

The American Dream – 2.5 Kids and a White Picket Fence: The Need For Federal Legislation to Protect the Insurance Rights of Infertile Couples

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“[O]f all the rights women possess, the greatest is to have a child”¹

I. INTRODUCTION

The most exciting part of Jennifer’s life quickly became a living nightmare. At age twenty-seven, she was living her dream. She had a good job, she was married, and she was pregnant with her first child. Unfortunately, smiles quickly turned to tears when complications arose several weeks into her pregnancy that caused her to miscarry. It was neither her faith nor her family that enabled her to get up and go on with life; it was her desire to become pregnant again.

Unbeknownst to her, both her body and her insurance company refused cooperate.² After surgery to correct endometriosis, Jennifer tried unsuccessfully to become pregnant for another year. Nearly hopeless, she sought the assistance of a fertility doctor. She was told not to give up because a viable pregnancy could result through artificial reproduction. However, as most infertile people discover, her insurance plan did not cover such procedures. Despite the cost, Jennifer underwent the procedure. It was unsuccessful, and, as Jennifer approached her thirtieth birthday, she was close to \$15,000 in debt and still without what she desired most: a child.

Unfortunately, infertile couples are caught between insurance companies that look to maximize profits and employers that seek to minimize costs. Consequently, the rights of average working Americans to equal employment benefits are often ignored. Politicians are influenced by heavy lobbying from the insurance industry. Accordingly, it is easy to see why the medical needs of infertile Americans are minimized by decision makers.

“For years millions of Americans have faced a serious medical insurance coverage gap: Very few health insurance plans cover infer-

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1. Press Release, Dona Bertarelli-Spaeth, The Bertarelli Foundation: The Public Attitude to Infertility (May 7, 2001) (on file with PR Newswire Assoc. Inc.) (quoting Lin Yutang).

2. After months of unsuccessful attempts at pregnancy she sought medical attention. After consultation with two doctors, she was diagnosed with endometriosis and underwent treatment.

tility treatment or adoption-related medical expenses.”³ In light of this problem, this Note addresses the need for federal legislation that would eliminate the inequalities among states regarding insurance coverage for the treatment of infertility.⁴

II. UNDERSTANDING INFERTILITY

“There is nothing more basic to human beings than the desire to have a family.”⁵

Approximately ten percent of Americans of reproductive age suffer from infertility.⁶ This disease can destroy the mind, body and soul. Infertility is equally opportunistic; it affects men and women of all races and backgrounds. Although medication or surgery can, in most cases, treat infertility, insurance companies continue to deny coverage.⁷

Infertility is recognized as a medical condition by both the American Society for Reproductive Medicine and the American College of Obstetricians and Gynecologists.⁸ It is defined as the “inability to conceive within one year or the inability to carry a pregnancy.”⁹

Most married couples that do not have children have not made the decision to be childless.¹⁰ It has been made for them by the betrayal of their reproductive systems.¹¹ This has led many infertile couples to postpone life and to “go to great lengths to conceive - often enduring extreme physical discomfort and incurring [great] expenses.”¹² As a result, infertility affects couples not only physically, but also mentally and financially.

3. 137 CONG. REC. 3452 (1991) (statement of Hon. Patricia Schroeder).

4. See Jack B. Helitzer, *High-Tech Assisted Reproductive Treatment of Infertility, Part 2: Current Proposed State and Federal Mandates*, 13 BENEFITS L.J. 103, 104 (2000). By the end of the summer of 2000, only thirteen states had enacted laws dealing with the coverage of infertility: Arkansas, California, Connecticut, Hawaii, Illinois, Maryland, Massachusetts, Montana, New York, Ohio, Rhode Island, Texas, and West Virginia. See *id.* at 104-05. On August 31, 2001 New Jersey enacted a law to provide infertility coverage. N.J. REV. STAT. § 17:48-6x (2001).

5. 145 CONG. REC. E1749 (daily ed. Aug. 4, 1999) (statement of Hon. Anthony D. Weiner).

6. See Kimberly Horvath, *Does Bragdon v. Abbott Provide the Missing Link for Infertile Couples Seeking Protection Under the ADA?*, 2 DEPAUL J. HEALTH CARE L. 819, 820 (1999).

7. Insurance companies cite high costs in denying coverage for infertility treatments. However, two studies in medical journals show that coverage for infertility would increase insurance premiums by only \$2.50 to \$3.00 per year per insured. Andrea Gerlin, *Aetna Agrees to Cover Some Advanced Fertility Procedures*, PHILADELPHIA INQUIRER, Jan. 15, 1998, at 1E.

8. Helen Lippman, *Pay or Pass on Elective Surgery? Surgery Defined for Insurance Coverage*, 19 BUS. & HEALTH 43, 44 (2001).

9. I. Ray King, *Treating Infertility Not That Expensive*, KNOXVILLE NEWS-SENTINEL (Knoxville, Tenn.), Oct. 17, 2000, at A9.

10. See Lisa M. Kerr, Note, *Can Money Buy Happiness? An Examination of the Coverage of Infertility Services Under HMO Contracts*, 49 CASE W. RES. L. REV. 599, 601 (1999). In fact, “[o]nly two percent of married women are voluntarily childless.” *Id.*

11. See *id.*

12. *Saks v. Franklin Covey Co.*, 117 F. Supp. 2d 318, 320 (S.D.N.Y. 2000).

A. Common Causes of Infertility

Both men and women can suffer from infertility.¹³ Abnormal male factors account for nearly forty percent of all reported infertility problems.¹⁴ In particular, sperm defects account for approximately twenty-five percent of all infertility.¹⁵

Approximately twenty percent of all infertility cannot be explained.¹⁶ “Unexplained infertility (also called idiopathic infertility) cases are those in which standard infertility testing has not found a cause for the failure to conceive.”¹⁷ Because the pregnancy process is complex it involves many steps that can go wrong.¹⁸ A problem with any of the steps in fertilization can cause a failure in conception that may be classified as unexplained infertility.¹⁹

The remaining forty percent can be attributed to problems within the female reproductive system. The most common are ovulation disorders, endometriosis,²⁰ exposure in utero to diethylstilbestrol (DES),²¹ and blockage or removal of the fallopian tubes.²²

Fortunately for the infertile, most of the aforementioned problems can be solved through modern artificial reproductive technologies. Thus, by proper diagnosis a doctor can prescribe and implement a protocol that can lead these couples to have children.

13. See Horvath, *supra* note 6, at 820.

14. *Id.*

15. ADVANCED FERTILITY CENTER OF CHICAGO, MALE FACTOR INFERTILITY TESTS, at <http://www.advancedfertility.com/sperm.htm> (last visited Aug. 11, 2001). Abnormal sperm can contribute to infertility both by not getting to the egg and, if the sperm reaches the egg, not penetrating the egg. Berger, Goldstein & Fuerst, *The Couple's Guide to Fertility, excerpted with approval by, THE INTERNATIONAL COUNCIL ON INFERTILITY INFORMATION DISSEMINATION, IVF-IN VITRO FERTILIZATION*, at <http://www.inciid.org/ivf.html> (last visited June 17, 2001).

16. See ADVANCED FERTILITY CENTER OF CHICAGO, UNEXPLAINED INFERTILITY, at <http://www.advancedfertility.com/unexplai.htm> (last visited Aug. 11, 2001).

17. *Id.*

18. *See id.*

19. *See id.* “The standard tests for infertility barely scratch the surface and are really only looking for very obvious factors, such as blocked tubes, abnormal sperm counts, ovulation regularity, etc.” *Id.*

20. Approximately five million women in the United States are affected with endometriosis, and nearly thirty to forty percent are infertile. See Mark Perloe, M.D. & Linda Gail Christie, *Endometriosis: Conquering the Silent Invader*, at <http://www.ivf.com/ch17mb.html> (last visited June 10, 2001). Women with endometriosis are two to three times more likely to be infertile. *Id.*

21. Daughters of women who took DES during their pregnancies have an increased risk of a rare cancer, infertility, pregnancy problems, and structural changes in their reproductive organs. See DES ACTION, HEALTH RISKS AND CARE FOR DES DAUGHTERS, at <http://www.desaction.org/daughter.html> (last visited Aug. 11, 2001). In particular, DES daughters are more likely to suffer infertility and “have a higher risk for ectopic pregnancy, miscarriage, and preterm labor and delivery.” *Id.*

22. According to experts, the most common cause of infertility in women “is a blockage of the fallopian tubes” that connect the ovaries to the uterus. Kris Eisenhauer, R.N., *4/1 - Infertility*, at <http://www.koin.com/health/health-980401-224716.html> (last visited Aug. 11, 2001). Once the problem was uncorrectable, but today’s medical technology allows women who suffer from tubal factor infertility to conceive children by opening the blocked tube or completely bypassing the tube altogether. ADVANCED FERTILITY CTR. OF CHICAGO, TUBAL FACTOR INFERTILITY, at <http://www.advancedfertility.com/tubal.htm> (last visited Aug. 11, 2001). “The treatment for tubal factor infertility is usually either tubal surgery to repair some of the damage or in vitro fertilization (IVF).” *Id.*

B. *Procedures Available for Correcting Infertility: Assisted Reproductive Technologies (ART)*

Infertility treatments can produce successful pregnancies in eighty-eight percent of infertility cases.²³ However, more than half of the insurance companies in the United States deny coverage for those procedures.²⁴ They cite high costs, but “[h]ow do you put a price on a child?”²⁵

The most common assisted reproductive technologies include the following: artificial insemination, drug therapy, in vitro fertilization (IVF), gamete intrafallopian transfer (GIFT), and zygote intrafallopian transfer (ZIFT).²⁶ IVF, GIFT, and ZIFT are very similar processes that involve stimulation of the ovaries, surgical egg retrieval, combining the eggs and sperm in the laboratory, and development of the embryo in the uterus.²⁷

Artificial insemination is the non-surgical “placement of sperm via a syringe into a female’s uterus or cervix for the purpose of producing pregnancy.”²⁸ For an uninsured individual, the cost per cycle for artificial insemination is approximately \$400.²⁹

Often, infertility in women is caused by ovulation disorders.³⁰ Fertility drugs can be used to regulate or induce ovulation.³¹ Drug therapy treatment is less expensive than some other treatments; however, it costs approximately \$3,000 per month.³²

23. H.J. Cummins, *Easing Infertility*, STAR TRIBUNE (Minneapolis, Minn.), May 14, 2001, at 1E.

24. *Id.*

25. *Id.*

26. See AETNA, AETNA U.S. HEALTHCARE CLARIFIES POSITION ON ADVANCED REPRODUCTIVE TECHNOLOGY, at http://aetna.com/news/1998/pr_19980114.htm (last visited Oct. 15, 2001).

27. See ASSISTED REPRODUCTIVE TECHNOLOGY AT REPRODUCTIVE MEDICINE & INFERTILITY, SHAWNEE MISSION MED. CTR., PATIENT GUIDE 1, 6 (1999).

28. AM. SOC’Y FOR REPROD. MED., HUSBAND INSEMINATION, A GUIDE FOR PATIENTS 1, 9 (1995) [hereinafter ASSISTED REPRODUCTIVE TECHNOLOGY]. The purpose of insemination is to inject the sperm closer to the egg and bypass the cervix. See *id.*

29. See Kerr, *supra* note 10, at 605.

30. See Erin Lynn Connolly, Note, *Constitutional Issues Raised by States’ Exclusion of Fertility Drugs from Medicaid Coverage in Light of Mandated Coverage of Viagra*, 54 VAND. L. REV. 451, 462 (2001). “[T]he process of ovulation and fertilization must occur” for a woman to become pregnant. *Id.*

31. See *id.*

32. Kerr, *supra* note 10, at 605.

The more high-tech artificial reproductive technologies, IVF,³³ GIFT,³⁴ and ZIFT,³⁵ are expensive. They cost approximately \$10,000 per attempt.³⁶ Thus, from 1997 to 2000, the percent of employers that provided insurance coverage for these procedures dropped.³⁷ However, less than one percent of infertile couples actually attempt IVF, GIFT, or ZIFT because those procedures are rarely medically necessary.³⁸

The costs of providing coverage for infertility treatments are not as great as employers and insurance companies want people to believe. Estimates conclude that providing infertility coverage would increase insurance premiums by a maximum of only \$3.00 per year, per insured.³⁹ Moreover, because the more expensive reproductive technologies are rarely necessary, the “actual average cost of infertility treatment is estimated to be only \$200 per couple.”⁴⁰

III. GROUP HEALTH INSURANCE COVERAGE

The goal of a group health insurance plan is to provide plan participants with affordable high-quality healthcare.⁴¹ Insurance plans are either public or private.⁴² Furthermore, private plans can be categorized as commercial plans, non-profit plans, managed care plans, and employers that self-insure.⁴³ The distinction is important because

33. In vitro fertilization (IVF), which means “fertilization in a glass,” is the process of retrieving a woman’s eggs, fertilizing them in a culture dish, and then transferring the fertilized eggs, called zygotes, into the woman’s uterus. *Id.* at 603. Hopefully, “if the zygotes implant successfully and become embryos, the pregnancy progresses as it would naturally.” *Id.*

34. GIFT is similar to IVF in that both procedures involve the stimulation of the ovaries, surgical egg retrieval, combining the egg and sperm in the laboratory, and development of the embryo in the uterus. *See* ASSISTED REPRODUCTIVE TECHNOLOGY, *supra* note 27, at 1, 6.

35. ZIFT combines IVF and GIFT, and is most useful to couples that have a male factor problem. *See id.*

36. *See* Kerr, *supra* note 10, at 605.

37. *See* Cummins, *supra* note 23. For example, from 1997 to 2000, the percent of employers that provided insurance coverage for IVF has dropped from twenty-one percent to seventeen percent. *Id.*

38. Kerr, *supra* note 10, at 603. The success of IVF leaves little room for debate, and since 1978 over “one million children have been born” from the procedure, yet employers and insurers that look to save continue to abandon the infertile. Bertarelli, *supra* note 1. The first child to be born through IVF was Louise Brown in 1978. *Id.*

39. Gerlin, *supra* note 7.

40. Kerr, *supra* note 10, at 605.

41. *See* Tom Buckham, *Local HMO to Phase Out Infertility Coverage*, BUFFALO NEWS, June 23, 2001, at C1. “The whole concept of [group health insurance] is to provide the greatest possible number of people access to necessary health services and good preventative care . . .” Phil Galewitz, *Av-Med, Citing Costs, to Stop Covering Fertility Treatments*, PALM BEACH POST, Apr. 14, 2001, at 6B. “Health insurance guarantees that you will not have to bear the entire burden of your health care expenses.” RESOLVE: THE NAT’L INFERTILITY SERV., HEALTH INSURANCE COVERAGE OF INFERTILITY TREATMENT, at <http://www.resolve.org/advstlaws.htm> (last visited July 15, 2001) [hereinafter RESOLVE].

42. *See* RESOLVE, *supra* note 41. “Public insurance includes: Medicare for elderly and disabled people, Medicaid for the needy, Veterans Administration for those who have served in the armed forces and CHAMPUS for military families.” *Id.*

43. *See id.*

private self-insured plans do not have to follow state mandates, but potentially would have to follow a federal mandate.⁴⁴

Generally, the cost of a group health insurance plan is less than that of an individual plan because the risks and expenses associated with the policy are spread across all participants.⁴⁵ To determine the cost of a group plan the insurance industry calculates the “average age of the group [and the] ratio of males to females” within the group.⁴⁶ High-priced procedures that are deemed elective or not medically necessary are typically not covered. It is believed that over the next year most insurance companies will discontinue infertility coverage completely because they have a misconception that infertility benefits are cost prohibitive.⁴⁷ However, one study found that providing infertility benefits would raise premiums only by 0.78 percent.⁴⁸ Consequently, by minimally increasing insurance premiums by less than one percent, the more than 6.1 million Americans afflicted with infertility could have access to treatment.

Public opinion suggests that people believe insurance coverage should be provided for infertility treatments.⁴⁹ “Because both infertility and pregnancy loss tend to be relatively invisible events in our culture, it is easy to minimize their emotional impact”⁵⁰ Therefore, the Bertarelli Foundation⁵¹ conducted a survey to determine the “public perceptions of infertility and the different methods of treating it.”⁵² The study showed that most people believe that infertility is a serious medical problem that must be addressed.⁵³

Of those interviewed, approximately sixty percent believed that insurance coverage should be provided for drug therapy and IVF.⁵⁴ Eighty-six percent believed that infertility was a medical condition, as

44. *See id.* Under the Employee Retirement Income Security Act (“ERISA”), private self-insured plans that do not use an insurance carrier and elect to pay benefits directly do not have to follow state mandates. *Id.*

45. *Id.*

46. A.D. BANKER & CO., A.D. BANKER & COMPANY LIFE / HEALTH STUDY GUIDE 80 (2d ed. 1991).

47. *See King, supra* note 9; *see also* Buckham, *supra* note 41, at C1.

48. *See King, supra* note 9. The three-year study done by the University of Iowa found that “the total cost per member per month for all health care was \$86.15, and the portion of this total cost for infertility services was 67 cents or 0.78 percent.” *Id.*

49. “While Mother’s Day brings many families together, we mustn’t forget that for millions of women it is a day of solitude, even of grief, and that infertility can lead to relationship problems for a couple.” Bertarelli, *supra* note 1.

50. A Resolution to Designate October, 2001 as “Pregnancy and Infant Loss Awareness Month,” S.J. Res. 25, 102d Leg., Reg. Sess. (Tenn. 2001) available at <http://www.legislature.state.tn.us/>.

51. *See* Bertarelli, *supra* note 1. The Bertarelli Foundation is a private not-for-profit organization whose goal is “to improve knowledge and understanding of infertility.” *Id.*

52. *Id.*

53. *See id.*

54. *See id.* The survey was given to more than eight thousand adults in the United States, Europe, and Australia. *Id.*

opposed to an illness.⁵⁵ Additionally, fifty percent of the respondents felt that infertility was widespread.⁵⁶ Most importantly, to illustrate the pervasiveness of infertility, thirty-nine percent of those interviewed “[knew] a family member or close friend who [had] suffered from infertility.”⁵⁷ Federal legislation would address the public’s desire for infertility benefits.

IV. COVERAGE COMPARISON

Although Medicaid expressly excludes coverage for female fertility drugs,⁵⁸ on July 2, 1998, the Health Care Financing Administration (“HCFA”) mandated that state Medicaid programs provide coverage for the impotency drug Viagra.⁵⁹ However, Viagra is also used to treat male infertility, which is in conflict with the exclusion for fertility drugs.⁶⁰ Accordingly, Medicaid’s exclusion of coverage for female infertility drugs is questionable and possibly discriminatory.

To justify Medicaid coverage for Viagra, HCFA reasoned that “[b]ecause only about ten percent of Medicaid beneficiaries are adult males, the number of Medicaid beneficiaries that could be diagnosed with erectile dysfunction is very small.”⁶¹ In reality, nationwide coverage for impotence has an estimated cost of approximately two hundred million dollars.⁶² Furthermore, in the United States alone, Viagra has been prescribed more than twenty-two million times to over seven million men to enhance their sex lives.⁶³ “Many view the added expense as diverting funds ‘from other important health programs such as maternal and child welfare, H.I.V., and programs for

55. *Id.*

56. *Id.*

57. *Id.*

58. 42 U.S.C. § 1396r-8 (2001). “The following classes of drugs or classes of drugs, or their medical uses, may be excluded from coverage or otherwise restricted . . . (B) Agents used to promote fertility.” *Id.* § 1396r-8(d)(2)(B).

59. Viagra improves erections in men with erectile dysfunction or impotence. PFIZER, PATIENT SUMMARY OF INFORMATION ABOUT VIAGRA, at http://www.viagra.com/consumers/prod_info_cons.asp?n=0 (last visited July 14, 2001) [hereinafter PFIZER, PATIENT SUMMARY]. As Viagra’s website advertises, “with Viagra, a touch or a glance from your partner can again lead to something more.” PFIZER, VIAGRA - THE PROVEN STEP TO START SOMETHING ALL OVER AGAIN, at <http://www.viagra.com/consumers/about/index.asp?in=0> (last visited Oct. 15, 2001) [hereinafter PFIZER, VIAGRA - THE PROVEN STEP]. Specifically, Viagra improves “a man’s response to sexual stimulation” and allows him to maintain an erection for up to four hours. *Id.* However, Viagra is only a treatment for erectile dysfunction and does not cure impotence. PFIZER, PATIENT SUMMARY, at http://www.viagra.com/consumers/prod_info_cons.asp?n=0 (last visited July 14, 2001).

60. Connolly, *supra* note 30, at 452-53; *see also* HEALTH CARE FINANCING ADMINISTRATION, DRUG POLICY: MEDICAID COVERAGE OF VIAGRA, at <http://www.hcfa.gov/medicaid/drugs/drpolicy.htm> (last visited July 14, 2001) [hereinafter FINANCING ADMINISTRATION].

61. FINANCING ADMINISTRATION, *supra* note 60.

62. *See* Connolly, *supra* note 30, at 465.

63. PFIZER, VIAGRA - THE PROVEN STEP, *supra* note 59 at <http://www.viagra.com/consumers/about/index.asp?n=0> (last visited July 14, 2001). These numbers include all prescriptions written for Viagra. *See id.*

the disabled so that roughly 10% of Medicaid recipients can have adequate sex lives.’”⁶⁴

Medicaid coverage for certain medical treatments is based not on medical necessity, but on who is to be covered.⁶⁵ Nonsensically, coverage is provided to men for a drug that is marketed to enhance their sexual performance, yet infertility coverage is denied to women who cannot naturally bear children. Therefore, most states are currently in the “untenable position of covering Viagra for men while virtually none of them cover birth control or infertility treatments for women.”⁶⁶

Another example of the inequities in health benefits is insurance coverage for sex-change operations. Currently, San Francisco provides city employees with sex-change benefits.⁶⁷ In July 2001, “San Francisco police men [became] free to become police women, and vice versa, after a city decision . . . [that made] sex changes a paid medical benefit for municipal workers.”⁶⁸ Additionally, some private employers are beginning to offer such benefits.⁶⁹

Sex-change operations are expensive and benefit few people. Specifically, a male-to-female transformation costs approximately \$37,000, and a female-to-male procedure costs about \$77,000.⁷⁰ Infertility treatments offer more to society, at a lesser price, than sex-change operations. Any justification for the failure to include infertility treatments does not seem reasonable.

64. Connolly, *supra* note 30, at 465.

65. See Lisa Girion, *Complaint Calls Airline Health Plans Unfair to Women*, L.A. TIMES, Apr. 24, 2001, at C1. American Airlines’ insurance plan provides coverage for Viagra claiming that it is medically necessary, yet it excludes coverage for birth control, pap tests, and infertility treatments for women. *Id.* “The suggestion that Viagra is ‘medically necessary to sustain life’ is absurd. Many women . . . have died because of cervical cancer, which might have been detected by a Pap smear.” *Id.*

66. Amy Goldstein, *U.S. Tells States to Cover Viagra Prescriptions Under Medicaid*, WASH. POST, July 3, 1998, at A21.

67. San Francisco is the only municipality in the United States that provides city employees sex changes. Jennifer Harper, *Boy Meets Girl*, WASH. TIMES, May 15, 2001, at A8. Until 1998, Minnesota state employees were offered sex-change benefits. *Id.* Additionally, Oregon considered, but decided against, offering sex-change benefits to state employees. *Id.* The benefits that are included in the San Francisco plan include “the costs of surgery, hormone treatments, follow-up office visits and medical care, and psychological counseling.” INSTITUTE OF MANAGEMENT & ADMINISTRATION, COMPENSATION & BENEFITS NEWS, ARE YOU READY TO OFFER SEX-CHANGE BENEFITS?, at <http://www.ioma.com/nls/hr.shtml> (last visited Sept. 21 2001) [hereinafter IOMA].

68. Press Release, Agence France Presse, San Francisco Council Approves Sex Change Funding (May 1, 2001) (on file with author). The United States Supreme Court defined a transsexual as “one who has [a] rare psychiatric disorder in which a person feels persistently uncomfortable about his or her anatomical sex,” and who typically seeks medical treatment, including hormonal therapy and surgery, to bring about a permanent sex change.” *Farmer v. Brennan*, 511 U.S. 825, 828 (1994) (quoting AMERICAN MEDICAL ASSOCIATION, ENCYCLOPEDIA OF MEDICINE 1006 (1989)).

69. IOMA, *supra* note 67, at <http://www.ioma.com/nls/hr.shtml>. Avaya offers coverage for sex-changes under a policy that “expressly prohibits discrimination based on ‘sexual orientation and gender expression.’” *Id.* (quoting Suellen Roth, Avaya Vice President).

70. See *Forcing Taxpayers to Fund Sex Changes*, INDIANAPOLIS STAR, May 14, 2001, at A12.

V. REASONS WHY INSURANCE COMPANIES DENY COVERAGE FOR INFERTILITY

Even though both the American Society for Reproductive Medicine and the American College of Obstetricians and Gynecologists recognize infertility as a medical condition, insurance companies continue to deny infertility benefits.⁷¹ Eighty-eight percent of infertile couples can achieve successful pregnancies through assisted reproductive technologies.⁷² However, when it comes to medical care, “[t]he insurance industry argues that leaving the question of care to doctors increases the costs because physicians order unnecessary tests to defend their opinions.”⁷³ Thus, society must rhetorically ask – who is more qualified to determine medical necessity?

Medical care and treatment decisions should be left to the experts. Physicians have completed undergraduate programs that emphasize physiology and biology,⁷⁴ graduated from an accredited four-year medical school,⁷⁵ completed a residency program, and passed several written exams.⁷⁶ Therefore, patient decisions should be left to physicians who have been educated in medicine, and not to insurance accountants and bureaucrats who base medical decisions on economics.

Unfortunately, the reality is that insurance coverage is often determined by fiscal policy as opposed to medical necessity. To illustrate, in *Witcraft v. Sundstrand Health and Disability Group Benefit Plan*,⁷⁷ the Iowa Supreme Court held that infertility was an illness.⁷⁸ Commentators have taken this further by stating that “the malfunction of the reproductive organs should not be treated any differently than the malfunction of any other organ.”⁷⁹ In *Witcraft*, the insurance company argued that the inability to naturally conceive was not an illness, but merely “the condition of not being pregnant”⁸⁰ The court rejected this argument, however, and found that the “natural function of the reproductive organs was to procreate.”⁸¹ Thus, any

71. Lippman, *supra* note 8.

72. Cummins, *supra* note 23, at 1E.

73. CNN, WHO DECIDES WHAT IS MEDICALLY NECESSARY?, at <http://www.cnn.com/HEALTH/9907/14/medical.necessity/> (last visited Aug. 25, 2001).

74. See Michael J. Frank, *Safeguarding the Consciences of Hospitals and Health Care Personnel: How the Graduate Medical Education Guidelines Demonstrate a Continued Need for Protective Jurisprudence and Legislation*, 41 ST. LOUIS U. L.J. 311, 314 (1996).

75. See *id.* at 315.

76. See Annette E. Clark, *On Comparing Apples and Oranges: The Judicial Clerk Selection Process and the Medical Matching Model*, 83 GEO. L.J. 1749, 1791 (1995).

77. 420 N.W.2d 785 (Iowa 1988).

78. *Witcraft v. Sundstrand Health & Disability Group Benefit Plan*, 420 N.W.2d 785, 788 (Iowa 1988).

79. D’Andra Millsap, *Sex, Lies, and Health Insurance: Employer-Provided Health Insurance Coverage of Abortion and Infertility Services and the ADA*, 22 AM. J.L. & MED., 51, 57 (1996).

80. *Witcraft*, 420 N.W.2d at 788.

81. *Id.* at 789.

improper functioning in these organs should be considered an illness.⁸² Because infertility has been defined as an illness, the insurance companies should consider infertility treatable and insurable.

In an attempt to justify their refusal to provide benefits, insurance companies have argued that infertility treatments are experimental.⁸³ They claim that because the success rates for infertility treatments are less than fifty percent, the treatments are experimental and are not medically accepted procedures.⁸⁴ However, the medical community does not share this view. In fact, as early as 1982, “the Board of Directors and members of the American Fertility Society unanimously concluded that IVF must be recognized as an acceptable treatment for achieving pregnancy.”⁸⁵

Insurance companies have labeled expensive medically necessary procedures as experimental in an attempt to avoid coverage. In *Reilly v. Blue Cross and Blue Shield United of Wisconsin*,⁸⁶ the insurance company refused to cover IVF because its own advisory committee had concluded that the procedure was experimental due to a success rate of less than fifty percent.⁸⁷ The United States Court of Appeals for the Seventh Circuit disagreed with the insurance company.⁸⁸ The court was concerned with the inherent conflict of interest present in allowing an insurance company to determine what procedures are experimental.⁸⁹ Moreover, the court added, “[n]ot only may the decision to grant or deny coverage based solely on a success ratio per se be arbitrary and capricious, but the particular ratio selected, in this case, for IVF, may well be arbitrary and capricious.”⁹⁰

VI. THE AMERICANS WITH DISABILITIES ACT

The Americans with Disabilities Act (“ADA”) was designed to protect disabled individuals from discrimination, and further, to promote the integration of these individuals into society.⁹¹ Pursuant to the ADA, individuals may not be discriminated against because of a physical or mental impairment.⁹² The ADA has defined a “disability”

82. *See id.*

83. *See* Millsap, *supra* note 79, at 58.

84. *See id.*

85. *Reilly v. Blue Cross & Blue Shield United of Wis.*, 846 F.2d 416, 420 (7th Cir. 1988).

86. 846 F.2d 416 (7th Cir. 1988).

87. *See id.* at 423. “Blue Cross allegedly relied on the advice of its own advisory groups who presumably assisted Blue Cross in the administration of its health plans nationwide, those for which it is also an insurer, creates an inherent risk of abuse.” *Id.*

88. *See id.*

89. *See id.* at 423-24. Allowing insurance companies to arbitrarily determine what procedures are medically accepted is asking the fox to guard the hen house.

90. *Id.*

91. *See* 42 U.S.C.S. § 12101 (Law. Co-op 2001) (statute was held to be unconstitutional by *Doe v. Div. of Youth & Family Servs.*, 148 F. Supp. 2d 462 (D.C. N.J. 2001)).

92. *See* 42 U.S.C.S. § 12102.

as “a physical or mental impairment that substantially limits one or more of the major life activities of such individual”⁹³ The United States Supreme Court has determined that infertility falls within the definition of a physical impairment.⁹⁴ In addition, medical professionals have classified infertility as a mental impairment in that the inability to conceive places an emotional and psychological burden upon an individual.⁹⁵ It can create “one of the most distressing life crises that a couple [may experience]”.⁹⁶

In *Bragdon v. Abbott*,⁹⁷ the United States Supreme Court applied a three-step approach to determine whether the inability to reproduce is covered by the ADA.⁹⁸ First, the individual must have a physical or mental impairment.⁹⁹ Second, the impairment must affect a major life activity.¹⁰⁰ Finally, the “physical impairment [must substantially] limit . . . the major life activity . . . assert[ed].”¹⁰¹

For the ADA to apply, the individual must have a physical or mental impairment, and the physical or mental impairment must affect a major life activity.¹⁰² For example, courts have observed that “functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working” are major life activities.¹⁰³ Undeniably, the ability to reproduce should be defined as a major life activity.

In *Bragdon* the Court announced that “[r]eproduction and the sexual dynamics surrounding it are central to the life process itself.”¹⁰⁴ The Court held that HIV was a substantial limit on the ability to reproduce.¹⁰⁵ As a result of this decision, the inability to naturally conceive due to a disease, such as infertility, cannot be given any less protection. A major life activity does not have to involve a “public, economic, or daily dimension.”¹⁰⁶ *Bragdon* should be interpreted as

93. *Id.* *Bragdon* involved the interpretation of the 1990 ADA, which has not been materially modified. *See id.* The relevant provision defined a “physical or mental impairment” as “(A) any physiological disorder or condition . . . affecting one or more of the following systems . . . reproductive . . . or . . . (B) any mental or psychological disorder, such as . . . emotional.” *Bragdon v. Abbott*, 524 U.S. 624, 632 (1998).

94. *See Bragdon*, 524 U.S. at 627.

95. *See* AMERICAN SOC’Y FOR REPRODUCTIVE MED., FREQUENTLY ASKED QUESTIONS: THE PSYCHOLOGICAL COMPONENT OF INFERTILITY, at http://www.asrm.org/Professionals/PG-SIG-Affiliated_Soc/MHPG/mhpgfaqs.html (last visited Aug. 9, 2001); *see also Bragdon*, 524 U.S. at 632; Horvath, *supra* note 6, at 819.

96. AMERICAN SOC’Y FOR REPRODUCTIVE MED., at http://www.asrm.org/Professionals/PG-SIG-Affiliated_Soc/MHPG/mhpgfaqs.html (last visited Aug. 9, 2001).

97. 524 U.S. 624 (1998).

98. *See id.* at 631.

99. *See id.* at 632.

100. *See id.* at 637.

101. *Id.* at 639.

102. *See id.* at 637.

103. 42 U.S.C.S. § 12101 (defining major life activity).

104. *Bragdon*, 524 U.S. at 638.

105. *Id.*

106. *Id.*

an attempt by the Supreme Court, which concluded that reproduction is a major life activity, to further restrict the ability of insurance companies to disclaim coverage for infertility.¹⁰⁷

The *Bragdon* decision gives infertile couples a basis on which to demand equal coverage from insurance companies in regards to infertility treatments. First, an infertile couple who satisfies the ADA three-pronged approach should be a protected class.¹⁰⁸ Second, the classification of infertility as a disability should require employers who offer health care plans to provide insurance coverage for infertility treatments.¹⁰⁹ Finally, “[u]nder the ADA, employers are also prohibited from engaging in a contractual relationship with a health plan that would discriminate against a disabled employee.”¹¹⁰ Consequently, the recognition of infertility as a disability will cause courts, legislators, employers, and insurance companies to reconsider their views on infertility coverage.

Courts have not been consistent in their interpretation of whether infertility is a major life activity. Prior to *Bragdon*, the United States Court of Appeals for the Eighth Circuit heard *Krauel v. Iowa Methodist Medical Center*.¹¹¹ In *Krauel*, the court held that a female employee’s infertility was not an impairment that substantially affected a major life activity.¹¹²

Krauel, the plaintiff, could not naturally conceive, but, with the assistance of artificial reproductive technologies, she was able to have a child.¹¹³ Unfortunately, her insurance provider denied coverage of her infertility treatments.¹¹⁴ Krauel claimed that her inability to naturally conceive was a disability that substantially limited two major life activities, her ability to reproduce and her ability to care for others.¹¹⁵ The court turned to the definition of major life activity in the Rehabilitation Act of 1973 in finding against the plaintiff.¹¹⁶ While the court conceded that the list was not complete, it concluded that the ability to reproduce or care for others was not included in the examples of major life activities.¹¹⁷ Therefore, the court refused to find that Krauel suffered from a disability under the ADA. However, under the approach adopted by the Supreme Court in *Bragdon*, this case would be resolved differently.

107. *See id.* For a further discussion of infertility see, Horvath, *supra* note 6.

108. *See* Horvath, *supra* note 6, at 839.

109. *See id.* at 840 (“Any disability-based distinction is a violation of the ADA.”).

110. *Id.*

111. 95 F.3d 674 (8th Cir. 1996).

112. *See* *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 677 (8th Cir. 1996).

113. *See id.* at 675.

114. *See id.*

115. *See id.* at 677.

116. *See* Rehabilitation Act, 45 C.F.R. § 84.3(j)(2)(ii) (1973).

117. *See* *Krauel*, 95 F.3d at 676.

This area of law remains unclear. Subsequent to *Bragdon*, the United States District Court for the Southern District of New York heard *Saks v. Franklin Covey Co.*¹¹⁸ The plaintiffs claimed that the failure to cover infertility treatments violated the ADA.¹¹⁹ The court dismissed the suit and held that the insurance plan did not violate the ADA because the plan provided the same coverage to all employees.¹²⁰ Furthermore, the court stated that the plan did “not offer infertile people less pregnancy and fertility-related coverage than it offer[ed] to fertile people.”¹²¹ This case points out that the Supreme Court has recognized that the inability to reproduce is a disability under the ADA. Therefore, federal legislation is needed to protect the insurance rights of infertile couples.

To those who oppose a federal mandate on insurance companies, “it is . . . vital not to underestimate the toll infertility . . . [takes] on couples.”¹²² Couples who are unable to have children suffer emotional and psychological stress, such as strain on their marriage and possible discrimination at work.¹²³ Moreover, the stress may become too great upon the couple and result in the dissolution of the marriage.¹²⁴

It may be difficult to predict how the *Bragdon* decision will affect infertility coverage in the future, but it must be considered a step in the right direction. Although it does not mandate infertility coverage, it is a tool that can be added to state legislation and proposed federal legislation to prove that people deserve infertility coverage. Several states and the federal government have begun to push for infertility benefits.¹²⁵ Infertile couples should not be deterred in their efforts to lobby legislators and insurers for infertility benefits.

VII. STATE LEGISLATION MANDATING INFERTILITY COVERAGE

By August 2001, fourteen states had passed legislation that required insurers to cover infertility treatments.¹²⁶ Because each of the state laws regarding insurance coverage for infertility treatments is different, it is imperative that the plan participants understand their

118. 117 F. Supp. 2d 318 (S.D.N.Y. 2000).

119. *Saks v. Franklin Covey Co.*, 117 F. Supp. 2d 318, 326 (S.D.N.Y. 2000).

120. *Id.*

121. *Id.*

122. A Resolution to Designate October, 2001 as “Pregnancy and Infant Loss Awareness Month”, S.J. Res. 25, 102d Leg., Reg. Sess. (Tenn. 2001) available at <http://www.legislature.state.tn.us/>.

123. See Horvath, *supra* note 6, at 819.

124. See *id.*

125. See Helitzer, *supra* note 4, at 103-04.

126. See *id.* at 104. For example, California legislators, who intended to protect residents, noted that infertility was a serious medical dysfunction that “affects millions of Californians” and “if properly treated, successful pregnancies [could] result in 70 percent of the cases.” CAL. INS. CODE § 10119.6 (2000).

plan in relation to the law of the state in which they reside.¹²⁷ Although each state law may be different, the laws can be divided into two groups: those that mandate to cover and those that mandate to offer.¹²⁸

Mandate to cover laws require health insurance companies to provide infertility treatments as part of every policy.¹²⁹ Currently, only eleven states have laws that require infertility coverage to be provided as part of every policy within the state. These states are Arkansas,¹³⁰ Hawaii,¹³¹ Illinois,¹³² Maryland,¹³³ Massachusetts,¹³⁴ Montana,¹³⁵ New Jersey,¹³⁶ New York,¹³⁷ Ohio,¹³⁸ Rhode Island,¹³⁹ and West Virginia.¹⁴⁰ Each state law is different in the procedures covered and the qualifications that must be met in order to receive infertility benefits.¹⁴¹

Mandate to offer laws require health insurance companies to offer policies that include infertility benefits.¹⁴² However, in states that mandate to offer, the employer is not required to pay for the coverage, but merely must offer participants the coverage for an additional cost.¹⁴³ At this time, only three states mandate to offer: California,¹⁴⁴ Connecticut,¹⁴⁵ and Texas.¹⁴⁶

As a result of the increased recognition of infertility as a serious disease, many other states and the federal government are joining in the campaign to mandate insurance coverage. By July 2001, an additional fifteen states had attempted to legislatively address infertility.

127. See RESOLVE *supra* note 41, at <http://www.resolve.org/advstlaws.htm>. The scope of employer provided coverage can be divided into five categories: "any service, professional services, Rx therapy, artificial insemination and in vitro fertilization" Lippman, *supra* note 8, at 44.

128. See RESOLVE *supra* note 41, at <http://www.resolve.org/advstlaws.htm>.

129. See *id.*

130. See ARK. CODE ANN. §§ 23-85-137, 23-86-118 (Michie 2001).

131. See HAW. REV. STAT. ANN. §§ 431:10A-116.5, 432:1-64 (Michie 2000).

132. See 215 ILL. COMP. STAT. ANN. 5/356m (West 2000).

133. See MD. CODE ANN. art. 8, § 15-810 (2000).

134. See MASS. GEN. LAWS ANN. ch. 175, § 47H (West 2000).

135. See MONT. CODE ANN. § 33-31-102 (2000).

136. The New Jersey Family Building Act, section 1076, was originally introduced February 28, 2000, passed the Senate on March 26, 2001, passed the New Jersey House of Representatives on June 28, 2001, and was signed by the Governor on August 31, 2001. See Family Building Act, Bill Tracking, S.B. 1076, 209th Leg. (N.J. 2001). This was the second time that the New Jersey legislature attempted to require health insurers to cover infertility treatments. See Herb Jackson, *Bunch of Bills Await DiFrancesco's Signature Coverage for Infertility Advances*, THE RECORD (Bergen County, N.J.), June 29, 2001, at A4. In 2000, former Governor Christie Whitman vetoed a similar bill. See *id.*

137. See N.Y. INS. LAW §§ 3216(i)(13), 3221(k)(6), 4303(s) (2001).

138. See OHIO REV. CODE ANN. § 1751.01 (Anderson 2001).

139. See R.I. GEN. LAWS § 27-18-30 (2000).

140. See W. VA. CODE § 33-25A-2 (2001).

141. See RESOLVE, *supra* note 41, at <http://www.resolve.org/advstlaws.htm>.

142. See *id.*

143. See *id.*

144. See CAL. INS. CODE § 1374.55 (West 2000).

145. See CONN. GEN. STAT. ANN. § 38a-536 (West 2000).

146. See TEX. INS. CODE ANN. § 3.70-3, 3A (Vernon 2000).

These states include Florida,¹⁴⁷ Indiana,¹⁴⁸ Maine,¹⁴⁹ Michigan,¹⁵⁰ Nebraska,¹⁵¹ Nevada,¹⁵² New Hampshire,¹⁵³ New York,¹⁵⁴ Oklahoma,¹⁵⁵ Pennsylvania,¹⁵⁶ Tennessee,¹⁵⁷ Texas,¹⁵⁸ Virginia,¹⁵⁹ Washington,¹⁶⁰ and Wisconsin.¹⁶¹ In sum, while these states have not yet been successful in mandating insurance coverage for infertility treatments, the proposals are another indication that Americans want infertility coverage.

VIII. FEDERAL LEGISLATION PROPOSED IN 2001

“For many American families, the blessing of raising a family is one of the most basic human desires.”¹⁶²

Unfortunately, the laws regarding infertility coverage differ from state to state. Some states require that health insurance plans cover infertility treatments, some require that the coverage be offered, and still others do not require that infertility treatments be covered or offered. Hence, two employees that work for the same company in different states could both undergo infertility treatments; yet the treatment could be covered for one employee, but not for the other. This result is “not fair for young couples, who may have to move to another town or state to obtain infertility coverage.”¹⁶³

State legislation is a positive start; however, it is not enough, for two reasons. First, not all states have passed mandates that require infertility benefits. Second, state laws do not apply to private self-funded insurance plans that are governed by the Employee Retirement

147. See H.B. 677, 103rd Leg., Reg. Sess. (Fla. 2001); Coverage of Diagnosis and Treatment of Infertility, S.B. 142, 103rd Leg., Reg. Sess. (Fla. 2001).

148. See Group Policy Coverage for Infertility Treatment, H.B. 1182, 112th Leg., Reg. Sess. (Ind. 2001).

149. See H.R. 1013, 119th Leg., Reg. Sess. (Me. 1999).

150. See S.B. 520, 90th Leg., Reg. Sess. (Mich. 1999); see also S.B. 521, 90th Leg., Reg. Sess. (Mich. 1999); S.B. 522, 90th Leg., Reg. Sess. (Mich. 1999).

151. See Equity in Prescription Insurance and Contraceptive and Infertility Coverage Act, L.B. 319, 97th Leg., Reg. Sess. (Neb. 2001).

152. See S.B. 295, 79th Leg., Reg. Sess. (Nev. 1999).

153. See L.S.R. 3025, 157th Leg., Reg. Sess. (N.H. 2001).

154. See S.B. 936, 224th Leg., Reg. Sess. (N.Y. 2001); see also A.B. 2954, 224th Leg., Reg. Sess. (N.Y. 2001); S.B. 739, 224th Leg., Reg. Sess. (N.Y. 2001); A.B. 2003, 224th Leg., Reg. Sess. (N.Y. 2001); S.B. 1265, 224th Leg., Reg. Sess. (N.Y. 2001); S.B. 1411, 224th Leg., Reg. Sess. (N.Y. 2001); S.B. 5627, 224th Leg., Reg. Sess. (N.Y. 2001).

155. See H.R. 1338, 47th Leg., 1st Sess. (Okl. 1999).

156. See H.R. 1261, 185th Leg., Reg. Sess. (Pa. 2001); see also S.B. 417, 185th Leg., Reg. Sess. (Pa. 2001); S.B. 432, 185th Leg., Reg. Sess. (Pa. 2001).

157. See A Resolution to Designate October, 2001 as “Pregnancy and Infant Loss Awareness Month”, S.J. Res. 25, 102nd Leg., Reg. Sess. (Tenn. 2001), available at <http://www.legislature.state.tn.us/>.

158. See S.B. 572, 76th Leg., Reg. Sess. (Tex. 1999).

159. See Va. H.R. 1151, Reg. Sess. (Va. 2000).

160. See H.R. 2597, 56th Leg., Reg. Sess. (Wash. 1999); see also S.B. 6735, 56th Leg., Reg. Sess. (Wash. 1999).

161. See H.R. 565, 1999 Leg., Reg. Sess. (Wis. 1999).

162. 147 CONG. REC. S4892 (daily ed. May 14, 2001) (statement of Robert G. Torricelli).

163. Buckham, *supra* note 41, at C1.

ment and Income Security Act (“ERISA”).¹⁶⁴ Therefore, in order to equalize infertility coverage throughout the United States, two federal bills have been proposed: the Fair Access to Infertility Treatment and Hope Act of 2001 (“FAITH”)¹⁶⁵ and the Family Building Act of 2001.¹⁶⁶

Federal legislation pending in the United States House of Representatives describes assisted reproductive technologies as follows:

Such treatment shall include ovulation induction, artificial insemination, in vitro fertilization (IVF), gamete intrafallopian transfer (GIFT), zygote intrafallopian transfer (ZIFT), intracytoplasmic sperm injection (ICSI), and any other treatment provided it has been deemed as ‘non-experimental’ by the Secretary of Health and Human Services after consultation with appropriate professional and patient organizations such as the American Society for Reproductive Medicine, RESOLVE, and the American College of Obstetricians and Gynecologists.¹⁶⁷

On January 31, 2001, Representative Anthony Weiner introduced the Family Building Act of 2001. He said, “A fundamental part of the human experience is fulfilling the desire to reproduce.”¹⁶⁸ Subsequently, on May 14, 2001, Senator Robert G. Torricelli introduced FAITH.¹⁶⁹ He poignantly summarized the problem, stating that “[r]eproduction is one of the most important values for both men and women, and those individuals who desire the gift of the family should have access to the necessary treatments that make life possible.”¹⁷⁰ Currently, less than twenty-five percent of all health plans provide infertility benefits.¹⁷¹ The purpose of FAITH is to provide infertility benefits and “hope to those families who have struggled silently for years with the knowledge that they cannot have children.”¹⁷² In sum, the proposed legislation would help millions of American men and women gain access to the medically necessary procedures they so desperately desire.¹⁷³

Insurance coverage for infertility treatments would result in safer, more effective, and more economical procedures. In particular, the

164. See Helitzer note 4 at, 111-12.

165. See Fair Access to Infertility Treatment and Hope Act of 2001, S.B. 874, 107th Cong. (2001).

166. See Family Building Act of 2001, H.R. 389, 107th Cong. (2001). If passed, this legislation would require all health plans that provide pregnancy related benefits to provide coverage for infertility treatments. See Fair Access to Infertility Treatment and Hope Act of 2001, S.B. 874, 107th Cong. (2001); Family Building Act of 2001, H.R. 389. Furthermore, the proposed legislation is in agreement with the United States Supreme Court’s decision that reproduction constitutes a major life activity. See *Bragdon v. Abbott*, 524 U.S. 624 (1998).

167. Family Building Act of 2001, H.R. 389.

168. *Id.*

169. Fair Access to Infertility Treatment and Hope Act of 2001, S.B. 874.

170. 147 CONG. REC. S4892 (daily ed. May 14, 2001) (statement of Robert G. Torricelli).

171. Fair Access to Infertility Treatment and Hope Act of 2001, S.B. 874.

172. 147 CONG. REC. S4892.

173. Fair Access to Infertility Treatment and Hope Act of 2001, S.B. 874.

costs associated with the various infertility treatments are less for insurance providers than for individuals.¹⁷⁴ To illustrate, doctors generally agree to give insurance companies lower prices than individuals because of the number of patients insurance plans refer to doctors.¹⁷⁵ This happens because insurance companies represent less financial risk to the doctors than individuals. As a result, the amount of charges that doctors must write off each year is reduced.¹⁷⁶ Typically, insurance providers receive tremendous discounts from doctors. Often insurance companies pay doctors only twenty to fifty percent of what individuals would pay for the same procedures.¹⁷⁷ Therefore, a procedure that costs individuals \$10,000 may cost insurance companies as little as \$2,000.¹⁷⁸

Moreover, insurance coverage would provide safer treatments to parents and offspring. When a couple is required to pay for infertility treatments out of its own pocket, more pressure is placed on the physician to be successful the first time. This increased pressure can lead to multiple births.¹⁷⁹ IVF guidelines from the American Society for Reproductive Medicine (“ASRM”) suggest that physicians transfer less than four embryos into a woman’s uterus at one time.¹⁸⁰ The ASRM guidelines, however, are sometimes disregarded in an attempt to increase the likelihood of a successful pregnancy.¹⁸¹ Often, the misuse of reproductive technology can result in births of more than three children.¹⁸² “[A] shudder goes through the mainstream medical community every time a couple using infertility treatments wins the Super Birth Sweepstakes.”¹⁸³ Referred to as high-order multiples, these infants “are usually born prematurely and are at greatly increased risks of lifelong disability or death.”¹⁸⁴ Due to the widespread use of artificial reproductive technologies, it is time for federal legislation to protect the infertile and their children.

174. See Telephone Interview with Michelle Teson, Employee Benefits Expert, Robert D. O’Byrne & Assoc., Inc. (Aug. 10, 2001).

175. See *id.*

176. See *id.*

177. See *id.*

178. See *id.*

179. See Abigail Trafford, *Too Much of a Good Thing; ‘Miracle’ Birth is Nothing Worth Celebrating*, PITTSBURGH POST-GAZETTE, July 31, 2001, at C2. The lack of financing for infertility treatments in the United States may explain why European countries have a greater percentage of births from IVF, yet they have fewer multiple births than in the United States. See *id.* This might be explained by the fact that most fertility treatments are covered in Europe. See *id.*

180. See *id.*

181. See *id.*

182. See *id.*

183. *Id.*

184. *Id.*

IX. CONCLUSION

“Infertility is a disease with safe, proven and effective medical treatments available. Men and women in our country struggling to have a baby need—and deserve—greater access to necessary treatments.”¹⁸⁵

Viewed through the eyes of people who have experienced the disappointment of not having a child, it is easy to see the magnitude of the problem in our society. The problem can be witnessed in the offices of infertility doctors around the country. Insurance coverage for infertility treatments could improve the quality of life for many people. By ignoring the fact that infertility is a treatable disease, insurance companies are allowed to continue to turn away from the people that pay for and expect coverage.

Federal legislation that mandates insurance coverage for infertility treatments is needed to protect the rights of infertile couples. Even though legislation has been passed or is pending in a number of states, it is inadequate. Hopefully, the state action will serve as a wake-up call to Congress and encourage the passage of the proposed federal legislation. It is unfair to allow insurance coverage for people who work for the same company in different states to be unequal.**

185. Press Release, Gina Cella, RESOLVE Joins Senator Torricelli to Advance ‘Faith’ Bill to Support Family Building in the U.S. (May 11, 2001) (on file with PR Newswire).

** The same month that my wife Jennifer was to undergo further infertility treatment she learned that she was pregnant. After nearly four years of problems, she has replaced her tears and disappointment with morning sickness and constant exhaustion. Jennifer knows that complications can still arise, but for the first time in years she has what insurance can provide other couples—hope.