

Minnesota Attorney General: Administrative Rules Proceedings

Copyright Notice:

This material may be protected by copyright law (U.S. Code, Title 17). Researchers are liable for any infringement. For more information, visit www.mnhs.org/copyright.

Version 3
August 20, 2018

301

Attorney General

Robert J. Clayton
Special Assistant
Attorney General

April 4, 1977

296-4692

Michael B. Miller
Special Assistant
Attorney General

Insurance Division Rules Relating to Unfair Discrimination Practices Based upon Sex or Marital Status.

Enclosed herewith are the above-captioned rules. Please include the agency Finding of Fact, Order Adopting Rule, and Certificate of Compliance.

MBM:mb

Enclosure

301

Attorney General

Byron E. Starns
Chief Deputy
Attorney General

April 27, 1977

Michael B. Miller
Special Assistant
Attorney General

296-4692

Department of Insurance - Sex Discrimination Rules

Byron,

Enclosed please find a copy of the above-captioned rules. The Department, aside from reference to § 15.0412, subd. 3, cites the following as authority for promulgation of rules in this area:

§ 62A.041
§ 62D.12
§ 65B.13
§ 72A.12
§ 72A.20, subd. 1(8)
§ 72A.25

A look at Chapter 72 indicates that explicit authority for rulemaking would probably be located in § 72A.21, but it is not one of the powers enumerated therein.

Please call me if you wish to discuss this issue further.

MBM:mb

Enclosure

301

Attorney General

Robert J. Clayton
Special Assistant
Attorney General
5th Floor Metro Square Building

May 18, 1977

296-4692

Michael B. Miller
Special Assistant
Attorney General

Division of Insurance Rule 116, Relating to Sex Discrimination

After examination of the captioned rule and related documentation, I am returning them without approval as to form and legality.

The reason this rule is not approved is that no authority has been documented for promulgation of the rule as presently written. There are, therefore, four options open to the Insurance Division:

1) Adopt no rules relating to this subject matter;

2) Inform the industry of departmental regulatory priorities by informal statement;

3) Adopt procedural rules setting regulatory priorities and detailing the instances of sex discrimination that the Insurance Division will pursue by contested case hearing; or

4) Apply the existing rule only to variable basis life insurance policies and health care policies pursuant to Minn. Stat. §§ 16A.20 and 62E.09, respectively.

The last two possibilities would call for another public hearing, as either would be substantially different from the rule as presently written.

MBM:mb

Enclosure

Ins 116. Discrimination on Account of Sex and/or Marital Status

A. Purpose. The purpose of this rule is to eliminate unfair discrimination based upon sex or marital status in the terms and conditions of insurance contracts and in the underwriting criteria of insurance carriers. This rule does not apply to insurance rates.

B. Definition of Contract. As used in this rule, "contract" means any insurance policy, plan, certificate, subscriber agreement, statement of coverage, binder, rider or endorsement offered in this State by any person or entity engaged in the business of insurance.

C. Prohibited Practices. No person or entity engaged in the business of insurance in this State shall refuse to issue any contract of insurance in this State or shall cancel or decline to renew such contract because of the sex and/or marital status of the insured or prospective insured. The amount of benefits payable, or any term, condition or type of coverage shall not be restricted, modified, excluded or reduced on the basis of the sex and/or marital status of the insured or prospective insured. "However, nothing in this rule shall prohibit an insurer from taking marital status into account for the purpose of defining persons eligible for dependents' benefits except where the dependent is the child or acknowledged or adjudicated illegitimate child of the insured or prospective insured." Examples of the practices prohibited by this section include, but are not limited to:

1. denying, cancelling or refusing to renew coverage, or providing coverage on different terms, because the insured or prospective insured is residing with another person or persons not related to him or her by blood or marriage;

2. offering coverage to males gainfully employed at home, employed part-time or employed by relatives while denying or offering reduced coverage to females similarly employed;

3. reducing disability benefits for women who become disabled while not gainfully employed full-time outside the home when a similar reduction is not applied to men.

4. denying females waiver of premium provisions that are available to males or offering such provisions to females only for policy limits that are lower than those available to males;

5. denying maternity benefits to insureds or prospective insureds purchasing individual contracts when comparable family coverage contracts offer maternity benefits;

6. denying under group contracts, coverage to husbands of female employees when dependent coverage is available to wives of male employees;

7. offering coverage to males in certain occupations while denying coverage or offering more limited coverage to females similarly employed;

8. offering males higher benefit levels and/or longer basic benefit periods than are offered to females who are in the same risk classifications;

9. offering contracts containing different definitions of disability for females and males;

10. offering contracts containing different waiting periods for females and males;

11. requiring female applicants to submit to medical examinations while not requiring males to submit to such examinations;

12. establishing different conditions or benefit options for males and females;

13. denying to divorced or single persons coverage available to married persons;

14. limiting the amount of coverage available to an insured or prospective insured based upon his or her marital status;

15. denying employees of one sex insurance benefits that are offered to dependents who are of the same sex as the employees.

STATE OF MINNESOTA)
(ss.
COUNTY OF RAMSEY)

AFFIDAVIT OF SERVICE

Eileen A. Gaiovnik, being first duly sworn, deposes and says that on the 15th day of December 1976, at the City of St. Paul, County of Ramsey, State of Minnesota, she served the attached Report of Hearing Examiner INS-77-003-SM unstamped, by placing in the designated tray to be collected by messenger for delivery to the central mailing station as required by Minn. Stat., § 16.54 (1974), a true and correct copy thereof on all persons at the addresses shown on the attached mailing list.

Eileen A. Gaiovnik

Subscribed and sworn to before me
this 15th day of December, 1976.

Sandra A Haven

SANDRA A. HAVEN
NOTARY PUBLIC-MINNESOTA
RAMSEY COUNTY
My Comm. Expires July 29, 1983

STATE OF MINNESOTA
OFFICE OF HEARING EXAMINERS

FOR THE DEPARTMENT OF COMMERCE
INSURANCE DIVISION

In the Matter of the Proposed Adoption of Rules by the Insurance Division Relating to Unfair Discrimination Practices Based upon Sex or Marital Status.

REPORT OF HEARING EXAMINER

The above-entitled matter came on for hearing on October 6, 1976 at St. Paul before Steve M. Mihalchick, Hearing Examiner appointed by the Chief Hearing Examiner.

This is a rules hearing pursuant to Minn. Stat. Ch. 15, and Minn. Rules HE 101-109, to determine whether a proposed new rule, Minn. Rule INS 116, should be adopted. The operative portion of the proposed rule provides:

> "Prohibited Practices. No person or entity engaged in the business of insurance in this State shall refuse to issue any contract of insurance or shall cancel or decline to renew such contract because of the sex and/or marital status of the insured or prospective insured. The amount of benefits payable, or any term, condition or type of coverage shall not be restricted, modified, excluded or reduced on the basis of the sex and/or marital status of the insured or prospective insured."

For reasons stated below, the Examiner recommends that the rule not be adopted in its present form and that substantial changes be made to improve it.

The Agency panel consisted of Berton W. Heaton, Commissioner of Insurance; J. P. Koleski, Assistant Commissioner, Insurance Division; Thomas O'Malley, Assistant Commissioner, Insurance Division; Fred Pritzker, attorney, Assistant to the Commissioner; William L. Wilson, Commissioner of Human Rights; and Thomas J. Donaldson, Assistant Commissioner, Department of Human Rights.

Thirty-nine people attending the hearing signed the register. Twelve individuals made comments or statements at the hearing which continued until all interested groups and persons had an opportunity to be heard.

This Report is a recommendation only. Subsequent to this Report, the Commissioner of Insurance shall decide whether to modify and adopt the proposed rule. If substantial changes are

made, the hearing must be reconvened. The Chief Hearing Examiner will make a determination of compliance with rule-making procedures and the Attorney General will make a final determination of legality. If the adopted rule is approved at those levels, it will be published in the State Register and will be effective 20 days thereafter.

Pursuant to Minn. Stat. §§ 15.0412, subd. 4, and 15.052, subd. 4 (Supp. 1975), this Report shall be available to all affected individuals upon request for at least ten days before the Commissioner of Insurance takes any final action on the proposed rule.

The Commissioner shall, if he proposes to adopt the rule as originally proposed or amended, submit the complete hearing record to the Chief Hearing Examiner no sooner than ten days following receipt of this Report. He shall include the rule as originally proposed and the rule as proposed for adoption in final form. The Chief Hearing Examiner shall complete his review and submit his Report to the Commissioner on the issue of substantial changes in the rule and compliance with Minn. Stat. § 15.0412 within ten calendar days. Thereafter, the Commissioner will be responsible for filing the rule with the Attorney General. Interested groups or persons may submit additional arguments on legality to the Attorney General. The Commissioner shall, upon request, advise those groups or persons of the manner and time for submitting such arguments.

Based upon the proceedings and records herein, the Examiner makes the following:

FINDINGS OF FACT

PROCEDURAL REQUIREMENTS:

1. On August 20, 1976, the Insurance Division (Agency) filed the following documents with the Chief Hearing Examiner:

(a) A copy of the proposed rules;
(b) A proposed Order for Hearing;
(c) A proposed Notice of Hearing, and
(d) A statement of the number of persons expected to attend and estimated length of hearing.

2. On August 30, 1976, a copy of the Notice for Hearing and a copy of the proposed rule were published at 1 State Register 278.

3. On September 3, 1976, a Notice of Hearing was mailed to all persons and associations who had registered their names with the Secretary of State for the purpose of receiving such notice.

4. On September 10, 1976, the Agency filed the following documents with the Office of Hearing Examiners:

(a) The Order for hearing;
(b) The Notice of Hearing as mailed;
(c) The affidavit of receipt of the Secretary of State's list;
(d) The Secretary of State's Certification of the list;
(e) The Affidavit of Mailing;
(f) The Statement of Need; and
(g) The Statement of Evidence with names of persons expected to testify.

The documents were available for inspection at the Office of Hearing Examiners from the date of filng to the date of the hearing.

5. The record remained open through October 26, 1976 for the receipt of written comments. Nineteen public comments were received during the course of the hearing, primarily from insurance companies. The companies generally supported the need to eliminate unfair discrimination but specifically attacked various provisions of the rule.

NEED FOR RULES PROHIBITING UNFAIR DISCRIMINATION IN INSURANCE BASED ON SEX OR MARITAL STATUS.

6. It is abundantly clear from the evidence presented at the hearing that the insurance industry in general discriminates in underwriting criteria and rate classification upon the basis of sex and marital status. The discrimination is directed against women because of the fact they are women or because they are married or not married. In some cases, marital status discrimination can be further identified to a particular substatus; e.g., divorced, widowed, separated, unmarried couples, unmarried with children. Studies and reports from a number of states demonstrating this fact were introduced. They include California (Exs. 19 and 28); Michigan (Ex. 21); New York (Ex. 22); Illinois (Ex. 23); Iowa (Ex. 26); and Pennsylvania (Ex. 29).

7. The Ruling of the California Department of Insurance adopting regulations nearly identical to the rule proposed here (Ex. 19), summarizes many of the studies and reports. The summary of the Pennsylvania Report (Ex. 29) shows the typical discriminatory practices.

". . . (1) unavailability of maternity coverage to single women (where available on an individual basis, the single parent is required to enroll in a 'family' policy where the premium is based on the coverage issued to two adults and their children); (2) waiting periods and total exclusions for disorders of the female organs; (3) denial to female employees in group policies of an opportunity to include their husbands as dependents although male employees may obtain coverage for their wives; (4) refusal to allow married females to enroll as individuals under group policies although married males may do so; (5) denial of maternity benefits for female employees when such benefits are available to spouses of male employees; (6) providing maternity benefits for female employees which are less favorable than for spouses of male employees; (7) limitations on the availability of income disability insurance for females; (8) lower maximum issue ages and higher minimum issue ages for policies issued to females than to males; (9) exclusion of pregnancy as a disability under income disability policies; (10) reduction of income disability benefits when female insured ceases being gainfully employed away from home; (11) premium differentials between males and females; (12) different and less favorable occupational classes for females than for males; (13) unavailability of coverage for certain occupational classes for females although same coverage is available to males; (14) differences in the elimination periods available to females; (15) unavailability to females of benefits usually provided by riders- e.g., increases in benefits, partial disability benefits, lifetime accident benefits, hospital indemnity benefits, etc.; (16) waiting periods for diseases of only the female genital organs; (17) a three-year setback is provided to females in life insurance rates although present data indicates that females live six years and more longer than males; (18) refusal by some insurers to provide health and disability insurance coverage to unmarried mothers and/or their children; (19) limitation in the coverage afforded a married female depending upon her spouse's existing coverage; (20) providing family death benefits to surviving widows but not to surviving widowers unless the widower was a dependent; (21) absence of conversion privilege to divorced wife where life insurance coverage was previously provided by rider to the policy issued to the divorced husband; (22) unavailability and rate discrimination against divorced, separated, or widowed females for automobile and fire insurance; (23) unavailability of coverage to females living with males not their husbands; (24) unavailability of homeowners or tenants insurance policies to single persons; (25) unavailability of insurance to female spouse in her name."

8. The findings of the various reports and studies mirror the experience of Minnesota as shown by complaints received by the Insurance Division (T. 32) and the Department of Human Rights (T. 21), and by individual experiences testified to by people at the hearing.

9. Many, but not all, of the discriminatory practices listed above, and others like them, are unfair because they are not based on demonstrable actuarial evidence or experience. Often, they are

based on a paternalistic attitude or so-called traditional concepts of the role of women (T. 30).

10. It is the position of the Agency that unfair discrimination in availability is illegal in Minnesota under any of a number of statutes. But, the statutes are so piecemeal that it is necessary to centralize them in one rule to set them forth as a definite statement of policy (Ex. 10). Such a statement serves at least three needs: (1) It provides definite guidelines for the insurance companies to follow; (2) it aids consumers by defining their rights more clearly, and (3) it aids the speedy resolution of complaints by informing both insurers and consumers of their rights (T. 30-32). Insurers generally agreed that a need exists to specifically define prohibited acts of unfair discrimination (See, e.g., T. 66-67).

STATUTORY AUTHORITY

11. The Notice of Hearing (Ex. 6) states that the Agency's authority to promulgate the rule is based on Minn. Stat. §§ 15.0411, subd. 3; 72A.20, subd. 1(9) and 363.03, subd. 4. The Statement of Need (Ex. 10) cites Minn. Stat. Chs. 363 and 72A in general. The Summation of Evidence (Ex. 11), cites Minn. Stat. §§ 62A.041, 62D.12, 65B.13, 72A.12, 72A.20 and 363.03. In a preliminary review of the cited statutes, the Examiner had some doubts about the authority of the Commissioner to adopt the rule and expressed this doubt to the Agency. In response, the Agency submitted a document entitled "Authority to Promulgate Rules" (Ex.15) in which it set forth its arguments. In addition to statutes already cited, it relied on Minn. Stat. §§ 72A.25 and 72A.20, subd. 1(8) and upon implied authority.

12. The Agency's arguments for implied authority are not well stated, but the conclusion is correct. Authority for procedural and clarifying rules not expressly authorized by statute may be based upon the implied authority granted by Minn. Stat. § 15.0412, subd. 3 (Supp. 1975), which provides in pertinent part:

> "Each agency shall adopt rules setting forth the nature and requirements of all formal and informal procedures related to the administration of official agency duties."

Implied authority to adopt rules necessary to the exercise of statutory powers and duties is well recognized. 1 Am. Jur.2d, Administrative Law, § 97; Wesland v. State of Minnesota Railroad and Warehouse Commission, 25 Minn. 504, 88 N.W. 2d 834 (1958).

13. It is necessary to summarize the cited statutes, as well as some recent legislation, to determine the state of the law in this area and the extent of the Commissioner's authority. In its last session, the legislature enacted Laws 1976, Ch. 121, which, by its title, is "An Act relating to sex discrimination; abolishing discrimination on the basis of sex in certain insurance laws." It amended a number of insurance statutes, generally by substituting the words "spouse" and "surviving spouse" for "wife" and "widow". In Laws 1975, Ch. 139, "An Act relating to insurance; defining certain unfair discriminatory practices," Minn. Stat. § 72A.20, subd. 1, was amended to make availability and rate discrimination on the basis of disability illegal in life or accident and health insurance unless evidence established significant differences in class rates. These recent amendments show a continuing concern by the legislature about unfair discrimination in insurance.

14. The following statutes are relevant to unfair discrimination in insurance. Minn. Stat. 62A.041, requires that every group or individual Accident and Health insurance policy provides the same maternity benefits to unmarried women and female dependents that it provides to married women, including wives of employees who choose family coverage and that it provide the same coverage for a dependent illegitimate child of an insured (male or female) as provided to the child of any insured electing family coverage. Minn. Stat. § 62C.14, subd. 5, applies the same requirements to Health Service Plans and Health Maintenance Organizations. Minn. Stat. §§ 65B.13 and 72A.12, subd. 3, prohibits discrimination of any kind, including rates, in automobile and life insurance between persons of the same class or on account of race. Minn. Stat. §§ 72A.17 to 72A.32 regulate trade practices in the business of insurance and also apply to Health Service Plans and Health Maintenance Organizations. Under § 72A.20, subd. 1,

the following are specifically defined as unfair practices:

> (8) DISCRIMINATION. Making or permitting any unfair discrimination between individuals of the same class and equal expectation of life in the rates charged for any contract of life insurance or of annuity or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of such contract or in making or permitting the rejection of an individual's application for life insurance coverage, as well as the determination of the rate class for such individual, on the basis of a disability, unless the claims experience and actuarial projections and other data establish significant and substantial differences in class rates because of the disability;
>
> (9) DISCRIMINATION BETWEEN INDIVIDUALS OF THE SAME CLASS. Making or permitting any unfair discrimination between individuals of the same class and of essentially the same hazard in the amount of premium, policy fees, or rates charged 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, or in making or permitting the rejection of an individual's application for accident or health insurance coverage, as well as the determination of the rate class for such individual, on the basis of a disability, unless the claims experience and actuarial projections and other data establish signifcant and substantial differences in class rates because of the disability;

15. Minn. Stat. § 363.03, subd. 4, provides:

> "Public Services. It is an unfair discriminatory practice:
>
> > To discriminate against any person in the access to, admission to, full utilization of or benefit from any public service because of race, color, creed, religion, national origin, sex or status with regard to public assistance."

This Human Rights statute does not apply directly to insurance companies. They, quite simply, are not "public services" within the meaning given that term by Minn. Stat. § 363.01, subd. 19 (Exs. P and Q). However, the acts of the Commissioner in administering the insurance laws and particularly in approving insurance contracts are at least arguably a "public service." It is thus conceivable that the Commissioner may violate the Human Rights Act by allowing insurance companies to engage in unfair discriminatory practices. This was apparently the basis of a Charge of Discrimination filed against the Insurance Division by the Commissioner of Human Rights (Ex. 17). The Commissioner of Human Rights apparently feels that the Human Rights Act applies directly to insurance companies (Ex. 17, T. 17), and that his authority to adopt rules under § 363.05, subd. 1(8), implies authority

to adopt the rule proposed here. Again, there is no basis for such conclusions. What can be implied from the Human Rights Act is that the Commissioner of Insurance must act in a non-discriminatory manner and the general sense of the legislature as to what constitutes unfair discrimination.

16. As stated above, Minn. Stat. § 72A.20 enumerates various practices that are either examples of unfair competition or unfair and deceptive practices. The items contained therein are exemplary; they do not exhaust the list of practices that are in violation of the statute. An illegal practice not defined in § 72A.20 is still actionable by the Commissioner under § 72A.25. That section provides in pertinent part:

> "Whenever the commissioner has reason to believe that any person engaged in the business of insurance is engaged in this state in any method of competition or in any act or practice in the conduct of that business which is not defined in section 72A.20, that said method of competition is unfair or that said act or practice is unfair or deceptive and that a proceeding by him in respect thereto would be to the interest of the public, he may issue and serve upon that person a statement of the charges in that respect. . . ."

The Agency argues, and the Examiner agrees, that this section, when read together with the statutes listed above, gives the Commissioner implied authority to define unfair practices by rule. If the Commissioner can determine that a particular practice by a particular insurer is an unfair practice, it is only common sense that he can declare an industry-wide practice to be unfair. The proper method for doing this is through the rules procedure because that assures maximum public input and consideration of all relevant evidence and argument. The need for the rule has been discussed above. It is clear that standards relating to unfair discrimination must be adopted so that the Commissioner can fairly and uniformly perform his statutory duties of regulating the insurance business.

NEED FOR AND REASONABLENESS OF THE PROPOSED RULE.

17. Section A, Authority. No testimony was given as to why this section is reasonable or necessary. The section states that the rule is adopted under authority of Minn. Stat. §§ 15.0411,

subd. 3, and 72 A.20, subd. 1(9), and in conjunction with § 363.03, subd. 4. The Examiner can imagine no real utility in making such a statement, especially since it is not accurate. The agency has failed to demonstrate that Section A is reasonable and necessary. The Examiner would note that this section, like most of the rule, is adopted almost verbatim from the California regulations. (Ex. 19).

18. Section B, Purpose, states: "The purpose of these regulations is to eliminate unfair discrimination based upon sex or marital status in the terms and conditions of insurance contracts and in the underwriting criteria of insurance carriers."

The Examiner would first note that the words "these regulations" should be changed to "this rule", which is the preferred terminology under Minn. Stat. Ch. 15. The same change should be made in Section B.

The Agency testified that the rule does not apply to rates (T. 10-11), but that is not clear from the rule itself, especially if the reader is not familiar with insurance terminology or law. It was clear that several of the people testifying in favor of the rule thought that it would prohibit unfair rate discrimination (T. 46, 51, 57 and 80, Ex. M). If the rule is to serve its purpose of informing the consuming public, then its provisions must be clear. As presently written, the ambiguity makes this section unreasonable. A simple statement that the rule does not apply to rates would remove the defect and would not be a substantial change. It might, however, be more appropriate to make the statement in another section.

The word "unfair" generated a great deal of comment. (T. 70 and 87, Exs. L, M, P, Q, S) and is at the very heart of what controversy there is in this rule.

The insurers point out the obvious; insurance is, by its very nature, discriminatory. The comment of the CNA Companies (Ex. P. at 2) states it well:

> "Discrimination simply means the act of distinguishing differences. Insurance rests upon the principle of distinguishing differences. - persons should be grouped or classed so that each person in a given class or group will be exposed in a similar way to the risks

they are seeking proection against and will pay the same rate as other persons in the class. Insurance laws reflect such principle and do not prohibit differentiations per se - in fact, they specifically permit classifications and differentiations."

The Minnesota laws cited above make discrimination illegal per se only where the discrimination is based upon race. In all other cases, discrimination in rates, terms and conditions is prohibited only between individuals of the same class and same hazard. It was the testimony of the Agency that generally, no actuarial basis exists for any of the forms of sex or marital status discrimination listed as examples under Section D (T. 30-42). If that is true, it is difficult to understand why discriminatory rates are not prohibited by the rule. In keeping with the general requirements of the law, it would seem appropriate to prohibit rate discrimination as well, except where the carrier can demonstrate that claims experience, actuarial projections and other data establish significant and substantial differences in class rates. Such a provision would be a substantial change in the rule and would therefore, require additional hearings if it were to be adopted.

19. Section C, Definition of Contract. The definition given is extremely broad and applies to items which are not "contracts" by any stretch of the imagination (Ex. F). However, some term is necessary to insure that all forms of insurance are covered by the rules (T. 34). Because the definition is limited to use within this specific rule, it is not unreasonable for that purpose. However, the definition is unreasonably vague in another respect. It could be read as applying to contracts issued outside of this State by carriers doing business here. (T. 85, 88-92; Exs. H, J, O) Because this was not the intent of the rule (T. 89-91), the ambiguity could be cured by a non-substantial change such as deleting the words "in this State" from the end of the sentence and inserting them after the word "offered".

20. Section D, Prohibited Practices. This section suffers from the same unreasonble ambiguity just discussed; it may be read as applying to contracts issued outside the State (Ex. F). Again, the ambiguity can be cured by a non-substantial change.

One change could be that suggested by The American Council of Life Insurance and the Health Insurance Association of America (ACLI-HIAA) (Ex. F at 3), which is based upon the National Association of Insurance Commissioners (NAIC) model regulations and also found in the Iowa regulation, IAC 510-15.53 (507B) (Ex. 27). The Examiner would recommend, however, that the following change be made: Delete the words, "No person or entity engaged in the business of insurance in this State shall refuse to issue any contract of insurance or shall" and insert, "It is an unfair and deceptive practice in the business of insurance to refuse to issue any contract or". Such a change is consistent with the authority upon which this rule based (defining unfair practices)and and with the placement of the rule in Chapter Seven of the Insurance Division Rules, "Unfair Trade Practice Rules." It also helps define the remedies available to the Commissioner as those under the Trade Practices sections of the law, Minn. Stat. §§ 72A.17 to 72A.32.

The Iowa (Ex. 27), California (Ex. 19) and NAIC model regulations contain a provision in this section that marital status may be considered for the purpose of determining eligibility for dependents' coverage. There were several requests for inclusion of a similar provision here (Exs. F, N. P). Because Minn. Stat. § 62A.041 covers dependent coverage rather specifically, at least as it relates to children of the insured, the provision would need some modification if it were to be added to the rule. Section 62A.041 does not require that dependent family coverage be provided to unmarried couples, but it does, in effect, require that family dependent coverage be made available to any unmarried parent if such coverage is offered to married parents. If such a clarification is added, the change would be reasonable and would clarify the intent of Section D. The Examiner suggests the insertion of the following sentence following the second sentence of Section D: "However, nothing in this rule shall prohibit an insurer from taking marital status into account for the purpose of defining persons eligible for dependents' benefits except where the dependent is the child or acknowledged or adjudicated illegitimate child

of the insured or prospective insured."

Some insurers suggested (Exs. F and S) that another exception be added to read: "Except to the extent the amount of benefits, term, conditions or type of coverage vary as a result of the application of rate differentials permitted under the Minnesota Insurance Code." The addition is not necessary because the rule does not apply to rate discrimination and the intent of the rule is to make all types of coverage and benefits available. However, absence of any control on rates does create a "loophole" in the rule because insurers will be able to set rates that are so prohibitive as to effectively make certain coverages unavailable. If rates were required to be justified by actuarial data and other evidence, they might still be prohibitive, but they would be "fair".

21. Each of the subsections of Section D are specific examples of prohibited practices. They are not intended as an exclusive list. According to testimony by the Agency panel, each example represents a practice about which there have been complaints, and for which no justification exists (T. 34-42). Insurers generally agreed that citing specific examples was necessary and reasonable, and the Examiner so finds.

22. Subsection D.1. prohibits discrimination because the (prospective) insured is residing with persons not related to him by blood or marriage. The most common complaint here is that single or divorced women have been denied automobile insurance because they are residing with a man (T. 34). Some insurers (Exs. F, I, J, N) again raise the point that this may prohibit making family coverage available only to legal families. The point is well-taken. But, if the suggested modification to defining dependents is made in Section D, it would not be necessary to make it here.

23. Subsections D.2. and D.3. reasonably deal with the availability of disability insurance for women. It's an area of many complaints (T. 35) and very important because everyone needs income protection. Insurers made no comments on these subsections.

24. Subsection D.4. prohibits "denying females waiver of premium provisions that are available to males or offering such provisions to females only for policy limits that are lower than those available to males." ACLI-HIAA points out that this may imply that different levels of basic coverage can be based on sex, contrary to the general purpose of the rule (Ex. F at 5). The provision should not be read to make such an implication, but the suggestion to strike all the words after "only" would remove any ambiguity that may exist and should be adopted.

25. Subsection D.5. requires that maternity benefits be offered on individual contracts if offered on comparable family coverage contracts. Minn. Stat. § 62A.041 requires more, and the Examiner would recommend that this example be changed to reflect that by adding the words "including unmarried women and minor female dependents" after the words "prospective insureds."

26. Subsection D.6. requires that group contracts offer dependent coverage for husbands of employees when dependent coverage for wives of employees is offered. No objection was made to this example.

27. Subsection D.7. requires that the same coverage be offered to males and females in the same occupational category. ACLI-HIAA argues, in effect, that the definition is overly broad (Ex. F at 6). Persons in the same occupational category may be exposed to different risks. They may do different types of work, and the insurer is justified, for purposes of classifying the risk, in analyzing the overall employment picture of that person. The Examiner agrees, especially since the basis for this example is that people doing the same job should have the same insurance available to them. Modifying "in the same occupational categories" to read "similarly employed", better defines "the same job."

28. Subsection D.8. is based on the same need and prohibits offering males higher benefits than females in the same risk classification. One insurer thought this was so broad that it would cover life insurance settlement options even though statistics clearly show different life expectances between the sexes (Ex. J). That is not what it says. The ACLI-HIAA raises a more

difficult question. Amounts of coverage in group contracts are often tied specifically to salary. Persons in the same "risk classification" may have different insurable interests because of differences in salary or other underwriting characteristics which may not be understood by consumers as "risk classifications." They suggest, therefore, changing "risk classification" to "underwriting classifications". Actually, both terms are equally vague to persons unfamiliar with insurance parlance; the change would be no improvement. It would not be practical to define every insurance term that might be misconstrued by the consuming public, and Agency personnel administering the rule should be able to explain that salary level and many other factors are part of "risk classification" if the question arises.

29. Subsection D.9. requires that disability be defined the same for males and females. The Commissioner of Human Rights felt that this was necessary so that maternity leave would be covered as a disability (T. 26). The Insurance Division's justification was based on the need for equal income protection (T. 38). Several insurers feared that this example might require coverage of normal pregnancy (Exs. F, I, O, P), as the Commissioner of Human Rights suggested. The rule should not mandate normal pregnancy coverage under disability coverage because normal pregnancy has not been historically considered an unavoidable disability and it may very well be discrimination against people who choose not to have children. California states that its identical regulation does not mandate maternity coverage as a disability. This is an issue of such emotional impact and important social and economic considerations that its resolution should be left to the legislature. The comments of the Commissioner of Human Rights and the insurers do raise the real possibility that the rule may be interpreted as requiring normal pregnancy to be included in the definition of disability. Therefore, the subsection is unreasonable as written and should be clarified. The Examiner would recommend that a parenthetical be added to the subsection that states:

> "(This rule does not require that normal pregnancy be included in any definition of disability, except that complications of pregnancy are a disability.)"

30. Subsection D.10. prohibits different waiting periods between males and females. The Commissioner of Human Rights said this was necessary because males are often covered under a maternity leave policy immediately while females must wait nine or ten months before being eligible for maternity leave (T. 26). The Insurance Division said that longer waiting periods are often imposed on women on such justifications as women are more likely to feign disability or they are poorer risks in general. Insurers thought this might prohibit waiting periods for maternity coverage (Exs. F and J). Obviously it should not because people would buy the coverage only when they knew the condition for payment existed. If normal pregnancy coverage was made mandatory by the Legislature, it might also be reasonable to eliminate the waiting period for then there would be a genuine risk spreading. The ACLI-HIAA suggested that the words "as to benefits applicable to both females and males." be added to clarify the example. This exception is too broad in that it is not limited to pregnancy. The example as written is more reasonable and properly interpreted does not apply to pregnancy because that may be considered as a condition existing from the time of conception.

31. Subsection D.11. prohibits requiring females to submit to medical examinations when males are not required to do so. The Insurance Division said there was no evidence suggesting that women were poorer risks, and therefore, the practice is unfair. The ACLI-HIAA said that rules for ordering medical examination are based upon a balancing of the cost of the examination against the likelihood of discovering information of underwriting significance and that this process indicates that the age at which examination should be ordered varies by sex. They claim the discrimination is not unfair because different medical facts pertaining to age of the sexes do exist. (Exs. F and L) Farm Bureau Life said its age rules were the same for both sexes (Ex. I), but wondered if the example prohibited requesting examinations that applied only to one sex or the other. Because there are both claims that data exists and that it does not exist to justify this discrimination, and because no actual evidence was introduced supporting either

position, and because the burden is upon the Agency to justify the rule, it must be found that the Agency failed to demonstrate the need for and reasonableness of this subsection. It should be deleted from the rule.

32. Subsection D.12. prohibits establishing different conditions or benefit options for males and females. Testimony by the agency indicates that this was needed because of differences in disability coverage available to women (T. 27, 40, 45). That need has already been covered. The intent of the example is not clear (Exs. F and O), and the Agency has failed to demonstrate the need for and reasonableness of this subsection.

33. Subsection D.13. prohibits denying coverage to unmarried persons that is available to marrieds. This is reasonable, and the comments in Finding No. 22, regarding family coverage, apply here.

34. Subsection D.14. prohibits limiting the amount of coverage available based upon marital status. The usual situation is that married people may obtain more life insurance. The insurer's concern was that this example might prohibit family policies (Ex. F) or limited dependent coverage as is mandated by many states or allowed for certain tax deductions (Ex. O). The point is well-taken and the rule is unreasonable as written. The corresponding Iowa regulation, IAC 510-15.53(507B), 11, (Ex. 27), contains a phrase that would cure this defect; viz., "unless such limitation applies only to coverage for dependents and is uniformly applied to males and females."

35. Subsection D.15, prohibits denying benefits to employees of one sex that are available to dependents of the same sex. The Commissioner of Human Rights says this is needed because single females have difficulty finding dependent coverage (T. 28). The Insurance Division indicates the women are often presumed to be covered as dependents on their husband's insurance and are thus offered less coverage. As the ACLI-HIAA points out (Ex. L), the real need is to prohibit different levels of coverage to employees of different sex. This example does not do that and previous examples do. The Agency has failed to demonstrate that this subsection is needed.

36. Section E, Remedy for Past Discriminations, provides that anyone who has been the victim of the practices prohibited by the rule within the prior year may petition the Commissioner who will investigate and take appropriate action. There were many comments on this section. (T. 10, 29, 44, 47, 59, 63, 67, 74, 85 and Exs. F, H, I, J, M, O, P, Q, R) California has the same rule, and their report justifies the section for their purposes (Ex. 19 at 11). The comments were to two points: (1) what is appropriate action; and (2) the section is illegally retroactive. The Agency's justification was that this was nothing new, the Agency can already investigate complaints and take appropriate action; which may mean no action (T. 74). However, the very clear implication of the section is that some specific remedies might be available to the complaining party for past practices. Nothing of the kind is available under the Unfair Practices Law, and so this rule is not only vague as to what "appropriate action" means, it is misleading to those not familiar with the Commissioner's power. The Agency also states that the prohibited practices are already illegal under the various laws and so there is no question of ex post facto application of the rule. That simply is not true. None of the insurance laws specifically prohibit discrimination based on sex or marital status, except those relating to maternity benefits. The Human Rights Act has no direct application to insurance. The authority to adopt this rule is based upon the broad authority of the Commissioner to determine unfair trade practices. Even that authority is limited to proscriptive application. The practices prohibited by this rule are at this point being determined to be unfair and any indication that remedies for past discrimination exists is not justified. Given that one purpose of the rule is to inform the consuming public, a rule that misinforms is inappropriate. The Agency has failed to demonstrate that Section E. is reasonable or necessary.

37. Section F. is the standard severability provision. No reason was given for its inclusion, and there is none. It just restates existing law. It should be deleted.

38. The ACLI-HIAA recommended the addition of an "Applicability and Scope" section (Ex. F). This is related to the retroactive discussion above because the suggestion provides that the rule shall apply to contracts issued or amended after the effective date of the rule. A fraternal insurer requested that the rule be limited in its application to fraternals who are by law allowed to limit their membership. Both points are well-taken, and, again, the Iowa regulations provide a good example to follow, IAC 510-15.52(507B).

39. The ACLI-HIAA also recommended that the effective date be set six months following adoption to allow sufficient time for carriers to change forms if necessary (Ex. F). They fail to state what forms changes would in fact be necessary. Being that a number of states have already adopted similar regulations, this rule should surprise nobody when it's adopted. Such a provision does not seem necessary.

40. All foregoing findings which may be conclusions are adopted as such.

CONCLUSIONS

1. Timely and adequate legal notice of the hearing was properly served and published by the Agency. All other substantive and procedural requirements of statute or rule have been fulfilled.

2. The Commissioner of Insurance has demonstrated his statutory authority to adopt the proposed rule.

This authority is properly implied from the broad authority of the Commissioner to determine the existence of unfair practices. While the existing statutes do not specifically prohibit sex or marital status discrimination in insurance, the overall thrust of the various statutes makes it unfair to discriminate in availability, conditions, terms and rates, on any basis, unless such discrimination is supported by actuarial evidence. The many studies and examples of unfair sex or marital status discrimination presented at the hearing show the practice to be widespread. It is, therefore, necessary that standards be set and unfair practices defined so that the Commissioner can fairly and

adequately carry out the duties of his office.

3. With the exceptions noted in the Findings, the Commissioner has demonstrated that the proposed rule is necessary and reasonable. As noted in the Findings, many of the parts of the rules that are unreasonble may be corrected by suggested non-substantial changes. Deletion of those unreasonable parts for which no change is suggested would not affect the overall purpose of the rule.

RECOMMENDATIONS

Having concluded that the proposed rule, with the exceptions noted, is authorized, necessary and reasonable, and, thus, proper for adoption, the Examiner recommends that it not be adopted.

The rule needs substantial changes and improvements to fully meet the needs of preventing the unfair discriminations which have been shown to exist. Rate discrimination, if not based on valid classifications and actuarial data, is at least as discriminatory as not having coverage available in the first instance. Further, if unfair rates are not prohibited, insurers can make coverages effectively unavailable by raising the rate to a prohibitive level. It is not always possible to distinguish rates from availability. If evidence justifies extremely high rates in certain cases, it may well justify complete exclusion of the coverage because it is impossible to fairly rate the risk. Thus, any appropriate rule must address both rate and availability discrimination.

Therefore, this Examiner recommends that the hearing be reconvened at some future date, perhaps in six months, to consider a substantially revised rule. Such a rule could classify unfair practices into three groups: (1) Those where discrimination in rates and availability is unfair per se (where no possible justification exists or where so declared by law); (2) those where discrimination in rates and availability is allowed if the insurer can demonstrate an actuarial basis, and (3) those where rate discrimination only is allowed if an actuarial basis is shown. Prior to the hearing, input and hard evidence from interested persons and groups should be solicited so that the final proposed rule represents a consensus of opinion, to the extent that is possible.

Alternately, it is possible to adopt the rule as now proposed and amend it later. However, the Examiner fears that many people will have the impression that they have gained a great deal, and the aggressive input needed to write a good rule will have been lost.

Dated this 15th day of December, 1976.

STEVE M. MIHALCHICK
Hearing Examiner

STATE OF MINNESOTA
DEPARTMENT OF COMMERCE
INSURANCE DIVISION

In the Matter of the Proposed
Adoption of Rules by the Insurance
Division Relating to Unfair Dis-
crimination Practices Based Upon

FINDINGS OF FACT

The above-entitled matter came on for hearing on October 6, 1976, at Saint Paul, Minnesota. Steve M. Mihalchick, Hearing Examiner appointed by the Chief Hearing Examiner, presided.

The Agency panel consisted of Berton W. Heaton, Commissioner of Insurance (hereinafter "Commissioner"); J. P. Koleski, Assistant Commissioner, Insurance Division; Thomas O'Malley, Assistant Commissioner, Insurance Division; Fred Pritzker, attorney, Assistant to the Commissioner; William L. Wilson, Commissioner of Human Rights; and Thomas J. Donaldson, Assistant Commissioner, Department of Human Rights.

Thirty-nine people attending the hearing signed the register. Twelve individuals made comments or statements at the hearing which continued until all interested groups and persons had an opportunity to be heard.

Hearing Examiner Mihalchick prepared the Report of the Hearing Examiner (hereinafter "Report"), dated December 15, 1976, pursuant to Minn. Stat. § 15.052, subd. 3 (1975 Supp.) and Minn. Rules HE 106.

Based upon the proceedings and records herein, the Commissioner makes the following:

FINDINGS OF FACT

1. He adopts Findings 1 through 16 of the Report, which findings relate to procedural requirements, the need for rules prohibiting unfair discrimination in insurance based on sex or marital status, and statutory authority.

2. He adopts Finding 17 of the Report, and find that Section A should be deleted.

3. He adopts Finding 18 of the Report except for the items set forth herein and finds that the phrase "these regulations" in Section B and Section C should be changed to "this rule" and finds that the statement "this rule does not apply to insurance rates" should be added to Section B.

He declines to adopt the findings which state that the rules should be expanded to include a prohibition of discriminatory rates, and finds that such a change should not be made.

The Report, in Finding No. 22 and in the Recommendations, contains further clarification of the Hearing Examiner's position on this point. Numerous statements in the record (T.11, 77, 78, Ex.21 at 33-35, Ex.22 at 3-5, Ex.26 at 2-4, Ex.28 at 5-9, Ex.29 at 25-26) clearly demonstrate that insurance rating is a problem separate from availability.

Additionally, the National Association of Insurance Commissioners stated in the Preamble to the NAIC Model Regulation to Eliminate Unfair Sex Discrimination (N.A.I.C. Proceedings 1976, Vol.I, p.502) that:

> On the other hand however, since the business of insurance is built upon the ability of the insurance company to evaluate risk and assign a price tag to that risk, any attempt to tamper with the pricing mechanism of the insurance business must be approached with great care. The subjects of premium rates and availability of coverage have been determined to be separate issues which can be dealt with more effectively if handled separately. As a result, the NAIC Task Force on Unfair Sex Discrimination has chosen to propose this model regulation for adoption as the first step in a two stage program. The second stage will involve the review of rating systems which are currently in use in an attempt to determine the validity of assumptions, statistics and actuarial methods which have been routinely accepted in the past.

It must be conceded that on the surface it could appear that insurance companies could enact prohibitive rates so as to effectively make certain coverages unavailable. However, this ignores the fact that there are specific rating laws which prohibit differentiation of rates among like risks. It would appear highly unlikely that

discriminatory prohibitive rates such as the Hearing Examiner suggests could be enacted without detection and subsequent action by the Insurance Division under the existing insurance statutes.

The proposed rule going to practices other than rating was drafted by the Insurance Division to address what appeared to be the most serious problems. In addition, the rule was meant to address areas where the statutes were least specific.

Based on the Findings of Fact entered by the Hearing Examiner, he specifically finds that there is a need for rules in areas other than insurance rating. Therefore, he finds that making a substantial change to the rule proposed, by adding a section to apply to rating, which change would require additional delay in enacting any regulation, would not be in the public interest.

However, since the remarks of the Hearing Examiner indicate that he felt this area is ultimately in need of regulation, and in order to further clarify our position, which is that unfair rate discrimination is already prohibited by statute, members of the of the Insurance Division staff will review insurance rating to determine whether they can develop a workable rule which will take into account the basic structure of insurance, (Report, Finding #18), as well as the needs of the public. If it is ultimately determined that an acceptable rating rule can be developed, and that it would be beneficial, the Insurance Division will promulgate such a rule at that time.

4. He adopts Finding #19 of the Report and amends Section C as suggested to clarify the definition.

5. He adopts Finding #20 of the Report insofar as it states that Section D could be read as applying to contracts written outside the State. He amends the section by adding the words "in this state"

after the words "any contract of insurance." He further adopts the Finding applicable to dependent coverage and amends the Rule as suggested by the Hearing Officer. He adopts the Finding insofar as it rejects an exclusion relating to rates. He rejects the finding that non-inclusion of rates creates a "loophole." (See paragraph 3, supra).

6. He adopts Findings #21, #22, #23, #26, #28, #30, #33, #39, and #40 of the Report.

7. He adopts Finding #24 with the exception of the recommendation to delete the word "only." This change would make the section ambiguous. For example, even though both a male and female could obtain a waiver of premium for a $10,000 policy, the company might offer such a provision in a $5,000 policy purchased by a female. This offer arguably would be prohibited if the proposed change were made. Since the actual discrimination is to offer such a provision "only" on smaller policies, he leaves the section unamended.

8. He finds that the change proposed by the Hearing Examiner in Finding #25 is not necessary and would cause misunderstanding. Since the rule refers to individual as opposed to family contracts, there would be no female dependents covered under any such individual contract. When Minn. Stat. § 62A.041 (1974) refers to individual policies which cover minor female dependents, it refers to non-group policies.

9. He adopts Finding #27 and amends subsection D.7 accordingly.

10. He declines to adopt Finding #29 inasmuch as the provision as it stands does not mandate that a normal pregnancy be included in the definition of disability. This is the position taken by California in adopting the identical rule. Further, it finds support in General Electric v. Gilbert.

11. He declines to adopt Finding #31 and finds that subsection D.11 is reasonable and necessary. Since there was no actual evidence

submitted to support the claim that this rule would cause hardship, he finds that the Insurance Division satisfied its burden since it could not by definition submit actual evidence that no such data exists.

12. He declines to adopt Finding #32 and finds that subsection D.12 is reasonable and necessary based on the testimony cited in Finding #32.

13. He declines to adopt Finding #34 and finds that subsection D.14 is reasonable and necessary as written. The rule as written cannot reasonably be read to prohibit family policies.

14. He declines to adopt Finding #35 and finds based on the evidence referred to in the Finding, that subsection D.15 is reasonable and necessary as written.

15. He adopts Finding #36 and deletes Section E from the rule. It must be emphasized that this does not mean that violation of Minnesota insurance statutes themselves will not be acted upon by the Division simply because such violations occurred prior to the effective date of this rule.

16. He adopts Finding #37 and deletes Section F from the rule.

17. He declines to adopt Finding #38 and thus does not add the suggested provisions since they are not necessary.

CONCLUSIONS

1. He adopts Conclusion 1 and 2 of the Report.

2. He adopts Conclusion 3 with the exception of those items modified in the Findings hereinabove.

Dated: Feb. 18, 1977



BERTON W. HEATON
Commissioner of Insurance and
Chairman, Commerce Commission
500 Metro Square Building
Saint Paul, Minnesota 55101

STATE OF MINNESOTA
OFFICE OF HEARING EXAMINERS

FOR THE DEPARTMENT OF COMMERCE
INSURANCE DIVISION

IN THE MATTER OF THE PROPOSED ADOPTION OF RULES BY THE INSURANCE DIVISION RELATING TO UNFAIR DISCRIMINATION PRACTICES BASED UPON SEX OR MARITAL STATUS.

REPORT OF THE CHIEF HEARING EXAMINER

WHEREAS, a hearing was held on October 6, 1976, before Steve M. Mihalchick, a Hearing Examiner of the State Office of Hearing Examiners, on the above-entitled matter in compliance with Minn. Stat. §15.0412, Subd. 4; and

WHEREAS, the Report of Hearing Examiner made pursuant to Minn. Stat. §15.052, Subd. 3, was issued to the Insurance Division on December 15, 1976; and

WHEREAS, the Insurance Division has now determined to adopt rules pursuant to Minn. Stat. §15.0412, Subd. 4; and

WHEREAS, the Insurance Division has submitted said rules to the Chief Hearing Examiner for review pursuant to Minn. Stat. §15.052, Subd. 4, and Rule HE 107; and

WHEREAS, the Chief Hearing Examiner finds that the final proposed rules are not substantially different from those proposed at the public hearing and that the Insurance Division has met all requirements of Minn. Stat. §15.0412, Subd. 4.

NOW, THEREFORE, upon receipt of this Report, the Insurance Division has the responsibility of submitting the complete hearing record and the rules as adopted by the Division to the Attorney General and to publish in the State Register, all pursuant to Minn. Stat. §15.0412, Subd. 4.

Dated this 28th day
of February, 1977.

Duane R. Harves

DUANE R. HARVES
Chief Hearing Examiner

STATE OF MINNESOTA
DEPARTMENT OF COMMERCE
INSURANCE DIVISION

In the Matter of the Proposed Adoption of Rules by the Insurance Division Relating to Unfair Discrimination Practices Based Upon Sex

ORDER ADOPTING RULES

The above-entitled matter came on for hearing before the Insurance Commissioner of the State of Minnesota on the 6th day of October, 1976, at 500 Metro Square Building, 7th and Robert Streets, Saint Paul, Minnesota 55101, after proper notice required by Minn. Stat. § 15.0412 (1974) was served upon all persons, associations and other interested groups registered with the Secretary of State for that purpose.

After affording interested persons an opportunity to present written and oral data, statements and arguments, having heard all of the testimony, having considered all of the evidence adduced and having confirmed the need for the above-captioned rules and the reasonableness thereof.

NOW, THEREFORE, IT IS ORDERED that these rules identified as Minn. Rules Ins 116 are adopted this 6th day of April, 1977, pursuant to authority vested in me by Minn.Stat. §§ 15.0412.

STATE OF MINNESOTA
DEPARTMENT OF COMMERCE
INSURANCE DIVISION

Berton W. Heaton

BERTON W. HEATON
Commissioner of Insurance and
Chairman, Commerce Commission

Ins 116. Discrimination on Account of Sex and/or Marital Status

A. Purpose. The purpose of this rule is to eliminate unfair discrimination based upon sex or marital status in the terms and conditions of insurance contracts and in the underwriting criteria of insurance carriers. This rule does not apply to insurance rates.

B. Definition of Contract. As used in this rule, "contract" means any insurance policy, plan, certificate, subscriber agreement, statement of coverage, binder, rider or endorsement offered in this State by any person or entity engaged in the business of insurance.

C. Prohibited Practices. No person or entity engaged in the business of insurance in this State shall refuse to issue any contract of insurance in this State or shall cancel or decline to renew such contract because of the sex and/or marital status of the insured or prospective insured. The amount of benefits payable, or any term, condition or type of coverage shall not be restricted, modified, excluded or reduced on the basis of the sex and/or marital status of the insured or prospective insured. "However, nothing in this rule shall prohibit an insurer from taking marital status into account for the purpose of defining persons eligible for dependents' benefits except where the dependent is the child or acknowledged or adjudicated illegitimate child of the insured or prospective insured." Examples of the practices prohibited by this section include, but are not limited to:

1. denying, cancelling or refusing to renew coverage, or providing coverage on different terms, because the insured or prospective insured is residing with another person or persons not related to him or her by blood or marriage;

2. offering coverage to males gainfully employed at home, employed part-time or employed by relatives while denying or offering reduced coverage to females similarly employed;

3. reducing disability benefits for women who become disabled while not gainfully employed full-time outside the home when a similar reduction is not applied to men.

4. denying females waiver of premium provisions that are available to males or offering such provisions to females only for policy limits that are lower than those available to males;

5. denying maternity benefits to insureds or prospective insureds purchasing individual contracts when comparable family coverage contracts offer maternity benefits;

6. denying under group contracts, coverage to husbands of female employees when dependent coverage is available to wives of male employees;

7. offering coverage to males in certain occupations while denying coverage or offering more limited coverage to females similarly employed;

8. offering males higher benefit levels and/or longer basic benefit periods than are offered to females who are in the same risk classifications;

9. offering contracts containing different definitions of disability for females and males;

10. offering contracts containing different waiting periods for females and males;

11. requiring female applicants to submit to medical examinations while not requiring males to submit to such examinations;

12. establishing different conditions or benefit options for males and females;

13. denying to divorced or single persons coverage available to married persons;

14. limiting the amount of coverage available to an insured or prospective insured based upon his or her marital status;

15. denying employees of one sex insurance benefits that are offered to dependents who are of the same sex as the employees.

options

1. [illegible] rules –

2. procedural rule – kind of case. Ins will call hrg on [another hrg.]

3. limited to health care & variable life ins. policies [another hearing]

4. policy announcement to industry –

ADMIN 1000

STATE OF MINNESOTA

DEPARTMENT ATTORNEY GENERAL (Insurance)

Office Memorandum

TO : THOMAS R. MUCK
Assistant Attorney General

DATE: May 10, 1977

FROM : ROBERT J. CLAYTON
Special Assistant Attorney General

RJC

PHONE: 9412

SUBJECT: AUTHORITY OF THE INSURANCE DIVISION TO ADOPT RULES RELATING TO SEX DISCRIMINATION

Recently the Commissioner of Insurance issued an Order adopting certain rules relating to sex discrimination. In evaluating the question of whether the Commissioner has the power to adopt these rules, we are faced with a recent trend evident in the Ramsey County District Court. That body has favored a conservative approach towards the delegation of rule-making authority to administrative agencies.[1] This discussion will focus first on whether there is authority to adopt these rules for insurance generally and, second, on whether there is authority to adopt them for some types of insurance if there is no such general authority.

1/ In Minnesota State Bankers Assn. v. Heaton, File No. 397933, Judge Graff ruled that a rule promulgated by the Insurance Division was improper. The rule had been adopted with much opposition and was aimed at prohibiting one specific practice. Lending institutions were prohibited from requiring insurance companies to keep compensating balances on account in the institution. The rule declared this practice to be a rebate and thus a violation of Minn. Stat. §§ 72A.17 - 72A.30, the Unfair Trade Practices Act.

Judge Graff held that the rule was not proper because improper procedure had been followed when the rule was adopted and, also, because the Commissioner had no authority to adopt the rule. In deciding the issue of whether there was authority, the court noted that the statute already defined rebate and thus preempted the Insurance Division from adding to that definition. Judge Graff also mysteriously reasoned that the Insurance Division had no power to enact rules under Chapter 72A, which rules would take away an individual respondent's right to have the propriety of his actions determined in a contested case hearing.

It should be noted that this case did not involve Minn.Stat. § 72A.20, subd. 1(12), cited below, nor any other insurance rule-making provision. Moreover, since the opinion stated multiple bases for the result reached, its precedential value as to each specific point may be questioned.

I. Arguments For General Rule-Making Authority As To All Kinds of Insurance.

Minn. Stat. § 15.0412, subd. 3 (1976) might be relied upon as the basis of the authority to promulgate the rules now under consideration. That section states that "Each agency shall adopt rules setting forth the nature and requirements of all formal and informal procedures related to the administration of official duties." While it could be argued that this language only grants agencies the authority to promulgate procedural rules, the counter-argument is that if the Legislature intended only to give authority to adopt procedural rules, it could easily have so stated. The language used, when it talks about both the nature and the requirements of all procedures, seems to authorize something more. In order to give effect to all of the language used, one must analyze each part of the section separately. The statute says that agencies have the power to adopt rules setting forth the requirements of all formal and informal procedures. It seems reasonable that this language allows an agency to inform parties with which it deals of the conditions which must be met in order for the agency to take action. Under this interpretation of Minn. Stat. § 15.0412, subd. 3, the rules in question would be authorized.

If this section only authorizes the agency to adopt strictly procedural rules, its ability to function is greatly decreased. Any attempt by the Division to provide information to companies which it regulates or to individuals who deal with those companies would arguably be within the broad definition of rule in Minn. Stat. § 15.0411 (1976). An interpretation which requires an agency to forego giving any sort of guidance as to its views, short of holding a formal hearing involving a specific respondent, would be at best extremely cumbersome. Rather, the preferable interpretation would be that § 15.0412,

---

1/ The second case of importance is Minnesota-Dakotas Retail Hardware Association vs. The State of Minnesota, File No. 406422. A motion for rehearing has been filed but not decided in this case. Judge Godfrey has ruled that the Consumer Services Section did not have the authority to adopt rules relating to certain advertising practices. The opinion deals with the specific language of the Consumer Services statutes which purports to grant the agency some rule-making authority. According to Judge Godfrey, that grant was not sufficient to support the actual rules adopted. Even though the opinion deals primarily with those specific statutes, there is, however, language in the opinion which appears to have broader application to rule-making generally.

In spite of questions which might be raised as to the precedential value of either or both of these opinions, (copies of which are attached hereto), it must be conceded that the tone of both opinions reflects a negative judicial view of liberal interpretations of rule-making authority.

subd. 3, authorizes an agency to set forth the requirements which must be met to avoid the agency commencing action. The rules in question do this, since they say that companies shall not unfairly discriminate and then give examples of certain practices which the Division views as unfair discrimination.

Even if it is argued that Chapter 15 only gives the authority to adopt procedural rules, it would seem that the rules in question are still proper as "procedural" rules in the sense that they are an agency statement of general applicability and future effect which defines for the benefit of both the industry and the public, the types of matters which, when reported to the Insurance Division, will result in legal action, if not corrected. They can reasonably be interpreted as a statement by the Insurance Division of its litigating position in a contested case hearing held pursuant to Chapter 72A.

In order to strengthen the argument that the rules in question are procedural in nature, it would be desirable to have the rules reworded so they state that when any insurance company violates the rules, the Division will commence a contested case proceeding against the company. Such rewording would not change the primary objective of the regulations, informing interested parties of the Division's position. It would also avoid the language of the Minnesota Bankers' opinion.2/

Other general provisions of the insurance law support the argument that the rules in question can be enacted. Minn. Stat. § 60A.03, subd. 2(1) (1976) reads as follows:

> The commissioner shall have and exercise the power to enforce all the laws of this state relating to insurance, and it shall be his duty to enforce all the provisions of the laws of this state relating to insurance.

The Commissioner's power to enforce these laws must surely include the right to tell companies what actions he considers to be violations of the insurance law. Indeed, no companies questioned the Commissioner's authority to promulgate rules, as part of his power to enforce the state's insurance laws.

2/ If the Graff decision is viewed as definitive on the power of the Division to enact regulations under § 72A, it appears that the only way to avoid application of the case would be to rely on Subdivision 1(12), discussed below, or to have the rules reworded to state that the Insurance Division would commence an action based on these facts, leaving the determination of the specific issue of whether the action is improper to the contested case hearing.

The Commissioner does moreover have some rule-making authority to define unfair practices by insurance companies by virtue of Minn. Stat. § 72A.20, subd. 1(12) which states:

> The following are hereby defined as unfair methods of competition and unfair or deceptive acts or practices in the business of insurance:
>
> . . .
>
> Causing or permitting . . . the claims and complaints of insureds to be processed in an unreasonable length of time, or in an unfair, deceptive, or fraudulent manner, or in violation of such regulations as the commissioner of insurance shall make in the public interest to insure the prompt, fair, and honest processing of such claims and complaints.

(Emphasis added.)

The Insurance Division becomes involved in disputes only after a person dealing with the insurance company has encountered a problem with the company which the company has not, in the opinion of the complainant, properly resolved. Accordingly, the insurance company actions which precede an investigation by the Insurance Division almost invariably include a complaint to the company. By enacting the rules in question, the Commissioner is telling companies what complaints in the area of sex discrimination he feels should be resolved in favor of the complainant. It is reasonable for rules relating to the fair processing of complaints to give some guidance as to the Commissioner's view on what the proper standards for handling such complaints should be. On the other hand, this section can also be interpreted as referring only to the actual mechanical procedure by which companies handle and resolve complaints rather than the substantive standards with reference to which complaints are resolved. In making any arguments for rule-making authority in Chapter 72A, we would encounter the unfortunate precedent of the Graff case. It was not decided under Minn. Stat. § 72A.20, subd. 1(12) however.

Minn. Stat. § 62C.19 (1976) which applies to nonprofit health service plan corporations, such as Blue Cross-Blue Shield of Minnesota, states that such corporations "are subject to Minn. Stat. §§ 72A.17 - 72A.30 (1976) regarding regulation of trade practices, and to all regulations promulgated by the Commissioner regarding advertisements for and marketing of accident and health insurance." This language by implication indicates that the Commissioner has authority to promulgate rules and regulations such as those under consideration here, which in large part relate to medical protection including accident and health insurance and nonprofit health service plans.

Minn. Stat. § 60A.051, subd. 3 (1976) grants specific rule-making authority to implement Minn. Stat. § 60A.051, subd. 1 (1976).[3] That section relates to grounds upon which a certificate of authority to transact business as an insurer can be denied, suspended or revoked. It could be interpreted to apply to these rules by arguing that management of an insurance company is untrustworthy or incompetent within the meaning of subd. 1 when it unfairly discriminates in the issuance of insurance. Such conduct would create a hazard to the insurance-buying public, within the meaning of this provision since, certain segments are unfairly deprived of their ability to obtain insurance.

II. Arguments For Rule-Making Authority As To Specific Kinds of Insurance.

If it is determined that the Insurance Division has no authority to adopt rules defining certain practices as unfair and thus prohibited by Chapters 15, 60A or 72A, there are several other provisions which authorize the adoption of rules relating to specific types of insurance.

Many of the most serious problems addressed in the rules are in the field of accident and health insurance which includes disability insurance. Minn. Stat. § 62A.04, subd. 9(1976)[4] grants some rule-making authority in this field. However, it is limited to rules concerning the procedure for filing of health insurance policies. Arguably this could be interpreted to also allow specification of policy content as well, thus authorizing at least some of the rules in question.

3/ The commissioner of insurance may deny an application for a certificate of authority, or, after a hearing, may suspend or revoke the certificate of authority of an authorized insurer, or deny the renewal thereof, if he finds that:

(a) the board of directors or the principal management of such company is incompetent or untrustworthy or so lacking in insurance company managerial experience as to make its operation hazardous to its policyholders, its stockholders, or to the insurance buying public, or

(b) such company is controlled directly or indirectly through ownership, management, reinsurance transactions or other business relations by any person or persons whose business operations are or have been marked by manipulation of any assets, reinsurance, or accounts as to create a hazard to the company's policyholders, stockholders, or to the insurance buying public. Minn.Stat. § 60A.051,subd.1

The commissioner of insurance shall have the authority to issue regulations designed to implement subdivision 1 in the manner provided by chapter 15. Minn. Stat. § 60A.051, subd. 3.

4/ The commissioner may make such reasonable rules and regulations

Minn. Stat. § 62C.23 (1976) 5/ grants broad rule-making authority relative to the regulation of nonprofit health service corporations such as Blue Cross-Blue Shield. Minn. Stat. § 61A.20 (1976) 6/ does the same for life insurance issued on a variable basis. Also, Minn. Stat. § 62E.09 (1976) 7/ grants broad rule-making power to advance the provisions of the Comprehensive Health Insurance Act. It also gives the Commissioner power to formulate general policies to advance the purpose of the Act. As the Act states in its title, it was enacted to make minimum health care benefits available to all persons in the state. Rules prohibiting unfair sex discrimination would seem to be proper under this provision.

Therefore, even if the rules may not properly be adopted pursuant to Chapter 72A, they could properly be adopted insofar as they relate to health care benefits and variable life insurance policies.

4/ concerning the procedure for the filing or submission of policies subject to sections 62A.01 to 62A.09, as are necessary, proper or advisable to the administration of sections 62A.01 to 62A.09. This provision shall not abridge any other authority granted the commissioner by law. Minn. Stat. § 62A.04, subd.9.

5/ For the purpose of implementing and enforcing Laws 1971, Chapter 568, the commissioner may adopt rules and regulations pursuant to chapter 15. Minn.Stat. § 62C.23.

6/ Notwithstanding any other provision of law, the commissioner shall have sole and exclusive authority to regulate the issuance and sale of contracts on a variable basis and to provide for licensing of persons selling such contracts, and to issue such reasonable rules and regulations as may be appropriate to carry out the purposes and provisions of sections 61A.13 to 61A.21. Minn.Stat. § 62E.09

7/ The commissioner may:

(a) Formulate general policies to advance the purposes of sections 62E.01 to 62E.17; the commissioner may also adopt, promulgate, repeal, and amend rules pursuant to the rule-making provisions of chapter 15, to carry out the provisions of sections 62E.01 to 62E.17;

(b) Supervise the creation of the Minnesota comprehensive health association within the limits described in section 62E.10;

(c) Approve the selection of the writing carrier by the association and approve the association's contract with the writing carrier including the state plan coverage and premiums to be charged.

(d) Appoint advisory committees;

(e) Conduct periodic audits to assure the general accuracy of the financial data submitted by the writing carrier and the association.

CONCLUSION

As set forth above, there are reasonable grounds upon which to base a finding that the Insurance Commissioner has authority to promulgate the rules in question either as they are written now or with some modifications. If, however, it is determined that there is no authority of any kind to promulgate this rule, the Division could still announce to the industry what position it will take in a contested case proceeding. Although such a statement would arguably fall within the definition of rule in Minn. Stat. § 15.0411, subd. 3 (1976), it appears a proper course of conduct since if the Division does not have the authority to make rules relating to unfair practices, it would not be an "agency" as defined in Minn. Stat. § 15.0411, subd. 1 (1976). The fact that the Division has rule-making authority in other areas would not mean that it is an agency with respect to enforcement of the unfair trade practices act.

wrong circular

The announcement would probably have a similar effect on the industry as a rule would have. Most, if not all companies, would comply and all companies would be put on notice of the Division's position. All that would remain is that the Division would have to prove that the specific practice actually was unfair and in violation of Minn. Stat. §§ 72A.17 - 72A.30 (1976).

7/ (f) Contract with the federal government or any other unit of government to ensure coordination of the state plan with other governmental assistance programs;

(g) Undertake directly or through contracts with other persons studies or demonstration programs to develop awareness of the benefits of sections 62E.01 to 62E.17, so that the residents of this state may best avail themselves of the health care benefits provided by these sections; and

(h) Contract with insurers and others for administrative services.

Minn. Stat. § 62E.09

STATE OF MINNESOTA

COUNTY OF RAMSEY

DISTRICT COURT

SECOND JUDICIAL DISTRICT
#406422

Minnesota-Dakotas Retail Hardware Association, et al,

Plaintiffs,

and

The Sibley Company, a Minnesota corporation; Modern Merchandising, Inc., a Minnesota corporation; and Creative Merchandising and Publishing, Inc., a Minnesota corporation,

Intervenors,

-vs-

The State of Minnesota and Sherry Chenoweth, Director of Consumer Services Section of the Department of Commerce,

Defendants,

and

Minnesota Automobile Dealers Accociation,

Intervenor.

ORDER

The above-entitled matter came on for hearing before the undersigned Judge of District Court on January 24, 1977. Plaintiff Minnesota-Dakotas Retail Hardware Association was represented by its attorneys, John R. Stoller and Blaine Harstad, of the firm of Harstad & Rainbow, 1036 Midland Bank Building, Minneapolis, Minnesota. Plaintiff Intervenor The Sibley Company,were represented by its attorneys, William P. Studer and Mary Ann Borrows, of the firm of Oppenheimer, Wolff, Foster, Shepard and Donnelly, 4008 IDS Center, Minneapolis, Minnesota. Plaintiff Interve Modern Merchandising, Inc., and Creative Merchandising and Publishing, In were represented by their attorney, Peter S. Hendrixson, of the firm of Dorsey, Windhorst, Hannaford, Whitney & Halladay, 2300 First National Ban Building, Minneapolis, Minnesota. Plaintiff Intervenor, Minnesota Food Retailers Association was represented by its attorney, Arthur Gillen, of the firm of LeVander, Gillen, Miller & Magnuson, 402 Drovers Bank Buildi South St. Paul, Minnesota. Defendant State of Minnesota and Sherry

Chenoweth were represented by their attorneys, Peder B. Hong and Helen Kelly, Special Assistants Attorney General, 515 Transportation Building, St. Paul, Minnesota. Defendant Intervenor Minnesota Automobile Dealers Association was represented by its attorney, William E. Flynn, of the firm of Hamilton, Flynn & Heim, 3944 IDS Center, Minneapolis, Minnesota.

Prior to the commencement of trial the matter was submitted to this Court upon motion of Summary Judgment made on behalf of all of the parties herein on various legal grounds.

The Court having heard arguments of counsel, and upon all the files and records herein,

IT IS ORDERED that the motion of the plaintiffs is granted on the grounds that the Consumer Services Section had no statutory authority for the issuance of any substantive rules and regulations.

IT IS FURTHER ORDERED that the motion of the State of Minnesota is denied.

IT IS FURTHER ORDERED that the within action be dismissed with prejudice, and that the plaintiffs be allowed their costs and disbursements herein.

The following memorandum is made a part of this Order.

OTIS M. GODFREY, JR.
Judge of District Court

DATED: January 27, 1977.

M E M O R A N D U M

The immediate issue for determination by the Court has been raised by motions for Summary Judgment brought by various parties to the lawsuit. The principal ground set forth by plaintiffs is that the Director of Consumer Services Section of the Commerce Department of the State of Minnesota lacks statutory authority to issue the regulations which are the subject matter of this litigation.

Under Minnesota Statutes 45.16, the legislature has set forth four areas of responsibility of the Consumer Services Section, which is a division of the Commerce Department: 1) To act as the Governor's representative in the field of consumer matters; 2) to enforce the laws relating to consumer fraud and related unlawful practices; 3) to make recommendations to the Commerce Commission for needed legislative action in order to protect the consumer; and 4) to receive registration statements and reports of all persons soliciting charitable funds in Minnesota.

The Section can also "adopt, pursuant to the Administrative Procedures Act, rules and regulations to implement the provisions of this section."

The quoted language of the statute may well refer only to M.S.A. 45.16 Subd. 2 (d), which concerns charitable funds solicitations. In any event, this Court can find no statutory authority which vests the Consumer Services Section with the right or power to issue such regulations as are proposed, CS20-CS34.

From the statute and legislative history, it would appear that the Section is to act as an adviser to the Governor and the Commerce Commission, and to function as a clearing house for consumer complaints. The enforcement of our statutes on consumer fraud is the responsibility of the Attorney General, who investigates any apparent violations of law and seeks legal relief where necessary.

The proposed regulations go far beyond any rules or regulations necessary for the Section to carry out its duties enumerated in M.S.A. 45.16 Subd. 2. They are in fact of a substantive nature and attempt to define trade practices which would be prohibited under M.S.A. 325.78 and 325.79. Chapter 325 defines false and deceptive advertising, prohibits such activity, and provides for injunctive relief by the courts to restric such practices in the future.

Reference is made to the recent Supreme Court decision of State vs. Fry Roofing, 246 NW2d 696 (1976). In that decision the Supreme Court was not viewing with approval all of the actions of Fry Roofing,

long a thorn in the side of the City of Minneapolis and others concerned. The issue in the case was not whether Fry Roofing was an excellent operation, but whether or not the PCA had proper authority. The Attorney Gene argued that "there is a need, therefore we must imply the right to regula and to issue rules."

The Court, at page 699, said that "the State seeks to infer the existence of such power from other powers which were explicitly granted to the PCA. Analysis of the statute and legislative history reveals that to read such authority into the statutes would contravene their language and intent."

The decision further states, "Had the legislature intended the PCA to have the general power to issue and enforce orders, it could easily have so provided."

The same could be said of the Consumer Services Section. If the legislature wanted to give it authority to issue rules and regulations to define what constitutes prohibited practices in this area, they could have given them the authority to do so. As was pointed out in several of the briefs, Chapter 80C was passed at the same session of the legislature as this present law, and concerns the Commissioner of Securities, also within the Commerce Department. It says: "The Commissioner of Securities may define by rule false, fraudulent or deceptive practices in the offer and sale of franchises." There is no such language in M.S.A. 45.16.

I would submit that the Consumer Services Section does not appe to have been set up as a regulatory body; does not have a commissioner; isn't like the Public Service Commission, or the PCA, and there is no provision for hearings. None of the expected legislative guidelines for such a regulatory agency can be found. Rather by its very name, Consumer Services Section, is designed to provide service and information to the public. It is also to represent the Governor in the field of consumer affairs.

Perhaps most telling of all in a consideration of whether the Section was given legislative authority to promulgate such rules as we

have here is its authority to "make recommendations for proposed legislation." It is noted that the Director of Consumer Services Section is not given the authority to make direct recommendations to the legislature, but shall make recommendations to the chairman of the Commerce Commission who in turn would transmit to the Governor and to the legislature such recommendations, which he sees fit and that might be needed to adequately protect the consumer.

That is a long way from 15 pages of rules and regulations affecting almost all retail sales in the State of Minnesota, with, of course, the notable exceptions of all car dealers and other giants such as Wards and Sears.

The Consumer Services Section does not appear to have been set up as a regulatory body. Rather it is to provide service and information to the public, represent the Governor in the field of consumer affairs, and make recommendations, through the Commerce Commission, to the legislature when further laws might be needed to protect the consumer public.

O.H.G.

STATE OF MINNESOTA

COUNTY OF RAMSEY

DISTRICT COURT

SECOND JUDICIAL DISTRICT

Minnesota State Bankers Association, Farmers and Merchants State Bank of Springfield, Minnesota, First National Bank of Milaca, Minnesota,

Plaintiffs,

-vs-

State of Minnesota, Berton Heaton, Commissioner of Insurance,

Defendants.

FILE NO. 397933

MEMORANDUM

OPINION

I APPEARANCES

The above captioned case came on for hearing, without a jury, before the undersigned on January 13, 1975. James A. Beitz, Esq., of Head & Truhn, 1601 Soo Line Building, Minneapolis, Minnesota 55402, and John S. Jackson, Esq., 322 Baker Building, Minneapolis, Minnesota 55402, appeared on behalf of the plaintiffs. William R. Howard, Esq., Special Assistant Attorney General, and Robert Herr, Esq., Special Assistant Attorney General, Fifth Floor, Metro Square Building, St. Paul, Minnesota 55101, appeared on behalf of the defendants.

II STATEMENT OF CASE

This case arises out of the adoption of Minnesota Regulations, Insurance 116 (originally proposed as Minn. Reg. Ins. 101,) by the Insurance Division of the Minnesota Commerce Department. Regulation 116 applies to insurers who issue credit

insurance consisting of credit life insurance or credit accident and health insurance or both. "Credit life insurance" means insurance on the life of a debtor pursuant to or in connection with a specific loan or other credit transaction (Minn. Stat. 62B.02, Subd. 2). "Credit accident and health insurance" means insurance on a debtor to provide indemnity for payments becoming due on a specific loan or other credit transaction while the debtor is disabled as defined in the policy (Minn. Stat. 62B.02, Subd. 3). It appears that Regulation 116 makes it an unfair trade practice for insurers to offer to deposit or deposit with a bank or other financial institution, money or securities: (a) which would otherwise be required by the creditor of such bank or lending institution as a compensating balance or offsetting deposit; (b) without interest or a lesser rate of interest than that which is currently being paid other depositors on similar deposits; (c) any other practice by an insurer involving the use of its financial resources for the benefit of the credit institution as an inducement to purchase credit insurance. Regulation 116 does not lend itself to easy summarization and the full text is as follows:

"[Ins 116 - Credit Insurance.]

(1) Scope--this rule shall apply to the transaction of credit life insurance as defined in Minn. Stat. §62B.02, Subd. 2, and to the transaction of credit accident and health insurance as defined in Minn. Stat. §62B.02, Subd.3.

(2) Unfair Trade Practices Defined--the following acts, whether done directly or indirectly, in consideration of or in connection with a policy issued or proposed to be

issued are defined to be prohibited unfair methods of competition in the transaction of insurance described in subsection (1) above:

(a) The offer to deposit or the deposit with a bank or other financial institution, money or securities of the insurer or of any affiliate of the insurer with the design or intent that the deposit offset or take the place of a deposit of money or securities which otherwise would be required of the creditor by such bank of financial institution as a compensating balance or offsetting deposit for a loan or other advancement.

(b) The deposit with a bank or other financial institution of money or securities without interest or at a lesser rate of interest than is currently being paid other depositors on similar deposits with such bank or other financial institution.

(c) Any other practice which is followed by an insurer when such practice involves use of the financial resources of the insurer, for the benefit of the credit institution, as an inducement to purchase insurance described in subsection (1) above.

(3) Nothing herein shall prevent the insurer from making deposits in a financial institution which are not related to a credit insurance program if such deposits are not in fact related to whether the insurer is the insurer which insures the credit insurance program.

This case seeks a Declaratory Judgment adjudging and

declaring that Regulation 116 is void and seeking a permanent injunction restraining defendants, their servants, agents and employees from enforcing, executing, administering or in any manner giving effect to the provisions of Regulations 116. Pursuant to a stipulation of the parties, an order was entered on July 3, 1974, that: (1) This Court has jurisdiction over the subject matter of this case and over the parties consenting thereto; and (2) that the defendants are temporarily restrained and enjoined pending final determination of the merits from enforcing Regulation 116. Both parties have submitted comprehensive briefs.

III PROCEDURAL HISTORY OF REGULATION 116

Under date of January 2, 1974, Berton W. Heaton, Commissioner of Insurance of the State of Minnesota (hereafter "Commissioner") issued an "Order of Hearing". This order stated that on February 11, 1974, a public hearing would be had on proposed rules and regulations and amendments to existing rules and regulations governing credit life and credit accident and health insurance. The order is headed, "IN THE MATTER OF THE PROPOSED ADOPTION AND AMENDMENT OF RULES AND REGULATIONS OF THE STATE INSURANCE DIVISION GOVERNING CREDIT LIFE AND CREDIT ACCIDENT INSURANCE." On January 2, 1974, a "Notice of Hearing" was issued containing the same caption as the order. The notice of hearing states that the hearing will be had pursuant to Minn. Stat. 15.0412. The notice of hearing includes instructions for oral, as well as written presentation of statements, as well as time limits for submitting written statements.

and exhibits. The notice of hearing states that a copy of the proposed rules and amendments, as well as the procedural rules for the hearing are attached to the notice of hearing.

The proposed rules and amendments to existing rules governing credit life and accident and health insurance are as follows: Proposed Amendment to Insurance Rule 92 and schedules A and A-1 relating to rates; proposed establishment of Rule 102 relating to minimum reserves for credit life insurance; and proposed establishment of Rule 101 relating to unfair trade practices. It is only Rule 101 with which we are here concerned. Originally Insurance Rule 101 was added to Chapter 6 of the Insurance Division's Rules and regulations entitled "INS 90 - 100 Credit Life and Credit Accident and Health Insurance." Subsequent to the hearing of February 11, 1974, and prior to the transmittal of the proposed rules to the Attorney General for approval, the Insurance Division changed the designation of the proposed Rule 101 to "Minn. Reg. Ins. 116" and added it to Chapter 7 of the Insurance Division's Rules and Regulations entitled "Unfair Trade Practices Rules." Reference herein to such rule will be to Rule 116.

The hearing as scheduled was held on February 11, 1974. An Insurance Division Panel conducted the hearing. The panel was composed of George A. Beck, Hearing Examiner, James Perrigo, Special Assistant Attorney General, and Jay P. Koleski, Assistant Commissioner of Insurance. The hearing was conducted pursuant to the Procedural Rules for Hearing, a copy of which was attached to the Notice of Hearing. (It is unclear whether these rules were promulgated for this particular hearing and it is also unclear whether

the procedural rules were formally adopted by the Commissioner of Insurance.) At the beginning of the hearing a statement was made by the Commissioner. With respect to the matter here involved, he stated as follows: (Tr. 4, 5)

> "The second category of the proposed rules deals with the addition of provisions relating to unfair trade practices involving so-called compensating balances, interest free or lesser interest deposits and any other practices which involve the use of financial resources of the insurer as an inducement to purchase credit insurance. We have heard it said that these practices should be permitted as competitive tools so long as they do not impair solvency, affect rates, or violate the investment statutes. We do not agree with this position. When analyzed these practices constitute an inducement, an inducement that is a form of illegal rebate whereby money or its equivalent value is being given to the creditor for the protection of insurance business thereby causing an unfair trade practice in the marketplace. We have reason to believe that these practices exist in Minnesota because our review of the financial statements of the credit insurance carriers, disclosed that they have some rather high percent of their admitted assets in cash producing an unreasonably low investment return. Therefore we feel the need to adopt regulations specifically prohibiting these practices as illegal inducements or rebates."

Thereafter Examiner Beck stated additional rules for the hearing (Tr. 5 - 7) and among them stated as follows (Tr. 6 - 7):

> "The purpose of the hearing this morning is to allow

interested parties to express their views and present facts bearing upon proposed regulations in order to aid the Commissioner in his rule making function. With that goal in mind, there will be no questions directed towards the Insurance Division panel during the hearing."

At the hearing Mr. John Jackson, General Counsel of the Minnesota Bankers Association made a statement (Tr. 13 - 18) and at the close of his statement, moved that the Hearing Examiner withdraw consideration of proposed Rule 101 as it clearly circumvents statutory law with respect to the determination and abatement of unfair trade practices. Thereafter there was a colloquy between Mr. Jackson and Mr. Perrigo (Tr. 18 - 21) at the conclusion of which Mr. Jackson's motion was denied. A statement was made by Mr. Plunkett, President of the Rochester State Bank, a small portion of which referred to the questions here involved (Tr. 27 - 28). Mr. J. Peter Devine representing the Minnesota State Association of Life Underwriters, made a statement (Tr. 39 - 41). Mr. Devine favored the rate limitations on credit life and credit accident and sickness premiums, but opposed proposed Rule 101. Mr. Jack Blaine representing the American Life Insurance Association made a statement (Tr. 41 - 47). His organization supports the principle of prohibiting free deposits and compensating bank balances when used as an inducement to obtain or secure credit insurance business and assumed that the prescriptions of proposed Rule 101 would be so interpreted (Tr. 45). Mr. Lawrence F. Harr, General Counsel of the Consumer Credit Insurance Association made a statement and responded to certain questions (Tr. 71 - 82). He joined

with others who have questioned the authority of the Department to promulgate a general rule establishing certain acts as unfair trade practices (Tr. 77).

Under the rules relating to the hearing, a period of time was permitted to file written statements. Mr. Robert N. Taylor, Vice President and Counsel for Old Republic Life Insurance Company, filed a statement. In the written statement (third last paragraph) there was doubted the legality of the broad defining of practices without considerably more evidence and without adhering to a much more strict administrative authority than has been apparently formed in Rule 101. The Minnesota Bankers Association through its General Counsel, John S. Jackson, filed a comprehensive statement in opposition to proposed Rule 101. Other statements filed did not relate to the questions here involved.

Findings of Fact were entered by the Commissioner of Insurance on March 20, 1974 and filed with the Attorney General. Only one finding relates to the instant case. It is as follows:

> "6. That annual statements and examinations of insurers reveal a practice whereby companies use their financial resources in such a way as to permit an advantage to a credit institution for the purposes of inducing the purchase of credit insurance."

A Statement of Need was entered by the Commissioner of Insurance on March 20, 1974 and filed with the Attorney General Only one paragraph relates to the instant case. It is as follows:

> "4. The need to adopt Insurance Rule 116 (101 in the proposed rules) arises because examination reports of insurance

companies and their annual statements reveal that it is fairly common practice among companies writing credit insurance to use their financial resources for the benefit of the credit institution as an inducement to purchase credit insurance and because this practice is considered to be an unfair method of competition."

The Findings of Fact, Statement of Need, order adopting Rules, statement of compliance and other relevant documents were transmitted to the Attorney General pursuant to Minn. Stat. 15.0412, Subd. 4 and Rules and Regulations of the Attorney General, Chap. 3, Atty. Gen. 301-305 for approval as to form and legality. The Attorney General approved the rules and were filed with the Secretary of State and Commissioner of Administration on April 8, 1974. Rule 116 as finally adopted was the same as proposed.

IV THE ISSUES

Plaintiffs' Brief sets forth four issues viz.

1. Whether defendants had authority to adopt Regulation 116.
2. Whether defendants complied with statutory and regulatory rule making procedures.
3. Whether Regulation 116 or its adoption denied plaintiff's statutory and constitutional rights to due process of law and equal protection of the law.
4. Whether plaintiffs have standing to bring this action.

Defendants' Brief sets forth three issues, viz.

1. Plaintiffs lack standing to challenge this action under the Administrative Procedures Act, Minn. Stat. 15.0416

and 15.0417.

2. Minn. Stat. 15.0412 authorizes the Insurance Division of the Minnesota Commerce Department to promulgate Regulation 116.

3. Procedures of Chapter 15, which require a public hearing with prior notice and showing of need for a rule were followed by the Insurance Division when it adopted Regulation 116.

V. DO PLAINTIFFS HAVE STANDING?

There are three plaintiffs, viz. The Minnesota Bankers Association, (hereafter "Association), the Farmers and Merchants State Bank of Springfield, Minnesota (hereafter "Springfield"), and the First National Bank of Milaca, Minnesota (hereafter "Milaca"). The Association is a non-profit trade association operating and doing business under the Laws of Minnesota. Membership in the Association is comprised of state banks, organized under the laws of Minnesota and doing business within the State of Minnesota and national banks, organized under the laws of the United States and doing business within the State of Minnesota. Springfield is a state chartered commercial banking corporation organized and operating under the laws of the State of Minnesota. Milaca is a commercial banking corporation, organized and operating under federal charter pursuant to Title 12 of the United States Code and the laws of the State of Minnesota. All state and federally commercial banks located in and authorized to do business in the State of Minnesota

have in addition to the inherent and granted powers of corporations in general, special powers to maintain accounts which are opened by deposit or collection of money or currency. The receipt of such deposits results in a source of income to said banks. Springfield and MIlaca accept and maintain deposit accounts for commercial entities that are licensed to transact the business of insurance in Minnesota by the Commissioner of Insurance, including such entities which issue credit insurance sold by Springfield and Milaca. While it may be surmised that some other banks in the state engage in the same practice as Springfield and Milaca, the record here does not so affirmatively demonstrate.

Minn. Stat. 15.0416 provides as follows:

"15.0416 Determination of validity of rule

The validity of any rule may be determined upon the petition for a declaratory judgment thereon, addressed to the district court where the principal office of the agency is located, when it appears that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair the legal rights or privileges of the petitioner. The agency shall be made a party to the proceeding. The declaratory judgment may be rendered whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question."

The foregoing quoted statute limits the right to institute a declaratory judgment action concerning a rule only if the rule, or its threatened application interferes with or impairs or threatens to interfere with or impair the legal rights or privileges of the petitioner. There is nothing in the record that Rule 116 threatens to interfere with or impair the legal rights or privileges of the Association. In Snyders Drug Stores, Inc. vs. Minnesota Board of Pharmacy, __ Minn.___, 221 N.W.2d 102, 1974, Snyders brought an action to set aside a regulation issued by the Board. The trial Court permitted the Minnesota State Pharmaceutical Association and its officers to intervene as defendants. The Minnesota Public Interest Research Group (MPIRG) and the Metropolitan Senior Citizen's Federation (MSCF) moved to intervene as parties plaintiff under Rule 24.01 (Intervention of Right) or in the Alternative under Rule 24.02 (Permissive Intervention) but such motion was denied by an order of the trial court. The appeal was from such order. The Supreme Court found that the trial court erred in not granting intervention under Rule 24.02 and did not decide whether there was a right to intervene under Rule 24.01. The Supreme Court after reviewing numerous authorities, adopted "injury in fact" as the test for standing in Minnesota absent a discernible legislative intent to the contrary in a given case. There is no showing here that the Association has suffered or will suffer an injury in fact. It is therefore concluded that the Association does not have standing to bring this case. It has not been overlooked that in Snyders the trial court permitted the

Minnesota State Pharmaceutical Association and its officers to intervene as defendants. Whether such intervention was proper was apparently not before the Supreme Court and hence was not decided.

Springfield and Milaca have, as far as the record is concerned, the right to take deposits not only from insurance companies but from the general public. It appears to be agreed that the planned enforcement of Regulation 116 will necessarily eliminate some demand deposits now held by Springfield and Milaca or will convert them from a "demand" status to interest bearing status. This necessarily would result in economic injury to Springfield and Milaca. Since Springfield and Milaca have the right to take such deposits the effect of Regulation 116 would impair the legal rights and privileges of Springfield and Milaca. The situation is unique. While Regulation 116 is directed at insurers, it is doubtful that such insurers can clear the hurdles of 15.0416 to properly bring a declaratory judgment action. If conceivable insurers could clear these hurdles, it would not be reasonable to expect that insurers would take action against a regulation which provides, in effect that they shall receive the payment of interest in a larger sum than they previously received or the payment of interest where none was previously received or both. It seems apparent that enforcement of Regulation 116 will require Springfield and Milaca to pay interest where none was paid before and that they will be required to pay more interest than was previously paid. This result is an economic loss to them and satisfies the test in Snyders of an injury in fact. Springfield and Milaca are held to

have standing to bring this case under 15.0416.

VI WAS REGULATION 116 VALIDLY ADOPTED?

The Rules and Regulations of the Attorney General, Chapter three, provide for Rule Making Procedures (non-contested cases) and provide for Rules for contested cases in Chapter four. It has been contended that the proceeding which were held on February 11, 1974, were a "Contested Case" as such term is defined in 15.0411, Subd.4. This provision contemplates a proceeding in which the legal rights, duties or privileges of specific parties are required to be determined after an agency hearing. The hearing of February 11, 1974, did not encompass the legal rights, duties or privileges of specific parties as required by 15.0411, (Subd. 4) and hence was not a contested case as such term is defined in such statute. It does not follow that Regulation 116 was validly adopted as a non-contested case or as a rule making procedure.

There have heretofore been set forth the various steps which were taken in the adoption of Regulation 116. These steps appear to have been taken in seeking to comply with the Rules and Regulations of the Attorney General, Chapter Three, relating to Rule making procedures. Atty. Gen. 303 covers the requirements of the record in such cases. Atty. Gen. 303 (c) is that "the record must support the rules as adopted." Atty. Gen. 302 (b) relating to the Statement of Need is that "The Statement of Need shall contain a recitation of the reasons which support a finding of need for the rules. Atty. Gen. 302 (h) relate to Findings of Fact and states

"The Findings of Fact must contain that which the agency finds to be fact which supports the reasons or need for the rules adopted." After a complete review of the record, the Statement of Need, the Finding of Fact it appears there was a deficiency of evidence to support the adoption of the rule. 15.0412, Subd.4 sets forth the the requirement for the adoption of a rule by an agency. That statute states at the beginning that "No rule shall be adopted by any agency unless certain specified steps are taken:" While the statute does not say so expressly, it follows that there must be a good faith performance of the steps leading to the adoption of a rule. Other than the opening statement by the Commissioner about the proposed rule (Tr. 4, 5, heretofore quoted) the record is meager, sparse and inadequate to support the proposed rule. The Findings of Fact must be based upon the record. Here the Findings of Fact consists of a brief conclusionary statement. The Statement of Need is a restatement of the findings plus a statement that this practice is considered to be an unfair method of competition.

The manner in which Regulation 116 was processed encourages minimization of the utility of the hearing procedure. More significantly procedural due process was denied Springfield and Milaca. There were no opportunities to confront the defendant's officers and there is no showing that meaningful consideration was given to the submission of information by the opponents of the rule. There is nothing in the record that indicates what evidence was relied upon by the defendants in making the Findings of Fact and the Statement of Need. Under 15.0417 the Court is directed to find the rule invalid if it finds that the rule was adopted without compliance with the statutory rule-making proceedings. A rule adopted,

based upon an inadequate record is not im compliance with required rule making procedures.

VII DID DEFENDANTS HAVE AUTHORITY TO PROMULGATE REGULATION 116?

Minn. Stat. 15.0412 authorizes any Agency (as defined in 15.0411, Subd. 2) to adopt rules governing the formal or informal procedures prescribed or authorized by 15.0411 to 15.0422. Such rules include rules of practice before the agency and may include forms and instructions. 15.0412, Subd. 1, further provides that for the purpose of carrying out the duties and powers imposed upon it and granted to it, "an agency may promulgate reasonable substantive rules and regulations and may amend, suspend or repeal the same, but such action shall not exceed the powers vested in the agency by statute." (emphasis supplied) It is a cardinal principle of administrative law that while an agency may issue rules and regulations, it may not legislate. Even if the legislature should attempt to delegate its legislative perogative such attempt would be void as an unlawful delegation of authority. The question of unlawful legislative delegation is not in question here but what is in question is whether the defendants have, by enacting Regulation 116, exceeded the powers granted to them by the legislative enactment.

Minn. Stat. 72A.17 - 72A.32 is the statutory plan for the regulation of trade practices. The purpose of these sections (72A.17 to 72A.32) is to regulate trade practices in the business of insurance by defining or providing for the determination of all such practices in this state which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined on determined. 72A.19

prohibits various unfair methods of competition and unfair and deceptive acts or practices in the business of insurance. 72A.20 Subd. 1, states that the following are hereby defined as unfair methods of competition and unfair and deceptive acts or practices in the business of insurance. 72A.20, Subd. 1, (1) to (10) sets forth these practices clearly and comprehensively. The practice of rebate is described as follows:

> "(10) Rebates. Except as otherwise expressly provided by law, knowingly permitting or offering to make or making any contract of life insurance, annuity, or accident and health insurance, or agreement as to such contract, other than as plainly expressed in the contract issued thereon, or paying or allowing or giving, or offering to pay, allow, or give, directly or indirectly, as inducement to such insurance or annuity, any rebate or premiums payable on the contract, or any special favor or advantage in the dividends or other benefits thereon, or any valuable consideration or inducement whatever not specified in the contract; or giving or selling or purchasing, or offering to give, sell, or purchase, as inducement to such insurance or annuity, or in connection therewith, any stocks, bonds, or other securities of any insurance company or other corporation, association, or partnership, or any dividends or profits accrued thereon, or anything of value whatsoever not specified in the contract;

72A.19 empowers the Commissioner to investigate possible violations of 72A.19. 72A.22 describes the procedure the

Commissioner must employ when he believes any person is engaged in an activity described in 72A.20:

> Subdivision 1. Statement of charges and notice of hearing. Whenever the commissioner has reason to believe that any person has been engaged or is engaging in this state in any unfair method of competition or any unfair or deceptive act or practice, defined in section 72A.20, and that a proceeding by him in respect thereto would be to the interest of the public, he shall issue and serve upon that person a statement of the charges in that respect and a notice of a hearing thereon to be held at a time and place fixed in the notice, which shall not be less than 20 days after the date of the service thereof.

72A.24 provides for entry of decision following a 72A.22 hearing. The manner for review is set forth in 72A.24. There is no question that such procedures were not followed here.

The above statutory provisions provide the exclusive procedures for dealing with 72A.20 defined activities, including rebates. However, the legislature has also provided that (72A.25, Subd. 1);

> Whenever the commissioner has reason to believe that any person engaged in the business of insurance is engaged in this state in any method of competition or in any act or practice in the conduct of that business which is not defined in

section 72A.20, that said method of competition is unfair or that said act or practice is unfair or deceptive and that a proceeding by him in respect thereto would be to the interest of the public, he may issue and serve upon that person a statement of the charges in that respect and a notice of a hearing thereon to be held at a time and place fixed in the notice, which shall not be less than 20 days after the date of the service thereof. Each such hearing shall be conducted in the same manner as the hearings provided for in section 72A.22, and the provisions of that section as to service are made applicable to proceedings under this section. Upon good cause shown, the commissioner shall permit any person to intervene, appear and be heard at such hearing by counsel or in person. The commissioner shall, after the hearing, make a report in writing in which he shall state his findings as to the facts and shall serve a copy thereof upon the person upon whom he served his statement of charges."

The legislature has thus by 72A.25 provided that determination of what is an unfair trade practice (not defined in 72A.20) is a question of fact to be determined after a hearing conducted in the same manner as a hearing provided for in 72A.22. Regulation 116 seeks to convert the question of fact into a conclusive

presumption. Such power is not properly within administrative jurisdiction. Miller v. United States, 294 U.S. 435 (1934).

> "Where a statute requires an enforcing agency to prove certain things in order to show a violation, the enforcing agency may not dispense with that requirement by enacting a regulation which presumes certain acts to constitute violations, especially where the regulation itself is susceptible of various interpretations. Carter-Wallace, Inc. v. Gardner 417 F.2d 1086, 1092 (4th Cir. 1969), affirmed on other grounds."

Minn. Stat. 645.16, covering construction of laws provides in the second paragraph as follows:

> "When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit."

The language in 72A.22 and 72A.25 appear to be clear and unambiguous. It requires the Commissioner, whenever he has reason to believe that any person is engaged in any unfair method of competition or deceptive act or practice defined in 72A.20, or in any act constituting unfair competition not defined in 72A.20, to proceed pursuant to the provisions of 72A.22 or 72A.25. Section 72A.25 requires a 72A.22 evidentiary and contested case hearing. At such hearing the Commissioner must determine (1) whether the person was engaged in the act alleged, (2) whether the act of such person constitutes an unfair or deceptive method of competition and (3)

whether such an act is not defined in 72A.20. The third determination is necessary to ascertain whether to proceed further under 72A.25 or 72A.22. Section 72A.25, subdivisions 2 and 3 contain an additional practice not required in the case of a 72A.20 violation: review by the court and determination of whether the act is unfair and deceptive and whether the Commissioner's action was in the public interest." The statute (72A.25, Subd. 3) contemplating a finding by the court evidences the legislature's intent to make the determination of whether an act is an unfair method of competition a question of fact to be decided on a case by case basis.

> "Thus, Defendants have the authority to determine by hearing and evidence whether certain actions constitute unfair trade practices. When they attempt by regulation to predetermine such cases they exceed that authority and usurp the legislative function. 2 Am. Jur. 2d "Administrative Law" §299, citing Work v. United States, 261 US 352 (1923). The exercise of discretion and determinative power requires an exercise of judgment upon facts and precludes adoption of a fixed policy which ignores meaningful differences in cases. Swalbach v. State Liquor Authority, 7 NY 2d 518, 166 NE2d 811 (1960). The power to make rules and regulations does not authorize adopting a general regulation converting what the legislature envisions as a question of fact to be decided from case to case into a conclusive presumption. Miller v. United States, supra."

72A.20 appears to preempt defendants from defining any act as unfair or deceptive. This statute states "The following are hereby defined as unfair methods of competition and unfair "or deceptive acts or practices in the business of insurance:". It

goes on to list and describe twelve such methods and acts or practices prohibited by 72A.17 et seq. One of the prohibited activities, defined by the legislature as unfair or deceptive, is the practice of giving rebates." The statutory provision concerning "Rebates" (72A.20, (10) has heretofore been quoted. The Commissioner, at the opening of the hearing held on February 11, 1974, stated that certain practices when analyzed constitute an inducement that is a form of illegal rebate (Tr. 4). The Commissioner further stated "we feel the need to adopt regulations specifically prohibiting these practices as inducements or rebates" (Tr. 5). As has been pointed out the legislature has already defined and prohibited rebates. Thus, not only has the Legislature chosen not to grant to defendants "the specific authority to issue prescriptive regulations in the area of unfair competition, but, in addition, it has preempted the area by defining such activities, specifically including "rebates".

> "If the legislature has acted in a particular area by enacting a statute an administrative agency is preempted from enacting regulations which may be interpreted to conflict with that statute, Dumont v. Commissioner of Taxation, 278 Minn. 312, 154 N.W.2d 196 (1967), or which constitute a new statute or expand or enlarge restrictions imposed by said statute. U.S. v. 11,150 Pounds of Butter, 188 F. 157 (D. Minn. 1911); Lynch v. Tilden, 265 U.S. 315 (1924).
>
> In Dumont v. Commissioner of Taxation, supra, the Commissioner of Taxation adopted a regulation which the

court deemed to be in conflict with the statute. The court also inferred that legislative action by the Commissioner of Taxation in a specific area already entered by the legislature was of itself improper. The language of the statute was clear, it did not require illucidation. Further definition, unless totally consistent with the statutory language, in which case it would be superfluous, would extend or narrow the legislative language and, therefore, would be invalid. Dumont v. Commissioner of Taxation, supra. at 199.

In Wallace v. Commissioner of Taxation, 289 Minn. 220, 184 N.W.2d 588 (1971), the court addressed the question of legislative preemption of administrative legislating. Wallace appealed among other things a denial by the Commissioner of Taxation of Wallace's claim for deduction from Wallace's income, for income tax purposes, of medical expenses paid by Wallace's insurer. Wallace had incurred medical expenses during the tax year in question. A portion of those expenses was reimbursed by his insurer. Wallace sought to deduct all his medical expenses including those reimbursed by his insurer. He relied on the following statutory provision:

"Payments for expenses for hospital, nursing, medical, surgical, dental and other healing services including institutional care and treatment for the mentally ill

and physically handicapped, and for medical supplies and ambulance hire, incurred by the taxpayer on account of sickness, mental illness, physical handicap or personal injury to himself or his dependents and premiums paid for hospitalization and medical insurance including non profit hospital services and non profit medical service plans." Minn. Stat. 1967 290.09 Subd. 101. The Commissioner's arguments in support of denial of Wallace's claim included one based on Minn. Reg. Inc. Tax 2008(5) which specifically excluded reimbursed medical expenses from deductable items. The court responded that the Commissioner erred in assuming that Minn. Reg. Inc. Tax.2008(5) was within the scope of his power to adopt.

It is well established that the legislature may confer discretion on the commissioner in the execution or administration of the law. It may not give him authority to determine what the law shall be or to supply a substantive provision of the law which he thinks the legislature should have included in the first place. (Citations omitted) Id., at p. 594.

In addition, the court relied upon a subsequent legislative enactment incorporating the language of the Commissioner's regulation into State.Law.

In 1969, the legislature supplied the desired change by an amendment to 290.09, subd. 10, which limited the

deduction to medical expenses "not compensated for by insurance or otherwise." L. 1969, c. 575, §3. The issue presented here could not arise after the 1969 amendment. The amendment not only indicates a legislative awareness of the deficiency which the commissioner has attempted to cope with but also indicates an unwillingness to rely on the commissioner's Regulation 2008(5). Id."

A similar situation is found in the instant case. Since the original enactment of 72A.17 et seq. the legislature has upon three occasions added prohibited activities to 72A.20 which are 72A.20 Subd. 1 (12), 72A.31 and 72A.321. This indicates an unwillingness of the legislature to rely upon the Commissioner's regulatory powers and the legislative preemption of such power.

The commissioner may not issue interpretive guides in the form of regulations either, except where there is ambiguity in the language of the statute and the administrative construction is plainly consistent with the statute. "It is equally clear that where the provisions of an act are plain and unambiguous, the department administering it has no power to extend or amend it by regulations or interpretation." Walling v. Baltimore Steam Packet Co., 144 F.2d 130, 135 (4th Cir. 1944)." There is no claim by the defendants that 72A.19 and 72A.25 are ambiguous and they appear to be reasonably clear and unambiguous. On the other hand, Regulation 116 is susceptible of various interpretations not plainly consistent with the statute. The Commissioner does not contend that Regulation 116 is to clarify

any statutory provision contained in 72A.19 to 72A.321. The Commissioner therefore had no power to extend, amend or interpret the statute.

VIII CONCLUSIONS

1. The Minnesota Bankers Association do not have standing to maintain this action.

2. The Farmers and Merchants State Bank of Springfield, Minnesota and the First National Bank of Milaca, Minnesota have standing to maintain this action.

3. Regulation 116 was not validly adopted.

4. Defendants did not have authority to promulgate Regulation 116.

5. Plaintiffs Springfield State Bank of Springfield, Minnesota and the First National Bank of Milaca, Minnesota are entitled to judgment awarding them a permanent injunction enjoining and restraining the defendants, their servants, agents and employees from enforcing, executing, administering or in any manner giving effect to the provisions of Regulations 116.

6. Plaintiffs Springfield State Bank of Springfield, Minnesota and the First National Bank of Milaca, Milaca, Minnesota are entitled to their costs and disbursements herein.

Plaintiffs are hereby requested to prepare appropriate findings of fact, conclusions of law and order for judgment and submit them as to form to counsel for the defendants prior to submission of the Court. The Findings of Fact and the Conclusions of

Law shall incorporate by reference this memorandum decision.

Dated at St. Paul, Minnesota this 3rd day of March, 1975.

John W. Graff

JOHN W. GRAFF, RETIRED DISTRICT JUDGE
ACTING PURSUANT TO APPOINTMENT UNDER
MINN. STAT. 2.724, AS AMENDED.