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South Carolina Women are Not Preexisting Conditions

Elizabeth A. Hoskins

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I. INTRODUCTION

In 2002, Christina Turner was raped in Florida and received treatment for the assault.¹ Included in the treatment was a regimen of anti-HIV medication.² A few months later, insurance companies in Florida denied Christina Turner individual health insurance coverage because the insurers considered the treatment for the rape a preexisting condition.³ Christina Turner, like many women, experienced insurance discrimination. Although, in 1920, Congress ratified the Nineteenth Amendment, giving women the right to vote, women were far from being considered valuable members of society.⁴ In the second wave of the women's movement in the 1960s and 1970s, female graduates of higher education nearly tripled, and increased education brought an unprecedented female influence to the workplace and the nation's economy.⁵ The third wave, also known as the third suffrage movement, began in 1995 with an emphasis on addressing women's health issues.⁶ In this third suffrage movement, advocates for women's rights addressed the different and unique health needs of women.⁷ One such need is eliminating unfair discrimination of victims of intimate partner violence (IPV)⁸ when seeking health insurance coverage.

The practice of denying insurance coverage to victims of IPV received national attention in 1994 when Congressman Charles Schumer of New York, then a member of the United States House Judiciary Committee,⁹ conducted a survey of sixteen of the largest insurance companies in the nation.¹⁰ These

1. Jodi Jacobson, *Insurance Company Tells Rape Victim Her Assault Would be a Pre-Existing Condition*, RH REALITY CHECK (Oct. 21, 2009, 10:32 AM), <http://www.rhrealitycheck.org/blog/2009/10/21/insurance-company-tells-rape-victim-her-assault-preexisting-condition> (quoting Amanda Stone, *Insurance Company: Rape Survivor? Nope, We Won't Take Her*, DAILY KOS (Oct. 21, 2009, 7:47 AM), <http://www.dailykos.com/story/2009/10/21/795519/Insurance-Company-Rape-Survivor-Nope-We-Wont-Take-Her->).

2. *Id.* (quoting Stone, *supra* note 1).

3. *Id.* (quoting Stone, *supra* note 1).

4. See Bernadine P. Healy, *Women's Health: The Third Suffrage Movement*, 4 J. WOMEN'S HEALTH 219 (1995).

5. *Id.* at 219–20.

6. *Id.* at 220.

7. *See id.*

8. Frederick P. Rivara et al., *Healthcare Utilization and Costs for Women with a History of Intimate Partner Violence*, 32 AM. J. PREVENTIVE MED. 89, 89 (2007), available at <http://www.genderbias.net/docs/resources/guideline/Healthcare%20Utilization%20and%20Costs%20for%20Women%20with%20a.pdf>.

9. See Ryan Grim, *When Getting Beaten by Your Husband Is a Pre-Existing Condition*, HUFFINGTON POST, http://www.huffingtonpost.com/2009/09/14/when-getting-beaten-by-yo_n_286029.html (last updated May 25, 2011).

10. *Id.*; see Ellen J. Morrison, Note, *Insurance Discrimination Against Battered Women: Proposed Legislative Protections*, 72 IND. L.J. 259, 266–67 (1996) (citing *Morning Edition: New Law to Make Insurance Companies Cover Abused Women*, National Public Radio (Mar. 8, 1995) (transcript available via LexisNexis)).

insurance companies represented about fifty percent of the insurance market at that time.¹¹ Of these sixteen companies, he found that eight considered a history of IPV “as a factor when making decisions about issuing insurance policies and setting premiums.”¹² From 1995 to 2008, responding to the mounting criticism of insurance discrimination,¹³ forty-two states passed legislation prohibiting insurance companies from using a woman’s status as a victim of IPV in their underwriting criteria.¹⁴

Under current statutory schemes that limit what insurance companies may consider in their underwriting criteria, only eight states and the District of Columbia still allow insurance companies to consider a victim’s status of abuse.¹⁵ In 2008 and 2009, the National Women’s Law Center published two articles¹⁶ that outlined the prevalent issue of insurance gender discrimination and brought a second wave of media attention.¹⁷ The 2008 article specifically named

11. Morrison, *supra* note 10, at 266–67 (citing *Morning Edition: New Law to Make Insurance Companies Cover Abused Women*, *supra* note 10).

12. *Id.* at 267 (citing TERRY FROMSON & NANCY DURBOROW, PA. COALITION AGAINST DOMESTIC VIOLENCE & WOMEN’S LAW PROJECT, INSURANCE DISCRIMINATION AGAINST VICTIMS OF DOMESTIC VIOLENCE 2 (1998), available at http://www.womenslawproject.org/brochures/Insurance_discrimDV.pdf); see also *Many Insurers View Battered Victims as Poor Risks*, NEWSRX (Mar. 20, 1995), <http://webcache.googleusercontent.com/search?q=cache:50NLXutYFdoJ:www.newsr.com/newsletters/Womens-Health-Weekly/1995-03-20/1425373WW.html> (reporting that insurance companies such as Nationwide, Allstate, State Farm, Aetna, Metropolitan Life, The Equitable Companies, First Colony Life, The Prudential, and the Principal Financial Group had all either canceled or denied coverage to women who were victims of domestic violence).

13. E.g., *Insurance Policy Changed*, MILWAUKEE J., June 1, 1994, at A3, available at <http://news.google.com/newspapers?id=5WsaAAAAIBAJ&sjid=9SwEAAAAIBAJ&pg=2380,285513&dq=domestic+violence+and+insurance+policies&hl=en> (reporting that State Farm Insurance changed its policy after receiving public criticism).

14. WOMEN’S LAW PROJECT & PA. COALITION AGAINST DOMESTIC VIOLENCE, FYI INSURANCE DISCRIMINATION AGAINST VICTIMS OF DOMESTIC VIOLENCE SUPPLEMENT 2 (2002) [hereinafter INSURANCE DISCRIMINATION SUPPLEMENT], available at <http://www.pcadv.org/Resources/Supplement-ins%20desc.pdf> (charting forty-one states with state legislation prohibiting health insurance discrimination on the basis of domestic violence); see also LISA CODISPOTI ET AL., NAT’L WOMEN’S LAW CTR., NOWHERE TO TURN: HOW THE INDIVIDUAL HEALTH INSURANCE MARKET FAILS WOMEN 22 n.21 (2008), available at <http://action.nwlc.org/site/DocServer/nowheretoturn.pdf> (stating Vermont legislation requires guaranteed issue of all health insurance applicants); BRIGETTE COURTOT & JULIA KAYE, NAT’L WOMEN’S LAW CTR., STILL NOWHERE TO TURN: INSURANCE COMPANIES TREAT WOMEN LIKE A PRE-EXISTING CONDITION 6 (2009) (citing ARK. CODE ANN. § 23-66-206(14)(G) (Supp. 2011)), available at <http://www.nwlc.org/sites/default/files/pdfs/stillnowheretoturn.pdf> (stating that in 2009 Arkansas passed health antidiscrimination legislation).

15. CODISPOTI ET AL., *supra* note 14, at 8 (citing INSURANCE DISCRIMINATION SUPPLEMENT, *supra* note 14, at 2) (Arkansas, Idaho, Mississippi, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, and Wyoming); COURTOT & KAYE, *supra* note 14, at 6 (citing § 23-66-206(14)(G)) (updating the list by removing Arkansas).

16. CODISPOTI ET AL., *supra* note 14; COURTOT & KAYE, *supra* note 14.

17. See Les Blumenthal, *Domestic Violence as Pre-existing Condition? 8 States Still Allow It*, MCCLATCHY NEWSPAPERS (Oct. 5, 2009), <http://www.mcclatchydc.com/2009/10/04/764771/domestic-violence-as-pre-existing.html> (reporting that eight states and the District of Columbia do not prohibit insurance discrimination of victims of IPV); Grim, *supra* note 9 (criticizing insurance

South Carolina as one of the states that still allow insurance companies to deny coverage to victims of IPV.¹⁸

In the last two sessions of the South Carolina General Assembly, a bill has been introduced that would prohibit insurance companies from discriminating against all victims of abuse, including victims of IPV.¹⁹ This Note will discuss whether South Carolina should adopt legislation that would prohibit insurance companies from discriminating against victims of IPV and whether the state legislation from the last session is sufficient. Part II explains how and why insurance companies discriminate against victims of IPV and the difficulty in measuring the extent of insurance discrimination. Part III explores national efforts to prohibit insurance companies' discriminatory practices and why adopting state anti-discrimination legislation is still crucial. Part IV addresses current state anti-discrimination legislation and analyzes the proposed South Carolina legislation, House Bill 3344. Finally, Part V recommends the scope and enforcement mechanisms for future legislation, and Part VI concludes this Note.

Although the proposed legislation protects all victims of abuse, this Note will only focus on IPV against women as it relates to individual health insurance policies.

II. THE PROBLEM: GENDER INSURANCE DISCRIMINATION

As stated above, the third suffrage movement is about the distinct and unique needs of women in health care.²⁰ Women attempting to obtain individual health insurance fall victim to a number of unfair discriminatory practices.²¹ Such gender discriminatory practices by insurance companies include the use of gender rating,²² excluding from coverage medical care unique to women's health care,²³ and rejecting new

companies' broad interpretation of preexisting conditions and advocating for legislative change); Amie Newman, *I Am Not a Pre-Existing Condition*, RH REALITY CHECK (Oct. 14, 2009, 1:10 PM), <http://www.rhrealitycheck.org/blog/2009/10/14/i-am-not-a-preexisting-condition> (spreading the word about AWomanIsNotAPreExistingCondition.com campaign).

18. CODISPOTI ET AL., *supra* note 14, at 8 (citing INSURANCE DISCRIMINATION SUPPLEMENT, *supra* note 14, at 2).

19. See H.R. 3344, 119th Gen. Assemb., Reg. Sess. (S.C. 2011–12); H.R. 4198, 118th Gen. Assemb., Reg. Sess. (S.C. 2009–10).

20. See Healy, *supra* note 4, at 220.

21. See COURTOT & KAYE, *supra* note 14, at 3.

22. *Id.* (defining gender rating as the "practice of charging same-aged women and men different premiums for identical health coverage" and noting that it is practiced by 95% of the best-selling plans in the individual health insurance market).

23. *Id.*; see also *Hearings Focus on Health Insurance Gender Discrimination, The Underinsured*, KAISER HEALTH NEWS (Oct. 16, 2009), <http://www.kaiserhealthnews.org/daily-reports/2009/october/16/gender-gap.aspx> (quoting Erika Bolstad, *Women Tell Congress About Health Insurance Disparities*, MCCLATCHY NEWSPAPERS (Oct. 15, 2009), <http://www.mcclatchydc.com/2009/10/15/77259/women-tell-congress-about-health.html>) (summarizing a Colorado woman's

and renewal insurance applications for reasons that impact women more than men.²⁴

For instance, women are more likely than men to be physically abused by their intimate partners and thus more likely to sustain abuse-related medical conditions or develop a preexisting condition as a result of the abuse.²⁵ Eliminating insurance companies' ability to discriminate on the basis of abuse status is one step in the direction of eradicating the discriminatory treatment of women applying for health insurance.

A. *Discriminatory Application in Insurance Underwriting Policies*

When applying for health insurance coverage in the individual market, all new applicants are subject to the insurance company's medical underwriting process.²⁶ In eight states and the District of Columbia, current statutory schemes do not prohibit insurance companies from considering an applicant's perceived or actual history of IPV in the underwriting process.²⁷ Specifically, in South Carolina, the South Carolina Department of Insurance has no jurisdiction over the health insurance underwriting decisions of insurance companies.²⁸ Therefore, an insurance company has the right to deny an applicant for virtually any reason, including the existence of a preexisting condition.²⁹ In South Carolina, a preexisting condition is "normally a physical or mental condition for which medical advice, diagnosis, care or treatment is recommended or received before the effective date of the policy."³⁰ However, as long as the condition was

testimony that because of a prior medically necessary cesarean, unless she was sterilized, she would be denied individual health insurance); Newman, *supra* note 17 (stating that only fourteen states require insurance companies to cover maternity care).

24. See COURTOT & KAYE, *supra* note 14, at 3.

25. See Jennifer Robertson, *Domestic Violence and Health Care: An Ongoing Dilemma*, 58 ALB. L. REV. 1193, 1194 (1995) (citing R. EMERSON DOBASH & RUSSELL P. DOBASH, WOMEN, VIOLENCE AND SOCIAL CHANGE 265 (1992)) (stating that 95% of victims of IPV are women and that 97% of reported perpetrators of IPV are men).

26. Insurance companies use the medical underwriting process to decide whether to extend coverage to the applicant and how much of a premium, if coverage is extended, to charge. CODISPOTI ET AL., *supra* note 14, at 7. The underwriting process is a statistical analysis insurance companies use to maximize profits while still offering affordable health insurance. Morrison, *supra* note 10, at 269, 271 (citing Mark Scherzer, *Private Insurance*, in AIDS LAW TODAY: A NEW GUIDE FOR THE PUBLIC 404, 409, 412 (Scott Burris et. al. eds., 1993)). During the underwriting process, insurance companies consider an applicant's health status, health history, age, gender, and the applicant's insurance claims history. CODISPOTI ET AL., *supra* note 14, at 7.

27. See *supra* note 15 and accompanying text.

28. *FAQs: Individual Health Insurance*, S.C. DEP'T OF INS., <http://doi.sc.gov/faqs/Pages/IndividualHealthInsurance.aspx> (last visited Mar. 13, 2012).

29. See *id.*

30. *Id.*; see also S.C. CODE ANN. § 38-71-840(28) (2002) ("[A] limitation or exclusion of benefits relating to a condition based on the fact that the condition was present before the date of enrollment for the coverage, whether or not any medical advice, diagnosis, care, or treatment was recommended or received before the date.").

present prior to the effective date of the policy, despite the absence of medical advice, diagnosis, or medical consultation, the condition is still a preexisting condition.³¹ Therefore, under the current statutory scheme, an insurance company may deny individual health insurance coverage to a woman who has been abused prior to the effective date of the policy because the IPV can lawfully be considered a preexisting condition.³²

B. Insurance Companies' Detection of Intimate Partner Violence

When “assess[ing] each applicant’s risk of loss, and consequently the insurer’s risk of paying a claim” via the underwriting process,³³ an insurance company reviews each applicant’s medical records, databases that track risk factors,³⁴ and public records.³⁵ In an effort to reduce IPV, victim advocates encouraged the medical community to screen patients for IPV and to document abuse-related medical injuries.³⁶ Perversely, insurance companies use the documented evidence of abuse-related medical conditions as an indication of the risk associated with insuring victims of IPV.³⁷ Additionally, insurance companies may obtain information of a victim’s abuse status from public records such as emergency protective orders, police reports, credit reports, or court documents.³⁸ Insurance companies have abused the information obtained for the purpose of benefiting and protecting victims of IPV by using that information for discriminatory purposes.³⁹

C. Intimate Partner Violence Considered a Preexisting Condition

Insurance companies justify including IPV status as a preexisting condition excludable from individual health insurance coverage because victims of IPV are

31. § 38-71-840(28).

32. *See id.*

33. Morrison, *supra* note 10, at 269 (footnote omitted) (citing Benjamin Schatz, *The AIDS Insurance Crisis: Underwriting or Overreaching?*, 100 HARV. L. REV. 1782, 1803 (1987)).

34. *Id.* at 268 (citations omitted) (noting that these databases compile confidential information shared by insurance companies concerning client risk factors and subsequently disclose such information to the 600 insurance companies that subscribe to their database).

35. FROMSON & DURBOROW, *supra* note 12, at 1.

36. Morrison, *supra* note 10, at 259–60 (citing Ariella Hyman et al., *Laws Mandating Reporting of Domestic Violence: Do They Promote Patient Well-Being?*, 273 JAMA 1781, 1781–82 (1995); Antonia C. Novello et al., *A Medical Response to Domestic Violence*, 267 JAMA 3132, 3132 (1992)).

37. *Id.* at 260 (citing FROMSON & DURBOROW, *supra* note 12, at 1).

38. FROMSON & DURBOROW, *supra* note 12, at 1.

39. *See* FROMSON & DURBOROW, *supra* note 12, at 3.

exposed to a higher risk of injury⁴⁰ and cost more than individuals who are not in abusive relationships.⁴¹

1. Battered Women Are Exposed to a High Risk of Injury

Contrary to insurance companies' position that victims of IPV have voluntarily chosen to expose themselves to a high risk of injury,⁴² advocates for victims of IPV argue that victims do not voluntarily choose to remain in an abusive relationship and are often forced to remain in the abusive relationship because of safety and economic concerns.⁴³

a. Insurance Companies' Misconception that Battered Women Have Voluntarily Chosen to be Abused

From an underwriting perspective, remaining in an abusive relationship is a voluntary assumption of a risky lifestyle and, therefore, should be considered in the underwriting criteria.⁴⁴ Some insurance companies justify denying victims of IPV individual health insurance coverage because "battered victims simply are poor risks."⁴⁵ Insurance companies reason that while in a relationship, if a woman's intimate partner has, in the past, abused her, she is "more likely to get beaten again than the average person and [is] therefore more expensive to insure."⁴⁶ Insurance companies maintain that they should not be responsible to pay for abuse-related medical conditions and injuries because the victim of the abuse made a conscious lifestyle choice to remain in the abusive relationship and has not removed herself from the violence.⁴⁷

40. See NewsRX, *supra* note 12.

41. See Rivara et al., *supra* note 8, at 89 (citing Yvonne C. Ulrich et al., *Medical Care Utilization Patterns in Women with Diagnosed Domestic Violence*, 24 AM. J. PREVENTIVE MED. 9, 12 (2003)).

42. NewsRX, *supra* note 12.

43. FROMSON & DURBOROW, *supra* note 12, at 7.

44. According to insurance companies, by making a conscious choice to remain in the abusive relationship, victims of IPV are analogous to smokers who do not quit smoking and to diabetics who do not take their insulin. NewsRX, *supra* note 12. Likewise, insurance underwriters treat victims of IPV similar to skydivers, professional boxers, and racecar drivers. Morrison, *supra* note 10, at 272.

45. NewsRX, *supra* note 12; see also *Intimate Partner Violence: Consequences*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/ViolencePrevention/intimatepartner-violence/consequences.html> (last updated Oct. 28, 2010) [hereinafter *Consequences*] (reporting a correlation between a history of IPV and risky health behaviors such as "engaging in high-risk sexual behaviors," "using harmful substances," engaging in "unhealthy diet-related behaviors," and overusing health services).

46. Grim, *supra* note 9.

47. NewsRX, *supra* note 12.

b. Victims Do Not Choose to Be in an Abusive Relationship

The insurance classification of IPV victims voluntarily living risky lifestyles is based on misconceptions of abuse. Rather than being a voluntary lifestyle, IPV is a crime⁴⁸ that forces victims of IPV to face safety and economic obstacles⁴⁹ when trying to flee abusive relationships. Intimate partner violence is:

[A] pattern of coercive behaviors which may include physical/sexual assault, such as slapping, punching, choking, biting, shoving, kicking, throwing objects, rape; emotional/psychological abuse, such as put downs, isolation, extreme jealousy, public humiliation, threats to do bodily harm; and economic abuse, such as threats or actual destruction of personal property.⁵⁰

A victim of IPV does not choose to be slapped, choked, bitten, kicked, publicly humiliated, and psychologically abused by her partner.⁵¹ Additionally, there are many safety and economic obstacles to fleeing abusive relationships, such as shortage of shelters, fear of retaliation, and fear of losing health insurance, which are not considered by insurance underwriters in underwriting decisions.⁵² Of the total number of women in the United States, one in four will, at some point in her lifetime, experience IPV.⁵³ Unfortunately, many women who call a domestic violence hotline are unable to receive shelter services because of limited space availability.⁵⁴ Of the callers who do receive shelter

48. Morrison, *supra* note 10, at 272 (citing FROMSON & DURBOROW, *supra* note 12, at 7); see generally S.C. CODE ANN. § 16-25-20 (2003) (stating that domestic violence is unlawful and is a criminally punishable offense).

49. FROMSON & DURBOROW, *supra* note 12, at 7.

50. Robertson, *supra* note 25, at 1194 (citing AM. MED. ASS'N, DIAGNOSTIC & TREATMENT GUIDELINES ON DOMESTIC VIOLENCE 7 (1992)).

51. See FROMSON & DURBOROW, *supra* note 12, at 7.

52. See *id.* at 1.

53. *Domestic Violence Facts*, NAT'L COALITION AGAINST DOMESTIC VIOLENCE, [http://www.ncadv.org/files/DomesticViolenceFactSheet\(National\).pdf](http://www.ncadv.org/files/DomesticViolenceFactSheet(National).pdf) (last visited Mar. 13, 2012) [hereinafter *Domestic Violence Facts*] (citing PATRICIA TJADEN & NANCY THOENNES, NAT'L INST. OF JUSTICE & CTRS. OF DISEASE CONTROL & PREVENTION, EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY iii (2000)).

54. Morrison, *supra* note 10, at 262–63 (citing Joan Zorza, *Recognizing and Protecting the Privacy and Confidentiality Needs of Battered Women*, 29 FAM. L.Q. 273, 276 (1995); Susanne M. Browne, Note, *Due Process and Equal Protection Challenges to the Inadequate Response of the Police in Domestic Violence Situations*, 68 S. CAL. L. REV. 1295, 1296 (1995)). In 2010, intimate partner violence programs in South Carolina received 24,972 hotline calls. *Services Provided by SC Local Domestic Violence Programs-2010*, S.C. COALITION AGAINST DOMESTIC VIOLENCE & SEXUAL ASSAULT, <http://www.sccadv.org/domestic-violence-facts-and-stats/domestic-violence-victims-across-sc.html> (last visited Mar. 13, 2012). However, of those calls received, only 4,046 women received emergency shelter services. *Id.*

services, their struggle for independence is not complete. Shelters are only temporary, as victims and their children may only stay for four to eight weeks.⁵⁵ Without the financial means to establish a permanent residence, many victims fear becoming homeless and either never leave their abusive partners or return to their abusive partners once their stays at the shelter are complete.⁵⁶ Moreover, some victims fear their abuser's retaliation if they flee the violent environment, call the police, or apply for an emergency protective order.⁵⁷ This fear is not unfounded. Women who are in abusive relationships and "separate or divorce their partners are more frequently and more severely beaten than those who stay."⁵⁸ For example, in *Godfrey v. Georgia*, Godfrey murdered his wife soon after she left him and filed for divorce.⁵⁹

2. Battered Women Cost More Than Women Without a History of IPV

Insurance companies justify including IPV status as a pre-existing condition excludable from individual health insurance coverage because women with a history of IPV are more expensive to insure than women without a history of IPV.⁶⁰ In fact, a 2007 study by the American Journal of Preventive Medicine estimated that "for every 100,000 women enrollees, IPV is responsible for \$19.3 million in 'excess' [as compared to women without a history of IPV] healthcare costs each year."⁶¹ The same study reported that women with a history of IPV cost insurance companies 19% more annually than women without a history of IPV.⁶²

55. Morrison, *supra* note 10, at 263 (citing Zorza, *supra* note 54, at 276).

56. See FROMSON & DURBOROW, *supra* note 12, at 7; see also Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 892 (1992) ("Many victims of domestic violence remain with their abusers, perhaps because they perceive no superior alternative. Many abused women who find temporary refuge in shelters return to their husbands, in large part because they have no other source of income." (citations omitted) (citing Tracy B. Herbert et al., *Coping with an Abusive Relationship: I. How and Why Do Women Stay?*, 53 J. MARRIAGE & FAM. 311, 312-13 (1991); B. E. Aguirre, *Why Do They Return? Abused Wives in Shelters*, 30 SOC. WORK 350, 352 (1985))).

57. See Morrison, *supra* note 10, 261 (citing Casey, 505 U.S. at 892; Joan Zorza, *Women Battering: High Costs and the State of the Law*, 28 CLEARINGHOUSE REV. 383, 386 (1994)).

58. *Id.* at 263 (citing Zorza, *supra* note 57, at 386). Batterers who are separated from their partner "commit seventy-nine percent of all reported spousal violence." *Id.* (citing Zorza, *supra* note 54, at 274). When the emergency protective order is obtained because of a physical assault, abusers violate the order one-half of the time. *Domestic Violence Facts*, *supra* note 53 (citing TIADEN & THOENNES, *supra* note 53, at 54 (2000)). A protective order obtained to protect a rape victim is violated by the perpetrator in more than two-thirds of the cases. *Id.*

59. *Godfrey v. Georgia*, 446 U.S. 420, 425-26 (1980).

60. See Rivara, *supra* note 8, at 89.

61. *Id.* at 94.

62. *Id.* at 93.

a. Estimated Cost of Intimate Partner Violence

Since victims are reluctant to report abuse-related medical injuries to the medical community, police, and judicial system,⁶³ and because most studies focus on the number of victims and not on the number of victimizations,⁶⁴ the actual costs of IPV are uncalculated.⁶⁵ Attempting to calculate the costs associated with IPV, the Centers for Disease Control and Prevention (CDC) estimated that “5.3 million IPV victimizations occur . . . each year. This violence results in nearly 2.0 million injuries, more than 550,000 of which require medical attention.”⁶⁶ Furthermore, the CDC reported that the total health and mental health care costs of IPV against women in 1995 was \$4.1 billion.⁶⁷ Although the reported statistics are high, the CDC cautioned that this statistical estimate is an underestimation of the actual cost of IPV.⁶⁸

b. Costs for Physical Injuries and Disorders Related to Intimate Partner Violence

More than 1.8 million victimizations each year cause injuries,⁶⁹ often requiring a victim seeking medical care to utilize more than one service.⁷⁰ Victims of IPV are also at an increased risk for developing short and long-term physical health problems, such as gynecological disorders,⁷¹

63. See Morrison, *supra* note 10, at 264; see also Robertson, *supra* note 25, at 1198 (reporting only four to five percent of women seeking medical treatment are identified as victims of IPV); *Domestic Violence Facts*, *supra* note 53 (citing Irene Hanson Frieze & Angela Browne, *Violence in Marriage*, in *FAMILY VIOLENCE* 163 (Lloyd E. Ohlin & Michael H. Tonry eds., 1989)) (“Most cases of domestic violence are never reported to the police.”).

64. See CTRS. FOR DISEASE CONTROL & PREVENTION ET AL., DEP’T HEALTH & HUMAN SERVS., *COSTS OF INTIMATE PARTNER VIOLENCE AGAINST WOMEN IN THE UNITED STATES* 6 (2003) [hereinafter CDC].

65. Morrison, *supra* note 10, at 264 (citing Zorza, *supra* note 57, at 383).

66. CDC, *supra* note 64, at 1.

67. *Id.* at 30.

68. *Id.* at 27.

69. *Id.* at 15. The CDC reported that there are “322,230 intimate partner rapes each year,” 116,647 of which result in additional injuries other than the initial rape, “36,161 of which require medical care.” *Id.* In the United States, there are nearly “4.5 million physical assault victimizations” each year in which more than 1.8 million victimizations cause injuries, “519,031 of which require medical care.” *Id.* One of the main resources victims of IPV utilize is the emergency department. See *id.* The CDC reported that emergency departments treat almost “15,000 rape victimizations and more than 240,000 physical assault victimizations.” *Id.* In fact, “twenty-two to thirty-five percent of all women who seek emergency medical treatment do so after being injured by an abusive intimate partner.” Robertson, *supra* note 25, at 1197 (citations omitted).

70. See generally CDC, *supra* note 64, at 29 (“Medical care costs include ambulance transport and paramedic care; ED care; physician, physical therapy, and dental visits; inpatient hospitalizations; and outpatient clinic visits. Victims seeking medical care often received more than one service.”).

71. Jacquelyn Campbell et al., *Intimate Partner Violence and Physical Health Consequences*, 162 *ARCHIVES INTERNAL MED.* 1157, 1158 (2002) (citations omitted), available at

headaches,⁷² chronic pain,⁷³ fibromyalgia, irritable bowel syndrome, and heart or circulatory conditions.⁷⁴ Thus, each victimization usually results in multiple medical care visits.⁷⁵

c. *Costs for Psychological Disorders Related to Intimate Partner Violence*

As a result of abuse, victims of IPV also seek mental health care services.⁷⁶ A 2007 study by the American Journal of Preventive Medicine reported that the use of mental health services by women with a history of IPV was two times higher than women without a history of IPV.⁷⁷ The wounds developed from repeated abuse usually require multiple visits over an extended period of time.⁷⁸ During these visits, mental health providers commonly treat victims of IPV for not only psychological disorders,⁷⁹ but also for stress-related symptoms.⁸⁰ Notably, the psychological trauma of abuse can be so severe that twenty-five percent of all suicide attempts and twenty-six percent of all suicide attempt-related injuries treated in the emergency room are attributable to an abusive relationship.⁸¹

3. *Insurance Companies Are in a Better Position to Reduce Insurance-Related Obstacles Associated with Leaving Abuse-Related Relationships and to Spread the Cost of Intimate Partner Violence*

Insurance companies' decision to exclude victims of IPV from individual health insurance coverage because victims of IPV chose to remain in an abusive environment is fundamentally unfair because insurance discrimination places an additional obstacle for victims to overcome when considering whether to leave

<http://archinte.ama-assn.org/cgi/reprint/162/10/1157> (reporting that battered women are more likely to exhibit symptoms of "sexually transmitted diseases, vaginal bleeding or infection, fibroids, pelvic pain, and urinary tract infections").

72. Rivara, *supra* note 8, at 89 (citations omitted).

73. *Id.* (citations omitted).

74. *Consequences*, *supra* note 45.

75. *See generally* CDC, *supra* note 64, at 15.

76. CDC, *supra* note 64, at 18 (estimating the number of mental health care visits by female victims of IPV to be more than 18.5 million each year).

77. Rivara, *supra* note 8, at 93.

78. CDC, *supra* note 64, at 30 (revealing that on average each mental health patient being treated for IPV required almost 13 visits).

79. *See Consequences*, *supra* note 45.

80. Robertson, *supra* note 25, at 1198 (citing Evan Stark et al., *Medicine & Patriarchal Violence: The Social Construction of a "Private" Event*, 9 INT'L J. HEALTH SERVS. 461, 473-74 (1979)).

81. *Id.* (citing Howard Holtz & Kathleen Furniss, *The Health Care Provider's Role in Domestic Violence*, TRENDS IN HEALTH CARE, LAW & ETHICS 47, 47 (1981); Evan Stark, *Rethinking Homicide: Violence, Race, and the Politics of Gender*, 20 INT'L J. HEALTH SERVS. 3, 21 (1990)).

an abusive relationship.⁸² First, victims of IPV may remain with their abuser and under their abuser's health insurance plan if they are unable to obtain their own individual health insurance plan.⁸³ Second, victims are hesitant to receive treatment for abuse-related medical conditions because of the discriminatory impact that labeling abuse-related treatment as a preexisting condition causes.⁸⁴ Third, insurance companies learn of the "risky lifestyle" by documented evidence of victims seeking assistance.⁸⁵ Therefore, victims of IPV are less likely to report abuse to the police or to their health care provider for fear they will be unable to obtain affordable health care in the future.⁸⁶ Likewise, in order to protect their patients from unfair discriminatory practices and to assure payment for their services,⁸⁷ the medical community will be less likely to document abuse-related medical conditions if the information can be used to deny their patients health insurance.⁸⁸ With the reduction of documented medical evidence and victim self-reporting, the legal system loses the evidentiary support needed to prosecute batterers.⁸⁹ By ending discriminatory practices, insurance companies can reduce these insurance-related obstacles associated with leaving abuse-related relationships.

Furthermore, by refusing to insure battered women or cover the costs associated with IPV, insurance companies shift these costs onto society.⁹⁰ Victims who either have been denied health insurance coverage or who have had their abuse-related claims denied are personally responsible for these otherwise insurable claims.⁹¹ If the victims are eligible for government programs such as Medicare, Medicaid,⁹² or the South Carolina Health Insurance Pool,⁹³ the costs

82. See FROMSON & DURBOROW, *supra* note 12, at 1.

83. Blumenthal, *supra* note 17 ("[Senator Patty] Murray . . . recalls a private conversation she had with a woman who broke down as she explained that she couldn't flee an abusive relationship because her children were covered under her husband's health care plan and she couldn't get her own. Another woman told Murray that she didn't report that she'd been battered because she feared losing her coverage.").

84. Danielle Ivory, *Rape Is a Pre-Existing Condition? The Heartlessness of the Health Insurance Industry Exposed*, ALTERNET (Oct. 21, 2009), <http://www.alternet.org/health/143426?page=1> (denying health insurance coverage to a woman from Ithaca, New York, because she had "been raped before" and a woman from New Mexico for receiving treatment for PTSD after being raped (internal quotation marks omitted)).

85. FROMSON & DURBOROW, *supra* note 12, at 8.

86. *Id.* at 1.

87. Morrison, *supra* note 10, at 268 (citing FROMSON & DURBOROW, *supra* note 12, at 1).

88. FROMSON & DURBOROW, *supra* note 12, at 1.

89. Morrison, *supra* note 10, at 268 (citing FROMSON & DURBOROW, *supra* note 12, at 1).

90. See *id.* at 265–66.

91. *Id.* at 289.

92. See generally ALINA SALGANICOFF & USHA RANJI, KAISER FAMILY FOUND., MEDICAID'S ROLE FOR WOMEN ACROSS THE LIFESPAN: CURRENT ISSUES AND THE IMPACT OF THE AFFORDABLE CARE ACT 1 fig.1 (2012), available at <http://www.kff.org/womenshealth/upload/7213-03.pdf> (stating that in 2008 women comprised 68% of Medicaid adult enrollees).

93. See generally *South Carolina Health Insurance Pool (SCHIP)*, S.C. DEP'T OF INS., <http://doi.sc.gov/consumer/Pages/SCHIP.aspx> (last visited Mar. 2, 2012) (providing information

associated with the abuse-related medical conditions are distributed to society as a whole through taxes.⁹⁴ If the victims are not eligible for government assistance and are unable to pay for treatment, the medical community has to increase medical costs to absorb the financial loss of unpaid medical bills.⁹⁵

Insurance companies are in the best position to spread the costs associated with IPV.⁹⁶ First, because of the loss distribution function of insurance, insurance companies can more evenly distribute the cost of IPV to their policyholders.⁹⁷ Second, insurance companies are in a better position than the government to develop a policy that would shift the cost of IPV to the abusers and not to the victims or general public.⁹⁸ For example, an insurance company could seek indemnity from “any third party whose act of abuse caused th[e] claim.”⁹⁹ If the insurer covers an abuse-related medical condition, the insurer can shift the cost of IPV to the abuser and not to the victim, other policyholders, or society.¹⁰⁰

D. Difficulty in Measuring the Extent of Insurance Discrimination

The extent of health insurance discrimination is difficult to calculate for a number of reasons. First, insurers are not required to disclose the reasons behind denying an applicant,¹⁰¹ refusing to renew a policy, or cancelling a health insurance plan.¹⁰² Second, insurance companies are not required to disclose the criteria used in the underwriting process.¹⁰³ Lastly, it is difficult to determine how many women are vulnerable to this type of discrimination because most

about the SCHIP, a state program developed in order to make health insurance available to residents of South Carolina who are unable to obtain health insurance because of a preexisting “medical condition or whose premium for health insurance coverage exceeds 150% of the Pool rate”).

94. Morrison, *supra* note 10, at 289.

95. HOLLY LANG, GEORGIA WATCH, METROPOLITAN ATLANTA HOSPITAL ACCOUNTABILITY PROJECT, 7 (2010), available at <http://www.georgiawatch.org/wp-content/uploads/2010/06/Georgia-Watch-HAP-Report.pdf> (last visited Mar. 14, 2012).

96. Morrison, *supra* note 10, at 288.

97. *Id.*

98. *Id.*

99. H.R. 3344(E), 119th Gen. Assemb., Reg. Sess. (S.C. 2011–12).

100. See Morrison, *supra* note 10, at 288, 289.

101. FROMSON & DURBOROW, *supra* note 12, at 3; see S.C. CODE ANN. § 38-71-530(a) (2002). The South Carolina insurance code mandates that the South Carolina Department of Insurance develop disclosure standards. § 38-71-530(a). However, if an insurance company denies an applicant coverage for medical reasons, the company is not required to disclose the specific reasons, only that the applicant was denied coverage for a medical reason. See *id.* § 38-71-530(a)(5).

102. See FROMSON & DURBOROW, *supra* note 12, at 3. But see S.C. CODE ANN. § 38-71-335(A) (2002) (stating that insurers do not have the right to cancel a policy).

103. Morrison, *supra* note 10, at 267.

incidents of IPV are not documented,¹⁰⁴ and not all women apply for or have individual health insurance plans.¹⁰⁵

Even though the extent of insurance discrimination is incalculable, “approximately half of the nation’s largest insurance companies have admitted to utilizing domestic violence as an underwriting criterion.”¹⁰⁶ Given that “[w]omen of all class levels, educational backgrounds, and racial, ethnic and religious groups are battered,”¹⁰⁷ any woman who applies for, or has, private health insurance is vulnerable to insurance discrimination. Despite the data regarding insurance companies’ use of a victim’s abuse status in the underwriting process being outdated,¹⁰⁸ there are ample examples of insurance companies denying IPV victims solely because of their abuse status.¹⁰⁹ While South Carolina insurance companies have not specifically been reported “pinklining”—a term coined to indicate the “alleged practice by insurance companies” of denying “coverage to victims of domestic violence,”¹¹⁰—the South Carolina General Assembly and the South Carolina insurance market have both recognized that there is “room for improvement” in the state’s statutory scheme and both support legislation prohibiting future discrimination against victims of abuse.¹¹¹

104. *Id.* (citing Zorza, *supra* note 54, at 274–75).

105. *See* CODISPOTI ET AL., *supra* note 14, at 3. In the United States, according to the U.S. Census Bureau, in 2010, there were 96.7 million women between the ages of 18 and 64 and of those only 65.5 million women were covered under private health insurance, while 19 million women remained uninsured. *Current Population Survey (CPS) Table Creator*, U.S. CENSUS BUREAU, http://www.census.gov/hhes/www/cpstc/cps_table_creator.html (last revised Dec. 22, 2011) (analyzing 2010 data on health coverage). In 2010, South Carolina was home to 1.4 million women, and of those, 919,539 women had private health insurance while 349,172 were uninsured. *Id.*

106. Morrison, *supra* note 10, at 266.

107. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 889 (1992) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 744 F. Supp. 1323, 1361 (E.D. Pa 1990)).

108. *See* FROMSON & DURBOROW, *supra* note 12, at 2 (describing the results of an informal survey in 1994 and formal reports by the Insurance Commissioners in Pennsylvania, Kansas, and Texas in 1995).

109. *See, e.g., id.* at 3–4 (stating that women were denied health insurance because of medical records that detailed beatings by husbands, abuse-related preexisting conditions, and medical or psychiatric problems related to abuse).

110. Rebecca Brannan, *Unfair Trade Practices: Prohibit Discrimination Against Victims of Family Violence in Insurance Coverage, Rates, and Claims*, 17 GA. ST. U. L. REV. 220, 222 n.7 (2000) (citing *Lawmakers 2000* (Georgia Public Television broadcast Feb. 16, 2000) (on file with the *Georgia State University Law Review*)) (explaining “pinklining” is a variation of the discriminatory practice of “redlining”).

111. *Meeting Minutes on H.R. 3373, H.R. 3332, H.R. 3344, S. 75, S. 85, S. 417 Before the Senate Banking and Insurance Subcommittee*, 119th Gen. Assemb., Reg. Sess. (Feb. 16, 2011) [hereinafter *Meeting Minutes*].

III. NATIONALLY PROHIBITING GENDER INSURANCE DISCRIMINATION

A. *National Association of Insurance Commissioners (NAIC)*

After a Pennsylvania woman was denied health and life insurance “due to a history of domestic dispute”¹¹² and after former U.S. Representative Charles E. Schumer revealed that half of the nation’s major insurance companies consider domestic violence in their underwriting criteria,¹¹³ the National Association of Insurance Commissioners (NAIC) created model legislation prohibiting the discriminatory practice.¹¹⁴ Although the NAIC cannot compel state legislators to adopt the model legislation, states that have either enacted legislation prohibiting insurers from discriminating on the basis of abuse status or are considering enacting such legislation can use the four model laws developed by the NAIC as the basis for their legislation.¹¹⁵ Since the promulgation of the model laws, forty-two states have passed legislation prohibiting unfair discrimination against victims of IPV.¹¹⁶

B. *Patient Protection and Affordable Care Act (PPACA)*

The Patient Protection and Affordable Care Act (PPACA),¹¹⁷ passed by Congress in March 2010, ends insurance trade practices that are detrimental to women.¹¹⁸ On the night the House approved the legislation, Speaker Pelosi said, “After we pass this bill, being a woman will no longer be a preexisting medical condition.”¹¹⁹ PPACA bans preexisting condition exclusions and adopts a “guaranteed issue.”¹²⁰ It also bans gender rating, prohibits sex discrimination, guarantees maternity coverage for all, and ensures that new plans cover

112. See Megan O'Matz, *Pa. Abuse Case Spurs Insurance Legislation*, THE MORNING CALL, Mar. 12, 1995, available at http://articles.mcall.com/1995-03-12/news/3016637_1_domestic-abuse-domestic-violence-domestic-dispute.

113. Grim, *supra* note 9.

114. Morrison, *supra* note 10, at 281–83 (outlining the completed draft of the NAIC model law).

115. *Id.*; see also H.R. 3344, 119th Gen. Assemb., Reg. Sess. (S.C. 2011–12) (H.R. 3344 is an NAIC model).

116. See WOMEN'S LAW PROJECT & PA. COALITION AGAINST DOMESTIC VIOLENCE, *supra* note 14, at 2.

117. Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat. 119 (2010) (health insurance provisions substantially codified at 42 U.S.C. § 300gg (2010)).

118. See *The Health Care Litigation: What Women Could Lose*, NAT'L WOMEN'S LAW CENTER 1 (Mar. 26, 2012), <http://www.nwlc.org/sites/default/files/pdfs/healthlitigationfactsheet.pdf>.

119. *Id.*

120. *Id.*

recommended preventive care (such as Pap tests and mammograms) without copayments.¹²¹

After the enactment of PPACA, a number of lawsuits were filed challenging its constitutionality.¹²² In November 2011, the United States Supreme Court granted certiorari in *Florida v. Department of Health & Human Services*.¹²³ In March 2012, the Supreme Court heard oral arguments regarding the constitutionality of the Medicaid expansion provision, the individual mandate provision, and whether, if unconstitutional, the individual mandate provision is severable from the act.¹²⁴ If the Supreme Court decides the challenged provisions in PPACA are unconstitutional and not severable, without state legislation adopting antidiscrimination laws, the insurance industry will continue to fail to meet the specific health care needs of women.¹²⁵

Even if the Supreme Court holds PPACA constitutional, it is still imperative for states to adopt anti-insurance discrimination statutes because Congress may repeal some of the provisions of PPACA or the entire act. In January 2011, the United States House of Representatives voted to repeal PPACA.¹²⁶ Republicans in both the House of Representatives and the United States Senate have “pledged to repeal [PPACA], replace it, or block its implementation.”¹²⁷ Various approaches have either been suggested or attempted by Republicans in an effort to prevent PPACA from going into effect.¹²⁸ Although PPACA-blocking strategic approaches may fail while the democratic-controlled Senate and President Barack Obama continue to advocate for the implementation of PPACA, the future of PPACA is uncertain as Republican presidential candidates highlighted modification of PPACA during the primaries in their platforms for the 2012 presidential election.¹²⁹

121. *Id.* at 1–2 (citing Patient Protection and Affordable Care Act, 42 USC §§ 300gg-3, -4, -13, 18022, 18116 (2010)).

122. *See id.* at 2.

123. 780 F. Supp. 2d 1256 (N.D. Fla. 2011), *aff’d in part, rev’d in part*, 648 F.3d 1235 (11th Cir. 2011), *cert. granted in part*, 132 S. Ct. 604 (2011).

124. *See* MaryBeth Musumeci, *A Guide to the Supreme Court’s Review of the 2010 Health Care Reform Law*, KAISER FAMILY FOUNDATION, 1, 3 (January 2012), <http://www.kff.org/healthreform/upload/8270-2.pdf>.

125. *See* NAT’L WOMEN’S LAW CENTER, *supra* note 118, at 3.

126. Joanne Kenen, *Congress and the Affordable Care Act*, HEALTH AFFAIRS, 1 (Feb. 25, 2011), <http://www.rwjf.org/files/research/71968.pdf>.

127. *Id.*

128. *Id.* “Republicans have outlined five approaches either to weaken the [ACA] or to replace it with other alternatives.” First, “repeal the existing law and replace it with a new one.” Second, “weaken[] various provisions of the law or cut[] the funding to implement them.” Third, “weaken[] regulations designed to implement the law.” Fourth, “urg[e] states to decline to implement provisions, such as creation of new health insurance exchanges[,] and [lastly,] pursu[e] lawsuits at the state level that challenge the law in its entirety or provisions of it.” *Id.*

129. *See* *Health Care*, MITT ROMNEY, <http://www.mittromney.com/issues/health-care> (arguing that ObamaCare should be repealed and replaced) (last visited Mar. 14, 2012); *Healthcare*, NEWT 2012, <http://www.newt.org/solutions/healthcare> (advocating repeal of the “big government Obamacare”) (last visited Mar. 14, 2012); *Repeal and Replace ObamaCare with Patient-Centered*

IV. CURRENT ANTI-INSURANCE DISCRIMINATION STATE STATUTES AND THE 2010–2011 PROPOSED LEGISLATION IN SOUTH CAROLINA

Though many states have adopted anti-insurance discrimination statutes to prohibit insurance companies from denying individual health insurance coverage to victims of IPV, the states' approaches to prohibiting such discriminatory practices vary in their scope and enforcement mechanisms. As a state considering whether to adopt similar legislation,¹³⁰ South Carolina must determine the scope of the prohibition and how to enforce it.

A. *Scope of Prohibition*

When deciding to pass legislation prohibiting unfair discrimination against victims of IPV, state legislators must consider the controversy over the scope of the prohibition.

1. *Controversy over the Scope of Prohibition*

Broad state legislation prohibiting insurance companies from considering abuse status and abuse-related medical conditions when deciding whether to extend coverage, raise premiums, or cancel an insurance policy effectively eliminates unfair insurance discrimination against victims of IPV.¹³¹ However, without the ability to consider medical histories, insurance companies would not be able to adequately assess the risks associated with each individual applicant.¹³² In addition, women with preexisting conditions would be able to claim that the preexisting condition was a result of abuse and have their otherwise excludable condition covered by the insurance policy.¹³³ As a consequence of the broad physical and psychological ramifications of abuse, almost any medical condition could be considered abuse related.¹³⁴

On the other hand, state legislation that only prohibits insurance companies from denying coverage, raising premiums, or cancelling insurance policies “solely,” “only,” or “because of” abuse status inadequately addresses the issue.¹³⁵ Even with the adoption of a similar prohibition, victims of IPV are still adversely affected by the underwriting process in a way unique to that class of

Healthcare, RICK SANTORUM, <http://www.ricksantorum.com/repeal-and-replace-obamacare-patient-centered-healthcare> (“Priority number 1 = repeal ObamaCare . . .”) (last visited Mar. 14, 2012).

130. H.R. 3344, 119th Gen. Assemb., Reg. Sess. (S.C. 2011–12).

131. See Morrison, *supra* note 10, at 284.

132. See *id.*

133. Lynn Sargent Berner, *Victims of Domestic Violence: Hostages Not Skydivers*, 4 J. WOMEN'S HEALTH 227, 228 (1995).

134. See *Consequences*, *supra* note 45.

135. See Morrison, *supra* note 10, at 284.

persons.¹³⁶ Studies have established that many chronic medical conditions are exacerbated by IPV.¹³⁷ Additionally, battered women may develop an excludable preexisting condition as a result of the abuse.¹³⁸ Therefore, even though IPV is prohibited from being considered a preexisting condition, a victim of IPV may still be denied coverage for seeking treatment for IPV. Furthermore, insurance companies have broad authority to underwrite and may still inadvertently discriminate against victims of IPV by underwriting applicants because of common abuse-related medical conditions.¹³⁹ An important feature of this approach, however, is the legislative attempt to balance insurance companies' interest in maximizing profits with the public interest in protecting victims of IPV.¹⁴⁰ This approach establishes a social policy that discrimination against victims of IPV is not tolerated while recognizing the legitimate business interests of private insurance companies.¹⁴¹

2. *Majority Approach: Broad Scope of Prohibition*

According to the National Center on Domestic and Sexual Violence, more states have adopted a broad statutory scheme protecting victims of IPV than have adopted prohibitions aimed primarily at eradicating underwriting based solely, only, or because of the abuse status.¹⁴² Most statutory schemes prohibit insurance companies from denying insurance coverage, cancelling an insurance policy, excluding or limiting abuse-related claims, and denying claims based on IPV.¹⁴³ For example, Georgia passed an act in 2000 that prevents insurance companies from denying, limiting, or charging more for coverage, or denying or limiting claims associated with family violence.¹⁴⁴ Similarly, Texas prohibits insurance companies from denying to cover, refusing to renew, canceling or limiting coverage, or charging a rate different from similar plans because of an individual's abuse status.¹⁴⁵ However, the Texas statutory scheme does not prohibit insurance companies from considering abuse-related medical conditions in the underwriting decision.¹⁴⁶

136. See Berner, *supra* note 133, at 228.

137. *Id.* (citing Marti T. Loring & Roger W. Smith, *Health Care Barriers and Interventions for Battered Women*, 109 PUB. HEALTH REP. 328 (1994), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1403497/pdf/pubhealthrep00060-0026.pdf>).

138. Ivory, *supra* note 84.

139. Morrison, *supra* note 10, at 284.

140. See *id.* at 287 (citing Scherzer, *supra* note 26, at 413).

141. See *id.* (citing Scherzer, *supra* note 26, at 413).

142. *Analysis of State Laws Prohibiting Insurance Discrimination on the Basis of Domestic Violence*, NAT'L CTR. ON DOMESTIC & SEXUAL VIOLENCE (May 2003) [hereinafter NCDSV Chart] http://www.ncdsv.org/images/Statelawsinsurancediscrim_2003.pdf.

143. *Id.*

144. Brannan, *supra* note 110, at 229.

145. TEX. INS. CODE ANN. § 544.153 (West 2009).

146. *Id.* § 544.155.

3. *South Carolina's Proposed Adoption of the Minority Approach: Narrow Scope of Prohibition*

The proposed Unfair Discrimination Against Subjects of Abuse in Insurance Act would amend Title 38, Chapter 57 of the 1976 Code by adding section 38-57-115.¹⁴⁷ The proposed Act specifically “prohibit[s] unfair discrimination by insurance entities and insurance professionals on the basis of abuse status.”¹⁴⁸ The proposed Act defines “abuse status” as “the fact or perception that a person is, has been, or may be a subject of abuse, irrespective of whether the person has sustained abuse-related medical conditions.”¹⁴⁹ Consequently, a person may have abuse status even without abuse-related medical conditions and may be a subject of abuse even without seeking medical or psychological treatment.¹⁵⁰

The proposed Act prohibits insurers from denying, refusing to issue or renew, canceling, restricting or excluding coverage, denying a claim or limiting payment, or adding a premium differential to a policy on the basis that the applicant or the insured has abuse status.¹⁵¹ Insurers are also prohibited from imposing preexisting condition exclusions, underwriting, denying a claim, determining premium rates, or requesting information on the basis of abuse status.¹⁵² By removing a person’s abuse status from underwriting considerations, a battered woman will no longer be placed in a “special classification of uninsurability.”¹⁵³ Instead, she is assured that she will be treated in the same manner other applicants are treated.¹⁵⁴

Although this Act prohibits insurers from engaging in activities or practices on the basis of a person’s abuse status, such as considering IPV a preexisting

147. H.R. 3344, 119th Gen. Assemb., Reg. Sess. (S.C. 2011–12).

148. *Id.* § 2(B). In South Carolina, unfair discrimination is not defined for individual health insurance. See S.C. CODE ANN. § 38-57-120 (2002). However, in life insurance, annuities, and disability insurance, unfair discrimination is charging different rates or paying different benefits between individuals of the same class and with equal life expectancy or between individuals suffering from the same disability. *Id.* The proposed Act would apply to all lines of insurance, including individual health insurance policies, and broadly defines a subject of abuse. H.R. 3344, § 2(A)(8), (C).

149. H.R. 3344, § 2(A)(3).

150. This Act defines abuse in broader terms than the South Carolina Criminal Domestic Violence statutes. See S.C. CODE ANN. § 16-25-20 (2003). In the proposed Act, abuse means “the occurrence of one or more of the following acts by a current or former family member, household member, intimate partner, or caretaker.” H.R. 3344, § 2(A)(1). South Carolina, however, only criminalizes abuse of a household member. § 16-25-20. In Section 16-25-10, “household member” does not include dating relationships or same-sex relationships. See *id.* § 16-25-10. Instead, Section 16-25-10 defines “household member” as a spouse, a former spouse, persons having a child in common, or a male and a female who are living together or who have previously lived together. *Id.*

151. H.R. 3344, § 2(D)(1).

152. *Id.* § 2(D)(2), (3), (5), (8), (9).

153. FROMSON & DURBOROW, *supra* note 12, at 11.

154. *Id.*

condition,¹⁵⁵ this Act protects insurance companies by limiting their liability and reducing the chance that the medical questions in their underwriting investigation will be construed as discrimination.¹⁵⁶ These safe harbor provisions ensure that a victim of IPV is subject to the same underwriting procedure that non-victims of IPV are subject to, even though such underwriting procedures penalize a victim for seeking treatment for abuse-related medical conditions or injuries.

For instance, this proposed Act does not prevent insurance companies from considering the applicant's or the insured's medical history,¹⁵⁷ nor does it prohibit insurers from considering abuse-related medical conditions as preexisting conditions.¹⁵⁸ Insurance companies can deny coverage of a medical condition even if it is a result of abuse and they know it is a result of abuse.¹⁵⁹ However, insurers cannot deny coverage of the medical condition *because* it is a result of abuse.¹⁶⁰ Likewise, insurers may set rates based on an applicant's or insured's medical history as long as the premium rates are set based on medical claims (even if abuse-related) and medical injuries, and the rates are not set based on abuse status.¹⁶¹

B. Enforcement Mechanisms

Within the states that have passed legislation prohibiting insurance discrimination against victims of IPV, the scope of the enforcement mechanism and related penalties and the benefit received by victims of IPV vary. Some are inadequate.

1. Administrative Remedies

According to the National Center on Domestic and Sexual Violence, all of the states that have adopted anti-discrimination statutes provide a victim of discrimination an administrative remedy, such as suspension of the insurance license, a cease and desist order, or an administrative fine.¹⁶² Unfortunately,

155. "It is a prohibited act of unfair discrimination for an insurance entity or insurance professional to . . . impose any preexisting condition exclusion on the basis of the applicant's or covered person's abuse status" H.R. 3344, § 2(D)(2).

156. *See id.* § 2(F)(1)(a).

157. *Id.* "Nothing in this section may be construed to prohibit an insurance entity . . . from asking about a medical condition or from using medical information to underwrite" *Id.*

158. *See id.* An insurance company may ask about and use medical information to underwrite even if the medical information is related to a medical condition. *Id.* However, they are prohibited from imposing a preexisting condition on the basis of the person's abuse status. *Id.* § 2(D)(2).

159. *See id.* § 2(F)(1).

160. *See id.* § 2(D)(1)–(3).

161. *See id.* § 2(G). "Nothing in this section prohibits . . . setting rates in accordance with relevant actuarial data" *Id.*

162. NCDSV Chart, *supra* note 142.

most administrative remedies do not provide any type of corrective action for the individual harm.¹⁶³ Also, the administrative fine charged to violators of the prohibition varies substantially. To illustrate, in Georgia and Texas, the insurance commissioner may fine the insurers up to \$1,000 for each violation of the act or \$5,000 for repeat offenders.¹⁶⁴ Conversely, in West Virginia, if the commissioner determines that the violation is occurring “with such a frequency as to indicate a general business practice,” the insurer will be fined “in a sum not exceeding two hundred fifty thousand dollars.”¹⁶⁵

2. *Private Cause of Action*

Although all states provide administrative remedies, only two states allow a private right of action for a violation of their anti-insurance discrimination statutes.¹⁶⁶ In New Hampshire, if an insurer refuses to insure or refuses to continue to insure an applicant solely because the applicant “has been or may become the victim of domestic abuse or violence,”¹⁶⁷ and the insurance commissioner has found that the insurer violated the prohibition, “any consumer claiming to be adversely affected by the act or practice . . . may bring suit” against the insurer.¹⁶⁸ Similarly, in Texas, a person who has actual damages has a private cause of action.¹⁶⁹ The ability to bring a private cause of action empowers individuals who have damages resulting from an unfair insurance trade practice (such as refusing to insure an applicant solely because of abuse status) to seek judicial redress.¹⁷⁰ As well as obtaining damages, the right to a private cause of action for a violation of the prohibited behavior authorizes courts, in appropriate circumstances, to award injunctive relief, attorneys’ fees and court costs, consequential damages, and punitive damages.¹⁷¹ Advocates for allowing a private right of action emphasize that by allowing a private cause of action, insurance companies are further discouraged from engaging in unfair discriminatory practices because they would be vulnerable to suit by the insurance commissioner and the aggrieved party.¹⁷²

163. *Id.*

164. TEX. INS. CODE ANN. § 541.110 (West 2009); Brannan, *supra* note 110, at 230.

165. W. VA. CODE ANN. § 33-11-6(c) (LexisNexis 2011).

166. NCDSV Chart, *supra* note 142 (listing these two states as New Hampshire and Texas).

167. N.H. REV. STAT. ANN. § 417:4(VIII)(f) (LexisNexis 2009).

168. *Id.* § 417:19.

169. TEX. INS. CODE ANN. § 541.151 (West Supp. 2011).

170. *See* Morrison, *supra* note 10, at 279.

171. *See* § 541.152 (West Supp. 2011).

172. *See* Morrison, *supra* note 10, at 279.

3. *Proposed Enforcement Mechanism*

Not only does H.R. 3344 propose an administrative fine of up to \$200,000, it also proposes to amend section 38-57-10 by explicitly adding the legislative intent to create a private cause of action for the violation of the Act.¹⁷³

a. *Administrative Penalties*

According to South Carolina Code § 38-2-10, if the director finds a single occurrence of a violation of the proposed Act, the director is required to fine the violator “in an amount not to exceed fifteen thousand dollars,” but if the director determines the violation was willful, he is required to “fine the violator in an amount not to exceed thirty thousand dollars.”¹⁷⁴ Additionally, proposed section 38-57-115(I) authorizes the director to impose a fine of up to \$200,000 for a pattern of unfair discrimination.¹⁷⁵ Unlike the administrative fines in South Carolina, the administrative fines authorized in New Hampshire and Texas are nominal. In addition to authorizing a private cause of action, in Texas, a violator may be fined up to \$1,000 for each violation of the Act or \$5,000 for a repeated violation.¹⁷⁶ Likewise, in New Hampshire, a violator may be fined up to \$2,500 for each violation, or, where a pattern of conduct has been established, the violator may be ordered to pay actual economic damages to the individual consumer harmed.¹⁷⁷ These figures are drastically different from the \$200,000 administrative fine proposed in South Carolina coupled with the private right of action. In New Hampshire and Texas, the imposition of the nominal administrative fine is balanced with the right of a private cause of action.¹⁷⁸

Notwithstanding the private cause of action and an administrative fine of \$200,000, a violator of the proposed Act may also be ordered to cease and desist the unfair discriminatory practice and may have its license suspended or revoked.¹⁷⁹

b. *Private Cause of Action*

By expressing a legislative intent to include a private cause of action, South Carolina would join the minority of states that have adopted such a provision¹⁸⁰ and would drastically change precedent. Historically, the Insurance Trade

173. H.R. 3344, 119th Gen. Assemb., Reg. Sess. §§ 2(I), 4 (S.C. 2011–12).

174. S.C. CODE ANN. § 38-2-10 (2002).

175. H.R. 3344, § 2(I).

176. TEX. INS. CODE ANN. § 541.110 (West 2009).

177. N.H. REV. STAT. ANN. § 417:10 (LexisNexis 2009).

178. *See id.*; TEX. INS. CODE ANN. § 541.152 (West Supp. 2011).

179. S.C. CODE ANN. § 38-57-200, -320 (2002).

180. *See* NCDSV Chart, *supra* note 142; *see also* Morrison, *supra* note 10, at 281 (stating that state legislation rarely provides a private right of action).

Practices Act did not create a private cause of action.¹⁸¹ Instead, the current Act recognizes an administrative remedy for a violation.¹⁸² Admittedly, a private cause of action, without the limitation of requiring a finding of a violation by the director, would empower victims to sue the insurance company directly.¹⁸³ As a result, without requiring an administrative ruling, individuals who believe they have been unfairly discriminated against will use the judicial system, not the administrative system, to determine if a violation has even occurred. Therefore, if the Act passes, insurance companies will become vulnerable to lawsuits that, prior to the Act, they were not.¹⁸⁴ The purpose of this Act is to protect victims of IPV from unfair discriminatory practices,¹⁸⁵ not to provide a judicial forum for them to question and criticize the decision-making process of insurance underwriting.

V. RECOMMENDATION FOR ELIMINATING DISCRIMINATORY PRACTICES IN SOUTH CAROLINA

The South Carolina General Assembly should adopt legislation prohibiting insurance discrimination. First, the legislation should be broad enough to include not only household members who are victims of abuse, but also victims from dating and same-sex relationships. Second, the legislation should apply to all types of insurance. Third, the legislation should prohibit insurers from engaging in the following activities: denying coverage, refusing to issue or renew coverage, canceling, restricting, or excluding coverage, denying a claim or limiting payment, adding a premium differential to a policy, imposing preexisting condition exclusions, and determining premium rates on the basis of the applicant's or the insured's abuse status.

Lastly, the legislation should enforce the prohibition via administrative penalties, which would include a fine, cease and desist order, potential license suspension, and include a venue for harmed consumers to be compensated for economic damages resulting from the violation. To effectively prohibit unfair insurance discrimination against victims of IPV while also protecting insurance companies from becoming vulnerable to suit whenever they deny an applicant coverage or cancel an insurance policy, the proposed Act should remove the authorization of a private cause of action and should incorporate a provision for damages.

181. *Masterclean, Inc. v. Star Ins. Co.*, 347 S.C. 405, 415, 556 S.E.2d 371, 377 (2001) (holding that the Insurance Trade Practices Act does not create a private cause of action (citing *Gaskins v. S. Farm Bureau Cas. Ins. Co.*, 343 S.C. 666, 673, 541 S.E.2d 269, 272 (Ct. App. 2000))).

182. *Id.*

183. *See Morrison*, *supra* note 10, at 279.

184. *See* H.R. 3344, 119th Gen. Assemb., Reg. Sess. § 4 (S.C. 2011–12).

185. *Id.* § 2(B).

South Carolina should adopt a model similar to New Hampshire's insurance code, which incorporates an administrative fine for single violations.¹⁸⁶ However, where the commissioner has established a pattern of violations, in lieu of the administrative fine, he "may order relief for actual economic losses to restore, in whole or in part, any individual consumer . . . in interest to the position that the consumer formerly occupied either by the return of that which the consumer formerly had or by receipt of its equivalent in money."¹⁸⁷ Consequently, the harmed consumer would receive restitution for economic damages resulting from the unfair discriminatory practice. Additionally, the \$200,000 administrative fine and the potential of having to pay damages to each individual consumer harmed by the discriminatory practice would deter insurance companies from engaging in such discriminatory practices.

VI. CONCLUSION

Insurance companies do not underwrite women's health insurance fairly or uniformly.¹⁸⁸ Instead, insurance companies single out women and essentially treat them as preexisting conditions.¹⁸⁹ One form of gender insurance discrimination is the practice of denying individual health insurance to women who are, may have been, or were victims of IPV.¹⁹⁰ Protecting victims of IPV extends beyond criminalizing domestic violence.¹⁹¹ Protecting victims of IPV includes prohibiting unfair discriminatory practices by insurance companies that, otherwise, re-victimize battered women.¹⁹²

Forty-two states have already passed legislation prohibiting insurance companies from using IPV as an underwriting criterion.¹⁹³ South Carolina is only one of eight states that still allow the discriminatory practice.¹⁹⁴ By not passing legislation prohibiting insurance companies from underwriting victims of IPV, the state legislature is encouraging the unfair discriminatory practice and undermining public and private initiatives aimed at eliminating IPV.¹⁹⁵ Although the South Carolina legislature has considered a bill prohibiting the discriminatory practice in the last two sessions, the legislature has yet to enact a law protecting victims of IPV.¹⁹⁶ In the meantime, IPV continues to be a

186. N.H. REV. STAT. ANN. § 417:10 (LexisNexis 2009).

187. *Id.*

188. See FROMSON & DURBOROW, *supra* note 12, at 11.

189. CODISPOTI ET AL., *supra* note 14, at 5.

190. Morrison, *supra* note 10, at 275.

191. See S.C. CODE ANN. § 16-25-20 (2003).

192. See Morrison, *supra* note 10, at 285.

193. See INSURANCE DISCRIMINATION SUPPLEMENT, *supra* note 14.

194. CODISPOTI ET AL., *supra* note 14, at 8.

195. See Morrison, *supra* note 10, at 285.

196. See H.R. 3344, 119th Gen. Assemb., Reg. Sess. (S.C. 2011–12); H.R. 4198, 118th Gen. Assemb., Reg. Sess. (S.C. 2009–10).

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significant public concern and abused women continue to be vulnerable to insurance discrimination.

Elizabeth A. Hoskins

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