

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

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## I. INTRODUCTION

Over her lifetime, a woman has a one in nine chance of being diagnosed with breast cancer.<sup>1</sup> Breast cancer is one of the most prevalent forms of cancer and is a leading cause of cancer-related death among American women.<sup>2</sup> 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.<sup>3</sup> Breast cancer testimonials in magazines, newspapers, and on television talk shows demonstrate that these reforms are both welcome and necessary.<sup>4</sup>

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

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1. See Denise S. Wolf, Comment, *Who Should Pay for "Experimental" Treatments? Breast Cancer Patients v. Their Insurers*, 44 AM. U. L. REV. 2029, 2031 (1995) (noting the prevalence of breast cancer among American women).

2. See *Cancer Incidence in the United States*, SAPIENT HEALTH NETWORK BREAST CANCER SERVICE 1 (visited Jan. 12, 1998) <<http://www.shn.webmd.com/index.html>>. Breast cancer rates in the United States are among the highest in the world. See Celia Byrne, *Risk Factors*, SAPIENT HEALTH NETWORK BREAST CANCER SERVICE 1 (visited Jan. 14, 1998) <<http://www.SapientHealthNetwork.net>>. Sapient Health Network provides a website on women's health issues. A large portion of the site includes comprehensive information on breast cancer and many other health issues affecting women. The site includes everything from diagnosis to treatment and provides a support system for women dealing with a breast cancer diagnosis. The site enables women to connect with other women who are facing the same fears and problems. *Id.*

3. See generally Patient Access to Responsible Care Act of 1997, H.R. 1415, 105<sup>th</sup> Cong. (1997) ("PARCA") (amending Public Health Service Act ("PHSA") and the Employee Retirement Income and Security Act of 1974 ("ERISA")); Responsibility in Managed Care Act of 1997, H.R. 2960, 105<sup>th</sup> Cong. (1997) ("RMCA") (amending the ERISA). At the time this paper was being written, PARCA and RMCA were referred to Committee for consideration. As of the time of publication, the 105<sup>th</sup> Congress failed to consider either of these bills. Rep. Charles Norwood (R-Ga.), who introduced and chaperoned the Bills, plans to renew his push for patient protection in the 106<sup>th</sup> Congress. See *Patient's Bill of Rights All But Dead As 105<sup>th</sup> Congress Heads into Final Days*, BNA Health Care Daily 191 (Oct. 2, 1998).

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.<sup>5</sup> 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<sup>6</sup> (“RMCA”) and the Patient Access to Responsible Care Act<sup>7</sup> (“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.<sup>8</sup>

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

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5. See, e.g., Stamp Out Breast Cancer Act, H.R. 1585, 105th Cong. (1997) (proposing “to allow postal patrons to contribute to funding for breast cancer research through the voluntary purchase of certain specialty issued United States postage stamps”); Breast Cancer Screening Act of 1997, S. 90, 105th Cong. (1997) (requiring studies and guidelines for breast cancer screening for women ages 40-49); Breast Cancer Patient Protection Act of 1997, S. 143, 105th Cong. (1997) (requiring minimal hospital stay following mastectomy or lymph node dissection and prohibiting providers from denying women eligibility, or continued eligibility, to enroll or to renew coverage under the terms of their insurance plans); Breast Cancer Early Detection Act of 1997, H.R. 418, 105th Cong. (1997) (amending Title XVIII of Social Security Act to provide for coverage of annual screening mammography under Part B of Medicare program for women age 65 or older); Women’s Health and Cancer Rights Act of 1997, H.R. 616, 105th Cong. (1997) (requiring coverage for minimal hospital stays for mastectomies and lymph node dissections, reconstructive surgery following mastectomies, and secondary consultations); Expression of Support for the Goals of National Mammography Day, H.R. Res. 235, 105th Cong. (1997) (expressing support for goals of National Mammography Day); Resolution Expressing the Sense of the Senate that Individuals Affected by Breast Cancer Should Not Be Alone in Their Fight Against the Disease, S. Res. 85, 105th Cong. (1997) (expressing sense of the Senate that women suffering from breast cancer need support); Women’s Health Equity Act of 1991, H.R. 1161, 102d Cong. (1991) (promoting greater equity in delivery of health care services to America’s women through expanded research on women’s health issues, improved access to health care services, and disease prevention). See generally Keelyn Friesen, Comment, *Non-Passage of the Women’s Health Equity Act: Inaction May Lead to Cancerous Results*, 14 HAMLINE J. PUB. L. & POL’Y 243, 251-55 (1993) (explaining Women’s Health Equity Act and potential public policy ramifications of Congress’ failure to pass the proposed Act).

6. H.R. 2960, 105th Cong. (1997).

7. H.R. 1415, 105th Cong. (1997).

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.

erage determinations.<sup>13</sup> Part III discusses the role the judiciary typically plays in reviewing coverage determination cases between an insurer and an insured.<sup>14</sup> Part IV addresses the role played by the Employee Retirement Income and Security Act of 1974<sup>15</sup> ("ERISA") in affecting a woman's ability to compel her insurance provider to provide coverage for HDC-ABMT.<sup>16</sup> Part IV further includes a detailed discussion of the ERISA's operative provisions and the judicial responses it has engendered.<sup>17</sup> Part V analyzes the two proposed pieces of legislation that appear to eliminate ERISA's preemption problems,<sup>18</sup> 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.<sup>19</sup> 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.<sup>20</sup>

## 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.<sup>21</sup> 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.<sup>22</sup>

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

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13. *See infra* Part III.

14. *See infra* Part III.

15. 29 U.S.C. §§ 1001-1461 (1994).

16. *See infra* Part IV.

17. *See infra* Part IV.

18. *See infra* Part V.

19. *See infra* Part V.

20. *See infra* Part VI.

21. *See* Byrne, *supra* note 2, at 1 (noting that, after skin cancer, breast cancer is the most common form of cancer).

22. Jessica L. Basso, Note, "Experimental" Chemotherapy Treatment for Advanced Stage Breast Cancer: Judicial Interpretation of Insurance Policy Coverage, 1 DEPAUL J. HEALTH CARE L. 105, 106 (1996) (internal citations omitted).