Third Party Insurer Liability in Title VII Discrimination Actions: A Resolution Against Liability

I. Introduction

In 1983, the United States Supreme Court granted certiorari to three very similar cases,[1] all of which presented for the first time the issue of whether or not a group annuity plan operated by an independent third party insurer may be discriminatory under Title VII.[2] The plaintiffs in each case alleged that they were being discriminated against because the annuity plans in question calculated payment schedules on the basis of sex-segregated mortality tables.[3]

Two of the cases, *Spirt v. Teachers Insurance and Annuity Association* (TIAA)[4] and *Peters v. Wayne State University*,[5] differed from the third, *Arizona Governing Committee v. Norris*,[6] in one important

[1]Spirt v. Teachers Ins. & Annuity Ass'n, 691 F.2d 1054 (2d Cir. 1982), *vacated*, 103 S. Ct. 3566 (1983), *on remand*, 735 F.2d 23 (2d Cir. 1984); Peters v. Wayne State Univ., 691 F.2d 235 (6th Cir. 1982), *vacated*, 103 S. Ct. 3566 (1983)· Arizona Governing Comm. v. Norris, 103 S. Ct. 3492 (1983).

[2]42 U.S.C. §§ 2000e to 2000e-17 (1982). Title VII provides in pertinent part: "It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin . . . ." 42 U.S.C. § 2000e-2(a).

[3]The basis of the alleged discrimination in each of the three cases was the employer's (or insurer's) use of mortality tables that placed men and women in different actuarial classes. These different classifications were used because women, as a class, live longer than men. Because of the different life expectancy, women, as a class, were expected to receive a greater number of monthly payments than their male counterparts. Thus, women received lower monthly payments than would a man of the same age making the same financial contribution.

A related issue was decided in Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978). In *Manhart*, the United States Supreme Court found that an employer-operated pension fund was discriminatory because the employer, based on sex-segregated mortality tables, required women to make greater contributions in order to receive monthly payments equal to those of the men.

The question whether or not these classifications should be deemed discriminatory, a question beyond the scope of this Note, has been discussed in numerous cases and articles. *See, e.g.*, Arizona Governing Comm. v. Norris, 103 S. Ct. 3492; Benston, *The Economics of Gender Discrimination in Employee Fringe Benefits:* Manhart *Revisited*, 49 U. Chi. L. Rev. 489 (1982); Note, *TIAA-CREF and the Sex-Based Mortality Table Controversy*, 7 Coll. & U. L. 119 (1980-81); Note, *Challenges to Sex-Based Mortality Tables in Insurance and Pensions*, 6 Women's Rts. L. Rep. 59 (1979-80).

[4]691 F.2d 1054 (2d Cir. 1982), *vacated*, 103 S. Ct. 3566 (1983), *on remand* 735 F.2d 23 (2d Cir. 1984).

[5]691 F.2d 235 (6th Cir. 1982), *vacated*, 103 S. Ct. 3566 (1983).

[6]103 S. Ct. 3492.

respect. In addition to seeking redress against their actual employers, the plaintiffs attempted to establish liability on the part of the third party insurers that administered the plans.[7] Both *Spirt* and *Peters* involved the same insurer[8] and annuity plan, yet the courts reached opposite results. In *Spirt*, the Second Circuit Court of Appeals found that the insurer was "so closely intertwined with [the plaintiff's employer] that [the insurer] must be deemed an 'employer' for purposes of Title VII."[9] The opposite conclusion was reached in *Peters*, where the Sixth Circuit held that the insurer could not be liable because the insurer was neither the plaintiffs' employer nor an agent of Wayne State University.[10]

In addition to the issues of liability as an "agent" or "employer" under Title VII, both *Spirt* and *Peters* raised the question of the impact of the McCarran-Ferguson Act (MFA)[11] on the insurers' liability.[12] The *Spirt* court rejected the insurers' MFA defense,[13] and the *Peters* court found it unnecessary to address the issue in light of its initial determination of no liability.[14]

Of the three cases granted certiorari, the Supreme Court rendered an opinion only in *Arizona Governing Committee v. Norris*,[15] the one case that did not raise the issues concerning an insurer's liability.[16] *Spirt* and *Peters* were both vacated and remanded "for further consideration in light of [*Norris*]."[17] On remand, the conflict with respect to insurer liability was not resolved. The Second Circuit did not change its position regarding TIAA's liability;[18] and although the *Peters* decision has not been reported on remand, the Sixth Circuit subsequently maintained its view that insurers are not liable under Title VII in *EEOC v. Wooster Brush Employees Relief Association*.[19]

[7]The plaintiffs in both *Spirt* and *Peters*, in addition to suing their respective universities, sued TIAA and CREF. TIAA and CREF are companion nonprofit insurance corporations which deal exclusively with some 2,800 colleges and universities and their employees. *See, e.g.*, *Spirt*, 691 F.2d at 1057.

[8]*See supra* note 7.

[9]691 F.2d at 1063. The court held that the annuity plan was discriminatory and that the plaintiff's employer, Long Island University, was also liable for the discrimination.

[10]691 F.2d at 238. The court characterized the district court's finding that the insurer was an "employer" as "clearly erroneous." *Id.*

[11]15 U.S.C. §§ 1011-1015 (1982).

[12]The McCarron-Ferguson Act (MFA), passed by Congress in 1947, exempts the "business of insurance" from the effect of any federal statute that does not "specifically [relate] to the business of insurance." *Id.* § 1012(b).

[13]691 F.2d at 1065.

[14]691 F.2d at 241. The issue of MFA exemption was addressed by the district court in *Peters* and the defense was rejected. 476 F. Supp. 1343, 1350-51 (E.D. Mich. 1979), *rev'd*, 691 F.2d 235 (6th Cir. 1982), *vacated*, 103 S. Ct. 3566 (1983).

[15]103 S. Ct. 3492.

[16]The plan in *Norris* was administered by Lincoln National Life Insurance Company. Lincoln Life was not joined in the suit. *Id.* at 3495.

[17]*Spirt*, 103 S. Ct. at 3565-66; *Peters*, 103 S. Ct. 3566.

[18]*Spirt*, 735 F.2d 23 (2d Cir. 1984).

[19]727 F.2d 566 (6th Cir. 1984). *Wooster Brush* differed from *Peters* and *Spirt* in that the discrimination alleged was the failure to provide pregnancy disability benefits. The essential issues of "employer" or "agent" status and MFA immunity, however, were the same.

These conflicting decisions have created uncertainty regarding the liability of independent third party insurers in Title VII litigation. This Note will examine the reasoning which has guided the courts in their decisions as to whether or not an insurer may be an "employer" or "agent" of an employer for purposes of Title VII. An analysis of the possible theories that might support the insurer's status as "agent" or "employer" will illustrate that the position favoring insurer non-liability is more firmly based in law and reason. In addition, the Note will explore the impact of the McCarran-Ferguson Act on insurer liability. The Note will demonstrate that all questions of insurer liability under Title VII should be precluded by the Act.

II. The Insurer As Employer or Agent

A. *The Policy Considerations of Title VII*

Title VII was enacted as part of the Civil Rights Act of 1964, a comprehensive series of statutes established for the purpose of eliminating to the extent possible the essential inequities resulting from widespread discrimination in American society.[20] Congress had come to the realization that the rights of citizenship alone were not sufficient guarantees of freedom in this country. The legislators recognized that "[t]he rights of citizenship mean little if an individual is unable to gain the economic wherewithall to enjoy or properly utilize [those rights]."[21] Thus, Title VII was enacted to guarantee every citizen equal employment opportunities by proscribing discrimination by an "employer"[22] or any "agent"[23] of an employer against any individual on the basis of sex, race, color, religion, or national origin.[24]

The broad scope of Title VII[25] and the important remedial purposes it was intended to effect have led many courts to recognize that the

---

[20]H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963).

[21]*Id.*

[22]42 U.S.C. § 2000e(b). The term "employer" is defined in the Act as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." *Id.*

[23]*Id.* The term "agent" is given no specific definition in the statute. *See infra* text accompanying notes 44-67.

[24]42 U.S.C. § 2000e-2(a).

[25]The pervasive scope of the policy behind Title VII is also illustrated by the very limited exceptions to the rules against discriminatory employment practices, the "bona fide occupational qualification" (BFOQ) exception and the "Bennent Amendment." The BFOQ exception allows an employer to hire his employees on the basis of religion, sex, or national origin in the few instances that such criteria are "bona fide occupational qualification[s] reasonably necessary to the normal operation of that [employer's] particular business or enterprise." 42 U.S.C. § 2000e-2(e). The Bennent Amendment allows different compensation between the sexes if such differentiation is authorized by the Equal Pay Act. *Id.* § 2000e-2(h). The Equal Pay Act allows different compensation only when the difference is the result of a seniority system, a merit system, a system which measures compensation by quantity or quality of production, or any factor other than sex. 29 U.S.C. § 206 (1982). *See* Note, *Title VII and the McCarran Act: Sex Discrimination in Retirement Benefits by Third-Party Insurers*, 68 Geo. L.J. 1285, 1293 (1979-80).

language of the Act should be liberally construed.[26] "Liberal" interpretation, however, has its limits, and some courts have exceeded these limits in the context of insurer liability under Title VII. Specifically, the terms "employer" and "agent" of section 2000e-2(a) have been interpreted in ways that create new definitions for the terms unwarranted by prior law, history, or reason.

Section 2000e-2(a) of Title VII is designed to effect Title VII's purposes through the proscription of certain employment practices by an "employer" or "any agent of such a person."[27] Therefore, unless a person charged with a violation of this section can be brought within the definition of employer or agent of an employer, such person can incur no liability for a violation of Title VII. Hence, the initial and most critical step in any section 2000e-2(a) action is the determination of whether or not the party charged fits within the definitions of these terms.

Unfortunately, many courts have been less than clear in their analyses of who is an "employer" or "agent" of an employer for purposes of Title VII. In very sketchy expositions, courts have used the term "employer" when the actual considerations seem to indicate some sort of agency relationship, and have applied the term "agent" when an employer analysis is apparently being used.[28] The courts themselves are seemingly unsure of the exact relationship they are attempting to establish.

B. *Liability Under* Spirt

One of the major cases finding insurer liability under Title VII is *Spirt v. Teachers Insurance and Annuity Association*.[29] In *Spirt*, the plaintiff, a professor at Long Island University, brought an action against the university and TIAA,[30] alleging that the defendants had violated section 2000e-2(a) of the Civil Rights Act of 1964[31] by using sex-segregated mortality tables in determining annuity rates for university employees.

The district court held that the TIAA was an "employer" within the meaning of that term as used in Title VII.[32] In so holding, the court explained that the remedial purposes of Title VII require a definition of "employer" which is broader than that which the term normally connotes. The court stated that the term "employer" "encompass[es]

---

[26]*E.g.*, *Spirt*, 691 F.2d at 1063 and cases cited therein.

[27]42 U.S.C. § 2000e(b). *See also supra* notes 22-23.

[28]*See infra* text accompanying notes 32-39.

[29]691 F.2d 1054 (2d Cir. 1982), *vacated*, 103 S. Ct. 3566 (1983), *on remand*, 735 F.2d 23 (2d Cir. 1984).

[30]Also sued with TIAA was College Retirement Equity Fund (CREF), a companion corporation of TIAA. TIAA provided variable annuities while CREF provided fixed annuities.

[31]*See supra* text accompanying notes 22-24.

[32]*Spirt*, 691 F.2d at 1057. TIAA is a nonprofit legal reserve life insurance company which provides retirement benefits to over 400,000 employees at more than 2,800 colleges and universities. *Id.*

persons who are not employers in conventional terms, but who nevertheless control some aspect of an individual's compensation, terms, conditions, or privileges of employment.''[33] Finding that Long Island University and other colleges and universities ''delegated their responsibility [sic] for and control over employee annuity plans to TIAA,''[34] the court concluded that if TIAA were not held liable, the discrimination could not be fully remedied; therefore, the effectiveness of Title VII would be impaired.[35] The court then stated that it was significant that TIAA is a nonprofit corporation ''whose sole reason for existence is to serve Spirt's direct employer, LIU, and other similar institutions by relieving them of the burden of establishing and administering their own insurance programs . . .and that participation in TIAA . . . is compulsory for plaintiff as a tenured professor.''[36]

The Second Circuit approved this reasoning summarily:

> We agree with the district judge that TIAA and CREF, which exist solely for the purpose of enabling universities to delegate their responsibility [sic] to provide retirement benefits for their employees, are so closely intertwined with those universities, (in this case LIU), that they must be deemed an ''employer'' for purposes of Title VII. It is also relevant that participation in TIAA-CREF is mandatory for tenured faculty members at LIU, and that LIU shares in the administrative responsibilities that result from its faculty members' participation in TIAA-CREF.[37]

In addition, both the district court and the court of appeals attempted to bolster their rationales with reference to a statement made by the United States Supreme Court in *Los Angeles Department of Water and Power v. Manhart*:[38] ''We do not suggest, of course, that an employer can avoid his responsibilities by delegating discriminatory programs to corporate shells. Title VII applies to 'any agent' of a covered employer . . . .''[39]

Although the reasoning of these courts may appear logical at first blush, closer analysis reveals that the argument is fraught with contradiction and difficulty. At the outset, it is not clear why it is ''significant'' or ''relevant'' that the TIAA-CREF plans are mandatory for tenured professors. The decision regarding whether or not participation was compulsory was that of the employer, the university, and not the insurer. TIAA and CREF are not shown to have held any positions of authority

---

[33]*Spirt*, 475 F. Supp. 1298, 1308 (S.D.N.Y. 1979)(citations omitted), *aff'd in part, rev'd in part*, 691 F.2d 1054 (2d Cir. 1982), *vacated*, 103 S. Ct. 3566 (1983), *on remand*, 735 F.2d 23 (2d Cir. 1984).

[34]475 F. Supp. at 1308.

[35]*Id.*

[36]*Id.*

[37]691 F.2d at 1063.

[38]435 U.S. 702 (1978).

[39]*Id.* at 718 n.33 (citation omitted).

by which they could have demanded that any single individual participate in a plan. Neither of the *Spirt* decisions explains how the mandatory participation requirement imposed by the university could possibly affect TIAA-CREF liability.[40]

Similarly, the court of appeals failed to explain the nature or importance of the university's sharing in the "administrative responsibilities" that arose from the participation of university employees in the TIAA-CREF plans. The only employer "responsibilities" mentioned in the cases are deducting pay from the employees and sending it, along with employer contributions, to the insurers.[41]

The assertion that TIAA and CREF were "closely intertwined" with Long Island University and other colleges and universities is especially troubling when considered in conjunction with the reference to the Supreme Court's statement in *Manhart* regarding the futility of delegating responsibilities to a corporate shell to avoid Title VII liability.[42] The fact that TIAA and CREF serve over 2,800 colleges and universities makes it clear that TIAA and CREF are anything but "corporate shells."[43] The additional statement that TIAA and CREF exist "solely for the purpose of enabling universities to delegate" responsibilities for benefits adds nothing but confusion; although the statement may be true its significance is never revealed.

The paucity of analysis and explanation in *Spirt* is characteristic of the opinions which impose Title VII liability on third party insurers. A study of the opinions leaves it unclear whether the *Spirt* courts were attempting to characterize TIAA and CREF as "employers" or "agents" of Long Island University. The conclusory nature of the opinions and their lack of clarity is revealed by a careful analysis of the concepts of "agent" and "employer," because a third party insurer fits into neither catagory.

C. *Agency*

Exactly who may be considered an "agent" under Title VII is not clear. The legislative history of the Act does not reveal the reasons for including the term, and the term is not specifically defined in the Act.[44] In addressing the issue of whether or not an insurer may be an "agent" for purposes of Title VII, the courts have suggested two basic approaches: the application of traditional agency principles[45] or a "piercing the

---

[40]*E.g.*, 691 F.2d at 1063 (fact that participation was mandatory was described, without explanation, as significant). *Cf. Norris*, 103 S. Ct. at 3497 n.10 ("It is irrelevant that female employees in *Manhart* were required to participate in the pension plan, whereas participation in the [plan at issue in *Norris*] is voluntary.").

[41]691 F.2d at 1057.

[42]*See supra* text accompanying note 39.

[43]*See supra* text accompanying note 39. *See also infra* text accompanying notes 68-69.

[44]*See supra* notes 22-23.

[45]*See Norris*, 103 S. Ct. 3492; *Peters*, 691 F.2d 235.

corporate veil" analysis where one corporation is deemed an "agent," "instrumentality," or "sham" of the other.[46] Although both approaches were intimated by the Second Circuit in *Spirt*,[47] neither was specifically followed. The Sixth Circuit, however, adopted both approaches to some extent in *Peters v. Wayne State University*[48] and *EEOC v. Wooster Brush Employees Relief Association.*[49]

The following discussion will examine the agency analyses in three contexts. The first, the *Spirt-Peters* situation, involves a nonprofit insurer that contracts directly with the insured with the approval of the employer. The employer in this instance assists both the insurer and the insured by deducting proper amounts from the salary of the insured and making additional contributions. The insurer in this context deals with numerous employees and employers.[50] The second situation, denominated the *Wooster Brush* context, again involves a nonprofit insurer contracting directly with the employee. The insurer receives major contributions from the employer on behalf of the employees and deals solely with one employer and its employees.[51] The third situation, called the *Commercial* context, could apply given a commercial group insurer. This context involves a major for-profit corporate insurer who contracts directly with the employer. Generally, a master contract is negotiated between the insurer and the employer-policyholder, and individual certificates, outlining the coverage provided by the master contract, are issued to the employees. The employees may or may not make individual contributions depending upon the type of plan requested by the employer.[52]

1. Traditional Agency Principles.—The most obvious approach to a determination of agency status for purposes of Title VII, given the lack of any specific definition in the Act, is the application of traditional agency principles. One of the basic canons of statutory construction is that when a common law word has been used, absent a different definition expressed or implied, the common law meaning should be applied.[53] The traditional agency relationship includes four elements: (1) a consensual relationship between two parties; (2) one party, the agent, holds a fiduciary position with regard to the other party, the principal; (3) the continuous right of the principal to control the conduct of the agent; and (4) the power of the agent to affect the legal relations of the

---

[46]*E.g.*, *Peters*, 691 F.2d 235.

[47]691 F.2d 1054.

[48]691 F.2d 235 (6th Cir. 1982), *vacated*, 103 S. Ct. 3566 (1983).

[49]727 F.2d 566 (6th Cir. 1984).

[50]The *Spirt-Peters* context is based on the facts in *Spirt*, 691 F.2d 1054, and *Peters*, 691 F.2d 235. The situation is unique because the companies sued, TIAA and CREF, are nonprofit corporations and deal solely with colleges and universities and their employees.

[51]The *Wooster Brush* situation is based on the facts in *Wooster Brush*, 727 F.2d 566. The *Wooster Brush* case involved a small nonprofit insurer that dealt only with Wooster Brush Company employees. The Wooster Brush Company voluntarily contributed to the insurer 50% of its operating fund.

[52]*See* R. Keeton, Insurance Law § 2.8(c), at 66-67 (1971).

[53]*E.g.*, Owens v. Rush, 24 F.E.P. 1543, 1561 (D.C. Kan. 1971).

principal.[54]

The first of these elements, a consensual relationship, presents no obstacle to a finding of agency in either the *Spirt-Peters*, *Wooster Brush* or *Commercial* contexts. In the *Spirt-Peters* and *Wooster Brush* situations, the approval and contributions by the employer clearly indicate consent to the relationship. In the *Commercial* context, the contract between the insurer and the employer establishes the requisite consent.

The second element, a fiduciary relationship between the employer and the insurer, is much more difficult to establish. A fiduciary relationship implies a confidential relationship where the agent has a duty to perform his responsibilities faithfully and loyally for the benefit of the principal.[55] In all three situations considered here, as in any insurance case, the insurer has a fiduciary duty to the insured employees. This duty arises from the unequal bargaining positions of the parties and the reliance placed by the individual insured on the insurer.[56] In the *Spirt-Peters* situation, these considerations do not arise in the insurer-employer relationship. The college or university that makes an agreement to contribute to the employees' retirement fund is not in the disadvantageous position of an individual buying insurance or annuity coverage. Universities, as with other businesses, are generally experienced in business and have a higher degree of bargaining power than an individual. Nor is reliance placed upon the insurer to protect the interests of the employer; as mentioned above, the interests to be protected are those of the employee.

Similarly, in the *Wooster Brush* context, the insurer's fiduciary duty is to the employee. The contributions made by the employer are voluntary and the resulting benefit to be protected is that of the employee. The employer has no special interest to be protected and deals at arm's length with the insurer. The insurer's fiduciary duty runs only to the employee with whom the insurer has contracted.

In the *Commercial* context, the considerations are the same. The employer deals with the insurer at arm's length,[57] and only the employee has special interests to be protected. The employer is in no disadvantaged position requiring more than the fulfillment of the insurer's promise to provide benefits established by the initial contract. No special loyalty is established; the insurer does not act solely in the employer's interest. Therefore, in the *Commercial* context, as well as in the *Spirt-Peters* and *Wooster Brush* situations, the fiduciary element is absent.

Similarly lacking in all three insurer-employer relationships is the third element, the power of the "agent" to affect the legal relations of

---

[54]*See* W. Seavy, Agency § 3 at 3-6 (1964); Restatement (Second) of Agency, §§ 1, 14 (1958).

[55]*See* W. Seavy, Agency § 3, *supra* note 54, at 3-6.

[56]*See, e.g.*, Henning v. Metropolitan Life Ins. Co., 546 F. Supp. 442, 446-47 (M.D. Pa. 1982); Brezan v. Prudential Life Ins. Co. of Am., 507 F. Supp. 962, 966 (E.D. Pa. 1981).

[57]Henning v. Metropolitan Life Ins. Co., 546 F. Supp. 442, 446-47 (M.D. Pa. 1982).

the "principal." The insurer is in no position to affect unilaterally the legal obligations of the employer in relation to third parties. Illustrative of this fact is the result of an insurer's failure to pay benefits owed an employee under a given plan. If the insurer were merely the agent of the employer, the agent's failure to pay prescribed benefits would result in the principal-employer being directly liable to the employee for the failure to pay.[58] This, however, is not the case. In the insurance context, the employee looks to the insurer for payment of benefits and seeks to hold the insurer accountable for its failure to conform with the terms of the insurance contract.[59]

The final element, the principal's continuous right to control the conduct of the agent, is also missing in the three situations under discussion here. The control element requires that the principal have a continuing right to control the activities and operations of the agent with regard to the duties for which the agent is responsible.[60] In the *Spirt-Peters*, *Wooster Brush*, and *Commercial* contexts, once the employer chooses to deal with the insurer, the employer has no control over the insurer's operations.[61] The insurers are completely independent entities,[62] and the administrative policies of the insurers are not within the employers' control.[63] Indeed, the decisions regarding which plans are available and what mortality tables are used ultimately are decisions made by the insurer;[64] they are not subject to modification in any way without a renegotiation of the contract that binds the parties in the first instance.[65]

Close analysis thus reveals that only one of the four necessary elements of agency, a consensual relationship, is present in the *Spirt-Peters*, *Wooster Brush*, and *Commercial* contexts. Because all four elements are not found, insurers cannot be brought within the definition of "agent" if the term is given its traditional common law definition.[66]

The courts have not, however, strictly confined their analyses to the common law requirements for agency. In light of the broad remedial

---

[58]*See generally* W. SEAVY, AGENCY § 56, *supra* note 54, at 101-04.

[59]*See, e.g.*, Henning v. Metropolitan Life Ins. Co., 546 F. Supp. 442 (M.D. Pa. 1982)(employee under group policy sues insurer to enjoin offset of policy benefits); Equitable Life Ins. Soc'y of the United States v. Kelleman, 224 Ind. 526, 69 N.E.2d 244 (1946) (group insurer sued for recovery of death benefits).

[60]*E.g.*, NLRB v. Local No. 64, Falls Cities Dist. Council of Carpenters, 497 F.2d 1335, 1336 (6th Cir. 1974).

[61]*E.g.*, *Peters*, 691 F.2d at 238.

[62]*E.g.*, *id.*; *Wooster Brush*, 727 F.2d at 572-73.

[63]*E.g.*, *Peters*, 691 F.2d at 238; *Wooster Brush*, 727 F.2d at 572-73.

[64]*E.g.*, *Peters*, 691 F.2d at 238.

[65]*See* 19 COUCH ON INSURANCE 2D § 82:31, at 759-60, § 82:80-81, at 827-31 (rev. ed. 1983).

[66]*See, e.g.*, NLRB v. Local No. 64, Falls Cities Dist. Council of Carpenters, 497 F.2d 1335, 1336 (6th Cir. 1974)(Control is a fundamental element of agency.). *See also* Owens v. Rush, 24 F.E.P. 1543, 1562 (D.C. Kan. 1971) ("Generally a Title VII 'agent' is an intermediate in hierarchy, a supervisory employee with the power to affect plaintiff's employment. . . .The sweep of Title VII's remedial provisions is broad, but not all-inclusive.").

purposes of Title VII,[67] a more relaxed requirement has been suggested in cases where two corporations are involved.

2. The "Sham" or "Instrumentality" Construction.—Instead of requiring the presence of all four of the factors required to establish a traditional agency relationship, the more liberal approach focuses on the single element of control that is primarily addressed when courts "pierce the corporate veil." Under this analysis, if the corporation sought to be charged as an agent can be characterized as a "sham," "shell," or "instrumentality" of the direct employer, liability under Title VII's "agent" requirement may be invoked. This analysis was specifically suggested by the Supreme Court in *Manhart*,[68] where the Court stated that the employer could not avoid liability by delegating its discriminatory program to a corporate shell.[69] This approach was at least mentioned in the *Spirt*, *Peters*, and *Wooster Brush* cases.[70]

To find that one corporation is an agent or instrumentality of another, there are generally five considerations: (1) that records, accounts, capital, employees, or transactions of the two companies are intermingled; (2) that the corporate formalities of the two entities are not observed; (3) that each corporation is not adequately financed; (4) that the two corporations are not held out as distinct entities; and (5) that the policies of the "agent" corporation are directed primarily to the interest of the "principal" corporation.[71]

In the *Wooster Brush* context, none of these criteria is met. Indeed, the court in the *Wooster Brush* case found specifically that the Employees Relief Association was not a "sham."[72] Although the Wooster Brush Company donated money to the Association, there was no indication that funds were intermingled.[73] Records were kept distinct and employees were not freely exchanged.[74] There was no evidence of inadequate financing or a failure to keep the two entities formally distinct.[75] The employees of the company were fully aware of the separation of the two corporations.[76] Finally, the policies of the Employees Relief Association were established by the association's board and directed to the interests of the employees, not the employer.[77]

The insurers in the *Spirt-Peters* context also do not qualify as instrumentalities of the employer-universities. TIAA and CREF are in-

---

[67]*See supra* text accompanying notes 20-24.

[68]435 U.S. at 718 n.33.

[69]*Id. See supra* text accompanying note 39.

[70]*Wooster Brush*, 727 F.2d at 573; *Peters*, 691 F.2d at 238; *Spirt*, 691 F.2d at 1063.

[71]H. Henn & J. Alexander, Laws of Corporations § 148, at 355-57 (3d ed. 1983).

[72]727 F.2d at 573.

[73]The Wooster Brush Company did contribute substantially to the association fund, but the moneys were apparently not intermingled. *See supra* note 51.

[74]*See Wooster Brush*, 727 F.2d at 572.

[75]*Id.* at 571-73.

[76]*Id.* at 573.

[77]*Id.* at 569.

dependent corporations providing insurance services to over 2,800 distinct and unrelated colleges and universities nationwide.[78] This fact in itself makes it evident that no one of these 2,800 institutions has the necessary control over TIAA-CREF or is intermingled with TIAA-CREF in such a way that either of the insurers could be characterized as an instrumentality or sham of an individual university.[79]

In the *Commercial* context, the necessary corporate distinctions and independence are present by definition. A corporate commercial insurer operates as a valid, distinct corporation dealing with numerous independent employers. It maintains its own employees, dictates its own policies for its own benefit, and is required by legislation to maintain sufficient financial reserves.[80] In none of the three contexts discussed here, therefore, are the factors present to bring the insurers within the more liberal interpretation of "agent."

The conclusion is inescapable that an independent third party insurer cannot, in any of the contexts discussed here, be brought within the purview of Title VII's prohibition of discrimination by "any agent" of an employer covered by the Act. None of the recognized analyses of the agency relationship results in a finding that the insurer is an "agent," and no new approach has been suggested. If agency were in fact the underlying rationale of the decisions which have imposed liability on third party insurers, the foregoing analysis demonstrates that these opinions are incorrect. Moreover, for courts to broaden the concept of agency beyond any heretofore recognized parameters of the term is a functional amendment to Title VII that should not be attempted without legislative guidance.

D. *The Insurer as "Employer"*

The remaining possibility for imposing direct liability on the third party insurer under Title VII is to find that the insurer is an "employer" within the meaning of the term as used in the Act. Of course, the insurers are not the insureds' employers in the commonly understood sense of the term. In the *Spirt-Peters* context, the universities are the employers. In the *Wooster Brush* case, the Wooster Brush Company is the employer, and in the *Commercial* context, the employer is the holder of the master contract. As was the case with the agency question, even when more liberal definitions are attributed to the term "employer," reasoned analysis of the question results in the conclusion that liability should not be found.

---

[78] *Spirt*, 691 F.2d at 1057.

[79] That TIAA and CREF were "instrumentalities" of Long Island University may have been what the *Spirt* court meant in the statement that TIAA and CREF are "so closely intertwined" with the university that they must be deemed "employers." *Id.* at 1063.

[80] *E.g.*, IND. CODE § 27-1-6-14 to -15 (1982).

1. The Joint Employer Analysis.—The one approach that has been suggested for finding "employer" liability under Title VII when the party charged is not the plaintiffs' actual employer is the "joint employer" analysis set forth in *EEOC v. Wooster Brush Employees Relief Association.*[81] In *Wooster Brush*, as in *Peters*, the Sixth Circuit found that the insurer was not an "employer" under Title VII. The joint employer analysis used in *Wooster Brush* was adopted from *Baker v. Stuart Broadcasting Company.*[82] The *Baker* court set forth four criteria for determining whether two entities constitute a single employer for purposes of Title VII: (1) interrelation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership and financial control.[83]

The *Baker* analysis, adopted in light of the broad interpretations demanded by Title VII,[84] is the most liberal of any approach discussed in this Note. While focusing on the interrelation of two companies, liability does not depend upon whether one of the companies is an "agent" or "instrumentality" of the other.[85] Hence, less domination or control is necessary. Although these criteria involve fact-sensitive considerations, the applicability of which will depend largely on the nature of the insurer's organization, a sufficient number of these elements are not found in any of the three contexts considered here to establish insurer liability as an "employer."

The *Wooster Brush* court found that the first of the *Baker* criteria, interrelationship of operations, was met in the case of the Employees Relief Association for a variety of reasons. Membership in the association was conditioned only upon a physical examination, employment with the Wooster Brush Company, an agreement to join, and the paying of

---

[81]727 F.2d at 571. *Wooster Brush* differed from *Spirt* and *Peters* in that the discrimination alleged was founded on the failure of the insurance plan to provide pregnancy-related disability benefits while providing benefits for disabilities not related to pregnancy. Discrimination regarding pregnancy is included in 42 U.S.C. § 2000e-2(a) as "sex-discrimination" by virtue of the the definition given the phrase "on the basis of sex" in 42 U.S.C. § 2000e(k):

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work. . . .

[82]560 F.2d 389 (8th Cir. 1977). *Baker* involved a sex discrimination suit under Title VII filed by Baker against Stuart Broadcasting and Grand Island Broadcasting, Ltd. The court used the test to decide whether or not the two defendant corporations could be combined in order to fulfill the requirement of section 2000e(b) that the "employer" have 15 or more employees.

[83]*Baker*, 560 F.2d at 392.

[84]*Id.* ("In view of the liberal treatment accorded to Title VII, we conclude that these factors should be applied in the determination of 'employer' under 42 U.S.C. § 2000e(b).").

[85]*Cf. infra* text accompanying notes 100-02.

dues.[86] The association depended wholly upon company employees who volunteered to operate the association.[87] Those employees who ran the association did so on company time and used company space and equipment.[88] The association's board of directors was also elected using company facilities.[89]

Such a conclusion regarding the first criterion, however, would be difficult to reach in the case of a university in the *Spirt-Peters* context. Whereas the association in *Wooster Brush* dealt only with the Wooster Brush Company and its employees, as indicated earlier, TIAA and CREF deal with over 2,800 colleges and universities and do not depend on any one of those institutions or their employees for the operation of the TIAA-CREF corporations.[90] TIAA and CREF's operations thus function independently of any one college or university,[91] and interrelation of operations is therefore not present.

Similarly, the first criterion would necessarily be absent in the case of a commercial group insurer. As with TIAA-CREF, such insurers are independent entities whose operations are in no way interrelated with any particular employer to whom insurance services are provided. For-profit corporations of this type have their own boards of directors, officers, and employees, and depend on their clients for no more than the business they generate.[92]

The second criterion, common management, was found to be absent by the court of appeals in the *Wooster Brush* case. The district court in *Wooster Brush* found that there was common management of the company and the association because the president of the company was also a managing member of the association.[93] This conclusion was rejected by the court of appeals because the president's rise to positions in both organizations was purely fortuitous.[94]

Common management is likewise absent in the relationship between TIAA-CREF and any one college or university. TIAA and CREF are run by boards and employees having no special ties to any of the hundreds of colleges and universities for which services are provided.[95] Such is also the case with commercial insurers. Commercial insurance companies are managed as entities distinct from the companies and organizations with which they do

---

[86]727 F.2d at 572.

[87]*Id.*

[88]*Id.*

[89]*Id.*

[90]*Spirt*, 691 F.2d at 1057.

[91]*See id.*

[92]Telephone interview with Jack D. Hunter, Esq., General Counsel, Lincoln National Corporation (Jan. 14, 1985).

[93]*Wooster Brush*, 727 F.2d at 572.

[94]When the association was formed, the president was an ordinary employee at Wooster Brush Company. His rise to presidency in the company had nothing to do with the association. *Id.*

[95]*See Peters*, 691 F.2d at 238.

business.[96]

The third criterion, centralized control of labor relations, was also held to be lacking in *Wooster Brush*. Again overruling the district court's finding, the court of appeals held that the association's dependence upon the company for facilities and volunteers was not sufficient to meet this requirement.[97] The court of appeals found no evidence that the association made any attempt to control labor relationships. This control was vested entirely in the company; the association's sole purpose was to provide insurance.[98] The same is also true in the *Spirt-Peters* and *Commercial* situations. The insurers do no more than provide insurance services upon request. The decision regarding whether insurance will be purchased, what company will provide the coverage, and what types of benefits will be included are all within the ultimate discretion of the employer.[99]

The final criterion, common ownership and financial control, also fails in all three of the situations discussed here. The Sixth Circuit pointed out in *Wooster Brush* that this fourth prong of the *Baker* analysis has been interpreted to require an inquiry into the legitimacy of the two entities in question. If the companies under consideration are distinct legal enitities, if neither is a "sham" or "instrumentality" of the other, then this criterion is not met.[100] The court found that the association was not a "sham," so this fourth part of the test failed.[101] As discussed previously, in none of the present situations is the insurer a "sham."[102]

The Sixth Circuit's characterization of the fourth prong of the test, however, seems to venture beyond the interrelation required by the *Baker* test.[103] Common management or financial control is not alone a sufficient basis for treating a corporation as a "sham"; neither would normally justify piercing the corporate veil.[104] Yet, these considerations may well be sufficient to satisfy the *Baker* test.[105] A less rigorous requirement would also better comport with the liberal interpretations generally given Title VII be-

---

[96] *See supra* note 92 and accompanying text.

[97] 727 F.2d at 572.

[98] *Id.*

[99] *Peters*, 691 F.2d at 238; *see Norris*, 103 S. Ct. at 3501.

[100] *Wooster Brush*, 727 F.2d at 572-73.

[101] *Id.* at 573.

[102] *See supra* text accompanying notes 71-80.

[103] It is not clear that a finding of "instrumentality" or "sham" is necessary to find "common managerial control." In the *Baker* case from which the test was adopted, the court mentioned only that the two corporations had common directors and one provided services to the other. These factors alone are generally not considered sufficient to disregard the separate identity of one of the corporations. *See* H. Henn & J. Alexander, Laws of Corporations § 148, *supra* note 71, at 355. *See also* Linsky v. Heidelberg E., Inc., 470 F. Supp. 1181, 1184 (E.D.N.Y. 1979) (characterizing the "joint employer" and "agent" or "instrumentality" tests as two distinct tests).

[104] *See supra* note 103.

[105] *Id.*

cause of the remedial nature and important social goals of the Act.[106]

Even if this more liberal view is taken, however, the fourth criterion is not met in any of the present contexts. As was the case in the agency analysis above, the requisite control element is lacking in all three cases. Different persons control the respective organizations.[107] In the *Wooster Brush* context, the company did contribute substantially to the association's fund, but this did not give the company the "control" over operations which is suggested by the *Baker* test.[108] In the *Spirt-Peters* and *Commercial* situations, financial independence is evidenced by the fact that the insurers deal with numerous independent clients.[109] Under the joint employer test, therefore, none of the insurers considered here would be an "employer."

2. "Significantly Affects": The Spirt *Definition.*— One final definition of "employer," recognized in *Spirt*, defines an employer as "any party who significantly affects access of any individual to employment opportunities."[110] Although the *Spirt* court apparently thought that this definition would bring an insurer within the purview of Title VII, a closer analysis reveals that an insurer is not an "employer" even when the term is given this very broad definition.

First, the phrase "significantly affects" logically requires some control over the thing affected. In the present context, the insurer must control the decision as to whether or not the employee will receive a particular benefit as a result of his employment with a particular company. To affect something requires the ability to change it in some respect; unless the insurer has the power to change the benefits given to the employee, it cannot be said to "significantly affect" his access to benefits.

It is clear, however, that the insurers in neither the *Spirt-Peters*, *Wooster Brush*, nor *Commercial* situations have this type of control over the provision of benefits as a result of the employment relationship. In all three cases, it is in the ultimate discretion of the employer which company he will choose to provide insurance coverage to his employees, and therefore it is the employer's decision regarding what benefits will be provided his employees at reduced or no cost.[111]

The only way that the insurer can be characterized as having "control" over what benefits are provided is to find "control" in the fact that the insurer decides what benefit plans it will offer to the employers.

---

[106] *See Baker*, 560 F.2d at 392.

[107] *See supra* text accompanying notes 93-96.

[108] *Wooster Brush*, 727 F.2d at 572.

[109] *See supra* text accompanying notes 78-80.

[110] 691 F.2d at 1063.

[111] *Cf. Norris*, 103 S. Ct. at 3501-02 ("[E]mployers are ultimately responsible for the 'compensation, terms, conditions, [and] privileges of employment' provided to employees . . . . An employer who [cannot find a nondiscriminatory plan] must either supply the fringe benefit himself, without the assistance of any third party, or not provide it at all.").

If liability were based on this type of "control," this characterization would impose an affirmative duty on the insurer to establish benefit plans in strict compliance with Title VII, regardless of whether the insurance company may consider such plans sound, marketable, or profitable. This, however, cannot be the case. Although Title VII's reach is broad, the Act was not intended to dictate affirmatively the business decisions of independent insurance companies regarding what options may be offered on the open market. Aside from the fact that there is no basis in the language of the Act for imposing such a duty on insurance companies, such an "interpretation" of the Act would contradict the statements that the United States Supreme Court has made on the issue. The Court has emphasized repeatedly that Title VII is intended to govern the traditional employer-employee relationship, not that of employees and third parties.[112] Indeed, the Court has stated specifically that Title VII has its limitations and that the Act was not "intended to revolutionize the insurance and pension industries."[113] Imposition of liability and the consequent duty to conform insurance coverage plans to Title VII would require a radical change that the Supreme Court has stated was unintended by the Act.[114]

E. The Policy Argument

The final argument in support of insurer liability, and that most heavily relied upon by the *Spirt* court, is that if the insurer is not held liable, the plaintiffs would have only incomplete remedies. "[E]xempting plans not actually administered by an employer would seriously impair the effectiveness of Title VII . . . ."[115]

The fallacy in this argument is that it confuses the parties with the employment practice. Of course, if neither the employer nor the insurer could be reached under Title VII, the proscribed employment practice would go unremedied. The discrimination inherent in the plan would go unchallenged for lack of parties to be charged. This, however, is not the case. In *Spirt* itself, as well as all of the other cases addressing these issues, the traditional employer has been held liable and a full and effective remedy imposed.[116] It is true that if the insurer is not held

---

[112]*Norris*, 103 S. Ct. at 3499; *Manhart*, 435 U.S. at 718 n.33.

[113]*Manhart*, 435 U.S. at 717.

[114]Reorganization of rates, reformation of established actuarial practices, and monumental cost increases are among those changes that would be necessary. *See Norris*, 103 S. Ct. at 3504-06 (Powell, J., dissenting).

[115]*Spirt*, 691 F.2d at 1063.

[116]*E.g.*, *Norris*, 103 S. Ct. 3492; *Spirt*, 691 F.2d 1054; *Peters*, 691 F.2d 235. *See also* Brunetti v. Wal-Mart Stores, 525 F. Supp. 1363 (E.D. Ark. 1981) (reimbursement of medical expenses ordered which would have been covered by employer's group insurance but for the wrongful termination); Gaballah v. Roudebush, 421 F. Supp. 475, 480 (N.D. Ill. 1976) ("If a job-related discrimination based on race, color, religion, sex or national origin is proved, the district court, within its equitable jurisdiction, could order employment, promotion or any other deprived benefit, back pay or lost income, and injunctive relief if necessary."); EEOC v. Kallir, Philips, Ross, Inc., 420 F. Supp. 919, (S.D.N.Y. 1976) (employer ordered to reimburse unlawfully discharged employee for medical expenses incurred after discharge that would have been reimbursable under employer's insurance policy).

liable, the *plan* will not be invalidated. However, insurance was not targeted by Title VII. Rather, Title VII was designed to prevent discriminatory employment practices,[117] and such practices are effectively redressed by holding the employer alone liable for the employment violations.[118]

The adequacy of employer liability was emphasized repeatedly by the Supreme Court in *Arizona Governing Committee v. Norris*,[119] where the district court granted full relief to the plaintiffs in a suit where the insurer was not joined. The Court found insurer liability unnecessary, stating that "employers are ultimately responsible for the 'compensation . . .' provided to employees . . . ."[120] "An employer who confronts such a situation [where it cannot find a nondiscriminatory plan] must either supply the fringe benefit himself, without the assistance of any third party, or not provide it at all."[121]

Those courts that have extended the reach of Title VII to impose liability on third party insurers undoubtedly sought to further the important policy of equality among this country's workers. The best of intentions, however, does not always produce the best law, and such is the case with the precedent favoring insurer liability. If insurer liability were necessary to carry out congressional and social policy, perhaps a basis for extension of the Act could be found. Third party insurer liability, however, is not only unwarranted by the case law and the language of Title VII, but is unnecessary as well.

III. Immunity Under the McCarran-Ferguson Act

Even if an insurer were brought within the definition of "employer" or "agent" for purposes of Title VII, the question of exemption from application of Title VII by operation of the McCarran-Ferguson Act (MFA)[122] would still arise.

---

[117]*See supra* text accompanying notes 20-24.

[118]*See supra* note 116 and accompanying text.

[119]103 S. Ct. 3492.

[120]*Id.* at 3501.

[121]*Id.* at 3502.

[122]15 U.S.C. §§ 1011-1015 (1982). The sections under consideration here, §§ 1011-1012(b) state:

§ 1011. Declaration of Policy

> Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

§ 1012. Regulaton by State law; Federal law relating specifically to insurance; applicability of certain federal laws after June 30, 1948

> (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) No Act of Congress shall be construed to invalidate, impair, or

A. Background of the MFA

In 1943, the United States Supreme Court held in *United States v. South-Eastern Underwriters Association*[123] that the business of insurance was "interstate commerce" and therefore subject to federal regulation. In so holding, the Court overruled prior decisions that had consistently held that the business of insurance was primarily a "local activity." As a result of the treatment of insurance as a local activity not subject to federal regulation, the states had taken upon themselves the job of regulating insurance and had developed comprehensive regulation of insurers.[124] The sudden reclassification of insurance as interstate commerce placed in question the validity of the state regulations and created uncertainty throughout the insurance industry.

The reaction in Congress to *South-Eastern Underwriters* was immediate. Motivated by myriad concerns,[125] legislation was introduced into both houses of Congress[126] that would, in effect, overrule the result of *South-Eastern Underwriters* and return the power to regulate the insurance

---

> supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended . . . , shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

[123] 322 U.S. 533 (1944). *South-Eastern Underwriters* was the first case in which the United States Supreme Court found that insurance was part of interstate commerce and thus subject to regulation by the Sherman Antitrust Act. The decision overruled such long-standing precedents as New York Life Ins. Co. v. Deer Lodge County, 231 U.S. 495, 510 (1913) ("contracts of insurance are not commerce at all, neither state nor interstate"); Hooper v. California, 155 U.S. 648, 655 (1895) ("The business of insurance is not commerce."); Paul v. Virginia, 75 U.S. (8 Wall.) 168, 183 (1869) ("[i]ssuing a policy of insurance is not a transaction of commerce"). For additional cases and analysis of these precedents, see B. Gavit, The Commerce Clause of the United States Constitution at 134-39 (1932).

[124] *See* Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 430 (1946); *see also infra* note 125.

[125] Having developed pervasive legislation covering all aspects of the insurance industry, the states were concerned that many of the laws, such as those establishing uniform rates and taxing of out-of-state insurers, would be found unduly burdensome on the flow of commerce and thus invalid. *Cf.* New York Life Ins. Co. v. Deer Lodge County, 231 U.S. 495 (insurer's challenge against a Montana tax alleged to constitute a burden on interstate commerce was rejected because insurance was not interstate commerce). In addition to the states' concerns that they would no longer be able to collect substantial revenues provided by insurance taxes, the insurers also found themselves in a difficult position. It was feared that no matter how they acted they would violate some law; if they complied with state rate-fixing regulations, they would vioalte federal antitrust proscriptions, while complying with the federal laws would violate the state regulations. *See* 91 Cong. Rec. 478-88 (1945); Note, *McCarron-Ferguson Act Immunity from the Truth in Lending Act and Title VII*, 48 U. Chi. L. Rev. 730, 732-36 (1981).

[126] H.R. 1973, 79th Cong., 1st Sess. (1945); S.R. 340, 79th Cong., 1st Sess. (1945).

industry to the states.[127] The final result was the emergence of the MFA. With narrow exceptions,[128] the MFA exempts the "business of insurance" from the effect of federal legislation that would "invalidate, impair, or supersede" state laws unless the federal legislation "specifically relates" to the business of insurance.[129]

B. The Plain Language of the MFA

For the MFA to exempt an insurer from the reach of Title VII and carry out Congress' desire to preserve the states' regulation of the insurance industry, three facts must be established. It must be shown that the insurer's activity in question constitutes the "business of insurance"; that the application would "invalidate, impair, or supersede" a state law; and, that Title VII does not "specifically relate" to the business of insurance.[130]

1. The Business of Insurance.—The exemption of the "business of insurance" does not comprehend all activities in which an insurer may engage.[131] Activities that are not peculiar to the industry, such as the company's relations with its own employees[132] or securities dealings,[133] are still subject to the full regulatory effect of federal legislation.[134] Rather, it is the relationship between the insurer and the insured that was intended as the object of the exemption; Congress was concerned with the contract of insurance itself, the terms, the rates, and other

---

[127]*See* H.R. Rep. No. 143, 79th Cong., 1st Sess. (1945):

> Inevitable certainties which followed the handing down of the decision in the *South-Eastern Underwriters Association* case, with respect to the constitutionality of State laws, have raised questions in the minds of insurance executives, State insurance officials, and others as to the validity of State tax laws, as well as State regulatory provisions; thus making desirable legislation by the Congress to stabilize the general situation . . . . The committee has therefore given immediate consideration to S. 340, together with a similar measure H.R. 1973, so that the several States may know that the Congress desires to protect the continued regulation and taxation of the business of insurance by the several States, and thus enables insurance companies to comply with State laws. What is more, the Congress proposes by this bill to secure adequate regulation and control of the insurance business.

Id.

[128]15 U.S.C. section 1012(b) provides that the Sherman Act, the Clayton Act, and the Federal Trade Commision Act shall be applicable to the business of insurance in areas which state law has not regulated. 15 U.S.C. section 1014 provides that the National Labor Relations Act, the Fair Labor Standards Act, and the Merchant Marine Act shall be applicable to the business of insurance.

[129]*See supra* note 122.

[130]*Id.*

[131]*E.g.*, SEC v. Nat'l Sec., Inc., 393 U.S. 453 (1968) (holding that an insurer was not exempt from the effect of section 10(b) of the Securities Exchange Act by the McCarran-Ferguson Act (MFA) because regulation of securities is not part of the "business of insurance").

[132]*See supra* note 128.

[133]SEC v. United Benefit Life Ins. Co., 387 U.S. 202 (1967).

[134]*Nat'l Sec.*, 393 U.S. at 459-60.

matters previously controlled by the states.[135]

Insurance practices such as the use of sex-segregated mortality tables to determine rates and the exclusion of pregnancy benefits from a particular contract are elements of the rates and terms of insurance contracts and thus fall within the purview of "the business of insurance" of the MFA. *Spirt* and *Peters* involved challenges to the validity of mortality tables and the *Wooster Brush* case involved the exclusion of pregnancy disability benefits from an insurance contract. Because these are elements of the rates and terms of insurance contracts, the "business of insurance" requirement for MFA exclusion is therefore met in all of these cases.[136]

2. Invalidate, Impair, or Supersede.—Imposition of Title VII liability on third party insurers would also meet the second requirement for MFA exemption, that the congressional act "invalidate, impair, or supersede" state law. Application of Title VII would invalidate or impair any state laws that authorize an insurer to use a plan that includes a factor found to be discriminatory under Title VII.[137] In the case of sex-segregated mortality tables, this requirement would be met by state statutes that generally allow gender to be used as a factor in calculating rates.[138] Most state insurance codes have provisions which will allow such classifications,[139] so these provisions would be invalidated or impaired.

Title VII's application to insurers would also "supersede" state laws, because most states have insurance statutes that specifically deal with discrimination in determining rates or benefits.[140] The state statutes prohibit

---

[135]*Id.* at 460.

[136]*See, e.g., Spirt*, 691 F.2d at 1064. There is some question regarding CREF's business as "insurance" because CREF deals in variable annuities. *Id.; but cf.* Note, *supra* note 125, at 745-46.

[137]*Norris*, 103 S. Ct. at 3507 n.6 (Powell, J., dissenting).

[138]*See, e.g.*, N.Y. Ins. Law §§ 159(1)(d), 160(c) (McKinney Supp. 1984-85); *see also* Ind. Code § 27-4-1-4(7)(a) (Supp. 1984) ("[I]n determining the class, consideration may be given to the nature of the risk, plan of insurance, the actual or expected expense of conducting the business or any other relevant factor."). There is no question that women do in fact have a longer life expectancy as a class than men; sex is therefore a "relevant factor" in determining the "nature of the risk." *See Norris*, 103 S. Ct. at 3496; *Manhart*, 435 U.S. at 704.

[139]*See Norris*, 103 S. Ct. at 3507 n.6 (Powell, J., dissenting). *See supra* note 138.

[140]*See, e.g.*, N.Y. Ins. Law § 209 (McKinney Supp. 1984-85).

> § 209. Life, accident and health insurance; discrimination and rebating: prohibited inducements and interdependent sales
>
> 1. No life insurance company doing business in this state . . . shall make or permit any unfair discrimination between individuals of the same class and of equal expectation of life, in the amount of payment or return of premiums, or rates charged by it for policies of life insurance or annuity contracts, or in the dividends or other benefits payable thereon, or in any of the terms and conditions thereof . . . .
>
> 2. No insurer doing in this state the business of accident or health insurance . . . shall make or permit any unfair discrimination between individuals of the same class in the amount of premiums, policy fees, or rates charged for any policy

discrimination in all areas that the states have deemed necessary; thus, adding the prohibitions against the use of sex-segregated mortality tables or disability plans without coverage for pregnancy-related disabilities would in effect supersede those laws.[141]

3. Specifically Relates.—The final requirement for MFA exemption, that the federal statute in question not "specifically relate" to the business of insurance, has prompted some disagreement among the courts. Some courts have suggested that Title VII, although it does not specifically mention insurance, may be construed to "specifically relate" to the business of insurance because discrimination is a matter that may arise in the insurance context.[142]

This interpretation, however, leads to an absurd result. If exclusion from the MFA did not require specific statutory reference to insurance, then any law which would naturally function to affect some insurance-related matter could be construed to "specifically relate." The result would be that the MFA would *never* operate. In cases where a statute does not affect insurance, the MFA would not be needed; in cases where a statute would affect insurance, the statute would specifically relate such that the MFA could not operate. A construction that would render the MFA meaningless obviously cannot reflect Congress' intent in passing

---

> or contract of accident or health insurance, or in the benefits payable thereunder, or in any of the terms or conditions of such contract . . . .

The following are unfair practices under IND. CODE § 27-4-1-4(7)(a)-(b) (Supp. 1984):

> (7)(a) Making or permitting any unfair discrimination between individuals of the same class and equal expectation of life in the rates or assessments charged for any contract of life insurance or of life annuity or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of such contract, provided that, in determining the class, consideration may be given to the nature of the risk, plan of insurance, the actual or expected expense of conducting the business or any other relevant factor.
>
> (b) Making or permitting any unfair discrimination between individuals of the same class involving essentially the same hazards in the amount of premium, policy fees, assessments, or rates charged or made for any policy or contract of accident or health insurance or in the benefits payable thereunder, or in any of the terms or conditions of such contract, or in any other manner whatever, provided that, in determining the class, consideration may be given to the nature of the risk, plan of insurance, the actual or expected expense of conducting the business or any other relevant factor.

[141]Some courts have also taken the view that the "invalidate, impair or supersede" requirement is met whenever the state has pervasively regulated the insurance area. *See Spirt*, 475 F. Supp. at 1303 and cases cited therein. This interpretation, however, seems to grant a broader immunity than is required by the language of the MFA; such an interpretation would grant immunity from almost all federal laws and conflict with the evident intentions of the framers. *See generally* Note, *supra* note 125, at 750-54.

[142]*See Spirt*, 691 F.2d at 1065-66; Note, *supra* note 25, at 1292. A rather novel approach was taken by the *Spirt* court. The argument was that New York insurance laws were preempted by the preemption clause of Title VII, section 2000e-7, and thus there was no question of a law being "invalidated, impaired or superseded." 691 F.2d at 1066. The obvious problem with this argument is that if the MFA exemption operates, it would exempt the insurer from section 2000e-7 as well as the other sections of Title VII.

this Act.[143]

C. *Policy Conflicts—The* Norris *Resolution*

Even recognizing that the plain language of the MFA grants insurers immunity from Title VII actions, some courts and commentators have, nevertheless, found liability by restricting the MFA to the antitrust area or finding an "implied repeal" of the MFA by virtue of the policy behind Title VII.[144]

1. Narrow Construction.—The first manner in which the courts have attempted to remove MFA exemption from Title VII cases is through narrow construction of the statute, only allowing its application in the area of antitrust regulation.[145] To arrive at such a narrow construction of the MFA, many courts have given great significance to the fact that the MFA was a direct reaction to *South-Eastern Underwriters*.[146] Because *South-Eastern Underwriters* was a case dealing with the application of federal antitrust laws to insurance rate fixing, the courts reason that antitrust regulation was the primary focus of the MFA. These courts conclude, therefore, that Congress never had any intention that the exemption operate in other areas.[147]

This view is much too simplistic. Both the plain language discussed above and the legislative history of the MFA indicate that this was not Congress' intent. The broad scope of the MFA is expressed repeatedly in statements in the congressional debates such as the declaration that there should be no "doubt as to the right of the states to go ahead and function freely in handling insurance."[148]

---

[143]*See Norris*, 103 S. Ct. at 3506-07 nn.5-6. *See also* 91 Cong. Rec. 481 (1945) (remarks of Sen. Ferguson):

> Having passed the bill now before the Senate, if Congress should tomorrow pass a law relating to interstate commerce, and should not specifically apply the law to the business of insurance, it would not be an implied repeal of this bill, and this bill would not be affected, because the Congress had not under subdivision (b), said that the new law specifically applied to insurance. I think that makes the bill very clear.

Id.

[144]*See supra* text accompanying notes 20-26 and 142.

[145]*See, e.g., Spirt*, 691 F.2d 1054; Hannahs v. Teachers Retirement Sys., 26 F.E.P. 527 (S.D.N.Y. 1981); Women in City Gov't v. City of New York, 515 F. Supp. 295 (S.D.N.Y. 1981).

[146]*E.g., Spirt*, 691 F.2d at 1065:

> We find . . . that Congress, in enacting a statute primarily intended to deal with the conflict between state regulation of insurers and the federal antitrust laws, had no intention of declaring that subsequently enacted civil rights legislation would be inapplicable to any and all of the activities of an insurance company that can be classified as "the business of insurance."

See also Women in City Gov't, 515 F. Supp. at 303-04.

[147]*See supra* note 146.

[148]91 Cong. Rec. 483 (1945) (remarks of Sen. Radcliff). *See also id.* (remarks of Sen. O'Mahoney) (Section 112(b) is "a sort of catch-all provision to take into consideration other acts of Congress which might affect the insurance industry, but of which we do not have knowledge at the time.").

Also indicative of the MFA's broad scope is the evolution of the statute itself. The MFA as first introduced,[149] did deal solely with the area of antitrust by exempting the insurance industry only from the reach of the Sherman Act[150] and the Clayton Act.[151] This initial version of the bill, however, was rejected in favor of the much broader version now in effect. As Justice Powell stated in *Norris*, although Congress was concerned with reconciling antitrust laws with insurance regulations, Congress "also recognized that the decision in *South-Eastern Underwriters Association* had raised questions as to the general validity of state laws governing the business of insurance. . . . Congress thus enacted broad legislation [to protect state regulation from future federal interference]."[152]

The conclusion that the MFA exemption should apply in the context of Title VII is also supported by *Norris*, in which the MFA exemption defense was rejected. The reason given for the rejection of the defense in *Norris* was that the defendant, the plaintiffs' employer in the traditional sense, was not itself engaged in the business of insurance.[153] It would follow from this reasoning that if the defendant were engaged in the business of insurance, as are the insurance and annuity companies considered in this Note, the MFA defense would succeed.

It is thus apparent that rather than suggesting a narrow interpretation, the historical and legislative records, as well as the *Norris* opinion, indicate that the MFA should be broadly construed to effect Congress' declared intention that "the continued regulation . . . by the several States of the business of insurance is in the public interest . . . ."[154]

2. Policy.— The final basis for a rejection of insurer MFA immunity in the context of Title VII has been an alleged conflict between the MFA exemption and the strong policy behind Title VII discussed above.[155] As explained earlier, the conflict has been resolved by the Supreme Court's decision in *Norris*. Complete relief may be granted by imposing liability solely on the plaintiff's actual employer. Because there can be redress for employment discrimination under Title VII without involving

---

[149]H.R. 3270 and S. 1360 provided:

> That nothing contained in the Act of July 2, 1890, as amended, known as the Sherman Act, shall be construed to apply to the business of insurance or to acts in the conduct of that business or in any wise to impair the regulation of that business by the several states.

S. Rep. No. 1112, pt.2, 78th Cong. 2d Sess. 1-2 (1944).

[150]15 U.S.C. §§ 1-7 (1976).

[151]*Id.* §§ 12-27, 44.

[152]103 S. Ct. at 3507 n.5.

[153]*Id.* at 3500 n.17 ("[T]he plaintiffs in this case have not challenged the conduct of the business of insurance. No insurance company has been joined as a defendant, and our judgment will in no way preclude any insurance company from offering annuity benefits that are calculated on the basis of sex-segregated actuarial tables.").

[154]15 U.S.C. § 1011; *see also supra* notes 122, 143, 148.

[155]*See supra* text accompanying notes 20-25; *see also Spirt*, 691 F.2d at 1063-66; Note, *supra* note 25, at 1292-99; Note, *supra* note 125, at 754-57.

independent third party insurers, exempting insurers from liability presents no barrier to fulfillment of Title VII's policy of employment equality.

The fact that MFA exemption presents no obstacle to the fulfillment of the goals of Title VII is not, however, the only reason for allowing insurers to use the defense. It has apparently been overlooked that there are strong practical considerations favoring the view that while employers should be forbidden to use discriminatory programs, imposing Title VII judgments directly on the insurance industry may well prove to be counterproductive.

First, any spreading of liability necessarily carries with it a corresponding reduction in the employer's incentive to avoid discriminatory practices.[156] The major incentive for compliance with any law of this kind is the financial burden the employer will bear as the result of his failure to conform to the requirements of Title VII. Thus, if the possible financial burden is reduced by spreading liability to the insurer, employer incentive to comply with Title VII will be lessened.

Second, and most importantly, a judgment by the courts that present insurance practices are undesirable runs the risk of being patently wrong. The courts simply do not have the resources and investigative capabilities to evaluate properly the effects of such a decision on the insurance industry and the public as a whole. Only Congress is in a position to make such a judgment. Moreover, exempting insurers from liability will allow market forces to find the best possible system of insuring large groups. If "nondiscriminatory" programs are cost efficient, the profit motive will cause insurers to modify their plans to make them marketable to the employers. On the other hand, if such modifications are untenable, insurance can be provided efficiently according to recognized actuarial practices; employers may simply follow the *Manhart* Court's suggestion and set aside equal sums for each employee to purchase his or her own cost efficient coverage on the open market.[157]

IV. Conclusion

That Congress did not intend third party insurers to be covered under Title VII is evident in the fact that insurers do not fall within the definition of "employer" or "agent" as used in the Act. Moreover, Congress exempted insurers from the application of Title VII through

---

[156]*Cf.* EEOC v. Ferris State College, 493 F. Supp. 707, 716 (W.D. Mich. 1980). The court, in denying the employer a right of contribution from a union for a violation of the Equal Pay Act, stated that such a right

> would simply entitle employers to pass off onto third parties their own liability for violations of the Equal Pay Act. Under a contrary holding, employers could discriminate with impunity, fully aware that the total cost of their unlawful behavior would not be borne by them alone. Indeed, . . . if employers are aware that they alone will bear the economic consequences of Equal Pay Act violations, a greater incentive would exist for resisting coercive pressures placed on them by unconscionable unions.

[157]435 U.S. at 717-18.

the McCarran-Ferguson Act. In spite of the law, however, there remains a split of authority regarding insurer liability.

This split in the decisions results, therefore, not from any basic ambiguities in the law, but rather from different perceptions of the judicial function. Those courts imposing liability have done so to reach what they envision as the most desirable result; the courts rejecting liability have based their decisions on the letter of the law.

American law is replete with instances of courts ignoring the letter of the law to reach desired results, and in some cases such an approach may be necessary to further the cause of justice. Such is not the case, however, with insurer liability under Title VII. The courts are not in a practical position to evaluate the ramifications of extending liability to such a mammoth enterprise as the insurance industry. Indeed, there are strong indications that extension of liability could work, ultimately, to the detriment of those individuals whom Title VII was established to protect.

In any case, Congress has thus far made the judgment that insurers should not incur liability under Title VII, and the courts should respect that judgment. The legislature is the only branch of the government with the resources to evaluate properly what laws will best effect social equality in the most practical manner. If liability is to be extended under Title VII, it is the duty of the courts to await the congressional mandate that would come from an amendment of the laws now in effect.

Douglas W. Holly