $210 million in 1987, the latest year for which we have complete records in our office.

While many insurance companies vehemently oppose nongender, there is one company which has been an outspoken proponent of the idea. John Hancock, this country's fifth largest life insurer with over $28 billion in assets, spoke in favor of the concept at a nongender hearing before members of the Iowa legislature in November. John Hancock's main reason for supporting nongender is the issue is no longer an actuarial issue, but a social issue. They contend that polls of their policyholders found 70% of the respondents felt using gender distinction in setting rates is unacceptable.

Another very common misconception was that the rising cost of insurance in Montana over the past three and a half years was due to the Nongender Law. Rates rose across the board during this time period, and that needs to be remembered. In addition, individuals calling our office about rate increases blamed it on nongender for types of insurance that do not take into account the individual's sex or marital status at all. One excellent example is professional liability/medical malpractice where an increase was blamed on nongender.

Our office had to require companies to change their premium inserts because the rate increase information they included was inaccurate. The companies were required to notify policyholders of the corrections. I have brought samples of these inaccurate representations to you today. This type of printed matter is no longer being circulated, but the misperception still spreads verbally.

We need to remember rates will probably not go down across the board with a repeal of the Nongender Law. If this bill is successful, there will be rate reallocation, and some people will benefit while others will suffer.

Our office has been busy the last few weeks compiling information about effects of the law on Montanan residents. I would like to leave copies for you. We feel these bear out the fact no one group bore the total benefit or brunt of the law.

INS 520 (6-7)

SENATE BUSINESS & INDUSTRY
EXHIBIT NO. 13
DATE 2/1/89
BILL NO. Bill SB205

205

WITNESS STATEMENT

NAME Tanya Ask DATE 2/1/89

ADDRESS

WHOM DO YOU REPRESENT? Montana Ins Dept

SUPPORT _____ OPPOSE ✓ AMEND _____

COMMENTS: Prepared Statement made on behalf of State Auditor and Commissioner of Insurance

See Exhibit 12

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Form CS-34A
Rev. 1985

NON-GENDER LIFE INSURANCE

1985 - 1988

Survey prepared by the Montana Insurance Department
January 31, 1989

LIFE INSURANCE RATES for a resident of Helena, Montana. The premium information requested was for a $50,000 annual renewable term and a $50,000 whole life product. Cash values were requested for the tenth year of the whole life product.

LIFE INSURANCE RATES: As reported by the named companies.

<u>$50,000 Annual Renewable Term Policy</u>

MASSACHUSETTS MUTUAL LIFE INSURANCE CO.

	1985 MT-ID	1988 Montana	1988 Idaho
Male, 25 yrs.	$121	$121	$121
Female, 25 yrs.	$118	$121	$118
Male, 45 yrs.	$240	$240	$240
Female, 45 yrs.	$223	$240	$223
Male, 65 yrs.	$1457	$1457	$1457
Female, 65 yrs.	$1299	$1457	$1329

Ex. #14
2/1/85

NON-GENDER TERM LIFE INSURANCE

1985 - 1988

From 1985 to 1988 the average $50,000 term life insurance premium for both a 25 year old Montana male and a 25 year old Idaho male increased 13%. The average premium for a 25 year old Montana female increased 21% and the average premium for a 25 year old Idaho female increased 11%.

From 1985 to 1988 the average $50,000 term life insurance premium for a 45 year old Montana male increased 4% and the average premium for a 45 year old Idaho male with the same coverage increased 6%. The average premium for a 45 year old Montana female increased 25% and the average premium for a 45 year old Idaho female increased 7%.

From 1985 to 1988 the average $50,000 term life insurance premium for a 65 year old Montana male decreased 1% and the average premium for a 65 year old Idaho male with the same coverage increased 1%. The average premium for a 65 year old Montana female increased 26% and the average premium for a 65 year old Idaho female decreased 6%.

CONCLUSION: Montana male term insurance rates have not significantly decreased when compared to sex distinct rates charged men in adjacent states--Montana males pay 2% less for their insurance. Premiums for Montana females have increased. When compared to sex distinct rates charged females in adjacent states, Montana females pay 10% to 32% more for term life insurance.

Ex. #14
2/1/89

NON-GENDER WHOLE LIFE INSURANCE

From 1985 to 1988 the average $50,000 whole life insurance premium for a 25 year old Montana male decreased 6% and the average premium for a 25 year old Idaho male with the same coverage decreased 4%. The average premium for a 25 year old Montana female increased 3% and the average premium for a 25 year old Idaho female decreased 9%.

From 1985 to 1988 the average $50,000 whole life insurance premium for a 45 year old Montana male decreased 9% and the average premium for a 45 year old Idaho male with the same coverage decreased 6%. The average premium for a 45 year old Montana female increased 3% and the average premium for a 45 year old Idaho female decreased 13%.

From 1985 to 1988 the average $50,000 whole life insurance premium for a 65 year old Montana male decreased 9% and the average premium for a 65 year old Idaho male with the same coverage decreased 5%. The average premium for a 65 year old Montana female increased 4% and the average premium for a 65 year old Idaho female decreased 15%.

CONCLUSION: Montana male whole life insurance rates have not significantly decreased when compared to sex distinct rates charged men in our adjacent states. Montana males pay 2% to 4% less for their insurance. Premiums for Montana females have increased significantly when compared to sex distinct rates charged females in adjacent states. Montana females pay 10% to 19% more for their insurance. They also saw an increase in the cash values over the same time period.

SENATE BUSINESS & INDUSTRY
EXHIBIT NO. 15
DATE 2/1/89
BILL NO. SB205

JAMES TALCOTT CONSTRUCTION, INC.

P.O. Box 2493
300—2nd Street Northwest • Great Falls, Montana 59403
Telephone (406) 761-0018

February 1, 1989

Senator Jerry Noble
Senate Business and Industry Committee
Montana Senate
Capitol Station
Helena, MT 59620

RE: Senate Bill 205

Dear Senator Noble,

My name is Diana S. Talcott. I am 50% owner of James Talcott Contruction, Inc. in Great Falls. I am also a single parent of a 12-year-old girl.

Last November I applied for Disability Insurance through New York Life. During the interview process my agent, told me, "You are fortunate that Montana is now a non-gender insurance state." I remembered that statement. And, when SB205 appeared, I called him to find out the exact savings. It was a 22% savings for women across all age groups. For me, that equals:

$ 16.92/month
$2030.40/ten years
$5076.00/twenty-five years

If my life style or health shows statistically that my life may be longer or shorter; then I would accept a rate differential. However, if my rate were changed solely because I am not married or because I was born female, I believe that would be unjustifiable.

I urge you to defeat this bill in committee.

Thank you for your consideration.

Sincerely,

Diana S. Talcott

Diana S. Talcott
Secretary-Treasurer

dst/kf

#16
DATE 2/1/89
SB 205

NON-GENDER HEALTH INSURANCE - INDIVIDUAL MAJOR MEDICAL

1985 - 1988

Survey prepared by the Montana Insurance Department
January 31, 1989

HEALTH INSURANCE RATES for a resident of Helena, Montana. The policy is a major medical with a $500 deductible. Comparisons were taken April 1, 1985; April 1, 1986; and April 1, 1988. The following rating assumptions were used to calculate the premium:

1) The major medical policy contains a $5,000 stop-loss provision.
2) The single man and single woman are lawyers employed by the State of Montana.
3) The couple with two children are social workers employed by the State of Montana. The 45-year-old couple's children are full time high school students.
4) All applicants are in excellent health with no prior medical history and all applicants are within the acceptable weight and height requirements.
5) Premium may not include discounts of any kind.

AETNA LIFE AND ANNUITY COMPANY	1985	1986	1988
Male, 25 yrs	$505	$689	$681
Female, 25 yrs	$637	$689	$681
Male, 45 yrs	$682	$897	$919
Female, 45 yrs	$885	$897	$919
Couple 25 years old and two children	$1869	$2240	$2021
Couple 45 years old and two children	$2294	$2656	$2498

Ex #17
2/1/89

USAA CASUALTY	NORTH DAKOTA	SOUTH DAKOTA	WYOMING	IDAHO	MONTANA
Male, 20 yrs.	$507	$815	$607	$656	$456
Female, 20 yrs.	$284	$536	$401	$366	$456
Male, 40 yrs.	$180	$247	$186	$230	$219
Female, 40 yrs.	$172	$247	$186	$220	$219
Couple, 22 yrs.	$210	$302	$228	$269	$374
Couple, 45 yrs. Male, 16 yrs.	$388	$526	$409	$501	$401
Couple, 45 yrs. Female, 16 yrs.	$269	$425	$335	$346	$401

CONCLUSIONS: Changes in automobile premiums between 1985 and 1988 for the Montana insured scenarios were as follows:

The average premium decrease for a 20-year-old male was 7%, while the average premium increase for a 20-year-old female was 63%. The average premium increase for a 40-year-old male was 22%, while a 40-year-old female paid an average of 23% more. Automobile premiums for a 22-year-old couple varied between a decrease of 15% to an increase of 77%, while the average premium increase for a 22-year-old couple was 36%.

Changes in automobile premiums for a 45-year-old couple with a 16-year-old male driver ranged between a decrease of 46% to an increase of 70%. The average premium increase for a 45-year-old couple with a 16-year-old male driver was 9%. A 45-year-old couple with a 16-year-old female driver experienced automobile premium changes ranging from a decrease of 5% to an increase of 110%. The average increase in premiums for a 45-year-old couple with a 16-year-old female driver was 49%.

CONCLUSIONS: Montana/Neighboring states comparison. 1988 automobile premiums for the scenarios were as follows:

Young women under the age of 25 pay significantly higher premiums than their counterparts in adjacent states, while young men's rates are moderately lower than those of their counterparts in adjacent states.

Parents with youthful female drivers pay significantly higher premiums than their counterparts in adjacent states, while parents with youthful male drivers pay slightly lower premiums than their counterparts in adjacent states.

Young married couples pay significantly higher premiums than their counterparts in adjacent states.

SENATE BUSINESS & INDUSTRY
EXHIBIT NO. 18
DATE 2/1/89
BILL NO. SB 205

January 31, 1989

TESTIMONY TO SENATE BUSINESS AND INDUSTRY COMMITTEE

Re: Opposition to SB 205
Fr: Sue Steyh, 201 N. Bozeman, Bozeman, MT 59715

I'm writing to urge you to vote against Senate Bill 205, which would repeal Montana's non-gender insurance law. I understand that some members of your committee have expressed concern about what happened to the auto insurance premiums of young women when the non-gender law took effect. I am one of those young women, so I'd like to explain why I support the law.

I'm 23 now and carrying both auto and health insurance. I know my auto insurance company, State Farm, raised rates for women my age after the law took effect, but rates dropped even more at the same time on the $500 deductible major medical policy I'm now carrying. Considering both auto and health insurance, I save 150% annually on insurance premiums due to the non-gender law, and this savings will go up considerably in two years when I turn 25 and receive adult driver rates. Auto insurance was only gender-based for young drivers before the law took effect, but health insurance was gender-based regardless of age, so the health insurance savings I'm enjoying will last the rest of my life and be worth a net lifetime savings to me of several thousand dollars. I work in the kind of job that does not provide employee health benefits, as most Montana women do, and the greater affordability of health insurance means a lot to me.

I know some people have been upset about auto insurance price increases, but as I understand it, most people's increases were unrelated to the non-gender law. People didn't realize that, because many insurance companies made it sound like their increases were due to the law. Even the higher rate I pay is partly due to other factors, and if State Farm rewarded drivers like me properly for perfect driving records--no tickets or accidents and low mileage--most young women would pay no more than they did before the law took effect, except for increases due to factors like inflation. State Farm says it does use driving record and mileage already, but it uses them in a way that only has a minor impact on rates. They could do much better, which would result in fairer treatment of safe drivers of all ages, both male and female.

I don't think insurance companies show much regard for their customers in opposing the law or handling rate adjustments the way they did. Interestingly, State Farm has provided two rebates to most of its customers since the 1987 repeal effort failed because of making too much profit.

I'm already trying to plan for my future financial security. Most people my age are willing to consider not only immediate financial impacts but also to think about long-range impacts if they're given a chance. If so many companies weren't misleading people, I think most people my age and their parents would recognize that the non-gender law is beneficial overall and worth protecting. Please oppose SB 205.

Sue Steyh

SENATE BUSINESS & INDUSTRY
EXHIBIT NO. 19
DATE 2/1/89
BILL NO. SB205

TESTIMONY FOR THE SENATE COMMITTEE ON BUSINESS AND INDUSTRY

Oppose SB 205, Revise the Laws Relating to Discrimination in Insurance and Retirement Plans

Name: Karen Landers, MD, Pediatrician from Helena

Representing: Montana Council for Maternal and Child Health

The Montana Council for Maternal and Child Health represents hundreds of health care professionals serving Montanans across the state. Because their primary goal is the provision of quality health care for Montana mothers and children, the Council opposes SB 205 particularly as it relates to exclusion of insurance coverage during pregnancy.

We live in a nation that currently ranks 19th amongst industrialized countries in infant mortality.[1] The state of Montana ranks approximately 24th in the country for infant mortality with an average of 120 infants dying every year before they reach their first birthday. Approximately one-half of the infants who die are low birthweight, weighing less than 5.5 pounds at birth. Quality care during pregnancy has been recognized as the most effective way to reduce low birthweight and infant deaths.[2]

Women with private insurance are more likely to obtain adequate prenatal care than those with Medicaid or no insurance.[3] In Montana, women who have 12 or more medical visits during pregnancy have a low birthweight rate of 4%. Women with 2 or fewer visits during pregnancy have a low birthweight rate of 11%.[4] The average cost of caring for a low birthweight infant in the newborn intensive care unit is $15000. The average bill for having a baby is $4300 including hospital and physician charges

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for prenatal care, labor, delivery, and postpartum checkup.[5]

Montana must address an already serious problem of access to prenatal care. Excluding pregnancy coverage for those with private insurance will greatly add to the numbers of women who have no means to pay for the prenatal care that is so critical in promoting a healthy outcome to pregnancy, and will increase the state's burden of providing for them.
It makes good financial and health care sense to provide early care during pregnancy and reduce more expensive and life threatening complications for both the mother and the infant. Let us promote the future of Montana by voting for healthy mothers and healthy babies. Vote no on SB 205!

References

[1]Death Before Life: The Tragedy of Infant Mortality, The National Commission to Prevent Infant Mortality, August 1988.

[2]Death Before Life: the Tragedy of Infant Mortality, The National Commission to Prevent Infant Mortality, August 1988.

[3]Prenatal Care: Reaching Mothers Reaching Infants, Institute of Medicine, 1988.

[4]Montana DHES, Bureau of Records and Statistics

[5]Prenatal Care: Reaching Mothers Reaching Infants, Institute of Medicine, 1988.

SENATE BUSINESS & INDUSTRY
EXHIBIT NO. 20
DATE 2/1/89
BILL NO. SB 205

February 1, 1989

TESTIMONY IN OPPOSITION TO SB 205

fr: Norma Boetel. Bozeman insurance agent and state president of the Montana Federation of Business Women, with a statewide membership of 600 people.

The Montana Federation/BPW members strongly endorse non-gender insurance and definitely oppose SB 205. We concur with Andrea Bennett, "enough is enough."

I have had many insurance agents, both men and women, say the same thing and indicate their clients are getting upset and tired of attempts to repeal the unisex law again.

Gender-based insurance affects the ability of women to obtain insurance because of the terms and conditions of some types of insurance, and the rate structure. The discrimination created by gender-based insurance could damage thousands of women in this state whose need for affordable insurance coverage is greater now than ever before, especially in the area of health insurance, because of increased health care costs.

Before non-gender insurance, women paid substantially higher rates than men for identical coverage for health insurance. Many health insurance plans exclude maternity coverage or if it is included, it is extremely expensive and limited in scope.

Before the 1985 legislation, disability income insurance for women was costly. Now it is affordable, which is an important factor because of the large numbers of women who are currently in the workforce. The industry justifies higher rates for women in disability income and health insurance by pointing out that women, as a class, have a higher use rate for these types of insurance. Published data, however, does not substantiate this assertion.

My primary concern is for single women and for female single parents who would have a difficult time affording health and disability income insurance if this law is repealed. During the last two years, as a health insurance agent, I know of hundreds of women who have started health insurance programs for themselves or families because it is now affordable. These responsible women have eliminated the accumulation of large catastrophic health care costs for themselves and their families by enrolling in health insurance plans. If this insurance law is repealed, many of these women will be unable to pay for health insurance premiums, if the premiums revert to their previous level. The result will be women letting their health insurance coverage lapse. Do you as concerned citizens and legislators of this state want to add to the welfare list of this state or do you want responsible people to care for their own insurance needs? If this law is repealed, you are encouraging women to drop their health insurance protection.

Again, before October, 1985 young women generally paid less than young men for auto insurance. However, auto insurance companies had not looked at factors other than sex to determine characteristics of safe drivers. When factors

After the law was passed to use non-gender rates, I asked one of the leading property/casualty agents in Bozeman if the non-gender law was the one and only factor which caused higher premiums for young female drivers. He told me there were other factors such as more newer cars which are costlier to fix, increased labor and parts costs, which had a greater impact on the reason for increased premiums than gender did. He told me the rates would have gone up regardless of the law.

In life insurance, before the passage of non-gender insurance, women had a slight advantage in lower rates paid for comparable coverage to men. Since 1985, the cost of the waiver of premium rider (a disability clause) on life insurance was lowered for women. Therefore, the premium increase for the life portion and the decrease for the waiver of premium rider was a near wash. In addition, women for various reasons buy smaller policies than men. Since most companies charge more per thousand dollars coverage for smaller policies, any overall advantage women had is lost.

Sex discrimination in insurance has cost women throughout their lifetime. Any advantage they enjoyed in auto and life insurance rates is more than offset by the higher rates/lower benefits in health and disability insurance, pensions, and annuities when gender-based.

Sex discrimination is prohibited by the Montana Constitution. It is time the legislature recognizes the requirements of the Montana Constitution by ensuring that all insurance companies doing business in this state adopt other factors in their ratemaking than the sex of the insuree. The result will be fair and affordable insurance for all citizens of the state of Montana. I urge the committee and the legislature to vote no. Do not repeal the non-gender insurance law.

SENATE BUSINESS & INDUSTRY
EXHIBIT NO. 21
DATE 2/1/89
BILL NO. SB205

WITNESS STATEMENT

NAME Kevin Shores BUDGET

ADDRESS Box 554 Cameron, MT 59720

WHOM DO YOU REPRESENT? Individual → (Private)

SUPPORT OPPOSE ✓ AMEND

COMMENTS: Dear Mr. Chairman and members of the commitee, I am from Ennis Montana and currently residing in Helena. I speak as a private individual and as a member of the group of drivers which are male, under 25 yrs. of age, with safe driving records, I and others in the same sitvation currently pay automobile insurance rates based on our individual driving records and activities.

As I understand this bill, it would return us to a system where my insurance rates are set according to the statistics of all male drivers under age 25 instead of my individual driving record. As I understand this system, my insurance rates will increase, based on a gender sterectype of male drivers under age 25. I do not think this is fair and I therefore oppose SB 205 and urge that it "not pass".

Kevin Shores

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Form CS-34A
Rev. 1985

SENATE BUSINESS & INDUSTRY
EXHIBIT NO. #22
DATE 2/1/89
BILL NO. SB 205

NATIONAL ORGANIZATION FOR WOMEN, INC.
MONTANA STATE

TESTIMONY OF MONTANA NOW
SENATE BUSINESS AND INDUSTRY COMMITTEE
MONTANA STATE LEGISLATURE
FEBUARY 1,1989

Montana NOW opposes SB 205 as it is nothing less than a repeal bill for the Unisex insurance law passed in 1983. We believe that there has been significant gains for women under Montana's Unisex insurance law and urge the legislature not to repeal it.

HEALTH INSURANCE

Women have clearly benefited under Unisex insurance from a reduction in their health insurance rates .And families have benefitted by the inclusion of maternity coverage in basic health insurance policies by those insurers that are complying with the law.

Montana NOW was instrumental in filing a complaint before the Human Rights Commission regarding Mutual of Omaha health insurance policy that was purchased after October 1, 1985 by a farm family and did not cover normal maternity costs. The Human Rights Commission issued its finding of reasonable cause in November 1987 that lack of maternity coverage constituted sex discrimination. While the complaint was in process, Mutual Of Omaha issued a new act of policies in Montana that contained normal maternity coverage. The cost of the new policy for the complainant was $55.61 a month while her old policy that excluded maternity coverage was $81.60 per month. This policy covers husband, wife, and three children and has a high deductible.Purchasing the new policy saved them $312.00 a year plus they received the benefit of normal maternity coverage.

Here is another example that shows that including maternity coverage does not cause insurance premiums to go up. This policy is for a husband, wife, and one child. This family had no employer-coverage and had purchased a policy from State Farm Insurance for $450.00 per quarter. The policy had a $1000 deductible and excluded normal maternity coverage. When they shopped around for a policy that included maternity coverage, they found a Mutual Of Omaha policy with a $500.00 deductible for $94.00 a month. In other words, they saved $672.00 a year and got the maternity coverage they wanted.

Montana has the smallest percentage in the U.S. of employees covered by employer health insurance. Montana families need health insurance coverage for normal pregnancy and need the cost to be affordable.

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2/1/89

NATIONAL ORGANIZATION FOR WOMEN, INC.

MONTANA STATE

Montana NOW Testimony page 2

AUTO INSURANCE

I am sure that there will be a lot of discussion of auto insurance rates today. But I would like to briefly talk about the real problem with auto insurance rates - the fact that they are not based in any significant way on mileage. Insurers are using unisex rates, but are also using very broad mileage catergories rather than charging for insurance based on actual miles driven. Women on the adverage drive only half the number of miles that men do and therefor women on the adverage are overcharged at every age for auto insurance. We estimated in our testimony to the 1987 legislature that the overcharge to Montana women amounts to seven million dollars a year.

True unisex pricing would be basing auto insurance premiums on the car's actual miles driven regardless of the sex of the driver.

What is the solution to this problem? It is not to repeal the law. The law needs some improvement and this can be done either through legislation or through administrative action of the Montana state government.

CONCLUSION

The unisex insurance law is working and is consistant with the Montana state constitution. We urge the legislature not to pass this bill.

Written by
Sharon Eisenberg
Montana NOW Insurance
Committee

SENATE BUSINESS & INDUSTRY
EXHIBIT NO. 23
DATE 2/1/89
BILL NO. SB 205

February 1, 1989

My name is Martha Newell and I am here in opposition to SB 205. In the last year, I've had a personal experience illustrating how marital status discrimination in insurance caused me economic harm. As a result, I filed a discrimination complaint with the Human Rights Commission, which is now pending.

In August of 1988, my partner and I purchased a house in Missoula. We shopped around and purchased homeowners' insurance. A couple of weeks later, we received a bill for additional charges. When we inquired about these charges, we were told that the charges were required because we are not married. We informed our agent that it is unlawful in the state of Montana to discriminate on the basis of marital status. We furnished her with copies of the Montana non-gender insurance law and the Montana Constitution. Our agent forwarded these to the insurance company. We received a letter back from the insurance company stating, and I quote, "We have not refused to insure these individuals based on their living arrangement, nor have we discriminated against them based on sex." Nonetheless, at the end of their letter, there was a handwritten note stating, and I quote again, "P.S. If they have been living together long enough to have a common law marriage, then the charge could be deleted." These 2 statements by the company are absolutely inconsistent.

When my only option is to be married or to pay a higher premium, that is discrimination. While I realize my rights and the rights of my partner are protected by the non-gender insurance law regardless of this committee's actions, I also realize that should you pass SB 205, people like me would be subject to marital status discrimination in insurance with no recourse.

I urge you to vote against SB 205.

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Royal Insurance
Milbank Insurance

P.O. Box 2M • East Highway 12
Milbank, South Dakota 57253
1-605-432-5551

September 20, 1988

SEP 22 [illegible]

Sullivan & Hunt Insurance Agency #5369
Missoula, MT

POLICY #1518711 - MICHAEL J. KADAS & MARTHA H. NEWELL

Karen, we have received your letter of September 14, 1988, and the attached copies of Montana law in regard to discrimination based on sex of the person.

In the case of this Homeowners Policy, we have made an additional charge to protect the liability exposure for both of the individuals listed as named insureds. We have not refused to insure these individuals based on their living arrangement nor have we discriminated against them based on sex. We have made the $24 charge to protect their liability exposure.

The Homeowners Form HO-3 Policy defines an insured as:

> "Insured" means you and residents of your household who are:
>
> a. Your relatives or
> b. Other persons under the age of 21 and in the care of any person named above.

If these two individuals are relatives, I would agree to delete the extra CPL charge.

Please discuss this with the insureds and let us know if any change should be made. If you have any further questions, please contact me.

Dave Schaack
Portfolio Underwriter

jp/23

P.S. If they have been living together long enough to have a common-law marriage, then the charge could be deleted.

SENATE BUSINESS & INDUSTRY
EXHIBIT NO. 24
DATE 2/1/89
BILL NO. SB 205

State of Montana
Senate Business and Industry Committee

Testimony in Opposition to S. 205

by Jenny A. Erickson
Assistant Legislative Counsel, Government Relations
John Hancock Financial Services
(617) 572-6616

[Headquartered in Boston, Massachusetts, The John Hancock is the country's fifth largest life insurance company, with $26 billion in assets in 1987.]

Laws bar discrimination based on race, religion and sex in hiring, promotion, housing and the extension of credit. John Hancock believes that the time has come to eliminate sex discrimination -- just as we have eliminated racial and religious discrimination -- in insurance, as well. Thus, we support so-called "unisex" insurance legislation which is fair to both consumers and insurers.

It's no secret that our position on this issue has cost us some friends within the insurance industry. But we're a company that is not afraid to stick its neck out on this and other issues, and it is clear that we have earned the respect of legislators, the public, and our policyholders because of it.

Divergent perspectives make the unisex debate a difficult one. The very essence of insurance involves prediction of losses, which can only be done accurately for homogeneous groups. Insurers argue that women as a group live longer than men. This is a scientific fact which was recognized by the Court in both the *City of Los Angeles Water and Power v. Manhart* and *Norris v. Arizona Governing Committee* cases. Therefore, insurers believe that using gender as a rating factor is an inherently rational and inherently fair practice.

Unisex proponents, on the other hand, argue that many individual women don't live as long as the actuaries' tables predict. Therefore, they believe that gender-based insurance rating is unfair to individual purchasers of insurance. Both *Norris* and *Manhart* support this argument as well.

When viewing the confusing unisex tableau, insurers necessarily focus on the group; they are looking at the forest. But civil rights are individual rights; unisex advocates are looking at the trees. Whose perspective is correct ? This is the difficult but necessary public policy question again facing the Montana legislature.

As a company, John Hancock stands out from the crowd because we recognize both points of view. Insurance companies have long used gender as one factor in pricing policies and we agree that classifications based on gender are actuarially supported for many lines of insurance. Our Chairman, Jim Morton, is an actuary. So is our President, Steve Brown. They both believe that gender is a valid underwriting factor. But they'll be the first to tell you that **that's not the point anymore. The debate has changed.**

The issue is no longer an actuarial one, it's a social one. Our nation's whole way of thinking about distinctions based on gender has evolved, and is, I hope, evolving still. The *Manhart* and *Norris* decisions established the United States Supreme Court's position of treating the issue as a social rather than an economic one. John Hancock agrees -- and we're not alone.... Many people feel that the policy of charging men and women different prices for the same insurance coverage -- despite any economic justification -- is an offensive practice, including most of our own policyholders.

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We conducted some polls and found that 70% of the respondents felt that using gender distinctions in setting rates is unacceptable. One survey, commissioned by the American Council of Life Insurance, showed that people had no problem with using age as a rating factor, but with gender the weight of opinion was by far on the other side. Our response was: if this is so socially unacceptable, then let's not do it. *So we support the removal -- by legislation -- of gender-based rates, provided that doing so does not create undue hardships on existing policyholders or place insurance firms at a competitive disadvantage. Thus, we oppose S.205, which would repeal Montana's fair and effective nondiscrimination law.*

John Hancock was the only major insurer to work toward enactment of unisex rate legislation in Massachusetts. We joined with a broad-based unisex coalition, including legislators, the Attorney General's office, women's groups and other civic groups, in support of a bill which passed the Massachusetts House of Representatives, but not the Senate, in 1986. The bill contained the three conditions prerequisite to our support of *any* unisex bill in *any* state: **the bill did not have extraterritorial effect; the bill did not apply in any way to existing contracts; and sufficient time was granted to establish and implement unisex rates.** Although Montana's public law 49-2-309 contains these safeguards, John Hancock will not support unisex legislation which does not contain them. We believe they are eminently reasonable and necessary for the protection of our business interests.

In September, 1988, however, Massachusetts became the first state to administratively adopt a unsex rating scheme when Insurance Commissioner Roger Singer promulgated broad antidiscrimination regulations. John Hancock opposes these regulations. We strongly believe that Commissioner Singer's action usurped powers properly held by the legislature. Although banning sex discrimination is a laudable goal, the Commissioner lacks the authority to realize it. It is the purview of the Massachusetts legislature -- the elected voice of the public -- to make this type of hard public policy decision. To allow the Commissioner to administratively dictate our underwriting rules would set a dangerous precedent.

We disagree with insurers who claim that proposed unisex laws implemented on a prospective basis will irreparably disrupt their business or even bankrupt them. We just don't think this is true. Unisex will no doubt cost companies in the short run, but absorbing reasonable costs is the price of doing business in a changing society. In the long run, unisex rates would basically be economically neutral for insurers if all companies selling within a state convert to unisex rates. Remember, the life insurance business is a tremendously competitive and flexible one, run by a lot of smart people -- it will survive any market dislocation generated by thoughtful, well-drafted unisex legislation.

We also disagree with the industry's assessment that unisex rates would be more costly than the current gender-based rates, since our actuarial studies show that changing to unisex rates would not greatly increase costs to consumers. For the individual insurance consumer who typically purchases more than one type of insurance, the overall cost of insurance would not be significantly greater under a unisex rating scheme. Some costs would increase while others would drop, thus balancing each other out. The net cost differential, of course, depends upon an individual consumers choice of coverages. For example, if a 45 year old woman purchased term life insurance, major medical coverage, disability coverage and an annuity from John Hancock her overall insurance cost would drop by 2% under unisex rates.

The rest of the insurance industry seems poised to fight unisex legislation wherever it is proposed. Frankly, John Hancock feels that our industry is getting a black eye on this issue. It's fighting a losing battle to perpetuate a practice it doesn't need. There are more important issues toward which we should direct our political capital.

Montana's nondiscrimination law, 49-2-309, was the first major step in sending gender-based rating, in the words of our Chairman, Jim Morton, "the way of the dinosaur." Repeal of this important law by the Montana legislature would clearly be a step back for both the citizens of Montana and all Americans who have benefited from your leadership in this area.

We respectfully urge you to reject S.205.

TESTIMONY OF ARTHUR W. ANDERSON,

CONSULTING ACTUARY,

IN REGARD TO S.B. 205.

AT THE REQUEST OF

THE NATIONAL CLEARING HOUSE FOR

ENDING SEX DISCRIMINATION IN INSURANCE

February 1, 1989

Montana Senate Business and Industry Committee

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2/1/89

My name is Arthur W. Anderson. I am, and have been for 22 years, a consulting actuary in Boston working primarily in the field of pension plans. Before becoming a consulting actuary I worked for a large insurance company. I am the author of the officially sponsored textbook on pension mathematics for actuaries. I have also had considerable experience as expert consultant to the American Civil Liberties Union and the Equal Employment Opportunities Commission in two of the landmark sex discrimination lawsuits brought during the 1970's: Peter vs. Wayne State, 691 F2d 235, vac 463 U.S. 1223, and EEOC vs. Colby College, 439 F.Supp. 631, rev 589 F.2d 1139. I am coauthor of the Brief of Eight Independent Actuaries as Amicus Curiae submitted to the U.S. Supreme Court in Norris v. Arizona Governing Committee, 463 U.S. 1073 (1983). That experience gave me considerable exposure to the arguments pro and con for sex-blind pricing and sex-blind benefits under insured products.

The intent of my testimony is to address some of the fallacious pseudo-actuarial arguments which are brought up by the insurance industry in most discussions of ending sex discrimination in insurance.

In my opinion there is nothing in Montana's law which could impair the solvency of any insurance company doing business in the state. Nor in my opinion is there any reason for protests from insurers who no longer receive discretionary life insurance or annuity dividends or payouts on a gender basis.

I was an expert witness in the EEOC v. Colby College case, a Title VII challenge to sex-based annuities which was tried prior to the Norris decision. The challenged insurance plan issued by TIAA-CREF provided actual annuity levels which were substantially larger than the contractually guaranteed sex-based minimum payments. During the Colby College trial there was testimony that if TIAA used unisex annuity rates, the male insurers around the country

would rise up in protest, because they all knew they would die sooner than all the female insurers and would therefore demand higher pensions to offset their shorter life expectancy. This uprising did not take place when the suit was settled and rates were made unisex.

A mortality rate (or a life expectancy--the two are related mathematically) is a characteristic of a group of people, not of an individual within the group. Take me, for example; I am forty-eight years old. If I looked at the U.S. Life Tables for 1979-81 for the whole population, I might conclude that I have five chances in a thousand of dying this year, or that my life expectancy is thirty years. This would be to misread the table. The table says that five out of every thousand Americans aged forty-eight will die within one year, but not which ones! That is why I carry life insurance: If I knew I was going to live thirty more years then drop dead, I would not need insurance (or I could wait twenty-nine years and buy a one-year term policy).

Incidentally, if I chose to misread the U.S. Life Table for white males, rather than for the whole population, I would incorrectly conclude that I had six chances in a thousand of dying within a year, or a life expectancy of only twenty-seven years. But I have not changed; I am still the same person who read the first table! The fact is that my future life-span is unknowable. You can determine the averages for a large group of people who are like me in one way or several, but then you will get different results depending on your choice of groupings; for example, from the aforementioned U.S. Life Tables, at age 40:

Group	Mortality Rate per 1,000 Persons	Avg. Remaining Years of Life
All US residents	4.88	29.65
White residents	4.39	29.94
Male residents	6.38	26.66
White male residents	5.73	26.94

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There also is a significant mortality difference between people grouped by race to that for people grouped by sex; insurers actually used race as a rating factor until it became illegal social policy to do so. Some insurance industry representatives argue that the mortality difference between races has different causes--economics and living conditions--than the mortality difference between sexes, which they claim is a biological fact. No scientific proof exists that either of these assertions is correct.

The actuarial process of determining insurance rates and benefits does involve grouping people according to potential risk, but the elimination of sex as a legal rating factor does not diminish the industry's capacity to group people usefully. A wide variety of behavioral and environmental factors with a direct causal relationship to mortality are available--such as smoking, which was, until recently, ignored by life insurers even though it has a greater correlation with mortality than sex or race.

The "pseudo-actuarial" arguments against sex-blind pricing and benefits fall into two types. First is that unisex pricing will promote anti-selection. Second, are "Horror stories" that involve the contradictions between sex-blind pricing and the statutory basis for reserves.

The first major pseudo-actuarial argument is that if insurance companies are forced to ignore sex in underwriting, the public will take advantage of this fact and cause what insurance companies call "anti-selection," that is, conscious selection against the company by the insurance-buying public. For example, the industry may argue that women might consider the premiums of their life insurance policies to be "too high," while men, on the other hand, would consider the premiums were "too low." (This presumes that all these hypothetical men and women are actuaries!) This would mean that more men than women would purchase the insurance policy and render the premium inadequate

The argument is fallacious, because it presumes that premium rates are frozen. Any company which found itself losing money on a class of business would be free to raise the premium to any level required, provided it did so without reference to sex.

A slightly more sophisticated version of this fallacious argument may be raised by companies to argue that they traditionally have sold insurance primarily to men and therefore their unisex premiums will be higher than the unisex premiums of a company which sells more insurance to women. Such a company with primarily male insurers may argue that it will no longer be able to compete effectively. This argument totally ignores the fact that the life-insurance element of many products issued by life-insurance companies (notably whole life, universal life, single premium annuities, etc.) are based only slightly on the mortality risk assumed, the larger part of the premium having to do with the saving component of the product. Also entering into premium structures is compensation of agency forces and administrative expenses, which vary considerably by company. Thus, mortality differences have only small impact on the premium structure. Differences between companies for comparable products exceed the differences in the male and female premiums charged today by any one company. Thus, the sex-based premium charged to women by one company may well be higher than the sex-based premium charged to men by a second company for a comparable policy.

The second pseudo-actuarial argument against sex-blind pricing concerns the treatment of statutory reserves. This is clearly not an issue in Montana since your statute took effect over three years ago, so I will not address it here.

Finally, allow me to note that sex-blind pricing and benefits have already

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come to the fields of employee benefits, of life insurance and annuity products sold to deferred compensation plans sponsored by employers, to automobile, and other types of property and casualty insurance - all without deleterious effect on the financial health of insurance companies.

Part of the evidence in the Colby College trial was a history of the Metropolitan Life Insurance Company printed in 1910. In that book it was stated that an insurance company would commit suicide if it did not charge to black customers double the premiums of those charged to white customers, owing to the higher mortality amongst blacks. In later decades this discrimination by race was outlawed, and blacks and whites are charged the same premiums and placed in the same pool for determination of dividends. The result was not in any way catastrophic for the life insurance industry. The parallel with that situation is inescapable: blacks do have different mortality than whites today, but the insurance industry does not argue for a return to 1910. It is once again time for the insurance industry to yield to the tides of change.

Elimination of discrimination in premiums and benefits under insured products is not an actuarial question at all. Rather, it is a policy question. Some of us would prefer to see elimination of discrimination in all areas of the economy while others have some interest in seeing its perpetuation. I ask only that the question be considered a policy one and not an actuarial one.

DATE 2/1/89 Pg 1 of 2

COMMITTEE ON Business & Industry

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One: Support	Check One: Oppose
Judy Mitel	State farm Insurance	205	✓	
Jon Ashabraner	State farm Ins	205	✓	
Tom Hopgood	Health Ins. Assoc. of Amer.	205	✓	
BERT STEIL	HEALTH INS ASSOC. OF AMERICA	205	✓	
Margaret Davis	LWVMT SB205			X
REGGIE GOOD	MONT. ASSN. OF CITY MANAGERS	SB205	✓	
Jim Enterud	MT Cattlewomen, MT Stockgrowers	SB 205	✓	
Tanya Ask	MT. INS Dept	205		X
Kevin Shires	private Citizen	205		✓
Kara Landis	Montana Chiropractic Assn	205		✓
Jan Hamilton	WIFE	205	✓	
Dave Drake	Farm Bureau	205	✓	
Laurie Nicholas		205	✓	
Paulette Bailey	private citizen	205		✓
Sandy Myers	American St. Ins Co	205	✓	
Harp Cate				
Kathy Anne,	John Hancock Ins.	205		✓
Daniel F. Case	Amer. Council of Life Ins.	205	✓	
Hello Estano	American Council of Life Ins	205	✓	
Jacqueline Terrell	American Ins. Assoc	205	✓	
Delayne Shaffer		205	✓	
[illegible]		205	✓	
Brian Sabo	Mt. Women's Lobby	205	✓	✓
Ann Bodeby	self			X
Chris Kenney	MT Soft Drink Assn	205		X
Cathy Harman	self	205		X

(Please leave prepared statement with Secretary)

DATE 2/1/89

COMMITTEE ON Business & Industry

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One: Support	Check One: Oppose
Wayne McCoy	MLWV	205		✓
Wilbur Rehmann	Mt. Nurses Assoc	205		✓
Jan Cooney			✓	
Brenda Nordlund	MT Q's Lobby	205		✓
Jim Jensen	self	SB 205		✓
Chris Kaufman	self	205		✓

(Please leave prepared statement with Secretary)