Legislative Developments in the Regulation of Insurance Coverage: Will These New Regulations Benefit Women with Breast Cancer?

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LEGISLATIVE DEVELOPMENTS IN THE REGULATION OF INSURANCE COVERAGE: WILL THESE NEW REGULATIONS BENEFIT WOMEN WITH BREAST CANCER?

JULIA ANASTASIO∗

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I. INTRODUCTION

Over her lifetime, a woman has a one in nine chance of being diagnosed with breast cancer. 1 Breast cancer is one of the most prevalent forms of cancer and is a leading cause of cancer-related death among American women. 2 As Congress begins a new legislative session, it has the opportunity to pass legislation that would enable women who need experimental treatment programs to combat breast cancer to challenge their insurance company’s denial of coverage. 3 Breast cancer testimonials in magazines, newspapers, and on television talk shows demonstrate that these reforms are both welcome and necessary. 4

Recently, women have successfully lobbied Congress to pass several key pieces of legislation specifically designed to benefit women with

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4. See, e.g., Tamera Eberlein, The Scariest Health Care News for Women This Year: Cost Cutting by Insurance Companies May Have an Enormous Impact on Health and Well-Being, REDBOOK, June 1, 1997, at 112 (noting that on average, women’s health care costs more than men’s, creating a problem for managed health care); Diane Lange, Treating Breast Cancer: More Information, More Options, SAN DIEGO UNION & TRIB., July 4, 1997, at E16 (discussing options for women diagnosed with breast cancer); CNN & Company: Should Americans Stay Young at All Costs? (CNN television broadcast, Jan. 14, 1998) (discussing a woman’s need for support while dealing with breast cancer).
breast cancer. Legislation proposed in the House of Representatives, if drafted properly, would compliment this series of legislation designed to benefit breast cancer victims. This Comment demonstrates how these two proposals, the Responsibility in Managed Care Act\(^6\) ("RMCA") and the Patient Access to Responsible Care Act\(^7\) ("PARCA"), will restore the right of consumers in self-insured plans to sue their health insurance providers under state law when the plan’s medical decisions result in injury or death. This Comment also highlights the inadequacies of the two proposed pieces of legislation. Ultimately, this author recommends that these bills be moved to the floor of Congress, debated and enacted in a form similar to the original drafts.\(^8\)

Part II discusses the incidence of breast cancer among women\(^9\) and describes the current treatment options for women.\(^10\) Part II explains a controversial new treatment regime, high-dose chemotherapy – autologous bone marrow transplant ("HDC-ABMT").\(^11\) Part II focuses on the insurance industry's response to this new form of treatment\(^12\) and discusses the criteria that insurance providers use in making cov-


8. See infra Part VI.
9. See infra Part II.
10. See infra Part II.
11. See infra Part II.
12. See infra Part III.
average determinations.\textsuperscript{13} Part III discusses the role the judiciary typically plays in reviewing coverage determination cases between an insurer and an insured.\textsuperscript{14} Part IV addresses the role played by the Employee Retirement Income and Security Act of 1974\textsuperscript{15} ("ERISA") in affecting a woman's ability to compel her insurance provider to provide coverage for HDC-ABMT.\textsuperscript{16} Part IV further includes a detailed discussion of the ERISA's operative provisions and the judicial responses it has engendered.\textsuperscript{17} Part V analyzes the two proposed pieces of legislation that appear to eliminate ERISA's preemption problems,\textsuperscript{18} and suggests that ERISA's preemption provisions need more than just procedural changes to afford women a greater ability to challenge an insurer's coverage decision.\textsuperscript{19} Part VI concludes that substantive changes are needed to provide women with greater access to the courts so they may be more successful in challenging insurance companies' decisions.\textsuperscript{20}

II. A DISCUSSION OF BREAST CANCER FROM DIAGNOSIS TO TREATMENT

A. Diagnosis

Breast cancer is the second-most common cancer, and causes the majority of cancer deaths among American women.\textsuperscript{21} Breast cancer progresses through four distinct stages:

- The disease of breast cancer is classified into four stages according to the extent of the disease. In Stage I, the solid tumor is typically less than one inch thick and is considered small. By Stage II, the tumor is larger, approximately one to two inches, and the cancer has spread to the auxiliary lymph nodes. In Stage III, the tumor is greater than two inches and adheres to the chest wall. Finally, by Stage IV, the cancer has metastasized, or spread to other organs or parts of the body.\textsuperscript{22}

From 1973 to 1991, the incidence of invasive breast cancer in the

\textsuperscript{13} See infra Part III.
\textsuperscript{14} See infra Part III.
\textsuperscript{16} See infra Part IV.
\textsuperscript{17} See infra Part IV.
\textsuperscript{18} See infra Part V.
\textsuperscript{19} See infra Part V.
\textsuperscript{20} See infra Part VI.
\textsuperscript{21} See Byrne, supra note 2, at 1 (noting that, after skin cancer, breast cancer is the most common form of cancer).