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ARTICLE

It's Only Covered If You Keep It: The Legality of Surrogate Pregnancy Exclusions in Health Insurance Policies

By Meghan Boone*

Abstract

In the last ten to twenty years, health insurance companies across the United States have begun to deny women maternity benefits to which they would otherwise be entitled, based on the fact that they are acting as surrogate mothers. Despite the growing prevalence of the practice of denying benefits in this manner, little attention has been paid to the legality of these exclusions. The few courts that have addressed the issue have all come to contrary results, and have all based their decisions in different bodies of law. This paper chronicles the uneasy relationship between health insurance companies and surrogate mothers, discusses the arguments both for and against the appropriateness of surrogacy exclusions, and analyzes the various legal frameworks with which to determine whether surrogate exclusions are legal. Ultimately, the paper concludes that a number of state and federal statutes—including the Pregnancy Discrimination Act, the Health Insurance Portability and Accountability Act, and the Patient Protection and Affordable Care Act—may prove useful in challenging the legality of these exclusions.

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I. INTRODUCTION

In chat rooms and online message boards, pregnant women from across the country attempt to navigate through a labyrinth of conflicting information to determine if their health insurance will cover their pregnancy and birth-related costs. Why the confusion about such a seemingly straightforward issue? Confusion reigns here because these women are not carrying their own children—they are part of a steadily growing group of women acting as surrogate mothers. Some of the women are simply concerned, and hoping to get as much information as they can before embarking on a surrogacy. For example, "Heather" from North Dakota writes:

> My husband is in the military and I am hoping to become a Gestational Surrogate for a great and deserving couple soon. I recently asked my insurance company if they would cover a surrogate pregnancy. They replied with, "The claims will be paid as for any maternity patient. Non-coital reproductive techniques are not a benefit [sic] of TRICARE." Should I have been more specific and asked if they would cover me becoming a Gestational Surrogate, or should I leave well enough alone? I would hate for my insurance company to back out and

> leave the Ip's [Intended Parents] or myself stuck with the bills. [1]

Still other posters, however, find themselves in much more dire situations, such as "April":

> I am currently several months pregnant as a gestational surrogate. When I was first considering being a surrogate, I was told by my insurance that the pregnancy and birth would be covered, but not the fertility treatments. Since I was also working with an agency at that time, they also checked into my insurance and had no problem with my company. Now, after I am pregnant, my insurance has told me that no part of this surrogacy arrangement is to be covered. What can I do? I would hate for my couple to pay all of the expenses. Just getting this far was expensive enough! [2]

The names and details from these stories may be different, but the worry these women—and many others like them—are expressing is remarkably consistent: if they act as surrogates will their health insurance cover their medical expenses in the same way it would if they were pregnant and not acting as a surrogate?[3] Surrogate mothers and potential surrogate mothers are particularly concerned with stories like April's, in which a woman believed—and was often told—that their surrogate pregnancies would be covered by their health insurance in the same manner as if they planned to keep the baby, only to find out several months into their pregnancy or after the birth of the child that their insurance refuses to cover any of their medical expenses.[4] Often originally motivated to carry a baby for altruistic reasons,[5] these surrogate mothers end up with huge medical bills and

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1. *Q & A: Insurance Issues*, SURROGATE MOTHERS ONLINE, http://www.surromomsonline.com/answers/10.8.htm (last visited Apr. 19, 2013).

2. *Q & A: Insurance Issues*, SURROGATE MOTHERS ONLINE, http://www.surromomsonline.com/answers/10.7.htm (last visited Apr. 19, 2013).

3. *See, e.g.*, Carey Hamilton, *Doctors Do Not Oppose Surrogate Pregnancy: It's a Question of Law*, SALT LAKE TRIB., Jan 23, 2005 http://www.sltrib.com/utah/ci_2533705 (last visited May 11, 2013) (detailing the journey of one couple whose sister-in-law was acting as a surrogate, and facing "a second challenge commonly faced by couples using surrogates . . . [worry that] their sister-in-law's health insurer will deny coverage for prenatal care and the delivery if the company finds out she is giving birth to someone else's baby").

4. For example, one surrogate posting in an insurance forum on www.allaboutsurrogacy.com shares this story:

> I have Anthem here in CT. I had verbally asked them if they cover me as a gestational carrier and was told yes. I emailed the SAME question and asked if I was covered as a gestational carrier (surrogate) and was emailed back yes. I had the baby 7/29 and they are rejecting all my claims. They say they do NOT cover surrogate pregnancies/arrangements. This is now in the hands of my state's insurance commission.

Med Insurance and Surrogacy—Anthem?, ALLABOUTSURROGACY.COM, http://www.allaboutsurrogacy.com/forums/index.php?showtopic=51194 (last visited Apr. 19, 2013).

5. *See* Liza Doubossarskaia, *Surrogate Motherhood: A Feminist Issue?*, SAY IT, SISTER! NOW'S BLOG FOR EQUALITY (Sept. 24, 2009), http://www.now.org/news/blogs/index.php/sayit/2009/09/24/surrogate-

little recourse against the powerful insurance industry.

This article will attempt to answer two questions. Are these actions taken by insurance companies legal? How can insurance companies rationally differentiate between surrogacy, pregnancies resulting in adoption, and women utilizing egg and/or sperm donors?

First, this article will lay out the patchwork of laws governing surrogacy in the United States, exploring the historical and current approaches to insurance coverage of surrogate pregnancies, reviewing the few cases that have addressed the issue, and finally examining the applicability of state law and federal legislation such as the Pregnancy Discrimination Act (PDA), the Health Insurance Portability and Accountability Act (HIPAA), and the Patient Protection and Affordable Care Act (PPACA).

The second section will outline both the current state of the law on surrogacy in the Unites States, and the ways insurance companies have responded to the growing utilization of surrogacy among infertile couples. The third section will analyze insurance companies' growing tendency to exclude surrogate pregnancies under both state and federal law, as well as outlining policy considerations of such exclusions. The fourth section will address some common arguments advanced by insurance companies to explain these exclusions. Finally, I will conclude that although there is clearly a great need for uniformity in surrogacy law, both legal and policy reasons dictate that the denial of health benefits for insured women acting as surrogates is inappropriate and often illegal.

II. BACKGROUND

A. INFERTILITY GENERALLY

In the United States alone, over 7 million people are affected by infertility.[6] Infertility is defined as the failure to become pregnant after one year of engaging in regular, unprotected intercourse.[7] Women and men both experience infertility issues in about equal numbers.[8] To address infertility, individuals and couples are

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motherhood-a-feminist-issue (last visited Apr. 19, 2013) ("[W]hile a number of women find monetary compensation to be an attractive incentive, most insist that their primary motivation for offering surrogate services is altruistic. One surrogate explained to Newsweek magazine that she found surrogacy to be a meaningful and fulfilling experience because she was able to gift another family with a child").

6. *Fast Facts About Infertility*, RESOLVE: THE NATIONAL INFERTILITY ASSOCIATION, http://www.resolve.org/about/fast-facts-about-fertility.html (last visited Apr. 19, 2013). The Centers for Disease Control and Prevention report that the number of women with impaired fecundity in the United States rose 21% from 1995 to 2002. *See* Joseph C. Isaacs, *Infertility Coverage is Good Business*, 89 FERTILITY & STERILITY 1049, 1049 (2008).

7. *Health Guide: Infertility in Women*. N.Y. TIMES, http://health.nytimes.com/health/guides/disease/infertility-in-women/ (last visited Apr. 19, 2013).

8. Women and men each account for about one third of infertility. In the remaining third of cases, either both partners have a fertility issue, or the cause of the infertility remains unknown. AMERICAN SOCIETY FOR REPRODUCTIVE MEDICINE, *Frequently Asked Questions About Infertility*, http://www.asrm.org/awards/index.aspx?id=3012 (last visited Apr. 19, 2013). [hereinafter ASRM FAQ].

increasingly likely to seek out the advice and aid of the medical community.[9] The medical community can offer individuals afflicted with infertility a wide range of services, including advice, drug therapies, surgery, and assisted reproductive technology (ART) services.[10] Studies suggest that infertile couples will go to great lengths to have a healthy child.[11]

Most couples begin with standard infertility treatments such as hormone therapy, fertility drugs, or tubal surgery.[12] These types of treatment are utilized by 85-90% of infertile couples.[13] However, when these common treatments are unsuccessful, couples and individuals can turn to the more costly alternatives of ART or surrogacy.

B. SURROGACY

Surrogacy is the process whereby one woman is impregnated with the intention of giving the child to another individual or couple after carrying the child to term.[14] Use of a surrogate is most often recommended for women who don't have a uterus or whose uterus is malformed, who have a medical condition that would prevent or imperil a pregnancy, or who have had recurrent miscarriages or unsuccessful in vitro fertilization (IVF) implantations.[15] Surrogacy is also the only option available to homosexual male couples that want to have genetic children.[16]

Although there is no firm data, there have probably been about 28,000 surrogate births in the United States since 1976,[17] with the Center for Disease Control reporting approximately 1,000 surrogate births every year.[18] Surrogacy

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9. *See* Lisa M. Kerr, *Can Money Buy Happiness? An Examination of the Coverage of Infertility Services Under HMO Contracts*, 49 CASE W. RES. L. REV. 599, 602 (1999) (noting that the number of people seeking infertility treatments is increasing, and citing improved technology, increased maternal age and growing social acceptance of infertility treatments as possible factors explaining the increase).

10. Elizabeth A. Pendo, *The Politics of Infertility: Recognizing Coverage Exclusions as Discrimination*, 11 CONN. INS. L.J. 293, 299-230 (2005).

11. *See* Edward G. Hughes & Mita Giacomini, *Funding In Vitro Fertilization Treatments for Persistent Subfertility: The Pain and the Politics*, 76 FERTILITY & STERILITY 431, 432 (2001) (noting that "willingness-to-pay" studies show that couples may be willing to give up as much as 29% of their income or accept a 20% risk of *death* in order to have a healthy child).

12. ASRM FAQ, *supra* note 8.

13. *Id.*

14. Jami L. Zehr, *Using Gestational Surrogacy and Pre-Implantation Genetic Diagnosis: Are Intended Parents Now Manufacturing the Idyllic Infant?*, 20 LOY. CONSUMER L. REV. 294, 299 (2008).

15. Alex Kuczynski, *Her Body, My Baby*, N.Y. TIMES, Nov. 30, 2008 http://www.nytimes.com/2008/11/30/magazine/30Surrogate-t.html?pagewanted=all&_r=0 (last visited May 11, 2013).

16. Mireya Navarro, *The Bachelor Life Includes a Family*, N.Y. TIMES, Sept. 7, 2008 at ST1 (discussing that having a biological child is preferred in part because it makes legal rights easier to establish).

17. Kuczynski, *supra* note 15.

18. *See* Liza Mundy, EVERYTHING CONCEIVABLE: HOW ASSISTED REPRODUCTION IS CHANGING MEN, WOMEN, AND THE WORLD 130 (Alfred A. Knopf Pub. 2007). The 2008 Assisted Reproductive Technology Success Rates Report stated that gestational carriers were used in approximately 1% of ART cycles in 2008, which is around 915 cycles. CENTER FOR DISEASE CONTROL AND PREVENTION: DIVISION OF

has been steadily gaining in popularity in the United States.[19]

There are two types of surrogacy: traditional and gestational.[20] Traditional surrogacy requires the insemination of the surrogate using the couple's sperm and the surrogate's egg.[21] Gestational surrogacy requires a couple to create an embryo through IVF and transfer the embryo to the surrogate for gestation.[22]

Despite being the best and last option for many people seeking to have children, surrogacy is prohibitively expensive.[23] Estimates for the cost of having a child through surrogacy range from $25,000 to $150,000, depending on where the surrogacy takes place, if the process results in multiple births, and whether payment for sperm or egg donation is also necessary.[24] In addition to infertility

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REPRODUCTIVE HEALTH, ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES, 56 (Dec. 2010), *available at* http://www.cdc.gov/ART/ART2008/PDF/ART_2008_Full.pdf. The Society for Assisted Reproductive Technology said that in 2008 there were 847 surrogacy cycles reported. Betsy Bates, Surrogacy faces challenges in US, other nations, 45 OB GYN News 11 (Nov. 1, 2010).

19. Elisabeth Eaves, *Want To Work For $3 An Hour*, Forbes, July, 24, 2009, *available at* http://www.forbes.com/2009/07/23/surrogate-motherhood-minimum-wage-opinions-columnists-elisabeth-eaves.html ("The American Society for Reproductive Medicine saw a 30% rise in surrogate births between 2004 and 2006, for a total of 1,059 live births in 2006, the most recent year for which it could provide data.")

20. *Surrogacy*, RESOLVE: The National Infertility Association, http://www.resolve.org/family-building-options/surrogacy.html (last visited Apr. 19, 2013).

21. *Id.*

22. *Id.* Surrogacy agencies report that there is a trend towards gestational surrogacies and away from traditional surrogacies. *See* Kuczynski, *supra* note 15 (attributing the shift, in part, to the wider availability of doctors who perform I.V.F.). This is in part because the process created fewer legal risks. Aisha Sultan & Molly McElroy, *Couples Increasingly Turn to Surrogates to Build Their Families*, ST. LOUIS POST-DISPATCH, July 9, 2006, at Sec. D. When traditional surrogacy is used, the surrogate mother will be the genetic parent of any resulting child. Because of this genetic link, there is an increased risk that a court would grant the surrogate mother parental rights in any legal battle. Intended parents have a stronger custody case against the surrogate if the child is genetically related to the intended parents and not to the surrogate, and thus this method is less legally risky for intended parents, especially in states that do not formally regulate surrogacy. *Compare* In re Marriage of Moschetta, 30 Cal. Rptr. 2d 893 (1994) (holding that a traditional surrogate retained parental rights over the resulting child because of her genetic link to the child), *with* Johnson v. Calvert, 851 P.2d 776 (1993) (holding that a gestational surrogate could not retain parental rights because the intended mother had genetic link to child, which rebutted presumption that surrogate was the natural mother, and relying on the intent of the parties to determine that intended parents were natural parents). *See also* Mundy, *supra* note 18, at 132 (noting that a lack of genetic tie to a surrogate negates any legal claim of the surrogate to the resulting child). *But see* Darra L. Hofman, *"Mama's Baby, Daddy's Maybe:" A State-By-State Survey of Surrogacy Laws and Their Disparate Gender Impact*, 35 WM. MITCHELL L. REV. 449 (2009) (noting that in the majority of states, the legal status of baby born to surrogate is still often uncertain, even if the child is genetically related to the intended parents or mother).

23. Peter Sheridan, *Booming Baby Business*, Express UK (Jan. 1, 2011) http://www.express.co.uk/posts/view/220472/Booming-baby-business/ (last visited May 11, 2013) (noting that detractors complain that the cost of surrogacy makes it "exclusionary and only for the rich").

24. *See* Mundy, *supra* note 18 (estimating that for gay male couples, surrogacy costs between $100,000 and $150,000); Michelle Ford, Note, *Gestational Surrogacy is Not Adultery: Fighting Against Religious Opposition to Procreate*, 10 BARRY L. REV. 81, 85 (2008) (estimating total costs at between $25,000 to $75,000).

treatments associated with surrogacy,[25] costs include medical costs of the surrogate, compensation and life insurance policies for the surrogate, travel costs, legal expenses, and costs associated with the birth and pre-natal care.[26] Due to the high costs, infertility treatments such as surrogacy are primarily utilized by women and couples that are white, college-educated and affluent.[27]

1. Ethical and Moral Concerns

Like other types of ART procedures, surrogacy can raise moral and ethical questions. Because many countries and some U.S. states outlaw the process,[28] couples are increasingly crossing state and national lines in order to procure surrogates.[29] In trends dubbed "medical tourism" and "reproductive outsourcing," many American couples are seeking surrogates in India, where agencies that provide surrogates charge a fraction of the cost of their American counterparts.[30] Although there are no firm statistics about how many American couples have gone to India to use an Indian surrogate, anecdotal evidence suggests that this practice has increased considerably in recent years.[31] Such practices create ethical questions about whether it is exploitative to employ less socially advantaged women, either domestically or abroad, to carry the babies of the more affluent members of society.[32] As reported by the New York Times, an amicus brief filed on behalf of a well-known group of feminists in the infamous *Baby M*[33] case argued:

25. For example, in the U.S., the average cost of a single cycle of IVF is $12,400. ASRM FAQ, *supra* note 8.

26. Ford, *supra* note 24, at 84-85.

27. Marianne Bitler & Lucie Schmidt, *Health Disparities and Infertility: Impacts of State-Level Insurance Mandates*, 85 FERTILITY & STERILITY 858, 859 (2006).

28. RACHEL COOK, SHELLEY DAY SCLATER & FELICITY KAGANAS, SURROGATE MOTHERHOOD: INTERNATIONAL PERSPECTIVES, 2 (Hart Publ. 2003) (noting that surrogacy is outlawed in Austria, China, the Czech Republic, Denmark, Egypt, France, Germany, Italy, Jordan, Mexico, Norway, Poland, Portugal, Singapore, Spain, Sweden, Switzerland, Taiwan, Turkey, and in some parts of Australia and the United States).

29. Amelia Gentleman, *India Nurtures Business of Surrogate Motherhood*, N.Y. TIMES, Mar. 10, 2008, http://www.nytimes.com/2008/03/10/world/asia/10surrogate.html?pagewanted=all (last visited May 11, 2013).

30. *Id.* It costs about $25,000-$30,000 to employ an Indian surrogate, of which about $7,500 actually goes to the surrogate.

31. *Id.* Rudy Rupak, co-founder of a medical tourism agency that organizes Indian surrogates, said he expected to send at least 100 couples to India in 2008 in order to utilize a surrogate, which is three times the amount that he sent in 2007. *Id.*

32. *Id.* (noting that women in India may be agreeing to surrogacy just to be able to "eat two square meals a day"); *see also* Charlotte Rutherford, *Reproductive Freedoms and African American Women*, 4 YALE J.L. & FEMINISM 255, 268 (1992) (arguing that since gestational surrogacy creates the opportunity for African American women to give birth to completely white babies, it is reminiscent of forcing "African American slave women to breastfeed white children the breast milk they created for their own children, or to act as 'breeders' for the master's property").

33. In re Baby M, 537 A.2d 1227 (N.J. 1988). The "Baby M" case was the case that first introduced most Americans to the idea of surrogacy. In that case, after giving birth, the surrogate refused to relinquish the child. *Id.* at 1236-37. Although the New Jersey Court declared the surrogacy contract

> Legalizing a system that allows women, for a fee, to bear children for childless couples by being impregnated with the husband's sperm will lead to the exploitation of women, especially poorer ones, by more affluent couples. 'As technology develops, the 'surrogate' becomes a kind of reproductive technology laboratory,' the brief states. 'In short, she has been dehumanized and has been reduced to a mere 'commodity' in the reproductive marketplace.'[34]

Defenders of the practice say that it is mutually beneficial.[35] Many U.S. surrogacy agencies state that they will not accept surrogates who are impoverished.[36]

More single men, both gay and straight, and gay male couples are also turning to surrogacy to start families.[37] However, both gay and straight men can face discrimination in this process and may have to overcome prejudice about their parental fitness, either because of their sexuality or their gender.[38]

2. Legal Landscape

The United States is one of only a few developed countries where there is a complete lack of federal law concerning the legality of surrogacy.[39] At the state level, laws are either conflicting or absent.[40] In some states, the practice of

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unenforceable as a matter of public policy, it nevertheless awarded custody to the intended parents, based on the "best interests of the child" standard. *Id.* at 1234-35. It has been called "the custody trial of the twentieth century." Carol Sanger, *Developing Markets in Baby-Making: In the Matter of Baby M*, 30 HARV. J. L. & GENDER 67, 69 (2007).

34. Joseph Sullivan, *Brief by Feminists Opposes Surrogate Parenthood*, N.Y. TIMES, July 31, 1987, http://www.nytimes.com/1987/07/31/nyregion/brief-by-feminists-opposes-surrogate-parenthood.html (last visited May 11, 2013).

35. Gentleman, *supra* note 29 (explaining that one Indian surrogate bought a house with the money she earned from her first surrogacy, and expects to be able to pay for her son's education with her earnings from the second).

36. Kuczynski, *supra* note 15 (noting that surrogacy agencies worry that accepting truly impoverished women might "feel coercive," and that poor women are less likely to be in good health and appropriate weight, two prerequisites most agencies have for accepting a surrogate). In the context of this article, it is especially troubling to note the ethical issues that necessarily arise when less economically advantaged women carry pregnancies for more economically advantaged women or couples, and are subsequently denied health insurance coverage—thereby making any exploitation potentially a matter of life or death for the surrogate.

37. *See* Navarro, *supra* note 16 (noting that at one of the largest surrogacy agencies, twenty-four percent of its clients in 2008 were single men, both gay and straight).

38. *Id.* On the other hand, some surrogates say they actually prefer to carry babies for gay men. *See* Frank Bruni, *A Small-But-Growing Sorority is Giving Birth to Children for Gay Men*, N.Y. TIMES, June 25, 1998, at A12 (quoting one surrogate who stated she wanted to carry a child for a gay couple because gay men had the "ultimate restriction[] placed on them in trying to become parents"); Mundy, *supra* note 18, at 130-31 (noting that some women prefer to carry children for gay men because there is no jealousy issue with the intended mother).

39. Miriam Perez, *Surrogacy: The Next Frontier for Reproductive Justice*, RHRealityCheck.org, Feb. 23, 2010, *available at* http://www.rhrealitycheck.org/print/12665.

40. *See generally* Carla Spivack, *The Law of Surrogate Motherhood in the United States*, 58 AM. J. COMP. L. 97 (2010) (noting that law governing surrogacy is "in a state of flux and confusion" and that "no

surrogacy is legal and regulated.[41] In others it is a criminal offense.[42] However, in the majority of states there is no law addressing the issue at all.[43] This "patchwork of conflicting state regulations" has "created serious problems" such as certain states becoming "havens" for couples seeking to use surrogates.[44] Commentators have described the current legal landscape as "the wild west," where "almost anything is possible."[45]

C. INSURANCE COVERAGE

Of the 96.7 million women aged 18-64 in the United States, four out of five are insured either through private or publicly-funded programs.[46] Employer-sponsored health insurance covers 59% of women in this age group, or 57 million women.[47] Additionally, 12% of women are covered by Medicaid, 6% are covered through the individual insurance market, and 3% are covered under government-provided healthcare such as the military health insurance, Tricare.[48]

Having access to insurance benefits for pregnancy and childbirth is crucial to women's health, because even though fertility levels are slowly declining, the majority of American women will still have children in their lifetime.[49] In fact, childbirth is the leading cause of hospitalization in the United States, accounting

single statutory regime has won widespread acceptance"); Hofman, *supra* note 22 (giving a state-by-state analysis of surrogacy laws).

41. *See* NEV. REV. STAT. ANN. § 126.045 (permitting a married couple to enter into a surrogacy agreement); 750 Ill. COMP. STAT. 45/6 (2002) (legalizing gestational surrogacy).

42. *See.* D.C. CODE §§ 16-401, 402 (2002) (making surrogacy contracts unenforceable and providing that "[a]ny person or entity who or which is involved in, or induces, arranges, or otherwise assists in the formation of a surrogate parenting contract for a fee, compensation, or other remuneration, or otherwise violates this section, shall be subject to a civil penalty not to exceed $10,000 or imprisonment for not more than 1 year, or both"); MICH. COMP. LAWS ANN. § 722.851-861 (2002) (declaring surrogacy contracts void and unenforceable and stating that an individual who violates the statute is "guilty of a felony punishable by a fine of not more than $50,000.00 or imprisonment for not more than 5 years, or both").

43. *See* Hofman, *supra* note 22, at 454 ("The vast majority of states are silent or near silent on the issues of whether, when, and how surrogacy agreements are enforceable, void, or voidable").

44. *See* Lisa L. Behm, *Legal, Moral & International Perspectives on Surrogate Motherhood: The Call for a Uniform Regulatory Scheme in the United States*, 2 DEPAUL J. HEALTH CARE L. 557, 586 (1999) (contrasting the current situation with the results that would follow from comprehensive federal surrogacy regulation).

45. Astrid Rodrigues and Jon Meyersohn, *Military Wives Turn to Surrogacy: Labor of Love or Financial Boost?*, Good Morning America, Oct. 15, 2010, *available at* http://abcnews.go.com/GMA/Parenting/military-wives-surrogates-carrying-babies-love-money/story?id=11882687&page=1.

46. KAISER FAMILY FOUND., *Fact Sheet: Women's Health Insurance Coverage* (Dec. 2011), *available at* http://www.kff.org/womenshealth/upload/6000-091.pdf.

47. *Id.* This includes the 24% of women who are covered under employer-sponsored plans as dependents of their spouse. *Id.*

48. *Id.*

49. *See* Jane Lawler Dye, *Fertility of American Women: 2008*, U.S. Census Bureau (Nov. 2010), *available at* http://www.census.gov/prod/2010pubs/p20-563.pdf.

for nearly 25% of all hospitalizations.[50] And even when there are no complications, the average bill for a vaginal birth is $7,500, and for a cesarean section is $13,200[51]—prices that make it difficult for many families to pay out-of-pocket if they lack insurance coverage.

1. Coverage of Infertility Services Generally

Very few health insurance plans provide coverage for medical expenses related to infertility treatment.[52] Beginning in the 1990s, insurance policies started including specific exclusions for infertility treatments.[53] Even absent explicitly worded exclusions, insurers will often attempt to exclude infertility treatments, arguing that infertility is not an illness, artificial insemination is not a medical treatment, infertility treatment is not medically necessary,[54] infertility treatments are experimental, or that infertility constitutes a pre-existing condition.[55] There is a general view among insurance providers that infertility treatment is "extraneous to healthcare,"[56] and not "serious medicine."[57]

Group plans provided through employers are more likely than individual plans to offer infertility insurance, even though only one in five employers provide infertility treatment benefits to their employees.[58] The plans that are offered also vary widely in their comprehensiveness, reimbursement limits, and eligibility requirements.[59] Additionally, policies can change quickly, leaving some individuals who thought they were covered out of luck.[60]

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50. KAISER FAMILY FOUND., *Impact of Health Reform on Women's Access to Coverage and Care* 6 (2010), http://www.kff.org/womenshealth/upload/7987.pdf (last visited Apr. 19, 2013).

51. Kyla Davidoff, *Time to Close the Gap: Women in the Individual Health Insurance Market Deserve Access to Maternity Coverage*, 25 WIS. J.L. GENDER & SOC'Y 391, 398 (2010).

52. *See* Family Building Act of 2009, H.R. 697, 111th Cong. § (1)(a)(1)(3) (2009) ("The majority of group health plans do not provide coverage for infertility therapy"); Howard W. Jones & Brian D. Allen, *Strategies for Designing an Efficient Insurance Fertility Benefit: A 21st Century Approach*, 91 FERTILITY & STERILITY 2295, 2295 (2009) ("The evaluation and treatment of infertility as a legitimate medical problem is not routinely covered by most insurance programs in the United States").

53. James B. Roche, *After Bragdon v. Abbott: Why Legislation is Still Needed to Mandate Infertility Insurance*, 11 B.U. PUB. INT. L.J. 215, 219 (2002).

54. *See id.*

55. Peter J. Neumann, *Should Health Insurance Cover IVF? Issues and Options*, 22 J. HEALTH POL. POL'Y & L. 1215, 1217 (1997).

56. Melissa O'Rourke, Note, *The Status of Infertility Treatments and Insurance Coverage: Some Hopes and Frustrations*, 37 S.D. L. REV. 343, 343 (1992) (quoting Patricia Schroeder, *Infertility and the World Outside*, 49 FERTILITY & STERILITY 765 (1988)).

57. *See* Adam Sonfield, *Drive for Insurance Coverage of Infertility Treatment Raises Questions of Equity, Cost*, The Guttmacher Rep. on Pub. Pol'y, Oct. 1999, at 4, 5 (quoting Deborah Wachenheim of RESOLVE, stating that "[i]nfertility treatment is sometimes lumped together with cosmetic surgery as a 'lifestyle' type procedure").

58. *Health Insurance 101*, RESOLVE: The National Infertility Association, http://www.resolve.org/family-building-options/insurance_coverage/health-insurance-101.html (last visited Apr. 16, 2013).

59. *See id.*

60. *See* Anne Adams Lang, *For Infertility Treatments, Now You're Covered, Now You're Not*, N.Y. Times, June 21, 1998, at WH12 (describing the quick changes and withdrawn policies that characterize insurance company actions in the field of infertility treatments).

Regardless of the policies offered by private and public insurance plans, it is becoming increasingly clear that insurance companies are paying for infertility treatments whether they intend to or not.[61] According to Howard W. Jones, Jr. and Brian D. Allen, physicians will often use alternate or surreptitious diagnostic codes for infertility treatments, allowing at least some couples access to coverage for these treatments.[62] These "hidden" costs are common for employers who exclude infertility from their insurance plans.[63] According to one study, an employer with 28,000 employees could expect to be billed for $600,000 in hidden infertility costs a year.[64]

2. Types & Sources of Coverage for Surrogacy

Discussing insurance coverage for surrogacy is even more complicated than discussing infertility coverage in general, because unlike basic infertility coverage, there are three categories of individuals contemplated in surrogacy "coverage": 1) the intended parent(s), 2) the surrogate, and 3) the resulting child. Discerning the practices of health care providers with regard to surrogacy is a particularly difficult task because health insurance policies—if they address surrogacy at all—are often vague, and it is unclear which of the three categories of coverage outlined above are addressed by the plan. Many plans simply list "surrogacy" or "surrogate parent services" as exclusions, without further explanation as to whether this covers *using* a surrogate or *acting* as a surrogate.[65] In addition, there are two possible sources for health insurance coverage for surrogacy: 1) the intended parents' health insurance and 2) the surrogate's health insurance.

a. Costs Incurred By the Intended Parents. Costs incurred by intended parents in their search for, and use of, a surrogate are not covered under any health plan.[66] Treatments performed on the insured party that may be necessary to subsequent use of a surrogate, such as IVF, are generally covered in the same manner and amount as they would if no surrogate were going to be used.[67] The distinction between the former and latter treatments is the physical body on which the

61. Jones & Allen, *supra* note 52.

62. *Id.*

63. *Id.*

64. *Id.*

65. *See, e.g., Certificate of Insurance for Hospital and Related Expenses Coverage*, N.Y. STATE DEP'T OF CIVIL SERV., http://www.cs.ny.gov/ebd/ebdonlinecenter/pamarket/ebd/ebdonlinecenter/certs/pacmp/03sectio.cfm (last updated Jan. 1, 2009) (excluding from coverage, "[m]edical expenses or any other charges in connection with surrogacy"); UNITED HEALTHCARE OF THE MIDWEST, FEHB BROCHURE 52 (2011), *available at* http://www.opm.gov/insure/health/planinfo/2011/brochures/73-847.pdf (excluding "surrogate parenting").

66. *See, e.g.*, Flexible Spending Accounts: Eligible Health Care Expenses, Aetna, http://www.aetna.com/members/fsa/eligibleExpenses/healthcareFSA/healthexpenses_S.html (last visited Apr. 18, 2013) ("Fees paid to an agency to search for a surrogate mother are not qualified medical expenses").

67. *Id.*

treatment is performed—the body of the insured or that of a third party in order to subsequently benefit the insured.

b. Costs Incurred By the Surrogate. Whether a health insurance policy will cover the medical costs for the surrogate mother is less clear. Most surrogacy contracts provide that the surrogate's medical costs will be covered by the intended parents if not covered by her own medical insurance.[68] The intended parents can either pay for a health insurance policy for the surrogate or cover the costs associated with the pregnancy out-of-pocket. Because out-of-pocket pregnancy costs are substantial,[69] surrogates with their own health insurance policies are highly preferred.[70] Even if a surrogate has a health insurance policy that covers pregnancy, however, this does not necessarily mean that her health insurance will cover the cost of her surrogate pregnancy.

This uncertainty is due to a wholesale change in the approach of insurance companies in the last ten to twenty years regarding coverage of surrogate pregnancies.[71] In the early days of surrogacy, a woman's own health insurance would cover her pregnancy costs without regard to how or why she became pregnant.[72] An expert in the field notes that at one time, "insurance coverage [of surrogates] was readily obtained and rarely contested by insurance companies."[73] The relative rarity of surrogacy at that time helped surrogates to fly under the radar of their insurance companies.

This original approach has not been abandoned entirely. For instance, in 2006, spokespeople for Regence Blue Cross/Blue Shield of Oregon stated that they cover the pregnancies of compensated surrogates who are insured under their

68. *See* Ford, *supra* note 24. For an example of a model gestational surrogacy contract, *see generally Sample GS Contract*, ALL ABOUT SURROGACY, http://www.allaboutsurrogacy.com/sample_contracts/GScontract2.htm (last visited Mar. 28, 2013).

69. The financial aspects of a gestational surrogacy arrangement include the infertility treatment costs for the genetic parents, the medical costs for the surrogate, the fees for the surrogate, and any legal costs.

70. *See* Press Release, Alternative Reproductive Resources, *Fertility Agency Sweetens Incentives to Gestational Surrogates; Finds Interest Up* (Nov. 18, 2008), http://www.arr1.com/mediacenter/press releases/102908.html (last visited Apr. 19, 2013) ("Typically, agencies like [Alternative Reproductive Resources] require the surrogate to have health insurance to cover related costs"). However, the article goes on to state that the agency is now offering potential surrogates health insurance as an incentive because, "[i]n the current economic environment, we know many otherwise great candidates have lost their health insurance." *Id.*

71. Steven H. Snyder, *Medical Insurance Issues as they Affect the Selection of a Potential Surrogate*, AFA Blog (Apr. 1, 2010, 6:38 PM), http://theafa.typepad.com/theafablog/2010/04/medical-insurance-issues-as-they-affect-the-selection-of-a-potential-surrogate.html.

72. *Id.*; *see also* Mary Ellen McLaughlin, *Insurance and Surrogacy*, CONCEPTION CONNECTIONS (Oct. 7, 2009), http://conceptionconnections.wordpress.com/2009/10/07/insurance-and-surrogacy/ ("My, how times have changed, especially when it comes to health insurance and surrogacy. Nine years ago, when [Alternative Reproductive Resources] started its surrogacy services, the majority of the surrogate's health insurance plans covered the pregnancy").

73. Snyder, *supra* note 71.

plans.[74] Similarly, Utah's largest insurer, Intermountain Health Care, stated in 2005 that "a pregnancy is a pregnancy, regardless of its purpose," and that they cover surrogate pregnancies.[75]

However, the growing trend is for insurance companies to add exclusions to their policies for surrogate pregnancies.[76] One assisted reproduction organization estimated that in 2009 more than 90% of surrogate pregnancies were not covered by the surrogate's own health insurance.[77] For instance, Kaiser Permanente in California now retains the right to demand that insurees who are compensated for carrying children under surrogate agreements reimburse Kaiser for the costs of their obstetric care.[78] In its explanation of basic coverage benefits in most of its plans, Cigna states that "infertility services rendered to a surrogate and surrogate fees" are excluded because they are considered medically unnecessary.[79] The four biggest insurance companies regularly deny coverage based solely on the fact that the applicant is either a surrogate, considering surrogacy *or* intends to use the services of a surrogate.[80] In 2010, Arizona State University made changes to the health insurance policies offered to its employees, explicitly stating: "[m]aternity benefits for surrogates will no longer be covered."[81] In fact, a health insurance policy that does not contain a surrogacy exception at this point is "elusive,"[82] as these exclusions are "becoming standard within the [insurance]

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74. Gabrielle Glaser, *Oregon births a boom in surrogate babies*, OREGONIAN, July 9, 2006, at A01, *available at* 2006 WLNR 11922970.

75. Carey Hamilton, *Parenthood by Proxy: Providing the Medical Service*, SALT LAKE TRIBUNE, Jan. 23, 2005, at E1.

76. *See* Stephen Snyder & Mary Patricia Byrn, *The Use of Prebirth Parentage Orders in Surrogacy Proceedings*, 39 FAM. L.Q. 633, 635 n.5 (2005) ("[M]any health insurance companies are currently adding exclusions to their policies for surrogate pregnancies"); Ronald Lipman, *Finding a surrogate mother is the first hurdle*, HOUSTON CHRONICLE, Jan. 17, 2005, Business, at 2, *available at* 2005 WLNR 24593852 ("Sometimes the gestational mother's health insurance will pay for the costs associated with the birth. However, many insurance companies don't cover surrogacy births . . ."); Sultan & McElroy, *supra* note 22 ("Typically, a woman's own insurance will cover the costs of a pregnancy, but some insurance companies carve out surrogacy exceptions"); Kim Kelliher, *Born, but not free*, 73 HOSP. & HEALTH NETWORKS, June 1999, at 30, 30 (listing various insurance companies that have added exclusions).

77. McLaughlin, *supra* note 72.

78. Glaser, *supra* note 75.

79. CIGNA, CIGNA MEDICAL COVERAGE POLICY, INFERTILITY SERVICES 4 (2009), *available at* http://www.advocacyforpatients.org/pdf/ivf/ivf_cigna.pdf.

80. Memorandum from Chairmen Henry A. Waxmen & Bart Stupak to the U.S. House of Representatives Comm. on Energy & Commerce on Maternity Coverage in the Individual Health Ins. Mkt. 4 (Oct. 12, 2010), *available at* http://democrats.energycommerce.house.gov/Press_111/20101012/Memo.Maternity.Coverage.Individual.Market.2010.10.12.pdf.

81. *Frequently Asked Questions: Medical*, ARIZ. ST. U. HUMM RESOURCES, *formerly available at* http://cfo.asu.edu/hr-medicalfaqs.

82. *See* Kim Kelliher, *Born, but not free*, 73 HOSP. & HEALTH NETWORKS 6 (June 1999) (listing the various insurance companies that have added exclusions, and noting that "[c]overage is even more elusive today.").

industry."[83]

This ever-expanding universe of exclusions has very human victims. Whether through lack of diligence in determining what their insurance benefits are at the outset of a surrogate pregnancy or through new or vague exclusions, surrogates are often already pregnant before their benefits are terminated. One surrogate's struggles are heartbreakingly chronicled:

> Natash, a mother of 3 and Operating Room Surgical Tech, is serving as a surrogate for a SurroGenesis couple. She is 33 weeks pregnant with twins and suffering from Preeclampsia. As a result of the Preeclampsia, she has been confined to bedrest by her physician . . . . Her husband was laid off in January. Her employer has denied her request for disability because she is serving as a surrogate and has claimed that her Intended Parents are financially responsible. Yesterday she received an eviction notice because she cannot pay her rent.[84]

Another woman, a hopeful mother whose sister was acting as a surrogate, had a similar experience:

> I'm an Intended Mom with my Sister [sic] as my Surrogate. We are 9 [weeks] along as of yesterday. My insurance did not cover any of our infertility treatments and my [husband] and I paid for our IVF and transfer out of pocket. We thought that once we got pregnant that my sister's insurance would cover the rest. Last week, my sister's office manager, came to her and stated that my husband and I should pay for the birth and not use their insurnace [sic] because her being pregnant would raise the premiums. My sister had confirmed before we started this process that they would treat her pregnancy as a regular pregnancy and they would cover it. Her boss; however, pulled information from the insurance company and she stated it did not cover surrogacy pregnancy. I was devestated [sic] because we had confirmed prior to us starting the process. In looking at my sister's benefits, under exclusions and maternity, no where in there does it state it does not cover surrogacy pregnancy . . . . Someone plesase [sic] help. I don't know what we are going to do to pay out of pocket for our maternity expenses.[85]

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83. Mary Ellen McLaughlin, *Insurance and Surrogacy*, WELLSPHERE (Nov. 4, 2009, 10:07 PM), http://www.wellsphere.com/pregnancy-fertility-article/insurance-and-nbsp-surrogacy/868047.

84. Andrew Vorzimer, *SurroGenesis Surrogate, Pregnant With Twins, Facing Eviction*, THE SPIN DOCTOR (Mar. 20, 2009), https://www.eggdonor.com/blog/2009/03/20/surrogenesis-surrogate-pregnant-with-twins-facing-eviction/.

85. Mattison10, Post to *Insurance Questions*, ALLABOUTSURROGACY.COM, (Sept. 22, 2010, 1:25 PM), http://www.allaboutsurrogacy.com/forums/index.php?showtopic=50998.

One reason that insurance providers are beginning to add surrogacy exclusions to their policies may be that surrogate pregnancies increase the likelihood of costly high-order multiple births (triplets and quadruplets), premature birth and infant intensive care expenses.[86] Exclusionary clauses for surrogacy may also attempt to exclude "adverse complications to the surrogate resulting from the pregnancy and delivery."[87] Insurance companies have also become more likely to contest coverage for surrogacy even in the absence of explicit exclusions.[88]

In order to deal with these surrogacy exclusions, new, independent businesses are beginning to offer insurance policies to be purchased by intended parents for the surrogate to ensure that the she will have health insurance throughout the course of her pregnancy.[89] These plans provide insurance to surrogates for the costs of implantation through pregnancy and post-partum care.[90] The creation of these specialty plans highlights surrogates' need for health insurance, which is not currently being met through traditional insurance plans. The burgeoning surrogacy insurance market is not an entirely positive development, however, as intended parents desperate to find affordable health care for their surrogates have enabled unscrupulous actors to take advantage of them.[91] One such example is "Surrogenesis," a California corporation that contracted to compensate surrogates and pay their medical expenses out of a trust fund that intended parents paid into, but instead allegedly pocketed the money to the tune of two million dollars, and left some surrogates with no way to pay their medical bills.[92]

c. Costs of the Newborn. Generally speaking, the intended parents do not have trouble adding the infant to their health insurance policies once he or she is born.[93] In a state in which the intended parents can be the legal parents before the child is born,[94] the intended parents can add the child to their health insurance as a dependant immediately upon birth.[95] However, in a state in which the intended parents have to wait to adopt the child until after he or she is born,[96] they must ensure that they add the child to their insurance within the appropriate time frame, because otherwise there might be a period during which the child goes

86. Snyder & Byrn, *supra* note 77.

87. *Id.*

88. *See id.*

89. *See, e.g.,* New Life Agency, http://www.newlifeagency.com/.

90. *Id.*

91. *See* Alan Zarembo & Kimi Yoshino, *Hoping for a baby, falling prey to fraud*, LA Times, Mar. 29, 2009, at A.1 (detailing the trials of intended parents and surrogates who have fallen victim to surrogate agency scams).

92. William Saletan, *Fetal Foreclosure*, SLATE (Mar. 24, 2009, 8:34 AM), http://www.slate.com/id/2214498/.

93. Snyder & Byrn, *supra* note 77.

94. For example, Illinois, New Hampshire, Virginia, Texas, and Utah allow pre-birth parentage determinations. *Id.* At 651-54.

95. *See id.* at 635.

96. For example, Delaware, Georgia, Hawaii, Minnesota, and Tennessee prohibit pre-birth parentage determinations. *Id.* at 661.

uncovered.[97] Federal law provides, however, that adoptive children—whether or not the adoption has become final—must be covered under group health plans in the same manner as non-adoptive children.[98]

Parents must also consider whether care for the child will be "out-of-network," particularly given that surrogates often do not live in the same state as the intended parents.[99] This concern is especially pertinent to couples who are utilizing a surrogate in another country, as their health insurance might not apply at all outside of the United States.[100] In the case of foreign surrogates, parents may even face hurdles in obtaining recognition of their child as a citizen of their home country.[101]

3. Attempts at Legislation

a. Federal Law. There is currently no federal law that addresses insurance coverage of infertility treatments. However, there have been numerous congressional attempts to address this issue in the past. A bill entitled "The Family Building Act" (FBA) has been introduced in the House of Representatives in 1999,[102] 2001,[103] 2003,[104] 2005,[105] 2007,[106] and 2009.[107] None of the previous versions of the bill have made it out of committee. If enacted, the FBA would mandate that insurance companies that cover obstetrical care also cover infertility treatments.[108] The most recent version of the Act mandates that insurance companies cover the cost of ART for their insured, after less expensive methods had been attempted.[109] The Act defines ART as including "all treatments or procedures that involve the handling of human egg and sperm for the purpose of helping a woman become pregnant," and specifically includes "surrogate

97. *See id.* at 635 n.5.

98. The Omnibus Budget Reconciliation Act of 1993, 29 U.S.C.A. § 169(c)(1) (1998) (West, Westlaw through P.L. 112-209) ("In any case in which a group health plan provides coverage for dependent children of participants or beneficiaries, such plan shall provide benefits to dependent children placed with participants or beneficiaries for adoption under the same terms and conditions as apply in the case of dependent children who are natural children of participants or beneficiaries under the plan, irrespective of whether the adoption has become final").

99. *Id.*

100. *Id.*

101. *See* Betsy Bates, *Surrogacy Faces Challenges in US, Other Nations*, 45 OB GYN NEWS 11 (Nov. 1, 2010), *available at* obgyn.imng.com/fileadmin/content_pdf/obn/archive_pdf/vol45iss11/70406_main.pdf (noting that intended parents from Germany, Japan, and the United Kingdom have faced challenges in having their children recognized as citizens of their home country after being born using a surrogate in another country).

102. Family Building Act of 1999, H.R. 2706, 106th Cong. (1999).

103. Family Building Act of 2001, H.R. 389, 107th Cong. (2001).

104. Family Building Act of 2003, H.R. 3014, 108th Cong. (2003).

105. Family Building Act of 2005, H.R. 735, 109th Cong. (2005).

106. Family Building Act of 2007, H.R. 2892, 110th Cong. (2007).

107. Family Building Act of 2009, H.R. 697, 111th Cong. (2009).

108. *Id.* § (a)(1).

109. *Id.*

birth."[110] As of the date of its introduction, it had eight co-sponsors, all of whom are Democrats.[111]

In addition, the Fair Access to Infertility Treatment and Hope (FAITH) Act, which would also mandate insurance coverage for infertility treatment, has been introduced in the Senate twice.[112] Individual bills mandating infertility coverage for federal employees and military personnel,[113] or alternately for individuals in the Medicare system,[114] have also been proposed. To date, none of the bills related to insurance coverage of infertility have made it out of committee.

Some military officials attempted to add a provision to the 2008 defense authorization bill that would have cut off coverage to any medical procedures related to surrogate pregnancy for individuals using the military health insurance program, TriCare.[115] Women who have access to the military health care system are seen as especially desirable surrogate mothers because of their access to TriCare coverage, and can be paid additional bonuses because of it.[116] The Department of Defense, in a statement requesting a change to the policy, stated that the military health care program is "not . . . intended to support surrogate pregnancies, typically an income producing enterprise."[117] Although the change ultimately was not included in the bill, the issue of whether or not TriCare should cover costs associated with surrogacy continues to be a topic of "fierce debate."[118] In response, TriCare has created a policy whereby it reserves the right to access the surrogacy contract and deduct from a surrogate's insurance coverage any compensation that she receives that is not directly tied to her surrogacy-related expenses.[119] It's an "open secret" in the surrogacy industry, however, that TriCare rarely enforces this policy.[120] As TriCare's chief of public

110. *Id.* The sponsor of the most current form of the bill was Congressman Anthony Weiner (D-NY).

111. *Id.*

112. Fair Access to Infertility Treatment and Hope Act of 2001, S. 874, 107th Cong. (2001); Fair Access to Infertility Treatment and Hope Act of 2000, S. 2160, 106th Cong. (2000).

113. Infertility Coverage for Federal Employees, Military Personnel, and their Families Act, H.R. 1418, 109th Cong. (2005).

114. Medicare Infertility Coverage Act of 2005, H.R. 2758, 109th Cong. (2005).

115. Lorraine Ali & Raina Kelley, *The Curious Lives of Surrogates*, NEWSWEEK, Apr. 7, 2008, at 44.

116. *Id.*

117. Rick Maze, *DoD: Drop Surrogate Pregnancies from Tricare*, NAVY TIMES, Apr. 11, 2007.

118. *See* Ali & Kelley, *supra* note 115.

119. TRICARE Reimbursement Manual 6010.55-M Chapter 4, Section 4, XIV ("Contractual arrangements between a surrogate mother and adoptive parents are considered other coverage. TRICARE will cost share on the remaining balance of otherwise covered benefits related to the surrogate mother's medical expenses after the contractually agreed upon amount has been exhausted. This applies where contractual arrangements for payment include a requirement for the adoptive parents to pay all or part of the medical expenses of the surrogate mother as well as where contractual arrangements for payment do not specifically address reimbursement for mother's medical care. If brought to the contractor's attention, the requirements of TRICARE Operations Manual, Chapter 11, Section 5, paragraph 2.10. would apply").

120. Habiba Nosheen & Hilke Schellmann, *The Most Wanted Surrogates in the World*, GLAMOUR, Nov. 2010, http://www.glamour.com/magazine/2010/10/the-most-wanted-surrogates-in-the-world (last visited May 11, 2013).

affairs admitted, "We have 9.5 million beneficiaries, and our beneficiaries will have roughly 2,100 births every week. We have to be focused on making sure everybody gets their care. We can't be a big police force."[121]

b. State Law. Despite a hodgepodge of state mandates regarding insurance coverage for infertility generally,[122] there are currently no state laws that mandate insurance providers to cover the costs of surrogacy. Complicating the passage of laws regulating the coverage of surrogacy are the conflicting laws concerning the legality of surrogacy itself.[123] Although no states have laws directly on point, a small number of states have related laws or proposed legislation that provide at least some insight into these states' positions on the issue.

Perhaps the most comprehensive surrogacy law to date is the Illinois Gestational Surrogacy Act.[124] Although the Act does not mandate that insurance providers cover surrogacy costs, it does state that before entering into a contract, a potential surrogate must obtain health insurance for the duration of her pregnancy, and for eight weeks post-partum.[125] This language suggests that the Illinois Congress legislated under the assumption that health insurance companies would pay the maternity benefits of any pregnant policy-holder, without distinction as to the reason why she was pregnant or whose child she was carrying. Otherwise, requiring the surrogate to obtain health insurance would serve no purpose.

In addition, the law explicitly forbids refusal of insurance coverage for procedures to obtain eggs, sperm or embryos from an otherwise qualified covered individual, even if the individual uses these procedures in order to subsequently utilize a surrogate.[126] The language at least acknowledges the possibility of surrogacy and brings it into the larger ART framework for purposes of state insurance mandates, even if it does not actually create a mandate regarding surrogacy coverage.

There are only two other states that acknowledge surrogacy in the context of infertility coverage mandates. The Division of Insurance in Massachusetts issued administrative regulations stating that insurers are not required to cover surrogacy under the otherwise mandated comprehensive infertility coverage.[127] Rather, coverage of these benefits is deemed "optional" at the discretion of the

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121. *Id.*

122. For an overview of state's insurance mandates concerning infertility treatment generally, *see* American Society for Reproductive Medicine, *State Infertility Insurance Laws*, *available at* http://www.reproductivefacts.org/detail.aspx?id=2850.

123. *See supra* section II(a)(ii).

124. 750 ILL.COMP. STAT. ANN. 47/5 (2005).

125. 750 ILL. COMP. STAT. ANN. 47/20(a)(6) (2005).

126. *Illinois Insurance Facts*, Illinois Department of Financial and Professional Regulation—Division of Insurance, Revised Oct. 2008, *available at* http://insurance.illinois.gov/healthinsurance/infertility.asp.

127. 211 MASS.CODE.REGS. 37.07 (1995).

insurance company.[128] The law does not address whether there are restrictions on using embryos created through the use of the mandated ART coverage for the purposes of using a surrogate. The Insurance Department of the State of Connecticut likewise issued a bulletin interpreting that state's infertility mandate, which stated that "[g]estational carriers/surrogate parenting arrangements" were not covered.[129]

Oregon attempted to legislate in this area in 2003 with a bill in the State House of Representatives that would have allowed the state to request permission from the Federal Centers for Medicare and Medicaid Services to deny Oregon Health Plan coverage to surrogates.[130] The bill was proposed in response to concerns by doctors that women were receiving compensation for acting as surrogates while charging the state for the medical costs related to the surrogacy.[131] The bill never made it out of committee, however, in part because of concerns that the language was overbroad and could be interpreted to include women who give their children up for adoption.[132]

The mélange of legislative responses to insurance coverage for infertility treatments—including surrogacy—clearly illustrates the lack of a cohesive set of legal standards imposed on health insurance providers in the U.S. In the absence of such standards, health insurance providers have mainly been left to promulgate their own policies about which treatments to cover. As this section underscored, this is generally bad news for the infertile individual or couple seeking treatment.

III. LEGAL AND POLICY ARGUMENTS IN THE DEBATE FOR HEALTH INSURANCE COVERAGE OF SURROGACY

A. SCARCE AND INCONSISTENT APPROACHES BY THE COURTS

Despite the rapidly growing popularity of surrogacy, and the problems that its attendant costs can cause regarding insurance coverage, relatively few cases have been litigated in the courts. Individuals who have brought claims to court have not received consistent results, only further obscuring this already muddled landscape.

For example, in the case of *Mid-South Insurance Co. v. Doe*,[133] a federal court weighed in on the question of which of two insurance companies was required to cover the pregnancy, pregnancy complications, and two months of neonatal hospitalization costs for a child that resulted from a gestational surrogacy arrangement. Both the surrogate's and intended parents' insurance

128. *Id.*

129. STATE OF CONNECTICUT INSURANCE DEPARTMENT, BULLETIN HC-64, Sept. 15, 2005, *available at* http://www.ct.gov/cid/lib/cid/bullhc64r.pdf.

130. H.R. 3506, 2003 Leg., 72d Sess. (Or. 2003).

131. Erin Hoover Barnett, *Bill Aims to Stop Health Coverage for Moms Getting Surrogacy Pay*, OREGONIAN (Apr. 17, 2003).

132. *Id.*

133. 274 F. Supp. 2d 757 (D.S.C. 2003).

denied coverage for both the surrogate's pregnancy costs and the medical costs of the premature infant.[134] The court found that the surrogate's pregnancy costs should have been covered by her own policy since the medical treatments were at least in part for her own health, but that the child should have been covered by the policy of the intended parents since the surrogate did not intend to raise the child herself.[135] Although the court ordered that the insurance company reimburse the surrogate for her pregnancy costs, because of the novel nature of the claims involved, the court did not find that the health insurer acted in bad faith when it failed to pay the surrogate's medical bills, and was thus not liable for punitive damages.[136]

In a similar case, *Florida Health Science Center, Inc. v. Rock*,[137] a woman who acted as a surrogate for her brother and his wife sued her insurance company when it denied her claims for coverage of medical expenses related to her pregnancy. The insurance company maintained that it was not required to pay the expenses because the plaintiff's plan excluded coverage for:

> Charges for services, supplies or treatment related to the diagnosis or treatment of infertility and artificial reproductive procedures, including, but not limited to: artificial insemination, intro fertilization, surrogate mother, fertility drugs when used for treatment of infertility, embryo implantation, or gamete intrafallopian transfer (GIFT).[138]

The surrogate argued that this exclusion was vague, and instead simply barred an insured party from using their insurance to cover the medical costs of a third party surrogate.[139] The United States District Court for the Middle District of Florida analyzed the case under the Employee Retirement Income Act of 1974 (ERISA),[140] because the health insurance policy provided to the surrogate through her employer was an "employee benefit plan" within the meaning of ERISA.[141] The court held that the provision regarding surrogate motherhood was "ambiguous" and should have been construed in favor of coverage under ERISA and Florida law.[142] The next step of the ERISA analysis, however, required the court to determine whether the "wrong" interpretation by the claims administrator was nonetheless "reasonable."[143] Under this analysis, the court found that the claims administrator properly exercised its discretion when denying the claims,

134. *Id.* at 760.
135. *Id.* at 764.
136. *Id.* at 764-65.
137. 8:05-CV-1601-T-EAJ, 2006 WL 3201873 (M.D. Fla. Nov. 4, 2006).
138. *Id.* at *2.
139. *Id.* at *3.
140. 29 U.S.C. § 1132(e) (West, Westlaw through P.L. 112-283 approved 1-15-13).
141. *Rock*, 2006 WL 3201873 at *1.
142. *Id.* at *6.
143. *Id.* at *7.

because the interpretation was reasonable and not made in bad faith.[144] Thus, the defendant was not required to cover the costs associated with the pregnancy.[145]

Perhaps the most in-depth legal analysis of the problems that can arise when surrogates bill their health insurance for the cost of their pregnancies comes from the Wisconsin Supreme Court in *MercyCare Ins. Co. v. Wisconsin Commissioner of Insurance*.[146] Similar to the two previous cases, this case dealt with two women who were denied coverage of pregnancy-related costs by MercyCare because they were acting as gestational surrogates.[147] Their insurance policies articulated, in two places, that "surrogate mother services" were not covered.[148] In response to the denials, one of the women filed a complaint with the Wisconsin Commissioner of Insurance. The Commissioner issued a final decision in December 2006, concluding that the insurance provider's argument that it should not have to cover the maternity costs of surrogate mothers who were insured under its plan was without merit.[149] As the Commissioner of Insurance for the State of Wisconsin described, since the decision to become pregnant is an "intensely personal" one, it was inappropriate for insurance companies to question women on the reasons they had become pregnant.[150]

The circuit court reversed the Commissioner's decision, and the Commissioner appealed. The Wisconsin Court of Appeals certified the appeal to the Wisconsin Supreme Court,[151] which granted certification.[152]

MercyCare argued in the press that insurance was not intended to cover situations where the insured was making money or helping someone else, and that mandating coverage of surrogacy would cause premiums to go up for everyone covered under the plan.[153] But the real crux of the parties' disagreement centered on the interpretation of a Wisconsin statute regulating maternity coverage, which provides:

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144. *Id.* at *9.

145. *Id.* at *8-9. *See also* Spectrum Health v. Lehr, No. 298688, 2011 Mich. App. LEXIS 1558 (Mich. App., Sept. 8, 2011) (upholding a lower state court's ruling that the denial of benefits for a surrogate mother's delivery of triplets was "reasonable" within the meaning of ERISA).

146. 786 N.W.2d 785 (Wis. 2010).

147. *Id.* at 789-90.

148. *Id.*

149. *MercyCare Insurance Co.*, Office of the Commissioner of Insurance, State of Wisconsin, Case No. 06-C29951 (Dec. 18, 2006). The Commissioner rejected these arguments, on the theory that it would be "improper" and contrary to state antidiscrimination laws for insurance companies to have license to inquire into the reasons a woman is pregnant. *Id.* at 12.

150. *Id.* In that case, the insurer had discovered that the two women at issue in the case were carrying surrogate pregnancies when they disclosed this fact to their doctors and it was placed in their medical records. Jason Stein, *Must Insurer Pay for Surrogate?: HMO Appeals Administrative Decision That Says It Must Pay Medical Costs of Surrogate Mothers*, WISCONSIN STATE JOURNAL, Jan. 17, 2007, at A1.

151. MercyCare Ins. Co. v. Wis. Comm'r of Ins., No. 2008AP2937, 2009 WL 2781964 (Wis. Ct. App. Sept. 3, 2009).

152. MercyCare Ins. Co. v. Wis. Comm'r of Ins., 779 N.W.2d 180 (Wis. 2009).

153. Jim Leute, *Should Surrogates be Covered?*, THE JANESVILLE GAZETTE, Jan. 17, 2007; Ted Sullivan, *MercyCare: Court's Ruling in Surrogate Case Will Raise Costs*, GazetteXtra.com (Jul. 17, 2010), http://gazettextra.com/news/2010/jul/17/mercycare-courts-ruling-surrogate-case-will-raise-/.

> Every group disability insurance policy which provides maternity coverage shall provide maternity coverage for all persons covered under the policy. Coverage required under this subsection may not be subject to exclusions or limitations which are not applied to other maternity coverage under the policy.[154]

MercyCare argued that the second sentence allowed them to deny coverage to certain subgroups of individuals—in this case, those acting as surrogate mothers.[155] The Commissioner, however, asserted that the language allowed the providers to exclude certain types of services, but not to exclude certain types of people from the services generally provided under the plan's maternity benefits.[156] The Wisconsin Supreme Court agreed with the Commissioner and overturned the circuit court's decision. Specifically, the court noted that if MercyCare's interpretation of the statute were to be adopted:

> Taken to its logical conclusion, MercyCare's interpretation would permit an insurer to discriminate against any number of subgroups of insureds, as long as the discrimination was "uniform." For example, at oral argument, MercyCare suggested that it would be permitted to exclude an insured's fourth pregnancy—or even a second pregnancy—as long as that exclusion was applied to all policies uniformly.[157]

Rejecting this interpretation, the court ruled that an insurer may not deny coverage that is generally available to one group of pregnant women "based solely on the insured's reasons for becoming pregnant or the method used to achieve pregnancy."[158]

As the previous cases illustrate, there has been no uniform approach by the courts, and the judges confronted with these analogous circumstances all looked to different bodies of law—federal statutes and state antidiscrimination and contract laws, respectively—to attempt to answer the same question: can insurance companies legally deny benefits to surrogate mothers who have otherwise applicable maternity coverage? In the subsequent sections, I will suggest that this assortment of approaches may not be necessary, as the answer to the question may already exist in the various pieces of federal legislation that regulate pregnancy and insurance.

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154. WIS. STAT. ANN. § 632.895(7) (West, Westlaw through 2013 Wisconsin Act 9, published 03/27/2013).

155. MercyCare Ins. Co. v. Wis. Comm'r of Ins., 786 N.W.2d 785, 798 (Wis. 2010).

156. *Id.* at 798.

157. *Id.* at 799.

158. *Id.* at 803.

B. THE PREGNANCY DISCRIMINATION ACT

The Pregnancy Discrimination Act (PDA) was enacted to overturn the Supreme Court decision in *General Electric v. Gilbert*,[159] which stated that pregnancy discrimination was not a form of sex discrimination under Title VII.[160] The PDA states that discrimination on the basis of sex includes discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions."[161] It goes on to say that women affected by pregnancy "shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs."[162] The PDA covers employers who have fifteen or more employees, federal, state and local governments, employment agencies, and labor organizations.[163]

The legislative history of the Act makes it clear that its passage was intended to not only prohibit discrimination in decisions affecting employment—such as hiring and promotion—but also in the receipt of employer-provided benefits such as health insurance.[164] Since the passage of the PDA, courts presented with the question of whether health insurance benefits are included under the "benefits" language of the PDA have consistently answered in the affirmative. In *Newport News Shipbuilding & Dry Rock Co. v. EEOC*,[165] the Supreme Court held that employer-provided health insurance plans constituted a term, condition, or privilege of employment, and those benefits were thus subject to antidiscrimina-

159. Gen. Elec. Co. v. Gilbert, 429 U.S. 125 (1976). The legislative history makes it painstakingly clear that the intent in enacting the PDA was to overturn the *Gilbert* decision. *See* 124 CONG. REC. 38574 (daily ed. Oct. 14, 1978) (statement of Elizabeth Holtzman) ("This bill was originally designed to overturn that ruling [*Gilbert*] and to make it clear that pregnancy discrimination on the basis of pregnancy is, in fact, sex discrimination");123 CONG. REC. 29387 (remarks of Sen. Javits) ("[T]his bill is simply corrective legislation, designed to restore the law with respect to pregnant women employees to the point where it was last year, before the Supreme Court's decision in *Gilbert* . . ."). It is worth noting that the PDA only altered the definition of sex discrimination to include pregnancy discrimination under Title VII. The case that was the precursor to *Gilbert*, *Geduldig v. Aiello*, 417 U.S. 484 (1974), and dealt with a similar challenge except on constitutional equal protection grounds, is arguably still good law despite the passage of the PDA. Thus, pregnancy discrimination may still be legal under the Equal Protection Clause. *See* Shannon W. Liss, *The Constitutionality of Pregnancy Discrimination: The Lingering Effects of* Geduldig *and Suggestions for Forcing its Reversal*, 23 N.Y.U. REV. L. & SOC. CHANGE 59, 61 (1997) (arguing that *Geduldig* continues to have legal force). *But see* Candace Saari Kovacic-Fleischer, United States v. Virginia*'s New Gender Equal Protection Analysis with Ramifications for Pregnancy, Parenting and Title VII*, 50 VAND. L. R. 845, 886-87 (1997) (arguing that the decision and analysis in *United States v. Virginia* effectively overruled *Geduldig*).

160. *Gilbert*, 429 U.S. at 134-35.

161. 42 U.S.C. § 2000e(k) (1976).

162. *Id.*

163. *See* U.S. Equal Employment Opportunity Commission, *Facts About Pregnancy Discrimination* (2008), http://www.eeoc.gov/facts/fs-preg.html (last visited Apr. 19, 2013).

164. 123 CONG. REC. 29337 (daily ed. Sept. 15, 1977) (statements of Sen. Harrison A. Williams) ("[I]t is important to bear in mind that this legislation does not require that any employer begin to provide health insurance where it is not presently provided. Rather, it requires that employers who do provide health insurance do so on a nondiscriminatory basis.")

165. 462 U.S. 669 (1983).

tion laws such as the PDA.[166] Applying this principle, the Court ruled that an employer-provided health insurance plan that failed to provide benefits for pregnancy and pregnancy-related conditions to spouses of employees in the same manner as for female employees ran afoul of Title VII.[167]

A woman acting as a surrogate has yet to bring a claim that a denial of benefits violates the PDA, but individuals and couples have brought claims under the PDA for denial of infertility benefits in general. Although these litigants have met with only limited success, these failures have hinged upon courts' willingness to see infertility as a condition "related" to pregnancy under the Act. For instance, in *Pacourek v. Inland Steel Co.*,[168] the Northern District of Illinois found that the statutory language of the PDA favored an inclusive reading of "related medical conditions," and thus that infertility issues should be covered in the same manner as other disabilities.[169] Likewise, in the case of *Hall v. Nalco*,[170] the Seventh Circuit held that termination of an employee due to absenteeism related to undergoing IVF procedures was actionable under the PDA.[171] The court stated that "[e]mployees terminated for taking time off to undergo IVF—just like those terminated for taking time off to give birth or receive other pregnancy-related care—will always be women, . . . Thus, contrary to the district court's conclusion, [the employee] was terminated not for the gender-neutral condition of infertility, but rather for the gender-specific quality of childbearing capacity."[172]

Other courts have reached the opposite conclusion. In the case of *Krauel v. Iowa Methodist Medical Center*,[173] the Eighth Circuit held that infertility should not be covered as a "related medical condition" under the PDA, because "[p]regnancy and childbirth, which occur after conception, are strikingly different from infertility, which prevents conception."[174] *Saks v. Franklin Covey Co.*[175] reasoned that since infertility affects both men and women, the refusal to cover infertility treatments cannot be sex discrimination, and therefore does not

166. *Id.* at 678.

167. *Id.* at 676. ("Under the proper test petitioner's plan is unlawful, because the protection it affords to married male employees is less comprehensive than the protection it affords to married female employees").

168. 858 F. Supp. 1393 (N.D.Ill. 1994).

169. *Id.* at 1403 ("As a general matter, a woman's medical condition rendering her unable to become pregnant naturally is a medical condition related to pregnancy and childbirth for purposes of the Pregnancy Discrimination Act.").

170. 534 F.3d 644, 645 (7th Cir. 2008).

171. *Id.* at 649.

172. *Id.* at 648-49; *see also* Cleese v. Hewlett-Packard Co., 911 F. Supp. 1312, 1318 (D.Or. 1995) (holding that the "purpose of the PDA is best served by extending its coverage to women who are trying to become pregnant"). *See generally* Jeanne Hayes, FEMALE INFERTILITY IN THE WORKPLACE: UNDERSTANDING THE SCOPE OF THE PREGNANCY DISCRIMINATION ACT, 42 Conn. L. Rev. 1299 (2010) (arguing that infertile women should be under the protection of the PDA).

173. 95 F.3d 674 (8th Cir. 1996).

174. *Id.* at 679.

175. 117 F. Supp. 2d 318 (S.D.N.Y. 2000).

fall under the purview of Title VII.[176]

Women who act as surrogates, however, may be more successful using the PDA to seek coverage for their pregnancies. It is logical that a surrogate's claim that a denial of health insurance benefits violates the PDA would be met with more success than those claiming rights to infertility benefits, since the condition of the surrogate plaintiff is a physical *pregnancy*. Without any such case law, it is impossible to say how a court might react.

According to the plain language of the statute, however, it seems that such a claim would have merit. Surrogate mothers are undeniably "pregnant." Since the PDA mandates that employer-sponsored health insurance cover pregnancy in the same manner as other disabilities, it would be difficult for an employer to argue that excluding surrogacy is permitted under the statute, regardless of the manner in which the employee became impregnated or her plans for the child once it is born. The history of the Act focuses exclusively on the discrimination and disadvantages women face in the workplace because of the *physical fact of pregnancy*:

> In using the broad phrase "women affected by pregnancy, childbirth and related medical conditions," the bill makes clear that its protection extends to the whole range of matters concerning the childbearing process. At the same time, the bill is intended to be limited to effects upon the woman who is herself pregnant, bearing a child, or has a related medical condition, and not to include any effect upon one woman due to the pregnancy of another.[177]

The bill was described at its core as being necessary for the "effective protection against discrimination on the basis of [women's's] childbearing capacity,"[178] because "discrimination based on pregnancy not only singles out and discriminates against the woman as a woman, it also discriminates against the child-bearing process."[179] The legislative history[180] strongly suggests that the physical pregnancy itself is the determinative factor when deciding who is covered.

176. *Id.* at 328. The court in this particular case reached this conclusion despite the fact that the procedure at issue—surgical impregnation—can only be performed on women. *See also* Niemeier v. Tri-State Fire Prot. Dist., 2000 LEXIS 12621, at *17-19 (N.D. Ill. 2000) (reviewing split in circuits concerning whether PDA mandates coverage of infertility treatments and concluding that the court "currently remains[s] unconvinced" that infertility should be considered a "related medical condition" under the PDA).

177. H.R. REP. NO. 95-948, at 5 (1978).

178. 123 CONG. REC. 29337 (1977).

179. 123 CONG. REC. 29635 (1977).

180. *See id.* ("Mr. HATCH: So the Senator is satisfied that, though the committee language I brought up, 'woman affected by pregnancy' seems to be ambiguous, what it means is that this act only applies to the particular woman who is actually pregnant, who is an employee and has become pregnant after her employment? Mr. WILLIAMS. Exactly").

The PDA is silent as to whether the intent of the woman in becoming pregnant, or her plans for the child once it is born, factor into the protections afforded by the statute, suggesting the drafters intended no such distinctions. One could argue that the silence reflects nothing more than the fact that Congress, at that time, had no reason to foresee the current rise in surrogate pregnancy. While this is true, the legislative history makes it clear that at the time of the passage of the PDA, members of Congress undeniably were aware of the range of circumstances that pregnant women find themselves in—from planned pregnancies to unplanned ones,[181] from pregnancies resulting from marital relationships to those resulting from rape or incest,[182] and from women who choose to parent their own children to those that relinquished their parental rights through adoption.[183] Despite being aware of these differences, the drafters of the PDA made no distinctions between these groups of women and the protections they would receive, instead tying protection under the statute *only* to the physical state of pregnancy.[184] In fact, the drafters were careful to make the point that the bill did *not* address a woman's decision to stay home with children after the point at which she was medically able to resume work, but *only* the period of pregnancy which rendered her medically disabled.[185] This language bolsters the idea that it is the physical fact of pregnancy—not the panoply of options for what happens next—which was the focus of the legislation.

Although the legislative history lacks language about the extent to which a woman's decision to relinquish parental rights after giving birth factors into her protection under the statute, it does make clear that women who choose to

181. *See* 123 CONG. REC. 29641 (1977) (describing the plight of one of the original plaintiffs in the *Gilbert* case, who "accidentally became pregnant"); 123 CONG. REC. 29661 (1977) (statements of Sen. Biden) ("No contraceptive is perfect, consequently, each year tens of thousands of pregnancies after marriage are unplanned").

182. *See* 123 CONG. REC. 29657 (1977) ("We are talking about pregnancy as a result of incest and pregnancy as a result of rape. We are talking about some of the tragic genetic diseases which now can be detected very early in the instances of pregnancy like Tay-Sachs disease which leads to the ultimate painful death of the child before the age of 4. We are talking about all these things which it seems to me the Senate is hardly in a position to pass judgment upon").

183. From 1952 to 1972, 8.7% of all babies born to unwed mothers in the United States were placed for adoption. However, when only looking at white women who gave their premarital children up for adoption, the number jumps to a full 19.3% for the same time period. C.A. Bachrach, K.S. Stolley, & K.A. London, *Relinquishment of premarital births: evidence from the national survey data*, Family Planning Perspectives, 24, 27-32, 48 (1992). These percentages—very high compared to the numbers of adoptions today—suggest that the possibility of adoption could not have completely escaped the attention of all the members of both houses of congress.

184. *See* 123 CONG. REC. 29635 (1977) ("The whole purpose of this bill is to say that if a corporation, a business is to provide disability that they cannot discriminate against women because of the unique character of disability that might confront them and thus we are talking about those disabilities that are attendant to the child-bearing potential of women").

185. 123 CONG. REC. 29635 (1977) ("In the case of an employer which does provide a disability plan, benefits are required to be paid only on the same terms applicable to other employees—that is, only when the employee is medically—and I stress 'medically'—unable to work. For instance, S. 995 does not require an employer to provide benefits for a woman who wishes to stay home to prepare for child birth or to take extensive leave to care for her child after birth").

terminate their pregnancies *before* giving birth are covered by the statute. As the House Report states,

> Because the bill applies to all situations in which women are "affected by pregnancy, childbirth, and related, medical conditions," its basic language covers decisions by women who chose to terminate their pregnancies. Thus, no employer may, for example, fire or refuse to hire a woman simply because she has exercised her right to have an abortion.[186]

Although not entirely analogous, this is another example of the legislative history revealing that it was the physical fact of pregnancy—not the eventual outcome—that was determinative in deciding who was protected.

The drafters of the legislation were concerned about not only whether women who chose to have abortions were covered under the terms of the legislation, but also what incentives such a bill would have on a woman's decision whether or not to have an abortion at all.[187] In fact, much of the discussion of the bill centered on an amendment that made it clear that employers would not have to pay for elective abortions under the statute's language.[188] The drafters saw the legislation as a way to disincentivize abortions. Women would no longer be encouraged to choose abortion because of the possibly negative economic and employment consequences of carrying the pregnancy to term.[189] The argument that the bill would encourage more women to bear children instead of choosing abortions was in fact one of the bill's proponents' main selling points.[190] At various points in the legislative history, the bill was referred to as "pro-family"[191] and "pro-life."[192]

186. H.R. REP. NO. 95-948 (1978).

187. *See* 123 CONG. REC. 29657 (1977) (statement of Sen. Bayh) ("[T]he question of abortion is not foreign to this body. It is one of the most emotional, deeply felt, discussed-at-length issues that has ever confronted us from time to time").

188. H.R. REP. No. 95-948, at 7 (1978) (describing the concerns of some congress people, and the resulting amendment which stated that employers were not required to pay for abortion benefits in circumstances where the life of the mother was not endangered by the pregnancy).

189. 123 CONG. REC. 29657 (1977) (statement of Sen. Eagleton) ("[I]t is my belief that the provisions of this bill provide women with a strong economic incentive to carry pregnancy to term"); *Id.* ("Thus, if one is to look carefully at what the thrust of this legislation is, indeed by requiring that if disability insurance is provided it shall cover the expenses attendant to pregnancy and childbirth, we are saying to those women who otherwise for economic reasons pursue the path of abortion, 'you will not have to do so.'").

190. *Discrimination on the Basis of Pregnancy: Hearing on S. 995 Before the S. Subcomm. on Labor of the Comm. on Human Resources* (1977) (Comments of Chairmen Sen. Harrison A. Williams, Jr.) ("If S. 995 is not enacted countless families will be forced to suffer unjust and severe economic and social consequences. Women disabled by pregnancy and childbirth will be forced to take leave without pay. The loss of a mother's salary will make it difficult for parents to provide their children with proper nutrition and health care. For some women and their families it will mean dissipating family savings and security or being forced to go on welfare. For others, especially low income women, the loss of income will encourage abortions").

191. 124 CONG. REC. 38574 (1978) (Mr. Jeffords).

192. *Id.*

The legislative intent was thus clearly to make it *easier* for women to bear children, with the underlying assumption that *more* children was a net positive for society.[193] As one senator noted, "it is especially important that we not ask a potential mother to undergo severe disadvantages in order to bring another life into the world."[194] During the Subcommittee's hearing on the bill, Clarence Mitchell, testifying on behalf of the NAACP, stated,

> When we declare war we don't find out how much it is going to cost us to do it, we feel we have got to protect our Nation and we go to war regardless of the cost and people make sacrifices. I think it is the same principle when you are talking about the future of the human race. We want children not only to be born but we want them to be well born. We want mothers not to be restrained from carrying on that wonderful function of producing a fellow human simply because the future is uncertain and they don't know whether they would get the kind of benefits that people might get for getting an injury on the golf course.[195]

Thus, the proponents of the bill were very invested not just in eradicating discrimination against women but also in promoting and protecting the child-bearing process.[196] Looking at surrogacy in this context, protecting surrogate mothers falls in line with congressional intent by furthering the goal of promoting and increasing childbirth. This is even more true in the case of surrogacy, where children are placed with families who desperately want them.

Further, when interpreting the application of the PDA to other circumstances, such as covering the pregnant spouses of male employees for the purpose of health insurance benefits or women who seek abortion, courts have favored an expansive reading. The Supreme Court made a point to note that, although the legislative history of the PDA focused on the needs of female employees, that fact did not create a "negative inference" that the statute was *not* intended to apply to situations in which men were being discriminated against vis-à-vis access to benefits for their pregnant wives.[197] In the course of this discussion, the Court specifically notes that it would be error to, "limit[] the scope of the act to the specific problem that motivated its enactment."[198] Furthermore, courts have

193. *See* 123 CONG. REC. 29661 (1977) ("Moreover, from a moral perspective, I personally believe that abortion is wrong, that life is the highest good, the summum bonum").

194. 123 CONG. REC. 29387 (1977) (statement of Sen. Jacob Javits).

195. *Discrimination on the Basis of Pregnancy: Hearing on S. 995 Before the S. Subcomm. on Labor of the Comm. on Human Resources* (1977).

196. 123 CONG. REC. 29661 (1977) ("However, discrimination based on pregnancy not only singles out and discriminates against the woman as a woman, it also discriminates against the child-bearing process.").

197. Newport News Shipbuilding and Dry Dock Co. v. E.E.O.C., 462 U.S. 669, 679-80 (1983) (citing United States v. Turkette, 452 U.S. 576, 591, (1981)).

198. *Id.*

found that, consistent with the legislative history, the PDA also applies to women who terminate their pregnancies through abortion.[199] Applying those principles to the question at hand, it would likewise be error to limit the Act in such a way to exclude individuals who clearly fall within the purview of the plain reading of the statute's language and intent—surrogate mothers. Surrogates should be treated the same as other pregnant women for purposes of the Act because that vital element—a physical pregnancy—remains the same for them, and thus exposes them to the same risk of discrimination that all pregnant women face.

The PDA very clearly and simply mandates that insurance companies may not deny coverage to pregnant women if they cover other disabilities. As the legislative history makes clear, equality of health benefits for pregnancy is not "some kind of favor" to pregnant women that can be revoked at the will of the insurance companies, but an issue of fundamental fairness covered by the language of the statute.[200] Whether or not insurance companies want to—or feel they should have to—cover the pregnancy-related health costs of women acting as surrogates is simply not relevant to the inquiry of whether they are required to for those women who come under the protection of this landmark civil rights law.

Of course, the PDA only protects women that receive employer-provided health care benefits through employers with fifteen or more employees.[201] According to the most recent available data, 59% of insured women get their health care through employer-provided benefits.[202] Additionally, surrogates seeking to use the protections of the PDA to ensure health insurance coverage through their employers would have to sue their *employers* for sex discrimination instead of suing the insurance companies directly, which is admittedly a roundabout way to secure fair coverage. Thus, while the PDA would undoubtedly be helpful to a surrogate attempting to secure coverage, other sources of law are necessary for those who fall outside the purview of the PDA or who want to challenge the exclusions directly.

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199. *See* Doe v. C.A.R.S. Protection Plus, Inc., 527 F.3d 358, 364 (3d Cir. 2008); Turic v. Holland Hospitality, Inc., 85 F.3d 1211, 1213-14 (6th Cir. 1996).

200. *See* 123 CONG. REC. 29655 (1977) ("I must oppose the selection of this one item on the ground that we are doing the pregnant woman some kind of a favor. The fact is what we are doing, what we are dealing with here, is an actual disability which is prejudicial to millions of women, and it is, therefore, a discrimination which we should not accept").

201. *See* 42 U.S.C. § 2000e(b) ("The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . .").

202. KAISER FAMILY FOUND., *Fact Sheet: Women's Health Insurance Coverage* (Dec. 2011), *available at* http://www.kff.org/womenshealth/upload/6000-091.pdf. Americans who work for state and local governments are more likely than those working in the private sector to receive health benefits through their employers—73% to 52%, respectively. *See National Compensation Survey: Employee Benefits in the United States*, U.S. DEPARTMENT OF LABOR (Mar. 2009), *available at* http://www.bls.gov/ncs/ebs/benefits/2009/ebbl0044.pdf.

C. HIPAA

In addition to the protections afforded by the PDA, surrogates may also find that the anti-discrimination provisions of the Health Insurance Portability and Accountability Act of 1996 (HIPAA)[203] provide some protection from unfair exclusions or denials of coverage. First, HIPAA broadened the reach of the PDA by requiring all health insurance policies for small employer groups—defined as companies with two to fifty employees—to be sold on a guaranteed basis, thus providing small employers with the chance to buy policies with maternity benefits that would otherwise be unavailable to them.[204] Beyond this, HIPAA generally provides standards for health insurance coverage, as well as setting privacy standards for the healthcare industry.[205] Although HIPAA allows insurance companies to exclude benefits based on a determination that they are either medically unnecessary or experimental, it mandates that insurance providers must uniformly provide benefits for similarly situated individuals.[206] "Likewise, any restriction on a benefit or benefits must apply uniformly to all similarly situated individuals and must not be directed at individual participants or beneficiaries based on any health factor of the participants or beneficiaries."[207] An example of an impermissible exclusion is provided in the regulations:

> Facts. A group health plan applies for a group health policy offered by an issuer. Individual C is covered under the plan and has an adverse health condition. As part of the application, the issuer receives health information about the individuals to be covered, including information about C's adverse health condition. The policy form offered by the issuer generally provides benefits for the adverse health condition that C has, but in this case the issuer offers the plan a policy modified by a rider that excludes benefits for C for that condition. The exclusionary

203. Pub. L. No. 104-191, 110 STAT. 1936 (1996) (codified as amended in scattered sections of 18, 26, 29, and 42 U.S.C.).

204. *See* 45 C.F.R. § 146.150(a)(1)-(2) (2003).

205. D'Lisa Simmons, *Impact of HIPAA and The Privacy Rule*, 43 HOUS. LAW. 20, 20 (2006).

206. The full text reads:

> [B]enefits provided under a plan or through group health insurance coverage must be uniformly available to all similarly situated individuals .... Likewise, any restriction on a benefit or benefits must apply uniformly to all similarly situated individuals and must not be directed at individual participants or beneficiaries based on any health factor of the participants or beneficiaries (determined based on all the relevant facts and circumstances). Thus, for example, a plan or issuer may limit or exclude benefits in relation to a specific disease or condition, limit or exclude benefits for certain types of treatments or drugs, or limit or exclude benefits based on a determination of whether the benefits are experimental or not medically necessary, but only if the benefit limitation or exclusion applies uniformly to *all similarly situated individuals and is not directed at individual participants or beneficiaries based on any health factor of the participants or beneficiaries.*

29 C.F.R. § 2590.702(b)(2)(i)(B) (emphasis added).

207. NONDISCRIMINATION AND WELLNESS PROGRAMS IN HEALTH COVERAGE IN THE GROUP MARKET, 71 FED. REG. 75,014, 75,015 (Dec. 13, 2006) (to be codified at 29 C.F.R. pt. 2590).

> rider is made effective the first day of the next plan year.
>
> Conclusion. In this [e]xample, the issuer violates this paragraph (b)(2)(i) because benefits for C's condition are available to other individuals in the group of similarly situated individuals that includes C but are not available to C. Thus, the benefits are not uniformly available to all similarly situated individuals. Even though the exclusionary rider is made effective the first day of the next plan year, because the rider does not apply to all similarly situated individuals, the issuer violates this paragraph (b)(2)(i).[208]

This example suggests that since surrogates are "similarly situated" to other pregnant beneficiaries of a plan by virtue of their shared medical condition, they may not be lawfully singled out for exclusion of benefits based on the fact of their surrogacy. This conclusion is dependent on a finding that surrogacy qualifies as one of the eight "health factors": 1) health status, 2) medical condition, 3) claims experience, 4) receipt of health care, 5) medical history, 6) genetic information, 7) evidence of insurability, or 8) disability.

Surrogacy could easily come under the definition of several of these categories. Pregnancy is a "medical condition," the act of impregnation through ART could be considered "medical history," and the fact that the fetus may not be genetically related to the surrogate mother could fall under the "genetic information" category. Since surrogacy is physically indistinguishable from pregnancy, it follows that insurance companies should not be able to discriminate between groups of people who share the same medical condition. HIPAA does allow companies to limit benefits for injuries resulting from certain "high-risk" activities.[209] In the case of surrogacy, it could be argued that the ART procedures used in order to impregnate a surrogate are "high-risk," but even then surrogates would still have to be treated the same as women who undergo these types of treatments in order to bear their own children. Although this theory has yet to be litigated, the antidiscrimination provisions of HIPAA may provide yet another avenue for surrogates to challenge exclusions and denials of coverage based on their status as surrogate mothers.

D. STATE LAWS

As the case of *MercyCare Ins. Co. v. Wisconsin Commissioner of Insurance*, discussed *supra*, showed, state anti-discrimination laws may also provide a

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208. NONDISCRIMINATION AND WELLNESS PROGRAMS IN HEALTH COVERAGE IN THE GROUP MARKET, 45 C.F.R. § 146.121(b)(1)(iii) (2006).

209. *See FAQs About the HIPAA Nondiscrimination Requirements*, U.S. DEP'T OF LABOR, http://www.dol.gov/ebsa/faqs/faq_hipaa_ND.html ("However, a plan may exclude coverage for injuries that do not result from a medical condition or domestic violence, such as injuries sustained in high risk activities (for example, bungee jumping). But the plan could not exclude an individual from enrollment for coverage because the individual participated in bungee jumping").

fruitful basis for challenging insurance company practices. Although the Wisconsin law[210] is unique in the specificity of its language, other states have statutes that could support an argument that surrogate pregnancies should be covered in the same manner as other pregnancies. For instance, Vermont has statutory language similar to the anti-discrimination provisions contained in HIPAA and the Wisconsin law determinative in the *MercyCare* decision, prohibiting discrimination between similarly situated individuals for purposes of insurance benefits.[211]

Several states have antidiscrimination laws that outlaw discrimination in pregnancy coverage on the basis of marital status. For instance, in Colorado, insurance companies must "offer coverage for maternity care to both married and unmarried women in individual, nonfamily contracts and shall offer the same coverage and the same payment of costs for maternity benefits to unmarried women that it offers to married women."[212] Oregon,[213] Maine,[214] Maryland,[215] Minnesota,[216] and New Jersey[217] all have similar laws prohibiting insurance companies from discriminating between married and unmarried women for purposes of maternity benefits. Although not directly on point, it might be possible to argue by analogy that insurance companies likewise cannot discriminate based on the women's plan for the child after birth.

Perhaps most importantly, nineteen states have laws mandating that insurance plans provide or offer maternity coverage to some extent, while not limiting this mandate to employers with 15 or more employees like the PDA.[218] These statutes require insurance companies to cover, or offer at least some policies which cover, the physical costs associated with pregnancy and birth. Again, since surrogate mothers have the exact same costs as non-surrogate mothers in this regard, an insurance company may have a difficult time arguing that exclusions of these costs do not run afoul of state mandates to cover maternity.

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210. WIS. STAT. ANN. 632.895(7) (West, Westlaw through 2011, Act 113).

211. *See* 8 VT. STAT. ANN. § 4724(7)(A) (West, Westlaw through 2011 Adj. Session) (prohibiting "[m]aking or permitting any unfair discrimination between insureds of the same class and equal risk in the rates charged for any contract of insurance, or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of such contracts").

212. COLO. REV. STAT. ANN. § 10-16-104 (West, Westlaw through 2013 First Reg. Sess.).

213. OR. REV. STAT. § 743A.084 (West, Westlaw through 2013 Reg. Sess.).

214. ME. REV. STAT. ANN. tit.24-A, § 2832 (West, Westlaw through 2011 Second Reg. Sess.).

215. MD. CODE ANN., INS. § 15-506 (West, Westlaw through 2012 Reg. Sess. and First and Second Spec. Sess.).

216. MINN. STAT. ANN. § 62A.041(West, Westlaw through 2013 Reg. Sess. through Ch. 10).

217. N.J. STAT. ANN. 17:48A-7c (West, Westlaw through L.2013, c. 35 and J.R. No. 2).

218. *See* MASS. GEN. LAWS ANN. ch. 176A, § 8H (West, Westlaw through 2013 First Ann. Sess. Ch. 3); Nev. Rev. Stat. § 689B.260 (West, Westlaw through 2011 76th Reg. Sess.); Haw. Rev. Stat. Ann. § 393-7(c)(5) (West, Westlaw through 2012 Reg. and Spec. Sess.). *See generally* NATIONAL WOMEN'S LAW CENTER, *Maternity Care: Health Care Report Card, available at* http://hrc.nwlc.org/policy-indicators/maternity-care (outlining the various maternity mandates by state).

E. HEALTH CARE REFORM

The Patient Protection and Affordable Care Act (PPACA),[219] signed into law on March 23, 2010, mandates many important changes to the health insurance market in the United States, including the area of women's health. In addition to a number of provisions relating to preventative care for pregnant women,[220] the ability to use freestanding birth centers and midwives,[221] and maternal and infant visitation programs,[222] the law has two important new mandates for the insurance market. First, maternity and newborn care are considered "essential health benefits," which means that all new health plans in the individual and small group market *must* include maternity benefits.[223] Second, for plans in the group market, pregnancy cannot be a "pre-existing condition."[224]

In light of these two new insurance mandates—particularly the first—all insurance plans will have a directive even more stringent than that contained in the PDA. Not only do insurance companies have to offer maternity coverage in the same manner and to the same extent as other disabilities as mandated by the PDA, they must also include this coverage in all policies regardless of whether other health conditions are covered. In the face of an explicit mandate to cover maternity, could insurance companies continue to deny coverage for one category of maternity—surrogate pregnancy?

An October 12, 2010 memorandum to the House of Representatives Committee on Energy and Commerce from Congressmen Waxman and Stupak concerning maternity coverage in the individual health insurance market and how health care reform is likely to affect it offers a hint to how Congress intends to answer this question.[225] The memorandum details the results of an investigation into the four largest for-profit health insurance companies—Aetna, Humana, UnitedHealth Group, and WellPoint—and their approaches to maternity coverage in the individual insurance market. The report noted that in addition to the general lack of available maternity coverage in the individual health insurance market, "[h]ealth insurance companies also sometimes exclude from coverage expectant fathers, candidates for surrogacy whether they are the surrogate or the recipient, and those in the process of adoption."[226] In fact, the eight-page

219. PUB. L. NO. 111-148, 124 STAT. 119 (2010).

220. *See* NATIONAL WOMEN'S LAW CENTER, *What Women Need to Know About Health Reform: Access to High Quality Maternity Care* (June 2010), *available at* http://www.nwlc.org/sites/default/files/pdfs/HCR_Maternity%20Care.pdf.

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. *See* Memorandum from Chairmen Henry A. Waxmen and Bart Stupak to the U.S. House of Representatives Committee on Energy and Commerce on Maternity Coverage in the Individual Health Insurance Market (October 12, 2010), *available at* http://democrats.energycommerce.house.gov/Press_111/20101012/Memo.Maternity.Coverage.Individual.Market.2010.10.12.pdf.

226. *Id.* at 1.

memorandum references three times the difficulty that surrogate mothers and couples utilizing surrogate mothers have in accessing health insurance in the individual market—repeatedly grouping this practice alongside the similar difficulties experienced by non-surrogate mothers, adoptive mothers, and expectant fathers.[227] The memorandum then goes on to say that the "health care reform legislation signed into law by President Obama will halt the practice of denying coverage to expectant parents . . . . health insurance companies will no longer be able to deny coverage to women because they are pregnant or exclude maternity-related claims."[228] By grouping surrogates in with other types of individuals who struggle to find health insurance for maternity costs, and then indicating that the PPACA will end these struggles, the memorandum suggests that insurance for surrogates will be mandated by the new law in the same way as insurance for non-surrogate parents. These provisions, however, do not take effect until 2014.

1. Policy Considerations

In addition to the legal concerns expressed in the previous sections, the current trend towards excluding surrogates from health insurance also creates poor policy outcomes. Scholars and activists working for reform in infertility coverage have advanced a multitude of legal and policy-based theories that reveal the issues arising when infertility treatments are excluded from insurance coverage.

Some of the more practical arguments highlight the simple fact that a majority of Americans believe that insurance should cover infertility treatments.[229] Others assert that requiring insurance coverage would reduce the desire for—and incidence of—multiple births occurring both with surrogacy and traditional ART procedures, because couples would be less likely to worry about the costs associated with undergoing another round of treatment if the first was unsuccessful or if they wanted to have another child.[230] This hypothesis is supported by data from European countries that subsidize IVF, which show lower rates of multiple births, despite having overall birth rates comparable to those in the U.S.[231] These advocates also argue that coverage of infertility treatments would have the added benefit of leading to more cost-effective and humane treatment of

227. *See, e.g., id.* at 4 ("The four health insurance companies also sometimes exclude from coverage expectant fathers, candidates for surrogacy whether they are the surrogate or recipient, and those in the process of adoption").

228. *Id.* at 2.

229. *See* Joseph C. Isaacs, *Infertility Coverage is Good Business*, 89 FERTILITY & STERILITY 1049, 1050 (2008) (citing to 2002 and 2005 public opinion polls that stated that 80% of the public believed that infertility diagnosis and treatments should be covered under health insurance); Aaron C. McKee, Note, *The American Dream—2.5 Kids and a White Picket Fence: The Need for Federal Legislation to Protect the Insurance Rights of Infertile Couples*, 41 WASHBURN L.J. 191, 196 (2001) (noting that approximately 60% of those interviewed in study stated they believed insurance should cover drug therapy and IVF).

230. Peggy Orenstein, *In Vitro We Trust*, N.Y. TIMES, July 20, 2008, at MM.

231. *Id.*

infertility patients.[232]

Many scholars also point to the race and class disparities in access to infertility treatment as a reason to mandate insurance coverage.[233] Seventy-five percent of low-income women who are infertile do not have access to fertility services, and a disproportionate number of these women are African-American.[234] In addition, scholars argue that mandated insurance coverage for ART and surrogacy is necessary because the right to procreation is a basic human right.[235] Many scholars are also pushing for comprehensive federal legislation that would protect the interest of infertile people through mandated insurance coverage, [236] or through the regulation of surrogacy.[237]

The exclusion of surrogacy from health insurance policies that otherwise cover maternity benefits also implicates a number of privacy concerns. Pregnancy and birth are incredibly personal experiences[238] and women come to this experience from a variety of circumstances—from planned pregnancies to accidental pregnancies, from becoming pregnant naturally to utilizing a wide variety of infertility treatments, from planning to parent the resulting child to deciding to place it with adoptive parents. Considering the wide range of circumstances that women find themselves in, it is unsavory from a privacy perspective to allow insurance companies to inquire deeply into how exactly their policy holders became pregnant, under what circumstances, with what intentions, and what their plans are for after the birth.

232. *Id.* at 297.

233. *See* Charlotte Rutherford, *Reproductive Freedoms and African American Women*, 4 YALE J.L. & FEMINISM 255, 268 (1992); Lisa M. Kerr, *Can Money Buy Happiness? An Examination of the Coverage of Infertility Services Under HMO Contracts*, 49 CASE W. RES. L. REV. 599, 642 (1999).

234. *Id.* Access to infertility services may be even more vital to low income people, because they are at an increased risk of infertility due to the likelihood they have been exposed to environmental toxins and STDs, as well as the barriers they have to accessing proper nutrition and healthcare. *Id.*

235. *See* Lisa L. Behm, *Legal, Moral & International Perspectives on Surrogate Motherhood: The Call for a Uniform Regulatory Scheme in the United States*, 2 DEPAUL J. HEALTH CARE L. 557, 553-66 (1999); Laura A. Brill, *When Will the Law Catch Up With Technology?: Jaycee B. v. Superior Court of Orange County: An Urgent Cry for Legislation on Gestational Surrogacy*, 39 CATH. LAW.241, 253 (1999).

236. *See* James B. Roche, *After* Bragdon v. Abbott*: Why Legislation is Still Needed to Mandate Infertility Insurance*, 11 B.U. PUB. INT. L.J. 215, 219 (2002); Aaron C. McKee, Note, *The American Dream—2.5 Kids and a White Picket Fence: The Need for Federal Legislation to Protect the Insurance Rights of Infertile Couples*, 41 WASHBURN L.J. 191, 206 (2001); Lisa M. Kerr, *Can Money Buy Happiness? An Examination of the Coverage of Infertility Services Under HMO Contracts*, 49 CASE W. RES. L. REV. 599, 642 (1999).

237. Laura A. Brill, *When Will the Law Catch Up With Technology?: Jaycee B. v. Superior Court of Orange County: An Urgent Cry for Legislation on Gestational Surrogacy*, 39 CATH. LAW.241 (1999). These efforts are supported by advocacy groups such as RESOLVE, a national infertility group. *See Take Action: Federal Legislation*, RESOLVE: The National Infertility Association, http://www.resolve.org/get-involved/federal-legislation.html (last visited Apr. 16, 2013).

238. *See* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child").

IV. CONCERNS FROM THE HEALTH INSURANCE PROVIDERS

Although taken together the PDA, HIPAA, PPACA and state laws present a compelling argument that surrogate pregnancies must be covered in the same manner as non-surrogate pregnancies, the following sections will address some common arguments advanced by insurance companies against this coverage.

A. VOLUNTARY MEDICAL CONDITIONS

One argument often advanced by insurance companies is that pregnancy-related expenses for women acting as surrogates—much the same as those incurred for most plastic surgery—are voluntarily taken on.[239] The whole point of insurance, the argument goes, is to protect against the unexpected, not to finance actions which intentionally place the insured's health in danger. This argument has a major flaw when made in the context of pregnancy, which is that many, if not most, of the non-surrogate pregnancies that are covered by insurance companies are also voluntary and desired.

The legislative history of the PDA can offer guidance, because although it is understandably silent as to the possibility of surrogate pregnancy, this idea of voluntariness was certainly on the minds of the legislators who were deciding whether or not pregnancy should be afforded equal treatment for the purpose of access to medical benefits. The legislative history reveals a divergence of opinion about whether or not the "voluntary" issue was important to the discussion, and if so, in what way. In the words of Senator Hatch, who was arguing for special limitations on disability benefits associated with pregnancy:

> Most disease, most disability is involuntary, or at least I think in the eyes of most people who look at this particular area. This is something where people choose whether they want to have a child or whether they don't, at least in most instances, and I think that is crucial to the ultimate determination of this, or at least should be.[240]

Many members of Congress, however, noted the voluntary aspects of other types of illness. For example, Senator Kennedy noted:

> You are familiar with the fact that cosmetic surgery is paid for, that a host of different services that are paid for in terms of men, as I know and as you know, Mr. Chairman, the incidences of cancer that result

239. *See* Gabrielle Glaser, *Oregon births a boom in surrogate babies*, THE OREGONIAN, July 9, 2006 (noting that surrogacy, unlike other instances in which people utilize health insurance benefits, is not "accidental").

240. *Discrimination on the Basis of Pregnancy: Hearing on S. 995 Before the S. Subcomm. on Labor of the Comm. on Human Resources* (1977) (statements of Sen. Orrin Hatch). Senator Hatch's proposal—that pregnancy disability be limited to 6 weeks—was ultimately rejected with a vote of 72 nays to 13 yeas. 123 CONG. REC. 29635 (1977).

> from heavy smoking or from overeating, the epidemiological evidence is clear and is convincing and compelling. And, yet, you find that people that take voluntary action in that respect are going to be covered in terms of disability but, in this instance, unless this amendment is passed working women are not covered. It just makes absolutely no sense.[241]

And in the committee hearing on the bill, commentators noted that although pregnancy itself can be a voluntary condition, the associated and often unexpected health problems were not:

> First of all, if you are disabled by diabetes in pregnancy it is not because you volunteered for the diabetes. If you are disabled by renal disease in pregnancy, it is not that you volunteered for the renal disease. And when it is, for instance, said that you are covered under disability benefit plans if you break your leg skiing, and it is then said that is voluntary, isn't the answer that you do not go and ski in order to break your leg? Neither do you get pregnant in order to become disabled.[242]

During the course of the hearing, it was also noted that many companies who currently had disability or insurance plans already covered other conditions which could be described as voluntary—such as attempted suicide, hair transplants, or vasectomies[243]—or did not make a distinction between voluntary or involuntary conditions in their policies.[244] And the very notion that childbearing was "voluntary" was questioned by some of the individuals called upon to testify:

> One answer is, pregnancy is voluntary. Instead of responding that no contraceptive method is foolproof or that vasectomy, sports injuries, and lung cancer from smoking are also voluntary, perhaps we should be questioning the definition of "voluntary." Can pregnancy be truly voluntary for women if there is no other gender around to get pregnant in our place? If Americans have a generative conscience—if we are building a better world for our children—it becomes mandatory for some people to have those children; namely female people.[245]

In the end, those arguing that pregnancy should be treated differently from other disabilities because of its more voluntary nature lost out to those who felt that pregnancy—as a physically disabling condition—should be treated no differently than other temporarily disabling conditions, as the language of the PDA

241. *Id.* (statement of Sen. Ted Kennedy).

242. *Discrimination on the Basis of Pregnancy: Hearing on S. 995 Before the S. Subcomm. on Labor of the Comm. on Human Resources*, 95th Cong. (1977).

243. *Id.*

244. *Id.* at 262 (statements of Leon Lynch, Vice President, United Steelworkers).

245. *Id.* at 460 (statements of Letty Pogrebin, Ms Magazine).

reflects.[246] Congress' consideration and subsequent rejection of the voluntary distinction argument strongly suggests that this argument similarly has no place in the discussion about whether surrogate mothers should be covered under the PDA. Congress made it clear that the important difference was the physical fact of pregnancy—not whether or how someone chose to come to that state.

B. BENEFITS ACCRUING TO THIRD PARTIES

Another common argument that insurance companies advance in their defense of surrogacy exclusions is that the "benefit" of the insurance should only accrue to the insured individual, and in surrogacy arrangements, the "benefit"—or the resulting child—instead goes to the intended parents, who are not beneficiaries of the insurance plan.[247]

This argument has three major flaws. The first is that the care a woman receives when she is pregnant is undeniably also benefitting her—and indeed without proper care a pregnant woman can have complications that threaten her life.[248] Congress was aware of the ruinous impact of losing healthcare during a pregnancy on women's health, and was aware that it was not only for the benefit of the baby that a woman needed healthcare during the course of her pregnancy.[249] The second flaw with the argument above is that it ignores the benefit that accrues to the fetus—for whom the withdrawal of care could likewise prove detrimental or even fatal.[250] Finally, this argument is flawed because it's disingenuous to say that a woman who is not acting as a surrogate receives medical care throughout the pregnancy and birth only receives "benefit" from the services because they are instrumental in bringing her child into the world in good health. Who is to say what the "benefit" is and to whom it accrues in a situation such as this?

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246. The text simply reads,

> [W]omen affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section . . . shall be interpreted to permit otherwise.

Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (1978).

247. *See* Stein, *supra* note 151, at A1 (quoting the attorney for insurance company MercyCare as saying that, "MercyCare believes health coverage is a personal insurance that isn't meant to cover a surrogate situation where our insured is getting paid or doing a favor for someone who is not insured").

248. MATERNAL MORTALITY, WORLD HEALTH ORGANIZATION (May 2012), *available at* http://www.who.int/mediacentre/factsheets/fs348/en/index.html.

249. *See Amending Title 7 of the Civil Rights Act Providing for Disability Coverage to Pregnant Employees*: *Hearing on H.R. 5055 Before the H. Subcomm. on Emp't Opportunities, Educ., and Labor Comm.* (1977) ("Insufficient income during pregnancy may impact on the health of the mother and ultimately on the child in any or all of several ways, each as undesirable as the others. Lack of pregnancy benefits restricts maternal access to vital nutrition and health care, each increasingly expensive commodities. The lack of benefits would also encourage the pregnant woman to continue working late into her pregnancy and to return to work as soon as possible after giving birth, regardless of the health and social consequences of doing so") (statement by the American Nurses' Ass'n).

250. *Id.*

C. COMPENSATION TO THE SURROGATE

Another argument that insurance companies make is that in situations where the surrogate is paid for her services, she is essentially engaging in a for-profit business at the insurance company's expense.[251] Some insurance companies have responded to this situation by demanding that women repay the insurance company up to the amount that the surrogate was compensated for the surrogacy.[252]

This question is complicated by the fact that it is not always clear what is actually being "paid for." As Wendy Mariner, a professor at Boston University's School of Public Health said:

> Theoretically, compensation is for expenses and risks incurred by the gestational mother. But if she is paid—and her insurance is covering the cost of the pregnancy—what, exactly, is the compensation for? The pleasure of watching the surrogate be pregnant? Probably not. It seems more like it's an option on a child.[253]

Many surrogates argue, however, that their primary motivation is altruistic, and it is demeaning to suggest they are acting as surrogates primarily for pecuniary gain.[254]

The insurance companies' arguments about surrogate compensation are more fitting in states such as California, where surrogates can legally be compensated for their services.[255] In the states that explicitly allow and regulate surrogacy, however, there is a growing trend to structure the law in such a way that prevents surrogates from being compensated, or from being compensated over and above the attendant costs of the surrogacy—such as the costs associated with IVF, repayment for time taken off work, maternity clothes, or for the surrogate's

251. *See* Kim Kelliher, *Born, but not free*, 73 HOSP. & HEALTH NETWORKS 6 (June 1999), *available at* http://www.hhnmag.com/hhnmag/jsp/articledisplay.jsp?dcrpath=AHA/NewsStory_Article/data/HHNMAG319&domain=HHNMAG (quoting a spokesperson from Kaiser Permanente in San Diego as saying that, "since surrogates are paid for carrying a baby, it is unfair for their medical costs to be covered with inexpensive insurance" and that insurance is getting "soaked" by the practice).

252. *See* Gabrielle Glaser, *Oregon births a boom in surrogate babies*, THE OREGONIAN, July 9, 2006 (quoting a Kaiser spokesman for Kaiser Permanente in California stating that the company may now demand that clients who are compensated for surrogacy reimburse the costs of their obstetric care).

253. *See id.*

254. Ali & Kelley, *supra* note 116. ("As for the implication that surrogates are in it only for the money, [surrogate Gina Scanlon] notes that there are many easier jobs than carrying a baby 24 hours a day, seven days a week. (And most jobs don't run the risk of making you throw up for weeks at a time, or keep you from drinking if you feel like it.) 'If you broke it down by the hour,' Scanlon says wryly, 'it would barely be minimum wage. I mean, have [these detractors] ever met a gestational carrier?'").

255. *See* Johnson v. Calvert, 851 P.2d 776, 784 (Cal. 1993) (finding that the compensation a surrogate mother received for her services "in gestating the fetus and undergoing labor" were not violative of the public policies embodied in the California Penal Code).

medical costs if she doesn't have her own health insurance.[256] These laws effectively address the concerns of the insurance companies, as they ensure that only "compassionate" surrogates[257] are being covered—and that these surrogates are not making money at the insurance companies' expense.

Although the concern of the insurance companies in this particular context is more compelling than the other concerns discussed, *supra*, it still may not be able to overcome the simple yet persuasive arguments made by reference to the PDA, HIPAA, and the PPACA—that these companies may have absolutely no discretion in excluding these costs and staying within the anti-discrimination and coverage mandates.

D. COST

The final argument that insurance companies make is that coverage of surrogacy—and in many instances simple coverage of maternity benefits—is simply too detrimental to their bottom line.[258] Maternity coverage, as one senior executive of a health insurance company stated, results in "higher prices, lower margins and loss of market share."[259] By way of explaining why

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256. *See* WASH. REV. CODE ANN. §§ 26.26.210, 26.26.230 (2002) (prohibiting surrogacy contracts for compensation except for "payment of expenses incurred as a result of the pregnancy and the actual medical expenses of a surrogate mother, and the payment of reasonable attorney fees for the drafting of a surrogate parentage contract"); 46 Or. Op. Att'y Gen. 221, at *6 (1989) ("Any payments in excess of the surrogate mother's actual medical, legal, living and travel expenses—that is, payment for the surrogate mother's services in bearing the child—would invalidate the surrogate mother's consent to adopt"); N. M. STAT. ANN. § 32A-5-34(F) ("Nothing in this section shall be construed to permit payment to a woman for conceiving and carrying a child"); VA. CODE ANN. §§ 20-156, 20-160, (noting that any agreement between the parties for payment of compensation is void and unenforceable, except as to "[r]easonable medical and ancillary costs," which the statute defines as "the costs of the performance of assisted conception, the costs of prenatal maternal health care, the costs of maternal and child health care for a reasonable post partum period, the reasonable costs for medications and maternity clothes, and any additional and reasonable costs for housing and other living expenses attributable to the pregnancy"); N.H. REV. STAT. § 168-B:25 (1990) (requiring that fees paid to surrogates be limited to pregnancy-related medical expenses, lost wages, insurance, reasonable attorney's fees, and counseling fees).

257. "Compensated" v. "compassionate" surrogacy is a common way to differentiate those surrogates who enter into surrogacy arrangements for altruistic reasons and those that do so for financial gain. *See* Lauren Streicher, *Important points when thinking surrogate mom*, Chicago Sun Times, Jan. 14, 2005, *available at* http://www.highbeam.com/doc/1P2-1568542.html. But for an argument that this distinction is a false one, *see* Gregory Pence, *De-Regulating and De-Criminalizing Innovations in Human Reproduction*, 39 CUMB. L. REV. 1, 7 (2009) ("[M]oney fuel[s] stupendous breakthroughs in assisted reproduction and such market forces will continue to be good for babies and for infertile couples who want them.").

258. *See* Ted Sullivan, *MercyCare: Court's ruling in surrogate case will raise costs*, GazetteXtra.com, July 17, 2010, http://gazettextra.com/news/2010/jul/17/mercycare-courts-ruling-surrogate-case-will-raise-/ (quoting Mercy Health System General Counsel Ralph Topinka saying that the court's decision in MercyCare—which mandates that insurance cover surrogate pregnancy—will have the effect of raising insurance costs for everyone).

259. Memorandum from Chairmen Henry A. Waxmen and Bart Stupak to the U.S. House of Representatives Committee on Energy and Commerce on Maternity Coverage in the Individual Health Insurance Market 6 (October 12, 2010), *available at* http://democrats.energycommerce.house.gov/Press_111/20101012/Memo.Maternity.Coverage.Individual.Market.2010.10.12.pdf.

Kaiser Permanente will not cover surrogate pregnancies for either the surrogate or intended parents, a representative on their health blog reasons:

> Kaiser Permanente does not cover surrogate pregnancy most likely due to the financial risk. When you buy any type of insurance, you are buying a hedge against possible risk. The more likely you are to cost the insurance company money, the higher your premiums will be for that insurance . . . . surrogacy pregnancy creates a situation where the medical insurance company is very likely to incur a financial loss. The premiums paid for the health insurance are likely to be less than the value of the health care provided for the surrogate pregnancy.[260]

The issue of cost was also present during the debates surrounding the PDA,[261] HIPAA, and the PPACA. For instance, there were many who thought the costs associated with the PDA would cripple American companies.[262] Despite these worries—which proved to be largely unfounded—the members of Congress debating the PDA were explicit in their refusal to place a price tag on the creation of life. As Senator Bayh stated, "[w]e are removing, that where the price tag of a baby determines whether it is born or not."[263] And after comically suggesting that, "maybe we may not find it feasible economically to propagate the race,"[264] one presenter to the committee went on to say that "we can't assess the cost of bringing a life into the world in terms of dollars and cents."[265]

V. CONCLUSION

In the end, all the arguments made by insurance companies and all the counter-arguments made by those groups that would seek to have surrogacies covered for policy reasons are almost irrelevant in the face of existing state and

260. Surrogate Pregnancy, Kaiser Health Insurance Blog, *available at* http://www.newlifeagency.com/news/11.cfm.

261. 124 CONG. REC. 6862, 124 CONG. REC. 6878, 124 CONG. REC. 6880 (1978) (statements of Congressman Augustus F. Hawkins) ("Cost estimates have ranged from a completely unrealistic $130 million for disability alone to a high (and probably inflated estimate) of $2.5 billion by groups opposed to the legislation. The estimates are difficult to make because there has been no thorough analysis of existing health plan coverage for pregnancy. But even the maximum costs are minuscule when spread among all covered employers and employees. They fade into insignificance in a two trillion dollar economy").

262. *Discrimination on the Basis of Pregnancy: Hearing on S. 995 Before the S. Subcomm. on Labor of the Comm. on Human Resources* (1977) (statements of Sen. Bayh) ("I would like to deal with that because a number of the prophets of doomsday you are going to bring the wheels of industry to a close and the costs born by employers are going to be enormous. This is a red flag which is absolutely untrue").

263. 123 CONG. REC. 29635(1977).

264. *Discrimination on the Basis of Pregnancy: Hearing on S. 995 Before the S. Subcomm. on Labor of the Comm. on Human Resources* (1977) (statements of Clarence Mitchell, Director of the Washington Bureau of the National Association for the Advancement of Colored People and Chairman of the Leadership Conference on Civil Rights).

265. *Id.* at 110.

federal law. Surrogates are pregnant women. Pregnant women are protected by a number of laws the operation of which does not depend on either 1) the circumstances in which they became pregnant or 2) their intentions for the child after birth. If insurance companies feel that covering surrogates is fundamentally unfair, they can always lobby to change the laws. But until that happens, surrogates will have a number of powerful legal tools to fight denials of coverage based on the physical fact of pregnancy—and as surrogacy gains in popularity, it seems likely they will begin to use these legal tools in increasing numbers.