



BUREAU OF INSURANCE

November 4, 1999

Administrative Letter 1999 - 13

**TO: All insurers licensed to write Accident and Sickness Insurance in Virginia, all Health Services Plans, and all Health Maintenance Organizations Authorized to do Business in Virginia.**

**RE: Sections 38.2-3412.1:01 F (iii) and 38.2-3432.2 A 2 of the Code of Virginia**

The 1999 Virginia General Assembly adopted Senate Bill 430, which provided for "parity" in mental health coverage with respect to coverage for biologically based mental illness. The provisions of Senate Bill 430, which created a new § 38.2-3412.1:01 and amended §§ 38.2-3412.1 and 38.2-4319, have an effective date of January 1, 2000.

The Bureau of Insurance has been approached by several health insurance carriers who have asked us to advise them if a conflict exists between new § 38.2-3412.1:01 F (iii) and existing § 38.2-3432.2 A 2. Section 38.2-3432.2 A 2 provides:

*All products that are approved for sale in the small group market that the health insurance issuer is actively marketing must be offered to all small employers, and the health insurance issuer must accept any employer that applies for any of those products.*

The above provision is commonly referred to as the "all products guarantee." The term "Small employer" is defined in the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and the Code of Virginia as one with two to 50 employees.

New § 38.2-3412.1:01 F (iii) states, in part:

*The provisions of this section shall not apply to . . . (iii) policies, contracts, or plans issued in the individual market or small group markets to employers with 25 or fewer employees, . . . .*

The issue, then, is whether the new requirement that exempts groups with 25 or fewer employees from the new mental health mandate conflicts with the "all products guarantee" for groups of two or more found in § 38.2-3432.2 A 2.

As § 38.2-3432.2 A 2 was taken directly from HIPAA, the Bureau of Insurance sought an opinion from the Health Care Financing Administration (HCFA) as to whether or not they believe that a conflict exists, whether Virginia's new law would be pre-empted by HIPAA, and what the consequences of such a conflict or pre-emption might be.

HCFA has recently responded to the Bureau's inquiry, and has indicated that § 38.2-3412.1:01 F (iii) does conflict with federal law. The language contained in § 38.2-3412.1:01 F (iii) cannot supersede the "all products guarantee" created by federal law and enacted into Virginia law through § 38.2-3432.2 A 2. Once products covering biologically based illnesses exist in the small group market in Virginia, federal law requires that these products be offered to all "small employers" in that market as defined in § 2791(e)(4) of the PHS Act (42 USC § 300gg 91(e)(4)).

It was also noted by HCFA, however, that § 38.2-3412.1:01 F (iii) is not pre-empted by federal law because while the Code of Virginia does not require that the policies covering biologically based mental illness be made available to employers with 25 or fewer employees, neither does it prohibit selling such policies to those employers. Federal law provides that requirements such as the "all products guarantee" found in HIPAA "...shall not be construed to supersede any provision of State law which establishes, implements or continues in effect any standard or requirement solely relating to health insurance issuers in connection with group health insurance coverage except to the extent that such standard or requirement prevents the application of..." the requirement (§ 2723(a)(1) of the PHS Act). A state law is only pre-empted if it mandates an act that violates a requirement established by Title XXVII of the PHS Act. A state law provision that neither requires nor prohibits such an act is not preempted. With respect to §§ 38.2-3412.1:01 F (iii) and 38.2-3432 A 2, an issuer can comply with both state and federal law if it offers the coverage for biologically based mental illness to all small employers, including those with 25 or fewer employees.

The same logic would appear to apply to the conflict between § 38.2-3432 A 2 and § 38.2-3412.1:01 F (iii). While the new law would permit an issuer to provide the coverage only to groups larger than 25, doing so would violate the "all products guarantee" in § 38.2-3432 A 2.

Therefore, unless and until clarifying legislation is adopted by the Virginia General Assembly, the Bureau of Insurance recommends that issuers provide the coverage for biologically based mental illness to **ALL small employers** as that term is defined in federal law and in Virginia law, **i.e. employers of two to 50 employees**, in order to avoid being found in violation of § 38.2-3432 A 2 at the state level or the corresponding requirement under HIPAA at the federal level.

Questions relating to this matter should be referred to:

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Sincerely,

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Commissioner of Insurance