

**01-103**

INSURANCE: ACCIDENT AND SICKNESS INSURANCE – MANDATED BENEFITS.

**Federal Women’s Health and Cancer Rights Act and state law require coverage for reconstructive breast surgery in course of treatment of cancer where all or part of breast is surgically removed and coverage for surgery to reestablish symmetry between breasts. Any benefit covered under Act that is not mandated by state law is required by Act. Issue of preemption does not arise where state law requires at least same coverage for reconstructive breast surgery as Act requires.**

The Honorable William C. Mims  
Member, Senate of Virginia

The Honorable Joe T. May  
Member, House of Delegates

December 7, 2001

You inquire regarding § 38.2-3418.4 of the *Code of Virginia*, which requires health insurance coverage for reconstructive breast surgery.<sup>1</sup>

You relate that on October 21, 1998, Congress enacted the Federal Women’s Health and Cancer Rights Act of 1998 ("Cancer Rights Act").<sup>2</sup> The Cancer Rights Act provides that "medical and surgical benefits with respect to a mastectomy shall [be] provide[d], in a case of a participant or beneficiary who is receiving benefits in connection with a mastectomy and who elects breast reconstruction in connection with such mastectomy."<sup>3</sup> You state that you do not believe that the Cancer Rights Act preempts state law that provided at least the same coverage for reconstructive breast surgery on the effective date of the Act. Finally, you relate that the Cancer Rights Act applies to most, if not all, health insurance, including managed care programs, self-insured programs, and programs subject to state-mandated benefits.

You first ask whether § 38.2-3418.4 provides "at least the coverage of reconstructive breast surgery otherwise required under [the Cancer Rights Act],"<sup>4</sup> and if not, you inquire regarding amendments to § 38.2-3418.4 that may be necessary to conform state law with the coverage required under the Act.

The Supremacy Clause of the Constitution of the United States provides that federal laws and treaties "shall be the supreme law of the land."<sup>5</sup> As you note in your request, by virtue of this clause, federal law supersedes any conflicting state law.<sup>6</sup> The preemption of state law by federal law may occur by express statutory language or other clear indication that Congress intended to legislate exclusively in the area.<sup>7</sup> Even if Congress does not intend the enactment of a federal statutory scheme completely to preempt state law in the area, congressional enactments in the same field override state laws with which they conflict.<sup>8</sup>

The Cancer Rights Act requires that "medical and surgical benefits with respect to a mastectomy shall provide, in a case of a participant or beneficiary who is receiving benefits in connection with a mastectomy ..., coverage for ...

reconstruction of the breast."<sup>9</sup> Section 38.2-3418.4(A) provides that "accident and sickness insurance policies ... shall provide coverage for reconstructive breast surgery under such policy." The use of the word "shall" in a statute generally implies that its terms are intended to be mandatory, rather than permissive or directive.<sup>10</sup> Both laws consistently require coverage for reconstructive breast surgery in the course of treatment of cancer where all or part of a breast is surgically removed. Both expressly require coverage for surgery to reestablish symmetry between the two breasts.<sup>11</sup>

The Cancer Rights Act specifically requires coverage for "protheses and physical complications of mastectomy, including lymphedemas."<sup>12</sup> Section 38.2-3418.4 does not contain such explicit references to either protheses or physical complications.

The Cancer Rights Act clearly requires coverage for such procedures unless the same coverage is required by state law.<sup>13</sup> Therefore, any benefit covered under the Cancer Rights Act that is not mandated by state law is required by the Act. Thus, amending § 38.2-3418.4 so as to have it mirror the Cancer Rights Act would not actually change the amount of coverage insurance providers must now provide in Virginia.

Accordingly, it is my opinion that § 38.2-3418.4 requires "at least the coverage of reconstructive breast surgery otherwise required under [the Cancer Rights Act],"<sup>14</sup> and thus, the issue of preemption does not arise.

<sup>1</sup>A. Notwithstanding the provisions of § 38.2-3419, each insurer proposing to issue individual or group accident and sickness insurance policies providing hospital, medical and surgical, or major medical coverage on an expense-incurred basis; each corporation providing individual or group accident and sickness subscription contracts; and each health maintenance organization providing a health care plan for health care services shall provide coverage for reconstructive breast surgery under such policy, contract or plan delivered, issued for delivery or renewed in this Commonwealth on or after July 1, 1998.

"B. The reimbursement for reconstructive breast surgery shall be determined according to the same formula by which charges are developed for other medical and surgical procedures. Such coverage shall have durational limits, dollar limits, deductibles and coinsurance factors that are no less favorable than for physical illness generally.

"C. For purposes of this section, '*mastectomy*' means the surgical removal of all or part of the breast as a result of breast cancer and '*reconstructive breast surgery*' means surgery performed on or after July 1, 1998, (i) coincident with a mastectomy performed for breast cancer or (ii) following a mastectomy performed on or after July 1, 1998, for breast cancer to reestablish symmetry between the two breasts.

"D. The provisions of this section shall not apply to short-term travel, accident only, limited or specified disease policies (except policies issued for cancer), policies or contracts designed for issuance to persons eligible for coverage under Title XVIII of the Social Security Act, known as Medicare, or any other similar coverage under state or federal governmental plans or to short-term nonrenewable policies of not more than six months' duration."

<sup>1</sup>Va. Code Ann. § 38.2-3418.4 (Michie Repl. Vol. 1999).

<sup>2</sup>Pub. L. No. 105-277, 1998 U.S.C.C.A.N. (112 Stat.) 2681-436 (codified at 29 U.S.C. § 1185b (Supp. V 2001)).

<sup>3</sup>29 U.S.C. § 1185b(a).

<sup>4</sup>*Id.* § 1185(e)(1) (quoting preemption provision in Cancer Rights Act relating to state laws).

<sup>5</sup>U.S. Const. art. VI, cl. 2.

<sup>6</sup>*See* *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 210-11 (1824); *see also* *Savage v. Jones*, 225 U.S. 501, 533 (1912).

<sup>7</sup>*See* *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977); Op. Va. Att’y Gen.: 1984-1985 at 280, 282; 1973-1974 at 284, 285.

<sup>8</sup>*See Jones*, 430 U.S. at 525-26 (citing U.S. Const. art. VI).

<sup>9</sup>29 U.S.C. § 1185b(a), (a)(1).

<sup>10</sup>*See* *Andrews v. Shepherd*, 201 Va. 412, 414-15, 111 S.E.2d 279, 281-82 (1959); *see also* *Schmidt v. City of Richmond*, 206 Va. 211, 218, 142 S.E.2d 573, 578 (1965); Op. Va. Att’y Gen.: 1998 at 56, 58; 1996 at 178, 178; 1991 at 238, 240; 1989 at 250, 251-52; 1985-1986 at 133, 134.

<sup>11</sup>*See* 29 U.S.C. § 1185b(a)(2); § 38.2-3418.4(C).

<sup>12</sup>*Id.* § 1185b(a)(3). "Prosthesis" (singular of "prostheses") is an artificial substitute, organ or part that replaces a missing part of the body, and "lymphedema" (which derives part of its meaning from the definition of "edema") is an excessive amount of fluid in body tissues resulting from obstruction of lymph nodes and vessels. *See* Am Jur. 3d *Proof of Facts* 560, 1060, 1498 (1989).

<sup>13</sup>*See id.* § 1185b(e)(1).

<sup>14</sup>*Id.*

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