INFERTILITY: THE UNRECOGNIZED ILLNESS IN THE HEALTH INSURANCE INDUSTRY

*Pamela J. Prager**

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I. INTRODUCTION

Infertility affects millions of couples in the United States. Infertility can be a devastating illness, yet insurance companies generally refuse to pay for the treatment of this disease. People who are diagnosed as infertile endure numerous medical procedures, including intrauterine insemination,[1] PROST,[2] and GIFT,[3] in hopes of conceiving a child.

Every day infertile couples face numerous reminders of their infertility. Walking past a maternity clothing shop, seeing pregnant women, and watching parents with their children are just a few reminders that infertile

* B.S., Iowa State University, 1985; J.D., Drake University, 1989; Associate with Dwight James & Associates, 630 Equitable Building, Des Moines, Iowa 50309.

1. *See infra* notes 82-95 and accompanying text.
2. *See infra* notes 117-18 and accompanying text.
3. *See infra* notes 112-16 and accompanying text.

couples face nearly every day.

The passing of time for infertile couples is measured by menstrual cycles. When ovulation occurs, hopes are raised and thoughts and prayers are "maybe this time." At the onset of menstruation, hopes turn into depression and even anger. Infertile couples ride on an emotional roller coaster. Infertility causes unhappiness, marital discord, depression, feelings of helplessness, and ill health.[4] The emotional toll on the couple can be phenomenal.

Infertility is defined as the inability to conceive during a specific period of time, usually one year.[5] Ten to fifteen percent of married couples are infertile.[6] Primary infertility refers to those married couples who have not had any children.[7] Secondary infertility refers to married couples who have had one or more children and have subsequently become infertile.[8] In the United States, primary infertility affects approximately one million couples.[9] Secondary infertility affects approximately 1.4 million couples.[10]

Of those with primary infertility, fifty-one percent seek treatment; twenty-two percent of the couples with secondary infertility seek treatment.[11] Forty-five percent of the couples with primary or secondary infertility who seek treatment subsequently conceive; forty percent have causes that cannot be corrected; fifteen percent are unable to conceive for no apparent reason.[12]

The costs of infertility diagnosis and treatment are prohibitive for most couples. A complete diagnostic work-up normally costs from $2,500 to $3,000,[13] and depending on the severity of the couple's problem, treatment can cost anywhere from $2,000 to $22,000.[14] Most private health insurance companies do not cover the medical expenses related to the treatment of infertility.[15] Thus, in addition to the emotional strain of being unable to give

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4. *Infertility: Medical and Social Choices*, Congressional Board of the 100th Congress, Government Document Number 052-003-01091-7 (1988); D. DANFORTH & J. SCOTT, OBSTETRICS & GYNECOLOGY 927 (5th ed. 1986).

5. D. DANFORTH & J. SCOTT, *supra* note 4, at 927.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Infertility: Medical and Social Choices*, Congressional Board of the 100th Congress, Government Document Number 052-003-01091-7, at 2 (1988).

10. *Id.*

11. *Id.*

12. D. DANFORTH & J. SCOTT, *supra* note 4, at 927.

13. *Infertility: Medical and Social Choices*, Congressional Board of the 100th Congress, Government Document Number 052-003-01091-7, at 9 (1988). Because insurance companies generally pay for the procedures used to diagnose infertility, diagnosis of infertility is not discussed in this Article. For a detailed discussion of the methods used to diagnose infertility see S. SILBER, HOW TO GET PREGNANT (1981).

14. *Infertility: Medical and Social Choices*, Congressional Board of the 100th Congress, Government Document Number 052-003-01091-7, at 9 (1988).

15. *Id.* Although this source indicates that most insurance companies will not cover costs of infertility, other sources and this author's personal experience reveal that insurance compa-

birth, the couple must face an enormous financial strain, or if they cannot afford treatment, they must face the only option available, to live child free.[16]

Insurance companies deny coverage for infertility for one of three reasons: (1) infertility is not an illness; (2) treatment is not medically necessary; or (3) treatment is experimental. This Article first discusses some of the more common causes of infertility in females and males to illustrate that infertility is an illness or disease and that treatment is as necessary for this disease as it is for other diseases for which insurance coverage is provided. Next, various procedures that are utilized to treat infertility are discussed. Finally, insurance benefits for the diagnosis and treatment of infertility are discussed, including appellate court decisions and statutes that have been enacted to ensure benefits for infertile couples.

II. Causes of Infertility[17]

A. *Causes of Infertility in Females*

The major causes of infertility in the female are cervical mucus abnormalities, obstructions in the fallopian tubes, and inadequate ovulation.[18] Abnormalities in the cervical mucus can prevent sperm penetration.[19] Cervical mucus is receptive to spermatozoa at the time of ovulation and impedes its

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nies will pay for a majority of the costs relating to the diagnosis of infertility but not for treatment. Thus, the companies will pay for diagnostic testing, prescription drugs, and surgery to correct causes of infertility, but generally do not provide coverage for procedures used to treat infertility such as in vitro fertilization, gamete intrafallopian tube transfer, pro-nuclear stage transfer, and artificial insemination. *See infra* notes 46-118 and accompanying text.

16. If insurance costs are prohibitive for a couple, it is most likely that adoption costs, which may run over $10,000, are also prohibitive.

17. This Article assumes the reader has a basic knowledge of the female and male reproductive systems. *See generally* S. Silber, How to Get Pregnant (1981); C. Harkness, The Infertility Book: A Comprehensive Medical and Emotional Guide (1986).

18. Other less common causes of infertility are:

(1) Vaginal obstructions or the congenital absence of the vagina. These conditions prevent the ejaculate from being deposited at the cervical opening of the uterus. D. Danforth & J. Scott, *supra* note 4, at 927.

(2) Abnormal vaginal secretions. Normal vaginal secretions are acid (ph 3-5). This acidity inactivates spermatozoa in a short time. Seminal fluid is alkaline and together with cervical mucus and vaginal sweating, a buffering system is created that renders the ph of the upper vagina more alkaline. This allows for the transport of the spermatozoa. *Id.*

(3) Abnormal production of progesterone. Progesterone is produced after ovulation. If it is not sufficient, it may prevent the ovum from implanting in the uterus. *Id.* This is known as a luteal phase defect. The luteal phase of the woman's cycle is the period between ovulation and the next menstrual period. C. Harkness, *supra* note 17, at 122.

(4) Uterine abnormalities. Endometritis, acute or chronic infections in the outer lining of the uterus, may prevent the implantation of the ovum in the uterus. Uterine tumors may distort the uterine cavity and cause obstructions which lead to infertility. Defects of the uterus from birth may cause abortions of preterm labor. D. Danforth & J. Scott, *supra* note 4, at 930.

19. D. Danforth & J. Scott, *supra* note 4, at 928.

penetration into the uterus at other times.[20] Mucus also plays other important roles in the fertilization process. It acts as a sperm reservoir, protects the sperm cells from the hostile environment in the vagina, filters out abnormal and unsuitable spermatozoa, protects sperm from the female's immune system, and supplies the energy requirements for the spermatozoa to reach the fallopian tubes where fertilization takes place.[21]

Obstructions in one or both fallopian tubes, which prevent sperm migration and ovum transport, account for twenty to forty percent of female infertility.[22] Obstructions in the fallopian tubes can be caused by infections or endometriosis.[23] Adhesions around the fallopian tubes or the ovaries may prevent the fimbriae[24] of the fallopian tubes from picking up the ovum and transporting it down the fallopian tube.[25] Adhesions may also obstruct the entrance to the fallopian tubes.[26] Adhesions can be caused by infections in the abdominal cavity following appendicitis, abortions, or child birth, among other causes.[27]

The failure to ovulate causes infertility in approximately fifteen to twenty percent of infertile women[28] and results from various hormonal imbalances caused by hypothalamic,[29] pituitary,[30] or ovarian deficits.[31] Failure to ovulate can also result from ovarian tumors or cysts,[32] thyroid defects,[33]

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20. *Id.*

21. *Id.*

22. *Id.* at 930.

23. *Id.* Endometriosis is when the same tissue that lines the uterus and that is expelled each month during menstruation grows elsewhere in the pelvic cavity. This misplaced tissue is responsive to hormonal signals the same as tissue in the uterus. Thus, it grows and deteriorates which in turn causes scarring and adhesions. THE COLUMBIA UNIVERSITY COLLEGE OF PHYSICIANS AND SURGEONS COMPLETE HOME MEDICAL GUIDE 155 (1985).

24. The fimbriae are finger-like projections which move the ovum through the fallopian tubes. TABER'S CYCLOPEDIC MEDICAL DICTIONARY 540 (14th ed. 1981).

25. *Id.*

26. D. DANFORTH & J. SCOTT, *supra* note 4, at 930.

27. *Id.*

28. *Id.* at 931.

29. The hypothalamus controls metabolic activities, such as water balance, sugar and fat metabolism, regulation of body temperature, and secretion of releasing and inhibiting hormones. TABER'S CYCLOPEDIC MEDICAL DICTIONARY 698-99 (14th ed. 1981). Hormones from the hypothalamus stimulate the pituitary gland. THE COLUMBIA UNIVERSITY COLLEGE OF PHYSICIANS AND SURGEONS COMPLETE HOME MEDICAL GUIDE 153 (1985). *See infra* note 30 and accompanying text.

30. The pituitary gland secretes a number of hormones which regulate growth, reproduction, and various metabolic activities. It is referred to as the master gland of the body. TABER'S CYCLOPEDIC MEDICAL DICTIONARY 1104-05 (14th ed. 1981). The pituitary gland stimulates the ovum's maturation and release from the ovary. THE COLUMBIA UNIVERSITY COLLEGE OF PHYSICIANS AND SURGEONS COMPLETE HOME MEDICAL GUIDE 153 (1985).

31. D. DANFORTH & J. SCOTT, *supra* note 4, at 931.

32. Polycystic ovaries is a condition where numerous (poly) cysts appear on the ovaries. It is believed the cysts produce a hormone which prevents ovulation. The symptoms of polycystic ovaries are absence of menstruation, enlarged ovaries, excessive hair growth, and obesity. L.

and adrenal dysfunction.[34]

B. *Causes of Infertility in Males*

Infertility in women can be caused by many things. However, infertility in males is normally due to absence of sperm, a low sperm count, or poor sperm quality.[35] These conditions may be caused from infections associated with high fever, mumps, or sexually transmitted diseases.[36] Obstructions in the ducts that transport the sperm also cause an absence of sperm or a low count.[37] Infections in the seminal vesicle[38] or the prostate[39] may alter the quality, volume, and pH balance of the seminal fluid.[40] The seminal fluid is important for fertility because it serves as a vehicle for the spermatozoa and provides protective and nutritive functions.[41]

Infertility in the male may also be caused by damage to the reproductive organs from trauma, surgery, or radiation.[42] Exposure of the testicles to heat may reduce the number of sperm.[43] Male infertility may also be associated with varicocele,[44] an enlargement of the veins in the spermatic cord.[45]

III. Treatment

A. *Hormonal Treatment*

Drug therapy with hormones can be effective in treating irregular ovulation or lack of ovulation, cervical mucus defects,[46] and luteal phase defects, which may prevent the fertilized ovum from implanting in the uterine wall.[47] Four different drugs have been developed to treat these problems:

Andrews, New Conceptions 46-47 (1981).

33. The thyroid gland controls metabolic processes. If there is too much thyroid hormone, metabolism is sped up; if there is too little, everything slows down. The Columbia University College of Physicians and Surgeons Complete Home Medical Guide 501 (1985).

34. D. Danforth & J. Scott, *supra* note 4, at 931.

35. The Columbia University College of Physicians and Surgeons Complete Home Medical Guide 151 (1985). In order to have a high quality sperm, it must move rapidly and easily. *Id.*

36. D. Danforth & J. Scott, *supra* note 4, at 931.

37. *Id.*

38. The seminal vesicles secrete a thick viscous fluid which forms a part of the semen. Taber's Cyclopedic Medical Dictionary 1295 (14th ed. 1981).

39. The prostate secretes a thin, opalescent, slightly alkaline fluid which forms part of the semen. Taber's Cyclopedic Medical Dictionary 1169 (14th ed. 1981).

40. D. Danforth & J. Scott, *supra* note 4, at 931.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. Taber's Cyclopedic Medical Dictionary 1539 (14th ed. 1981).

46. C. Harkness, *supra* note 17, at 118-24.

47. *Id.* at 122.

clomiphene (brand names Serophene and Clomid), bromocriptine (brand name Parlodel), human menopausal gonadotropin (brand name Pergonal), and gonadotropin-releasing hormone.[48]

Clomiphene is the most commonly prescribed and, depending on the amount prescribed, is usually the least expensive of these drugs, costing from four dollars to five dollars for each 50 milligram pill.[49] Dosages can vary from 50 milligrams to 250 milligrams per day for five days.[50] Thus, the cost can be from $20 to $125 per cycle.[51] Clomiphene is prescribed primarily for women with irregular ovulation or a lack of ovulation.[52] It is also prescribed to improve progesterone production, which is the cause of luteal phase defects.[53] In some women, clomiphene causes changes in the cervical mucus, which requires the administration of a second drug, synthetic estrogen, to improve the quality and quantity of cervical mucus.[54]

Bromocriptine is used for women who have pituitary gland deficits, which result in abnormally high levels of the hormone prolactin.[55] Bromocriptine suppresses hypothalmic activity, which reduces the output of the hormone by the pituitary gland.[56] The cost of bromocriptine is about $70 per cycle.[57]

Human Menopausal Gonadotropin ("HMG") is a natural hormone made from the urine of postmenopausal women.[58] This drug is prescribed for women who do not respond to clomiphene[59] and for women undergoing in-vitro fertilization, gamete intrafallopian tube transfer, or pro-nuclear stage transfer.[60] The cost of HMG is from $1,000 to $1,500 per cycle.[61]

Gonadotropin-releasing Hormone ("GnRH") is also prescribed for women who do not respond to clomiphene, but it does not alleviate luteal phase defects[62] as does clomiphene and HMG.[63] GnRH is also a natural hormone.[64] GnRH is administered through an intravenous ("IV") needle. A

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48. *Id.* at 125-31.
49. *Id.* at 126-27, table 9.1.
50. *Id.*
51. *Id.* at 128.
52. *Id.* at 125.
53. *Id.*
54. *Id.* at 127.
55. *Id.* at 128. Prolactin is a hormone produced in the pituitary gland. It stimulates the milk producing activity of the breast. TABER'S CYCLOPEDIC MEDICAL DICTIONARY 1166 (14th ed. 1981).
56. C. HARKNESS, *supra* note 17, at 128.
57. *Id.* at 126-27, table 9.1.
58. *Id.* at 129.
59. *Id.*
60. *See infra* notes 96-115 and accompanying text.
61. C. HARKNESS, *supra* note 17, at 126-27, table 9.1.
62. *See supra* note 18.
63. C. HARKNESS, *supra* note 17, at 131.
64. *Id.*

pump gauges the appropriate dosage of drug in ninety-minute intervals.[65] The pump, IV needle, and tubing must be carried continuously until ovulation occurs, which is usually for one or two weeks.[66] The initial cost of the pump is $1,000 with an additional cost of $300 per cycle for the drug and IV tubing.[67]

These drugs are also used to treat male infertility.[68] Clomiphene is used to treat low sperm counts.[69] HMG, as well as human chorionic gonadotropin ("HCG"), are used to treat undescended testicle problems, low sperm count, and abnormal hypothalamic activity.[70] Bromocriptine is used for men who have abnormal prolactin levels.[71] Testosterone is used for low sperm count when other hormonal treatments fail.[72]

B. *Surgery*

If there are blockages or adhesions in the fallopian tubes due to infections or endometriosis, microsurgery may be necessary to restore their function.[73] Microsurgery is a very delicate operation. A microscope is used to magnify the tissues and allow for finer, more delicate cutting and suturing.[74] During surgery, adhesions in and around the fallopian tubes and ovaries can be cut away with the use of scissors, electrosurgical needles, or lasers. The cost of microsurgery, including the hospital stay, is about $10,000.[75]

Microsurgery is also used to treat infertility in men who have duct obstructions or who have had a vasectomy.[76] The obstruction is located and bypassed.[77] A more simple surgery can be performed on men who have varicocele (varicose vein) in the scrotum.[78] An incision is made in the scrotum and the vein is tied off to prevent the backflow of blood.[79]

C. *Artificial Insemination*

There are two types of artificial insemination: artificial insemination by husband's sperm ("AIH") and artificial insemination by donor's sperm

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65. *Id.*
66. *Id.*
67. *Id.* at 126-27, table 9.1.
68. *Id.* at 194.
69. *Id.*
70. *Id.* at 195.
71. *Id.*
72. *Id.*
73. *Id.* at 137.
74. *Id.*
75. *Id.* at 138.
76. *Id.* at 197.
77. *Id.*
78. *Id.* at 196.
79. *Id.*

("AID").[80] The cost of artificial insemination is $150 to $200 per insemination.[81]

AIH is normally used to treat women who are infertile because their cervical mucus is inhospitable to sperm.[82] The sperm are inseminated directly into the uterus, thus bypassing the cervical mucus.[83] AIH can also be used to treat infertility of men who have a low sperm count, poor motility, or sperm antibodies.[84]

AID is used for treatment of male infertility when AIH fails, the male's sperm is too poor to attempt AIH, or there is a complete absence of sperm.[85] Reputable clinics that perform AID screen donors for genetic abnormalities and acquired immune deficiency syndrome ("AIDS").[86]

AIH and AID are simple procedures, which are usually performed twice a month and timed to coincide with ovulation.[87] Ovulation is pinpointed by using a basal body temperature chart[88] and ovulation predictor kits, which have recently been introduced into the market.[89] Because AIH is used to treat infertility caused by cervical mucus abnormalities, the cervical mucus is bypassed. The semen is reduced to a pellet form and inserted into the uterus with a syringe.[90] AID is used to treat male infertility, thus it is not necessary to bypass the cervical mucus as in AIH unless there is also female infertility. For AID, a speculum is inserted into the woman's vagina.[91] The donor sperm is then deposited at the cervical opening with a syringe.[92] A cervical cap is then placed over the cervic to prolong the sperm's contact with the area.[93]

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80. *Id.* at 203.

81. *Id.* at 34, table 3.1.

82. *Id.* at 204.

83. *Id.*

84. *Id.*

85. *Id.* at 205.

86. *Id.* at 207. Due to AIDS, the donor is usually tested for AIDS at the time of collection of the sample. The sample is then frozen and the donor is tested again in three to six months. If the tests are negative, the sperm is then released for insemination. *Id.*

87. *Id.* at 208.

88. *Id.*

89. Ovulation predictor kits detect the lutenizing hormone in the urine. Testing is done for several days. Initially the test will reveal a clear or light blue color in the chemicals provided for the testing. When ovulation is about to occur the increase of lutenizing hormone will cause the chemicals to turn a dark blue. Ovulation will usually occur in 12 to 24 hours after this "surge" of lutenizing hormone. The cost of these kits can be from $24 to $50 per kit. Normally one kit is needed per cycle.

90. Interview with Dr. Alan Munson, McFarland Clinic, Ames, Iowa (1988).

91. C. HARKNESS, *supra* note 17, at 209.

92. *Id.*

93. *Id.*

D. *In Vitro Fertilization*

In Vitro Fertilization ("IVF") may be used to treat a variety of infertility problems in both females and males.[94] In the female, it is used to treat tubal blockages or adhesions and endometriosis.[95] It can also be used to treat infertility caused by sperm antibodies in the male or female and low sperm count in the male.[96] IVF also is used in those cases where infertility is unexplained.[97] The cost of IVF ranges from $5,000 to $8,000 per attempt.[98]

The first step in IVF is inducing ovulation in the female.[99] An attempt is made to stimulate the development of more than one egg to increase the chances that at least one of these eggs can be successfully fertilized resulting in a pregnancy.[100] Next, the development of the follicles[101] is monitored.[102] Daily blood tests are taken to assess estrogen and LH levels and ultrasound is used to track the growth of the follicles.[103] After the eggs have matured, they can either be removed vaginally,[104] or laparscopy is performed and they are surgically removed.[105] The eggs are then placed in a plastic dish and the sperm are added.[106] The cultures are observed to determine whether fertilization has occurred,[107] and if so, the fertilized egg or eggs may then be transferred into the uterus.[108] Hormonal treatment is then given to help sustain the endometrial lining of the uterus and assist in the implantation of the egg or eggs.[109]

E. *Gamete Intrafallopian Tube Transfer*

Gamete Intrafallopian Tube Transfer ("GIFT") is less expensive than IVF, at a cost of about $3,500 per attempt.[110] GIFT is similar to IVF in that superovulation is induced with the use of fertility drugs, the follicles are

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94. *Id.* at 169.
95. *Id.* at 169-70.
96. *Id.* at 170.
97. *Id.*
98. *Id.* at 34, table 3.1.
99. *Id.* at 174.
100. *Id.*
101. The follicles are the fluid-filled sacs within the ovary that contain the eggs. *Id.*
102. *Id.*
103. *Id.*
104. This procedure involves inserting a needle through the vaginal wall and into the ovary to remove the eggs. *Id.*
105. *Id.*
106. *Id.* at 176.
107. *Id.*
108. *Id.* at 176-77.
109. *Id.* Hormonal treatment consists of progesterone injections or suppositories. *Id.* at 177.
110. *Id.* at 183.

monitored, and the egg or eggs retrieved.[111] After this point, the procedures begin to differ. Instead of being fertilized in a cultured dish, the egg or eggs are mixed with the sperm and placed immediately into the fallopian tubes where fertilization will hopefully occur.[112] Thus, the GIFT technique requires that the woman have at least one normal fallopian tube.[113]

F. *Pro-Nuclear Stage Transfer*

Pro-Nuclear Stage Transfer[114] ("PROST") is a variation of IVF and GIFT. Again, the procedures are similar through superovulation, monitoring of the follicles, and egg retrieval. It is similar to IVF because after the eggs are retrieved, they are fertilized in the laboratory. However, in IVF the eggs are left in the laboratory to develop into about eight cells. In PROST, the eggs remain in the laboratory only until the sperm penetrates the egg and it is fertilized; the egg is not allowed to develop into more than one cell. At this point, PROST is similar to GIFT, in that the eggs are then placed back into the fallopian tubes where implantation occurs naturally. In IVF the eggs are placed directly into the uterus. The advantages of PROST over IVF and GIFT is that unlike IVF, implantation occurs naturally and, thus, should be more successful.[115] Unlike GIFT, the eggs are fertilized in the laboratory and thus, it is known at the time the eggs are placed in the fallopian tubes that fertilization has occurred. In GIFT it is not known whether fertilization took place unless a pregnancy results. Thus, if there is no pregnancy, it is not known whether it is due to lack of fertilization or implantation.

PROST is a relatively new procedure. Its cost is higher than GIFT but lower than IVF, at about $4,000 to $5,000 per attempt.

G. *Surrogate Mothers*

Surrogate mothers are the flip side to donor artificial insemination. Instead of the male providing the infertile couple with sperm, the surrogate provides the egg and the womb[116] and she is artificially inseminated with the male's sperm.[117] The cost for the services of a surrogate is around $10,000 to $15,000.[118]

With the advent of IVF, GIFT, and PROST, egg donation only is now

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111. *Id.* at 182.

112. *Id.*

113. *Id.*

114. The information on PROST was obtained through personal experience and Dr. Alan Munson, McFarland Clinic, Ames, Iowa.

115. Preliminary success rates indicate that PROST may be more successful than IVF, but less successful than GIFT. It appears that the longer the egg is out of its natural environment, the less likely it is that a pregnancy will occur.

116. C. HARKNESS, *supra* note 17, at 256-57.

117. *Id.*; *see supra* notes 80-93 and accompanying text.

118. C. HARKNESS, *supra* note 17, at 259.

available. Couples that successfully undergo one of the above procedures are given the opportunity to donate any unused eggs or embryos to women who do not have ovaries, but who have a uterus to carry the baby.

IV. Insurance Benefits

Insurance companies generally provide benefits for infertility if the charges relate to diagnostic testing, prescription drugs, or surgery.[119] Insurance benefits are provided for the medical expenses of a surrogate mother by purchasing a health insurance policy. Although the policy does not pay for the insemination, it provides coverage for expenses relating to the pregnancy and birth. Insurance companies generally resist paying benefits for artificial insemination, in vitro fertilization, gamete intrafallopian tube transfer, and pro-nuclear stage transfer.[120]

Insurance companies usually base their rejection of claims for these treatments on one of three reasons: (1) infertility is not an illness; (2) the treatment is not medically necessary; or (3) the treatment is experimental. Each of these reasons is discussed separately.

A. *Infertility as an Illness*

The argument that infertility is not an illness is unfounded. This Article has demonstrated the numerous abnormal conditions in the body that lead to infertility. Many medical problems, other than lack of a child, may develop due to lack of ovulation or other conditions that result in infertility. One medical expert in infertility states:

> [It] is a true disease and should not be regarded simply as a problem with becoming pregnant. Even if the woman does not want to become pregnant, the hormonal imbalance resulting from or causing poor ovulation leads to heavy buildup of a hard uterine lining that does not shed properly like the soft lining of an ovulatory woman. Not only can this lead to irregular bleeding and occasionally a painful ovarian enlargement (which may even necessitate surgery), but over many years it can lead to the development of cancer of the lining of the womb. So the problem of not getting pregnant because of poor ovulation may be far greater than simply the barrenness of the marriage.[121]

The same can be said of the other medical problems that lead to infertility. For example, endometriosis not only affects the ability to become pregnant, but it can also cause severe pain with menstruation or intercourse, rectal pain with defecation, urinary tract burning, and abdominal pain.[122]

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119. *See infra* notes 252-56 and accompanying text.

120. *Id.*

121. S. Silber, How to Get Pregnant 103-04 (1981).

122. C. Harkness, *supra* note 17, at 145. The best cure for endometriosis is pregnancy. This creates a "Catch 22" situation—endometriosis causes infertility, but it can be cured by

Tubal blockage is normally caused from infections (inflammatory pelvic disease).[123] Insurance companies routinely provide benefits for infections in other portions of the body. An infection is no less a disease because it is located in the reproductive organs as opposed to the ear, throat, or some other organ.

In *Witcraft v. Sundstrand Health & Disability Group Benefit Plan*,[124] the Iowa Supreme Court recognized infertility as an illness. Jill Witcraft was subject to irregular ovulation and her husband, Thomas, had a low sperm count and low sperm motility.[125] Sundstrand had paid for some of the medical expenses relating to the couple's infertility including semen analysis, ultrasound, fertility drugs, and an intrauterine insemination procedure.[126] However, when the Witcrafts submitted claims for a more expensive insemination procedure than the one previously performed, the insurance company denied benefits, stating "[T]he medical services were not performed because of an illness or injury of the patient."[127] The insurance company testified at trial that "the condition of nonpregnancy is not an illness and that, therefore, artificial insemination to change that condition is not treatment of an illness."[128]

Thus, the controversy in the case turned on the meaning of the word "illness." The Iowa Supreme Court held the terms "illness," "sickness," and "disease" to be synonymous.[129] The court defined the word "disease" as a "morbid condition of the body, a deviation from the healthy or normal condition of any of the functions or tissues of the body."[130] The Iowa Supreme Court affirmed the district court's determination that infertility is an illness, adopting the district court's reasoning.[131] The district court stated that "the natural function of the reproductive organs is to procreate."[132] The couple's inability to procreate was due to the incorrect functioning of their reproductive systems.[133]

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pregnancy. In cases where the scarring and adhesions are not significant, a lack of menstruation for nine months will allow the patches of endometriosis time to dissolve. Another natural cure for endometriosis is menopause. The medications used to treat endometriosis thus either simulate pregnancy or menopause. In either case menstruation ceases and the endometriotic patches are given an opportunity to dissipate. When the medication is stopped it is hoped that pregnancy will occur. *Id.* at 134-35.

123. C. HARKNESS, *supra* note 17, at 134-36.

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

125. *Id.* at 786.

126. *Id.* at 790.

127. *Id.* at 787.

128. *Id.*

129. *Id.* at 788.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

The insurance company also argued that artificial insemination was not a treatment.[134] The insurance company would have paid for corrective surgery or treatment performed to correct the low sperm and motility of Mr. Witcraft.[135] In addition, they would cover expenses to treat Mrs. Witcraft's irregular ovulation.[136] However, the insurance company argued that "procedures such as artificial insemination performed on a healthy individual are not treatment of an illness."[137] The supreme court rejected this argument as well.

The district court rejected the argument at trial by stating, "The mere fact that the treatment may occur outside the body of one or the other or in the subsequent course of insemination is not material because it is the natural function of the organs, reproduction, which is in fact treated . . . ."[138] The supreme court affirmed this rationale and added that the procedure alleviated the couple's infertility and held artificial insemination is a "means of treating this illness."[139] The court defined treatment "as all the steps taken to effect a cure of an injury or disease, including examination and diagnosis as well as the application of remedies."[140]

In an unreported decision, the Tennessee Court of Appeals found infertility to be a defect. In *Tooley v. Georgia Life & Health Insurance Co.*[141] the insurance company denied benefits because the Tooleys misrepresented information on their application for insurance.[142] The Tooleys responded "no" to the question "[h]ave you ever miscarried or had disease of the uterus, tubes, ovaries?"[143] In addition, the Tooleys responded "no" to the question "[i]s any person above not now in good health or has any person above any physical or mental defects or deformities?"[144] Two years prior to the application, Mrs. Tooley had consulted a gynecologist regarding her inability to conceive.[145]

The Tennessee Court of Appeals declined to address the issue of

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134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.* at 789.
139. *Id.*
140. *Id.* at 790.
141. Tooley v. Georgia Life & Health Ins. Co., No. C. A. 115 (Tenn. Ct. App. May 23, 1986) (WESTLAW, TN-CS DATABASE).
142. *Id.* at 2. Although the court found that infertility was a "defect," it found that the misrepresentation was not material. *Id.* The appellate court recognized the insurer would not be subjected to increased risks for payment of benefits in treating infertility. *Id.* The court held the misrepresentation was not material by stating, "there is absolutely no proof that Mrs. Tooley's infertility would increase the risk to the insurer. *Id.* Indeed, as the policies provided maternity benefits, it would seem the opposite would be true." *Id.* at 3-4.
143. *Id.* at 2.
144. *Id.* at 3.
145. *Id.* at 2.

whether infertility is a disease.[146] However, they did state that the Tooleys made a misrepresentation on their insurance application because "[c]learly, infertility is a defect."[147]

In *Egert v. Connecticut General Life Insurance Co.*,[148] Connecticut General denied payment for the Egert's in vitro fertilization. Connecticut General denied the claim, in part, because infertility is not an illness.[149] Connecticut General took the position that Mrs. Egert's obstructed fallopian tube was an illness and it would pay for microsurgery to repair the tube.[150] Connecticut General argued "infertility is not an 'illness' but is simply the result of an 'illness,' more properly described as deteriorated fallopian tubes."[151]

The Seventh Circuit Court of Appeals rejected this argument because Connecticut General referred to the "illness of infertility" and the "diagnosis of infertility" in its Current Claims Practices manual.[152] The court held these passages undermined their litigating position.[153]

Blue Cross and Blue Shield has recognized infertility as a disease and has provided coverage for the treatment of infertility since 1981,[154] but has not provided coverage for the process of what it terms "impregnation."[155] Thus, Blue Cross and Blue Shield would provide coverage for diagnostic testing, prescriptions, and surgery, but not for IVF, GIFT, PROST, or artificial insemination, because the medical procedure results in the fertilization of the egg by means other than sexual intercourse.[156] This approach is typical of other insurance companies.[157]

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146. *Id.* at 3.

147. *Id.*

148. Egert v. Connecticut Gen. Life Ins. Co., 900 F.2d 1032 (7th Cir. 1990).

149. *Id.* at 1033.

150. *Id.* at 1034.

151. *Id.* at 1037.

152. *Id.*

153. *Id.*

154. Blue Cross and Blue Shield, Position Statement, Coverage of In-Vitro Fertilization and Similar Procedures (1989); Interview with Marilyn J. Musser, Coordinator of Public Policy, Blue Cross and Blue Shield of Iowa, 636 Grand Avenue, Des Moines, Iowa 50309 (1988).

155. *Id.*

156. *Id.* Effective January 1, 1989, Blue Cross and Blue Shield will provide coverage for these treatments as well. *See infra* notes 256-60 and accompanying text.

157. *See* Egert v. Connecticut Gen. Life Ins. Co., 900 F.2d 1032 (7th Cir. 1990). In Egert the insurance company had issued the following policy statement:

> We will allow for procedures that attempt to rectify the progression of normal bodily function and the attempt to conceive naturally. However, when normal progression is no longer occurring, and appears to be medically incorrectable, it is at this point that artificial means to induce a pregnancy begins (procedures which occur outside of the body). We do not consider artificial means to induce a pregnancy essential for the necessary care and treatment of an illness, therefore expenses should be denied.

Id. at 1034.

B. *Medically Necessary*

In *Kinzie v. Physician's Liability Insurance Co.*,[158] the Oklahoma Court of Appeals ruled that in vitro fertilization was not medically necessary.[159] Prior to submitting a claim for in vitro fertilization, Mrs. Kinzie had undergone surgery to repair obstructions in her fallopian tubes.[160] The insurance company paid for these claims, stating they were "reasonable and customary charges for medically necessary services."[161] However, when Mrs. Kinzie submitted a claim for in vitro fertilization, the insurance company denied benefits because it deemed in vitro fertilization as not medically necessary.[162]

The trial court ruled as a matter of law that "in vitro fertilization was not a medically necessary service because it was elective and was not required to cure or preserve Mrs. Kinzie's health."[163] The court continued by stating "it was not medically necessary to a woman's health to give birth to a child."[164] The court of appeals agreed and affirmed the trial court's granting the insurance company's motion for summary judgment.[165] The court of appeals reasoned that the infertile condition of Mrs. Kinzie's body was not corrected by in vitro fertilization and the infertile medical condition was in no way reversed or cured.[166] The court continued by defining the word "necessary" as a procedure that is "indispensable," "essential," "unavoidable," "compulsory," or "required."[167] The court stated, "The conception of a child, although certainly important to married couples who have a problem conceiving, was not 'medically necessary' to the physical health of the insured."[168]

The reasoning of the court is flawed for two reasons. First, the court ignored the fact that the insurance company had previously paid for surgery

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158. Kinzie v. Physician's Liability Ins. Co., 750 P.2d 1140 (Okla. Ct. App. 1987).
159. *Id.* at 1141.
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id. See* Zwahlen v. B. F. Goodrich, 755 P.2d 658 (Okla. 1988). In *Zwahlen* the Oklahoma Supreme Court, in interpreting worker's compensation laws, stated the "question of whether medical treatment is necessary for an injured worker is a question of fact for determination by the trial tribunal." *Id.* at 659. The same rule should be applied in determining what is medically necessary under private insurance contracts as under worker's compensation laws. The trial court and Oklahoma Court of Appeals should not have granted summary judgment; the matter should have been left to the determination of the trier of fact. Other courts have stated the determination of medical necessity should be left to the trier of fact. *See, e.g.*, McLaughlin v. Connecticut Gen. Life Ins. Co., 565 F. Supp. 434, 450 (N.D. Cal. 1983); Free v. Travelers Ins. Co., 551 F. Supp. 554 (D. Md. 1982).
166. Kinzie v. Physician's Liability Ins. Co., 750 P.2d at 1142.
167. *Id.*
168. *Id.*

to repair the obstruction to Mrs. Kinzie's fallopian tubes.[169] The insurance company paid for this surgery because it found the surgery was "medically necessary."[170] If the insurance company provided coverage for one procedure because it was medically necessary, there is no rational reason why the insurance company should not be required to provide coverage for IVF. The purpose of having surgery to correct obstructed fallopian tubes is the same as IVF—to achieve pregnancy.

Second, there are many other illnesses or diseases that are treated by physicians, but which do not effectuate a "cure" as defined by the Oklahoma Court of Appeals. There is no "cure" for high blood pressure or diabetes. Yet, these diseases are treated so that the afflicted persons can overcome the effects of the disease. Although these diseases are "life-threatening," they cannot be "cured." The common cold is often treated by physicians and benefits are paid by insurance companies. In most instances, the common cold is not "life-threatening" and it can never be "cured." In most cases, the treatment is not necessary to "preserve" one's health because the body's immune system will fight off the disease. The treatment for a cold does not reverse the condition, it merely alleviates the symptoms. Yet, insurance companies do not question claims made for treatment of the common cold. In vitro fertilization, GIFT, or PROST do not cure the underlying medical condition in many cases,[171] but they do "cure" the condition of infertility—the inability to conceive[172]—by allowing the couple to conceive.

Thus, based on the Oklahoma Court of Appeals' requirement that the condition be "cured," insurance companies should be required to pay for infertility treatments and not for cold treatments. In addition, the Oklahoma Court of Appeals' rationale of requiring the condition to be "cured" would allow most illnesses and diseases to be excluded from coverage. Many health problems would not be covered by insurance because very few diseases are actually "cured"; instead they are treated. High blood pressure and diabetes are treated with medication. If the medication is removed, the disease remains, but with treatment the persons are allowed to live a somewhat normal life. The same is true with infertility. The treatments allow the couple to conceive and give birth to a child. The underlying condition that caused the infertility may still be present, but the couple is allowed to live a normal life and raise a family.

Other courts, in interpreting the term "medically necessary," have given the term a less strict meaning. "Medically necessary" has been defined as "appropriate";[173] "requires services be prescribed in good faith by a physi-

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169. *Id.* at 1141.
170. *Id.*
171. Endometriosis, however, may be cured naturally by pregnancy. *See supra* note 122.
172. *See supra* notes 5-7 and accompanying text.
173. Abernathy v. Prudential Ins. Co. of Am., 274 S.C. 388, 264 S.E.2d 836 (1980).

cian";[174] and "wise in the light of facts known at the time rendered."[175] However, the Oklahoma Court of Appeals rejected these definitions, stating, "[T]he medical services conducted [in these cases] were performed to the insured's body in order to physically alleviate or correct a serious illness, disease or affliction."[176] The Oklahoma Court of Appeals did not even discuss the possibility that infertility may be an illness, disease, or affliction. Infertility is an illness, disease, or affliction, and is recognized as such by the medical community.[177] In vitro fertilization, GIFT, PROST, and artificial insemination are valid treatments of infertility.[178]

The reasoning used by the court in *Kinzie* is also contrary to the insurance industry's definition of "medically necessary." There is not a consensus in the insurance industry in specific terms as to what is or is not medically necessary.[179] However, Blue Cross and Blue Shield has defined medically necessary as:

> services and supplies furnished to [the insured] when, and to the extent, in the reasonable judgment of The Plans, they satisfy each of the following criteria:
> a. they are medically required and medically appropriate for diagnosis and treatment of [the insured's] Illness or Injury;
> b. they follow professionally recognized standards of health care; and
> c. their costs are not excessive when compared with other services that would be effective for diagnosis and treatment of [the insured's] Illness or Injury.
> The fact that a physician may prescribe, order, recommend or approve certain services to [the insured] does not necessarily mean that such services satisfy a, b, and c above.[180]

The insurance companies generally do not define "medically necessary" as narrowly as the Oklahoma court. Instead, insurance companies generally agree with the courts that define "medically necessary" as medically appropriate.[181]

By using Blue Cross and Blue Shield's definition, Mrs. Kinzie should have been allowed coverage. IVF was medically required and appropriate for the treatment of her illness of infertility because other methods had failed and IVF was her only remaining alternative. IVF has been accepted by the medical profession.[182] Although the costs of IVF are higher than other ser-

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174. Van Vactor v. Blue Cross Ass'n, 50 Ill. App. 3d 709, 365 N.E.2d 638 (1977).
175. Victum v. Martin, 367 Mass. 404, 326 N.E.2d 12 (1975).
176. Kinzie v. Physician's Liability Ins. Co., 750 P.2d at 1142.
177. *See supra* notes 17-45 and accompanying text.
178. *See supra* notes 46-118 and accompanying text.
179. Interview with Marlyn J. Musser, Coordinator of Public Policy, Blue Cross and Blue Shield of Iowa, 636 Grand Avenue, Des Moines, Iowa 50309 (1988).
180. Blue Cross and Blue Shield Alliance Select Subscriber's Certificate.
181. *See supra* notes 169-71 and accompanying text.
182. *See infra* note 199 and accompanying text.

vices, there would be no other service that is *effective* as required under "c" of Blue Cross and Blue Shield's definition of "medically necessary." Therefore, the treatment of infertility by IVF is or can be "medically necessary."

In *Regnier v. Industrial Commission of Arizona*,[183] Stephen Regnier was injured while at work, which resulted in his becoming a quadriplegic.[184] Due to his condition, Mr. Regnier is unable to achieve an erection or to ejaculate, preventing him from becoming a father.[185] Mr. Regnier requested insurance benefits to pay for a procedure involving the implantation of an artificial spermatocele to allow him to become a father.[186] The procedure would give Mr. Regnier a ten to fifteen percent chance of fathering a child; without it his chances were zero.[187] Two experts testified at a hearing before the Industrial Commissioner on behalf of the employer.[188] One stated the procedure was experimental, the other stated the chance of success was slim.[189]

The court held, "Medical benefits are payable when they will improve an injured employee's condition."[190] The court continued by stating:

> The proposed procedures, if successful, would replace a bodily function lost as a result of the injury. The fact that the procedures will not render claimant ambulatory or no longer a quadriplegic is irrelevant. Just as claimant's previous bladder surgery improved or restored a functional loss caused by the industrial injury, the procedures at issue here may restore claimant's ability to father children.[191]

The Oklahoma court's definition in *Kinzie* requires a life-threatening situation before treatment is deemed medically necessary. There are many diseases, illnesses, and injuries that are routinely treated, for which benefits are paid by insurance companies, that are not life-threatening: a cut requiring stitches, the flu, a common cold, and ironically, sterilization procedures (vasectomy and tubal ligation) and abortion, which are by no stretch of the imagination a disease, illness, or injury. Although infertility may not be life-threatening, the emotional cost of infertility to millions of couples is high. Couples experience feelings of depression, anger, and helplessness.[192] They are unable to concentrate, make decisions, and find it difficult to go to work.[193] The suicide rate for infertile couples is twice as high as for fertile

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183. Regnier v. Industrial Comm'n, 146 Ariz. 535, 707 P.2d 333 (Ct. App. 1985).
184. *Id.* at ___, 707 P.2d at 334.
185. *Id.*
186. *Id.*
187. *Id.* at ___, 707 P.2d at 335.
188. *Id.*
189. *Id.*
190. *Id.* at ___, 707 P.2d at 336.
191. *Id.*
192. *See supra* note 4 and accompanying text.
193. *Id.*

couples.[194] In addition to these serious emotional problems, infertile women are at a high risk for endometriosis and, later in life, cancer.

Egert v. Connecticut General Life Insurance Co.[195] illustrates the ludicrous arguments insurance companies advance for denying benefits for artificial insemination, IVF, GIFT, and PROST. In *Egert*, Connecticut General argued IVF was not essential for the necessary cure and treatment of infertility because IVF cannot make a person fertile again: unlike microsurgery or other procedures, IVF does not allow a couple to conceive naturally.[196] On the other hand, Connecticut General provided coverage for services " 'in connection with family planning counseling or counseling for treatment of infertility.' "[197]

As so succinctly stated by the Seventh Circuit Court of Appeals:

> Surely, counseling does not address the underlying causes of infertility; after several sessions with a trained counselor, it is unlikely that Kraft-Egert's fallopian tubes will somehow repair themselves and allow her to conceive naturally in the future. Indeed, the Plan's treatment of counseling for infertility seems to conflict directly with Connecticut General's explanation of its refusal to cover IVF treatments . . . .[198]

Infertility is a legitimate health problem. The test for determining whether a treatment is medically necessary should not be determined by whether there is a "cure" or "life-threatening" condition, but by whether the treatment will improve the patient's quality of life or improve the patient's condition. There is no question that the quality of life for infertile couples will improve if they are provided treatment just as the quality of life is improved for those who are treated for high blood pressure, diabetes, or other illnesses.

C. *Experimental*

The medical profession has accepted artificial insemination, in vitro fertilization, gamete intrafallopian tube transfer, and pro-nuclear state transfer as effective therapy for infertility.[199] In many cases, these treatments result in a pregnancy and a live birth.

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194. J. Veevers, *The Social Meanings of Parenthood*, PSYCHIATRY, 36:291 (1973).

195. Egert v. Connecticut Gen. Life Ins. Co., 900 F.2d 1032 (7th Cir. 1990).

196. *Id.* at 1037-38.

197. *Id.* at 1038.

198. *Id.*

199. *See* Reilly v. Blue Cross & Blue Shield United, 846 F.2d 416, 420 (7th Cir. 1988); *Covering the Cost of Infertility*, The Philadelphia Inquirer, Monday, August 15, 1988, p. 4A. The American College of Obstetricians and Gynecologists and American Fertility Society stated IVF procedures were no longer experimental. IVF ceased being experimental in 1982. PROST is a relatively new procedure, but is a form of IVF. *See supra* notes 114-15 and accompanying text. GIFT was removed in 1988. Artificial insemination was first performed in the 1700s and has been used routinely to treat infertility since the 1940s.

In *Reilly v. Blue Cross & Blue Shield United*,[200] Blue Cross and Blue Shield, in denying coverage for in vitro fertilization, classified the procedure as experimental because the success rate is less than fifty percent.[201] Although this argument, by definition, is technically correct, it is unsound. The success rate for in vitro fertilization has been reported at twenty percent.[202] Thirty to thirty-five percent of GIFT attempts result in live births.[203] However, when these rates are compared to the success rate of a normal couple attempting to have a child they take on a new meaning. A normal couple has only a fifteen to twenty percent chance of conceiving a child in any given month.[204] For GIFT, the chance of conceiving for any particular attempt is fifteen to twenty percent higher than a normal couple.

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200. Reilly v. Blue Cross & Blue Shield United, 846 F.2d 416 (7th Cir. 1988).

201. *Id.* at 423. Plaintiffs argued the use of a success ratio for determining whether a treatment was experimental was arbitrary and capricious. They contended if a success ratio were allowed the insurance companies could deny benefits for terminally ill patients because the success ratio is zero. The court agreed, stating, "Not only may the decision to grant or deny coverage based solely on a success ratio per se be arbitrary and capricious, but the particular ratio selected, in this case, for IVF, may well be arbitrary and capricious." *Id.* at 423-24.

202. *See* Michael v. Metropolitan Life Ins. Co., 631 F. Supp. 451, 453 (W.D.N.C. 1986) (success rate of 20%). It is unknown whether these figures represent the percentage of pregnancies obtained, percentage of live births, or percentage of couples who eventually give birth. Since many couples have more than one attempt at IVF, GIFT or PROST, the percentage of couples eventually giving birth will be higher than the percentage rate for pregnancies obtained and percentage of live births. Due to the miscarriages, the percentage of pregnancies obtained will be higher than the percentage of live births. This is illustrated as follows:

> Couples A, B, C, D, & E went to Infertility Clinic to have GIFT performed. Couple A had GIFT performed four times, with one miscarriage and one live birth. Couple B had GIFT performed one time with a live birth. Couple C had GIFT performed eight times, with three miscarriages and no live births. Couple D had GIFT performed six times with two miscarriages and one live birth. Couple E had GIFT performed three times with no miscarriages or births. This information is summarized as follows.

Couple	No. of Attempts	No. of Miscarriages	No. of Live Births
A	4	1	1
B	1	0	1
C	8	3	0
D	6	2	1
E	3	0	0
Totals	22	6	3

Success Rate

Percentage of Pregnancies Obtained:	6 + 3/22	= 41%
Percentage of Live Births	3/22	= 14%
Percentage of Couples Who Give Live Birth	3/5	= 60%

203. *Clinical Results of the Assisted Reproduction (IVF) Program at McFarland Clinic, P.C., Ames, Iowa*, Journal of In Vitro Fertilization and Embryo Transfer 121 (Nov. 2, 1990).

204. *Id.*; *see also* S. Silber, How to Get Pregnant 57 (1981).

By comparing the low percentages of IVF to a normal couple, the difference in success per attempt is a mere five to ten percent. If the higher rates are compared, a couple being treated with IVF could have a greater chance of conceiving than a normal couple, even with the health problems that complicate their ability to conceive.

In *Regnier*, the court stated that "[a]lthough new medical techniques frequently are described as experimental, that alone does not mean they cannot be found compensable as a medical benefit."[205]

D. *Mandatory Coverage*

Arkansas, Hawaii, Maryland, Massachusetts, and Rhode Island have enacted statutes that specifically prohibit insurance companies from denying benefits for in vitro fertilization.[206] California, Connecticut, and Texas have enacted statutes requiring insurance companies to offer infertility coverage to employees after related infertility treatments.[207] The Arkansas statute provides that all insurance companies shall include in vitro fertilization as a covered expense.[208] Failure to do so may result in suspension or revocation of the insurance company's certificate of authority.[209] The Insurance Commission is mandated to establish minimum and maximum levels of coverage.[210]

The Massachusetts statute mandates that any insurance company that provides pregnancy-related benefits must also provide benefits for infertility.[211] The statute defines infertility as "the condition of a presumably healthy individual who is unable to conceive or produce conception during a

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205. Regnier v. Industrial Comm'n, 146 Ariz. 535, ____, 707 P.2d 333, 337 (Ct. App. 1985).

206. ARK. STAT. ANN. § 23-86-118 (1989); MD. INS. CODE ANN. §§ 354DD, 470W, & 477EE (1985); MASS. GEN. LAWS ANN. ch. 175, § 47H (West Supp. 1989) and ch. 176G, § 4 (West Supp. 1989); HAW. REV. STAT. § 431: 10A-116.5 (Supp. 1989); R.I. GEN. LAWS §§ 27-41-32 (HADs), 27-19-23 (nonprofit hospital service corporations), 27-20-20 (nonprofit medical service corporations) (1989). In 1989, two bills were introduced in the Iowa legislature mandating coverage for in-vitro fertilization. *See* House File 2086 and Senate File 2080. These proposed statutes are similar to the Maryland statute. *See infra* notes 214-15 and accompanying text. However, the proposed statute in Iowa is not limited to requiring coverage for in-vitro fertilization, but would include "benefits relating to infertility," including in-vitro fertilization. Thus procedures such as GIFT and artificial insemination would also be included.

207. CAL. HEALTH & SAFETY CODE § 1374.55 (West 1990); CAL. INS. CODE § 10119.6 (West Supp. 1990); 1989 Conn. Legis. Serv. 89-120 (West); TEX. INS. CODE ANN. art. 3.51-6 (Vernon 1990).

208. ARK. STAT. ANN. § 23-86-118(1) (1989).

209. *Id.* § 23-86-118(b).

210. *Id.* § 23-86-118(c).

211. MASS. GEN. LAWS ANN. ch. 175, § 47H (West Supp. 1989). Chapter 176G, which relates to health maintenance organizations, provides that the HMO must "provide coverage for diagnosis and treatment of infertility as set forth in section forty-seven H of chapter one hundred and seventy-five." *Id.* ch. 176G, § 4.

period of one year."[212] The Rhode Island statute is similar but the subscriber may be required to make a twenty percent co-payment.[213]

The Maryland statute is more restrictive than the Arkansas statute in that it sets out several conditions before coverage is required. The Maryland statute provides that insurance companies must include coverage for in vitro fertilization if they provide coverage for other pregnancy-related procedures.[214] The woman's egg must be fertilized by her husband's sperm,[215] which eliminates the use of a donor in those cases where the husband's fertility problem is too severe for use of his own sperm. The couple also must have had a history of infertility for five years.[216] The infertility must be associated with endometriosis,[217] exposure in utero to diethylstilbestrol (DES),[218] or blockage or surgical removal of the fallopian tubes.[219] The couple must have also tried other less costly treatments.[220] Finally, the procedures must be performed at medical facilities that conform to the American College of Obstetric and Gynecology guidelines for in vitro fertilization clinics.[221] The Hawaii statute is similar, but it is only mandated that IVF be covered for one attempt.[222]

The Texas statute is similar to the Maryland statute, but adds oligospermia[223] as an additional covered medical condition that results in infertility.[224] The Texas statute exempts organizations or self-insuring employers who are directly affiliated with religious denominations and are opposed to in vitro fertilization on the basis of moral principles.[225] However, the Texas statute, like the California and Connecticut statutes, only requires that coverage be offered to employers.[226] The employers can reject coverage.[227]

West Virginia has also enacted a statute that appears to require cover-

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212. *Id.* ch. 175, § 47H.

213. R.I. GEN. LAWS §§ 27-41-32, 27-19-23, 27-20-20 (1989).

214. MD. INS. CODE ANN. § 354DD(1) (1985). (References are to section 354DD only. Sections 470W and 477EE contain the same provisions as 354DD.)

215. MD. INS. CODE ANN. § 354DD(3) (1985).

216. *Id.* § 354DD(4)(i).

217. *Id.* § 354DD(4)(ii)(1).

218. *Id.* § 354DD(4)(ii)(2).

219. *Id.* § 354DD(4)(ii)(3).

220. *Id.* § 354DD(5).

221. *Id.* § 354DD(6).

222. HAW. REV. STAT. § 431:10A-116.5 (Supp. 1989).

223. Oligospermia is a deficient amount of spermatoza in seminal fluid. TABER'S CYCLOPEDIC MEDICAL DICTIONARY 985 (14th ed. 1981).

224. TEX. INS. CODE ANN. art. 3.51-6(3A)(e)(3)(D) (Vernon Supp. 1989).

225. *Id.* § 3.51-6(3A)(f).

226. CAL. HEALTH & SAFETY CODE § 1374.55 (West 1990); CAL. INS. CODE § 10119.6 (West Supp. 1990); 1989 Conn. Legis. Serv. 89-120 (West); TEX. INS. CODE ANN. art. 3.51-6 (Vernon 1990).

227. CAL. HEALTH & SAFETY CODE § 1374.55 (West 1990); 1989 CAL. INS. CODE § 10119.6 (West Supp. 1990); 1989 Conn. Legis. Serv. 89-120 (West); TEX. INS. CODE ANN. art. 3.51-6 (Vernon 1990).

age for all infertility treatments by Health Maintenance Organizations ("HMOs"). The statute defines "basic health care services" to include "infertility services."[228] The statute then requires HMOs to "provide or arrange for the provision of at least basic health care services."[229]

Insurance companies resist statutory enactments requiring the payment of benefits because of anticipated high costs.[230] As benefits are added to health care packages, costs increase.[231] For example, a benefit package providing coverage for surgery and hospitalization costs less than a package providing coverage for surgery, hospital stays, prescriptions, and doctor office visits.[232] Similarly, a package providing coverage for accidental injuries, viral diseases, and infections is less costly than a package that also includes organ transplants and infertility treatments.[233]

Insurance companies argue that a single mandated coverage may be minimal.[234] For IVF it would cost only $2.25 per year for a single plan and $6.00 for a family plan.[235] However, as mandated coverage expands to include conditions such as mental disorders, chemical dependency, hearing aids, and corrective vision devices, the overall cost of the benefits package increases and eventually the cost becomes prohibitive.[236] This results in the inability of employers and individuals to purchase health care insurance.[237]

Blue Cross and Blue Shield and the Coalition for Health Care Cost Containment argue that "mandates interfere with the free market and are unfair to consumers and industry alike. They deny employers and employees the right to choose the benefits they want. The imposition of mandate results in less consumer choice and higher premiums."[238]

However, health insurance contracts are adhesion contracts in which the consumer is not given an opportunity to go through a list of various diseases and select only those diseases for which they desire coverage. Generally, when insurance companies offer a benefit package, options are given as to the dollar amount of coverage and the amount of deductible or other

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228. W. VA. CODE § 33-25A-2(1) (1988).

229. *Id.* § 33-251-4(2)(b).

230. Blue Cross and Blue Shield, Position Statement, received from Kathy Dirks, President, Resolve of Iowa, 7009 Windwood Lane NE, Cedar Rapids, Iowa 52402 (Resolve is a support organization for infertile couples) and Michael J. Meloy, Attorney at Law, 724 Spalding Blvd., Davenport, Iowa 52804.

231. Interview with Marilyn J. Musser, Coordinator of Public Policy, Blue Cross and Blue Shield of Iowa, 636 Grand Avenue, Des Moines, Iowa 50309 (1988).

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. Information received from Kathy Dirks, President, Resolve of Iowa, 7009 Windwood Lane NE, Cedar Rapids, Iowa 52402 and Michael J. Meloy, Attorney at Law, 724 Spalding Blvd., Davenport, Iowa 52804.

financial aspects.[239] They do not provide a list of diseases such as heart conditions, appendicitis, diabetes, or kidney disfunction, nor give consumers the opportunity to select those for which they want coverage. Only in very few cases is the purchaser of insurance given options to select some diseases or treatments for coverage. For example, an option may be available for organ transplants.[240] Typically, as the treatment becomes more common and less expensive, then the consumer is no longer given the option of inclusion or exclusion in the policy.[241] It needs to be noted that these options are for treatments, not illnesses. Many insurance companies have made a wholesale exclusion for the coverage of the illness of infertility, not merely for the treatments.[242]

If consumers were allowed to select coverage for each disease, obviously the insurance companies' risks would skyrocket because consumers would only pick the diseases they thought were a risk to them. Because consumers are not given a significant choice of benefits, the insurance companies' argument that mandates destroy the free market is weak. The generally accepted criteria for success in a free market are more choices and lower prices. However, insurance companies do not offer more choices and lower prices. They should not single out a disease such as infertility and deny coverage under the guise of a free market.

In Maryland, during 1988, after coverage for in vitro fertilization was mandated, Blue Cross and Blue Shield paid only $500,000 or a mere one dollar per year per contract; it anticipated costs to run as high as $5 million per year.[243] Blue Cross and Blue Shield's estimate was most likely inflated due to the misconception that all infertile couples will utilize in vitro fertilization.[244] Less than five percent of infertility patients are medically required to undergo in vitro fertilization; the remainder are successfully treated with procedures that have routinely been provided insurance coverage such as drug therapy or surgery.[245]

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239. Interview with Marilyn J. Musser, Coordinator of Public Policy, Blue Cross and Blue Shield of Iowa, 636 Grand Avenue, Des Moines, Iowa 50309 (1988).

240. *Id.*

241. *Id.*

242. As is explained in more detail later, many of the component parts of IVF, GIFT and PROST are covered under most insurance policies; however, when these procedures are combined and labeled IVF, GIFT or PROST, the insurance companies will deny coverage. Thus, the insurance companies could make an argument that they are not excluding treatment of the illness of infertility, but are merely excluding the procedures to treat infertility, which they do in other instances (i.e., organ transplants). This argument is weak because, unlike organ transplants, the component parts that comprise the procedures of IVF, GIFT and PROST are covered under most insurance policies.

243. Letter from John A. Picciotto, Blue Cross and Blue Shield of Maryland to Daniel M. Clements, Esquire (April 24, 1990).

244. *Id.*

245. *Id.*

Currently 80% of all infertility treatments are covered by insurance.[246] This amount is only 0.1% of total health care costs.[247] Even if this were to double due to mandates to insurance companies to provide benefits for all treatments, it would only be 0.2% of total medical costs. It is unlikely that insurance companies would increase benefits based solely on this small increase in payments. However, when a mandate of IVF is added to all other mandates, there could be an increase in the cost of insurance.[248]

Although they resist payments for IVF, GIFT, PROST, and artificial insemination, insurance companies pay for surgical repair of the fallopian tubes.[249] One couple was given a choice of surgery or IVF. They chose surgery because their insurance would pay the cost. The surgery required two hospital stays of one week each and weeks of missed work, which cost more than $23,900 altogether. Using IVF, the hospital stay would have been a few hours and a couple of days of missed work at a cost of $5,000.[250]

Insurance companies also routinely pay for the individual procedures involved in IVF, GIFT, and PROST.[251] For example, they pay for fertility drugs, ultrasound exams, blood work, and laparoscopy.[252] These procedures make up three-fourths of the total cost of IVF.[253] However, when the procedures are combined and labeled IVF, GIFT, or PROST, the insurance companies deny benefits.[254]

V. Conclusion

Infertility is a disease that affects millions of couples in the United States. Artificial Insemination, IVF, GIFT, and PROST have been recognized by the medical profession as acceptable treatments for infertility. These treatments are medically necessary to overcome the inability to have a child.

Blue Cross and Blue Shield of Iowa began to offer coverage for IVF, GIFT, and artificial insemination on January 1, 1989.[255] These procedures are now covered for a lifetime maximum of $15,000.[256] The doctor perform-

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246. *Id.*
247. *Id.*
248. *See supra* notes 230-33 and accompanying text.
249. *See* Egert v. Connecticut Gen. Life Ins., 900 F.2d 1032 (7th Cir. 1990).
250. *Covering the Cost of Infertility*, Philadelphia Inquirer, Aug. 15, 1988, at 4A.
251. Information received from Kathy Dirks, President, Resolve of Iowa, 7009 Windwood Lane NE, Cedar Rapids, Iowa 52402 and Michael J. Meloy, Attorney at Law, 724 Spalding Blvd., Davenport, Iowa 52804.
252. *Id.*
253. *Id.*
254. *Id.*
255. *Id.* Blue Cross and Blue Shield, Position Statement, Coverage of In-Vitro Fertilization and Similar Procedures, 1989; Meeting with Marlyn J. Musser, Coordinator of Public Policy, Blue Cross and Blue Shield of Iowa, 636 Grand Avenue, Des Moines, Iowa 50309 (1988).
256. *Id.*

ing the procedure must meet the criteria of the American Fertility Society and the American College of Obstetrics and Gynecology, as well as be approved by Blue Cross and Blue Shield.[257] Medical coverage is not provided for the collection of donor sperm or oocytes.[258] Thus, the coverage includes medical costs for donor artificial insemination or for surrogate mothers, but does not include the fees paid to the donor or surrogate for his or her services.[259]

Blue Cross and Blue Shield of Iowa changed their position on providing coverage for IVF, GIFT, and artificial insemination for the following reasons:

> 1. The University of Iowa, Iowa City, Iowa, and McFarland Clinic, Ames, Iowa, offer established programs for IVF and GIFT.
> 2. There are a growing number of persons seeking coverage.
> 3. Blue Cross and Blue Shield Association removed IVF from its list of experimental procedures because of its widespread use, increased demand, the promotion of IVF by the medical profession, and increased media attention.
> 4. The pressures placed on the legislature for mandated benefits.
> 5. The recent decision of the Iowa Supreme Court in *Witcraft v. Sundstrand Insurance* ruling infertility is an illness.[260]

Blue Cross and Blue Shield of Iowa has estimated the annual cost of providing coverage for IVF, GIFT, and artificial insemination in Iowa to be about $1.4 million, which is approximately 0.1% of its total health care expenditures of over $1 billion in 1987.[261]

Mandated coverage may be only a temporary and incomplete answer to the infertility problem. If legislatures begin succumbing to pressure groups who promote mandates for IVF, they will be faced with increased pressures from other groups seeking mandated coverages. This could ultimately result in prohibitive costs for health insurance. In addition, the statutes become inflexible and ultimately obsolete as new procedures are developed and become effective. This has already happened in states that have enacted mandates for IVF, because they do not include GIFT or PROST, which are less expensive and more effective than IVF in some circumstances.

Although mandated coverage may not be the answer, Blue Cross and Blue Shield's recent policy change similarly fails to provide a complete answer. First, the infertility treatment plan is only *offered* to employers and at a higher cost.[262] Unfortunately, most employers opt for lower cost health

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257. *Id.*
258. *Id.*
259. *Id.*
260. *Id.*
261. *Id.*
262. Information received from Kathy Dirks, President, Resolve of Iowa, 7009 Windwood Lane NE, Cedar Rapids, Iowa 52402.

insurance coverage and do not accept the plan providing infertility treatment.[263] Second, the lifetime maximum coverage is unfair. Most infertile couples will not have high infertility costs, but the minority who need more sophisticated treatment will undergo further discrimination because they will have inadequate coverage for the "high tech" procedures such as GIFT, PROST, or IVF.[264] Third, the infertility treatment plan gives the general public the impression that all infertility treatments are expensive, resulting in costly health insurance coverage.[265] Finally, couples will choose treatments based on insurance coverage, not on what treatments are most successful for their needs.[266]

Infertility is a disease. There are unique but effective treatments for this disease that should be given recognition. Although Blue Cross and Blue Shield has taken a step in the right direction, they must provide more comprehensive coverage for infertile couples. All insurance companies should offer coverage for all infertility treatments, including IVF, GIFT, PROST, and artificial insemination. Most companies already provide coverage for the majority of these costs, including diagnosis and some treatments. In addition, because the companies pay the costs for the individual component parts of IVF, GIFT, and PROST, they logically should pay the cost of the complete packages of medical treatment.

If insurance companies fail to meet consumer demand by continuing to refuse coverage for infertility, legislatures and courts need to recognize the high economic and related personal and social costs of infertility, and require insurance companies to provide coverage.

The courts will only be able to provide limited relief in requiring insurance companies to pay for infertility-related medical expenses. Although the Iowa Supreme Court has recognized infertility as an illness, payment of benefits were ordered because the insurance company did not exclude the treatment from coverage in its policy. Thus, the decision does not prevent insurance companies from specifically excluding treatments for infertility in their policies. Legislation will be necessary to prohibit insurance companies from excluding infertility treatment. The Rhode Island and Massachusetts statutes should serve as models for such legislation. The Rhode Island statute provides:

> **27-19-23. Coverage for infertility.**—(a) Any nonprofit hospital service contract, plan or insurance policies here and after delivered, issued for delivery, or renewed in this state, on or after December 1, 1989, except contracts providing supplemental coverage to Medicare or other governmental programs, which includes pregnancy-related benefits shall provide coverage for medically-necessary expenses of diagnosis and treat-

263. *Id.*
264. *Id.*
265. *Id.*
266. *Id.*

ment of infertility. To the extent that a nonprofit hospital service corporation provides reimbursement for a test or procedure used in the diagnosis or treatment of conditions other than infertility, such tests and procedures shall not be excluded from reimbursement when provided attendant to the diagnosis and treatment of infertility. Provided that, subscriber co-payment, not to exceed twenty percent (20%) may be required for those programs and/or procedures the sole purpose of which is the treatment of infertility.

(b) For the purposes of this section, "infertility" shall mean the condition of an otherwise presumably healthy married individual who is unable to conceive or produce conception during a period of one year.[267]

The Massachusetts statute provides:

§ 47H. Infertility, pregnancy-related benefits

Any blanket or general policy of insurance, except a blanket or general policy of insurance which provides supplemental coverage to medicare or other governmental programs, described in subdivisions (A), (C) or (D) of section one hundred and ten which provides hospital expense or surgical expense insurance which includes pregnancy-related benefits and which is issued or subsequently renewed by agreement between the insurer and the policyholder, within or without the commonwealth, while this provision is effective, or any policy of accident and sickness insurance as described in section one hundred and eight which provides hospital expense or surgical expense insurance which includes pregnancy-related benefits and which is delivered or issued for delivery or subsequently renewed by agreement between the insurer and the policyholder in the commonwealth while this provision is effective, or any employees' health and welfare fund which provides hospital expense and surgical expense benefits which includes pregnancy-related benefits and which is promulgated or renewed to any person or group of persons in the commonwealth while this provision is effective shall provide, to the same extent that benefits are provided for other pregnancy-related procedures, coverage for medically necessary expenses of diagnosis and treatment of infertility to persons residing within the commonwealth. For purposes of this section, "infertility" shall mean the condition of a presumably healthy individual who is unable to conceive or produce conception during a period of one year.[268]

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267. R.I. GEN. LAWS § 27-19-23 (1989). Rhode Island has identical sections that apply to nonprofit medical services corporations (section 27-20-20) and HMOs (section 27-41-32).

268. MASS. GEN. LAWS ANN. ch. 175, § 47H (West Supp. 1989).