AFTER *BRAGDON V. ABBOTT*: WHY LEGISLATION IS STILL NEEDED TO MANDATE INFERTILITY INSURANCE

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Infertility is a serious, widespread problem in the United States. Infertility is typically defined as the inability to become pregnant after one year of sexual intercourse without contraception.[1] Under this definition, infertility affects over six million couples in the United States.[2] Almost one-third of these couples seek treatment for their fertility problems every year.[3] Fortunately, various treatments exist to overcome infertility, some with excellent success rates.[4] However, these treatments are often expensive, time-consuming, and rarely an option for those couples without insurance coverage.[5] All too often, only the wealthy or well-insured can overcome problems of infertility. Some states have attempted to correct this imbalance by mandating that insurers provide infertility insurance.[6] While noble, these attempts have had mixed results because exemptions, loopholes, and restrictions often plague their design.

This article is intended to be a blueprint for those who are charged with overcoming the current legal obstacles that face the infertile. Part II tracks the legal challenges that have historically faced the infertile. Part III discusses the recent Supreme Court decision in *Bragdon v. Abbott* and its ramifications. Part IV provides an overview of the states that currently have a mandate for infertility insurance, and Part V discusses the need for federal legislation mandating infertility insurance.

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[1] *See* Adam Sonfeld, *Drive for Insurance Coverage of Infertility Treatment Raises Questions of Equity, Costs*, 2 GUTTMACHER REP. ON PUB. POL' Y 4, 4 (1999).

[2] *See id.*

[3] *See* Peter J. Neumann, *Should Health Insurance Cover IVF? Issues and Options*, 22 J. HEALTH POL., POL' Y & L. 1215, 1216 (1997).

[4] *See* William C. Cole, *Infertility: A Survey of the Law and Analysis of the Need for Legislation Mandating Insurance Coverage*, 27 SAN DIEGO L. REV. 715, 716-17 (1990).

[5] *See id.* at 717.

[6] *See id.* at 723-24.

I. INTRODUCTION

Most Americans are consumed with having children. Conversations at weddings, funerals, and everything in between, often center on a couple' s children and their achievements. For those couples who are unable to conceive, there are daily reminders at work, on T.V., and in conversations with friends, that their infertility prevents them from enjoying one of life's most precious gifts.

Infertile couples " not only face the emotional pain associated with not being able to have a child, but may also face many legal obstacles put in front of them by their health insurance and employers."[7] The two most prevalent are employer refusals to accommodate employees who wish to undergo infertility treatments, and health insurer refusals to provide coverage for infertility-related health expenses.[8]

II. HISTORY OF INFERTILITY INSURANCE LAW

Insurers did not begin to specifically exclude infertility treatments on a routine basis until the early 1990s. Prior to that (and continuing today even with the advent of specific exclusions), insurers generally raised three arguments in support of their denial of coverage.[9] Insurers asserted that 1) infertility is not an "i llness," 2) artificial insemination is not a " treatment," and 3) infertility treatment is not "me dically necessary."[10]

A. Infertility is Not an " Illness"

This argument is based on the simple contention that " although improper function of ovaries or testicles may be an illness, the condition of being not pregnant is not an illness."[11] Therefore, any procedure used to change that condition, such as artificial insemination, is not compensable under an insurance plan that only provides coverage for "i llnesses."[12]

On March 16, 1988, the Supreme Court of Iowa, in the landmark case of *Witcraft v. Sundstrand*, dealt a heavy blow to insurers who raise this argument.[13] The *Witcraft* court ruled that Plaintiff's infertility problem was an "i llness"

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[7] Pamela Prager, *Insurance Coverage for Infertility Treatment* (visited Mar. 23, 2002) <http://www.inciid.org/legal.html>.

[8] *See* RESOLVE: The Nat' l Infertility Ass' n, *Supreme Court Rules Reproduction is a Major Life Activity* (July 2, 1998) <http://www.resolve.org/advocacy/inaction/inaction6.shtml>.

[9] *See* Prager, *supra* note 7.

[10] *See id.*

[11] Witcraft v. Sundstrand Health and Dis. Gr., 420 N.W.2d 785, 788 (Iowa 1988).

[12] *See id.*

[13] *See id.*

under the Plaintiff's Health and Disability Group Benefit Plan.[14] To reach that conclusion, the court held that the terms "illness" and "disease" were synonymous.[15] The court then adopted the generally accepted definition of "disease" which is a "morbid condition of the body, a deviation from the healthy or normal condition of any of the functions or tissues of the body."[16] Using that broad approach, the court discounted the insurer's claim that the condition of not being pregnant is not an "illness." It held that "the natural function of the reproductive organs is to procreate. The evidence makes clear that both Mr. Witcraft, by low sperm production with decreased motility, and Mrs. Witcraft, by irregular ovulation, have conditions of their respective reproductive systems in which there is incorrect functioning."[17] Since the Witcrafts' infertility was a "deviation from the healthy or normal condition . . . of the body," the court concluded that infertility was indeed an "illness."[18]

While the *Witcraft* decision appears to limit the availability of the illness defense, it certainly does not eradicate it.[19] For instance, an insured whose infertility is due to menopause or the natural aging process would most certainly be denied coverage on the basis that her condition is not an "illness" because it is not a "deviation from the healthy or normal condition" of a bodily function. Additionally, the *Witcraft* decision is most likely limited to cases in which the plaintiffs seek an artificial insemination procedure, such as in vitro fertilization, to overcome their infertility. For instance, plaintiffs seeking coverage for a sterilization reversal procedure would most likely succumb to the "illness" argument as the plaintiffs' infertility would not be a "morbid condition of the body" but a voluntary decision or choice for a procedure that the plaintiff is now seeking to reverse.[20]

B. Artificial Iinsemination is Not a "Treatment"

The insurer in *Witcraft* also raised the argument that artificial insemination is not a "treatment."[21] The insurer asserted that the court should adopt the Black's Law Dictionary definition of "treatment" which defines 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."[22] Under that definition, the

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[14] *See id.* at 788.

[15] *See* Prager, *supra* note 7.

[16] Witcraft v. Sundstrand Health and Dis. Gr., 420 N.W.2d 785, 788 (Iowa 1988).

[17] *Id.* at 788-89.

[18] *See id.* at 789.

[19] *See* Endl v. Sch. Dist. of Beloit, No. 01-1607-FT, 2001 WL 1474786, at *2 (Wis. Ct. App. Nov. 21, 2001).

[20] *See* Marsh v. Reserve Life Ins. Co., 516 So. 2d 1311, 1315 (La. Ct. App. 1987); Ruess v. Time Ins. Co., 340 S.E.2d 625, 626 (Ga. Ct. App. 1986).

[21] *See Witcraft*, 420 N.W.2d at 787.

[22] *Id.* at 790 (alteration in original) (quoting BLACK'S LAW DICTIONARY 1346 (5th ed.

insurer would not be required to provide coverage for infertility treatments since such treatments do not effect a cure of the infertility, but simply allow an insured to become pregnant in spite of her infertility.

The *Witcraft* court disagreed with this point on the basis that the policy did not specifically state that it would only provide coverage for "treatments," but instead stated that the plan covers "expenses *relating* to injury or illness."[23] The court explained that this language would be interpreted by the average reader as covering "*any* expenses incurred because of, rather than as treatment for, the infertility problem of the couple."[24] It is therefore conceivable that an insurer could successfully raise this argument in cases where the policy language speaks in terms of "treatment" and not the broader language found in the *Witcraft* policy.

C. *Infertility Treatment is Not "Medically Necessary"*

This is perhaps the most daunting legal challenge that infertile couples and their attorneys must face. The bad news for infertile advocates is that no court has ever ruled that infertility treatments are "medically necessary."[25] The good news is that while the "infertility treatments are not medically necessary" argument appears to be different than the "artificial insemination is not a treatment" argument, they are essentially identical, such that advocates may potentially utilize the holding from *Witcraft*.[26] However, advocates will only have this option where their plan has similar language to the policy in *Witcraft*. On the positive side, this argument is a double edged sword as it allows an insured whose policy specifically excludes infertility treatments to claim that the treatments are covered nonetheless since they are "medically necessary."[27]

However, as stated earlier, this broad exclusion has been and continues to be used by insurers to effectively avoid coverage of infertility treatments.[28] It is used when infertility treatment is not specifically addressed in the insurance policy, and is also used in conjunction with specific infertile treatment exclusions.[29]

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[23] *Witcraft*, 420 N.W.2d at 790 (quoting provision of the plan at issue).

[24] *Id.*

[25] Note that the Louisiana Court of Appeals ruled that infertility treatments were "necessary treatments." *See* Ralston v. Conn. Gen. Life Ins. Co., 617 So. 2d 1379 (La. Ct. App. 3 Cir. 1993). However, that case was subsequently vacated and remanded by the Louisiana Supreme Court to the district court for further proceedings. *See* Ralston v. Conn. Gen. Life Ins. Co., 625 So. 2d 156 (La. 1993).

[26] *See* Cole, *supra* note 4, at 720 n.41.

[27] *See* Saks v. Franklin Covey Co., 117 F. Supp. 2d 318 (S.D.N.Y. 2000).

[28] *See* Bielicki v. City of Chicago, No. 97 C 1471, 1997 WL 260595 (N.D. Ill. May 8, 1997); Sophie v. Lincoln National Life Ins. Co., No. 95 C 2274, 1997 WL 603890, at *3 (N.D. Ill. Sept. 24, 1997); Kinzie v. Physician's Liab. Ins. Co. 750 P.2d 1140, 1141-42 (Okla. Ct. App. 1987).

[29] *See Kinzie*, 750 P.2d at 1142.

As stated above, the argument mirrors that of " artificial insemination is not a treatment." More specifically, the argument is that infertility treatments, such as in vitro fertilization, are not medically necessary to treat an insured's infertility since the treatment does not actually treat the condition that has caused the insured' s infertility. Rather, in vitro fertilization simply allows an insured to become pregnant despite her infertile condition.[30] The only court to come close to ruling that infertility treatments are "med ically necessary" was the Court of Appeal of Louisiana for the Third Circuit.[31] In *Ralston v. Connecticut General Life Insurance*, the court granted the insured's motion for summary judgment on the issue of whether infertility treatments were " essential for the necessary care and treatment" of the patent' s condition.[32] The court held,

> Under the above definitions, we find Mrs. Ralston's condition is not normal, that a vital function (the ability to reproduce) is impaired. In our view this constitutes a " sickness." The process of *in vitro fertilization* provides a remedy for this disorder within the reproductive organs. *In vitro fertilization* may result in pregnancy which serves the end purpose of the female' s reproductive organs. This Court does not adopt appellant' s reasoning that a procedure must effect a "c ure" to qualify as treatment. When *in vitro fertilization* is successful, however, the sickness (the inability to reproduce) is cured. Thus, under the language of the policy, we find *in vitro fertilization* "ess ential for the necessary care and treatment" of Mrs. Ralston' s infertility.[33]

However, the insurer appealed this summary judgment and the ruling was reversed.[34]

In addition to the above mentioned arguments, attorneys representing an infertile client whose health insurance policy has an effective date of 1990 or later will likely find that the policy includes a specific exclusion relating to infertility treatments. As it has become increasingly difficult to argue that health insurance contracts actually provide coverage for infertility treatments, many infertile advocates began searching for other means to secure coverage. With the advent of the Americans with Disabilities Act ("A DA"), many legal scholars believed that if infertility was deemed a disability under the Act, this would force employers to include infertility insurance in employment based health plans.[35] On June 25, 1998 this occurred.

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[30] *See id.*

[31] *See* Ralston v. Conn. Gen. Life Ins., 617 So. 2d 1379 (La. Ct. App. 1993).

[32] *Id.* at 1381.

[33] *Id.* at 1382.

[34] *See* Ralston v. Conn. Gen. Life Ins. Co., 625 So. 2d 156 (La. 1993).

[35] *See* Bonny Gilbert, *Infertility and the ADA: Health Insurance Coverage for Infertility Treatment*, 63 DEF. COUNS. J. 42, 46-57 (1996).

III. SUPREME COURT RULES REPRODUCTION IS A MAJOR LIFE ACTIVITY

The ADA is an anti-discrimination statute passed with the intention of allowing qualified individuals with disabilities enjoy the same employment opportunities as people without disabilities.[36] When the ADA was passed, many infertile advocates believed that if reproduction was recognized as a major life activity under the ADA, then the ADA would effectively force employers to accommodate employees who wish to undergo infertility treatments and compel health insurers to include infertility insurance in their plans.[37]

Three years have passed since the Supreme Court recognized reproduction as a major life activity in *Bragdon v. Abbott*. Although numerous courts have applied the rule laid down in *Bragdon*, they continued to hold that an employer's failure to provide infertility insurance does not violate the ADA.[38]

A. Bragdon v. Abbott

On June 25, 1998, the United States Supreme Court decided the case of *Bragdon v. Abbott*.[39] Abbott, a woman living with HIV, brought suit under the ADA, claiming that Bragdon, a dentist, discriminated against her when he refused to provide treatment in his office because of her HIV status.[40] In order to qualify for protection from discrimination under the ADA, one must have "a physical or mental impairment that substantially limits one or more . . . major life activities."[41] Abbott argued that her HIV status substantially limited the major life activity of reproduction.[42] The Supreme Court agreed, holding that reproduction is a major life activity under the ADA, and that Abbott's HIV infection substantially limited her ability to reproduce.[43] Consequently, she was afforded protection from discrimination under the ADA.[44]

1. High Expectations Following the Decision

Within hours after the decision, advocates for infertile persons "seized on the decision as a victory for all people whose ability to procreate is impaired."[45] Prior

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[36] *See* Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (1994 & Supp. 1997).

[37] *See* Gilbert, *supra* note 35, at 46-57.

[38] *See Saks*, 117 F. Supp. 2d at 323-28 (employer's exclusion of surgical impregnation procedures from insurance coverage does not violate ADA).

[39] 524 U.S. 624 (1998).

[40] *See id.* at 624.

[41] Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12102, 12112.

[42] *See Bragdon*, 524 U.S. at 625.

[43] *See id.* at 639-40.

[44] *See id.* at 640.

[45] Esther B. Fein, *AIDS Virus Case Opens Door For Infertile*, N.Y. TIMES, July 5, 1998, at D6.

to the *Bragdon* decision, many employers failed to offer infertile insurance, and furthermore, prohibited their infertile employees from taking leaves of absence to undergo lengthy infertility treatments.[46] Many infertile advocates believed that the *Bragdon* decision would effectively prevent employers from prohibiting infertile employees from taking time off from work, and more importantly, would force insurers to provide infertile insurance coverage.[47] The theory was that since infertility is an obvious impairment to the major life activity of reproduction, infertile persons would be protected from discrimination under the ADA.[48] Therefore, an employer who prohibited an employee from taking time off from work to undergo infertility treatments and who did not provide coverage for infertility treatments would in fact be discriminating against the infertile, a prohibited practice under the ADA.[49]

2. Does *Bragdon v. Abbott* Guarantee Infertile Insurance Coverage?

Unfortunately for infertile advocates, *Bragdon v. Abbott* has not had the effect that many had hoped for. In October 2000, Rochelle Saks, an infertile female employee, brought an action against her employer, Franklin Covey Co., under the ADA following the denial of her claim for surgical impregnation procedures.[50] Saks argued that her employer' s failure to provide infertility insurance coverage violated the ADA as it discriminated against infertile persons.[51] While the court agreed that Saks had standing to bring an ADA claim, the court held that the defendant' s failure to provide infertility insurance was not a violation of the ADA.[52] The court based its holding on the fact that the defendant's plan offered the same insurance coverage to all its employees.[53] As the court stated, the plan "do es not offer infertile people less pregnancy and fertility-related coverage than it offers to fertile people. Therefore, as a matter of law, the Plan does not violate the ADA."[54] In retrospect, the *Saks* decision was expected as the same theory, albeit in a different context, had already been applied by another court.[55] In *McGann v. H&H Music Company*, an employee sued his employer for discrimination and violation of rights under the Employee Retirement Income Security Act (" ERISA").[56] McGann's employer, H&H Music Company reduced his health plan from a $1 million maximum AIDS benefit to $5 thousand soon

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[46] *See* Prager, *supra* note 7.
[47] *See id.*
[48] *See* Gilbert, *supra* note 35, at 46-57.
[49] *See* RESOLVE: The Nat' l Infertility Ass' n, *supra* note 8.
[50] *See Saks*, 117 F. Supp. 2d at 323-28.
[51] *See id.* at 323.
[52] *See id.* at 327.
[53] *See id.*
[54] *Id.* at 326.
[55] *See* McGann v. H&H Music Co., 946 F.2d 401 (5th Cir. 1991).
[56] *See id.*; 29 U.S.C. § 1140 (2001).

after McGann informed his employer that he was suffering from AIDS.[57] In ruling that H&H Music Company did not unlawfully discriminate under ERISA, the court found it irrelevant that H&H Music Company had changed the plan right after being notified of McGann' s condition, and immaterial that McGann was the only employee who suffered from AIDS.[58] The court stated that "the reduction in AIDS benefits will apply equally to all employees filing AIDS-related claims and that . . . the effect of the reduction will not necessarily be felt only by [McGann]."[59] For H&H Music Company to have unlawfully "d iscriminated" under ERISA, its reduction in benefits had to affect only McGann and not all employees equally.[60]

While the *McGann* decision concerned ERISA and not the ADA, its broad definition of "dis crimination" should have alerted legal scholars to the potential limitations of the *Bragdon* decision.

3. Does *Bragdon v. Abbott* Prevent Employers From Prohibiting Employees From Taking Time Off From Work for Infertility Treatments?

This is not to suggest that *Bragdon v. Abbott* does not assist the plight of the infertile. As discussed above, another problem facing the insured, albeit less important to the infertile than insurance coverage, is the opportunity to take time off from work in order to undergo lengthy infertility treatment procedures.[61]

On this front, *Bragdon v. Abbott* has had more success. In *Laporta v. Wal-Mart Stores*, a former employee who was infertile brought suit against her employer, Wal-Mart, alleging that her termination violated the ADA.[62] More specifically, Laporta claimed that her failure to show up for work on days that she had scheduled infertility treatments was the basis for her dismissal.[63]

In denying the Defendant's motion for summary judgment, the court applied *Bragdon* and agreed with LaPorta that as an infertile employee, she was entitled to protection under the ADA.[64] As such, she was entitled to "rea sonable accommodations" for her disability.[65] The court stated,

> Plaintiff kept her supervisors well informed of her course of medical treatment and need for periodic time off from work. Her supervisors were also well aware that she was undergoing *in vitro* fertilization procedures and that she might need time off on short notice. A jury could certainly find that

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[57] *See McGann*, 946 F.2d at 403.
[58] *See id.* at 404.
[59] *Id.*
[60] *See id.*
[61] *See* RESOLVE: The Nat' l Infertility Ass' n, *supra* note 8.
[62] *See* LaPorta v. Wal-Mart Stores Inc., 163 F. Supp. 2d 758 (W.D. Mich. 2001).
[63] *See id.* at 766-67.
[64] *See id.* at 769-70.
[65] *See id.* at 766.

plaintiff's request for a single day off was a reasonable "method of accommodation" even on only one day's notice.[66]

B. Other Arguments That Employers Insurers Must Provide Infertility Insurance.

In addition to the ADA, some infertile advocates have attempted to utilize other federal statutes to create a mandate for infertile insurance coverage.[67] However, these attempts have equally resulted in failure.

1. Title VII

In the *Saks* case, the Plaintiff asserted that her plan's failure to provide for in vitro fertilization violated Title VII of the Civil Rights Act.[68] Rochelle Saks agreed that on the surface her policy did not appear to be gender biased, as both men and women were entitled to those infertility treatments that were covered and that neither men nor women were entitled to coverage for infertility treatments that were excluded (i.e., in vitro fertilization).[69] However, the gravamen of her argument was that since the only benefits that were excluded under the plan were ones that could only be performed on women, this constituted gender discrimination.[70] Unfazed by the logic of Saks' argument, the court summarily dismissed this contention, stating, "It is no answer to say that the excluded treatments can only be performed on women, because male employees can claim infertility-related benefits for treatments performed on their wives - and are, conversely, precluded from obtaining benefits for surgical impregnation of their wives."[71] The court employed the same broad definition of discrimination that it had utilized with Saks' ADA claim and went on to state that Title VII would only come into play "[i]f female employees of Franklin Covey . . . were denied benefits for surgical impregnation but those same benefits were made available to male employees."[72] Under the above mentioned reasoning, a health plan which provided for coverage for impotency medication yet excluded coverage for estrogen supplements would not violate Title VII as long as the female employees were entitled to obtain the impotency medication and as long as men were also prohibited from obtaining estrogen supplements. It would make no difference that female employees could not utilize impotency medication or that male employees would have no use for estrogen supplements. Admittedly, this argument would have some logic if every employee was heterosexual and in a stable marriage,

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[66] *Id.* at 767.
[67] *See Saks*, 117 F. Supp. 2d at 328..
[68] *See id.*
[69] *See id.*
[70] *See id.*
[71] *Id.*
[72] Saks v. Franklin Covey Co., 117 F. Supp. 2d 318, 328 (S.D.N.Y. 2000).

since the female employees' husbands could take advantage of the impotency medication and the male employees' wives would be also be excluded from obtaining estrogen supplements. However, if some of the employees are homosexual or single, the court's co nclusion just does not make sense.

C. Other Arguments that Employers Must Allow Infertile Employees to Take Leaves of Absence to Undergo Infertility Treatments.

1. Pregnancy Discrimination Act

The Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k), (" PDA") forms a part of Title VII of the Civil Rights Act of 1964.[73] The PDA amended Title VII to include, within the prohibition against discrimination "on the basis of sex," acts motivated " because of or on the basis of pregnancy, childbirth, or related medical conditions."[74] In *Erickson v. Board of Governors*, an infertile employee claimed that her employer, by terminating her employment after she utilized sick time in order to undergo infertility treatments, discriminated against her on the basis of a medical condition related to pregnancy in violation of the PDA.[75] In denying the employer' s motion to dismiss, the court agreed that infertility was covered by the PDA and that the employee had stated a cause of action.[76] However, other courts have disagreed with this assertion, holding that the PDA does not cover infertility.[77] Regardless of this split, the PDA's value to infertile advocates would be another potential avenue to prevent an employer from prohibiting an employee from taking leaves of absence to undergo infertility treatments—a goalbetter achieved through the use of the ADA.[78]

2. Family and Medical Leave Act

Though never expressly asserted in a case, this could present a persuasive argument under certain circumstances. Under the Family and Medical Leave Act ("FMLA"), individuals who are unable to perform their job due to a serious health condition are entitled to: 1) twelve weeks of leave; and 2) restoration to their former position or an equivalent position upon their return to work from leave.[79] Unfortunately, it is doubtful that any court would find that infertility

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[73] *See* Pregnancy Discrimination Act, 42 U.S.C. § 2000e.

[74] *Id.* § 2000e(k).

[75] *See* Erickson v. Bd. of Governors, 911 F. Supp. 316 (N.D. Ill. 1995), *rev' d on other grounds*, 207 F.3d 945 (7th Cir. 2000).

[76] *See id.*

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

[78] *See LaPorta*, 163 F. Supp. 2d at 758.

[79] *See* Family and Medical Leave Act, 29 U.S.C. § 2612, 2614; Soodman v. Wildman, Harrold, Allen & Dixon, No. 95 C 3834, 1997 WL 106257, at *8 (N.D. Ill. Feb. 10, 1997).

constitutes a serious health condition. However, many infertile couples suffer from depression.[80] Depression has been found to constitute a "serio us health condition."[81] Therefore, employees who provide their employers with the proper notice and claim that undergoing infertility treatment, would alleviate their depression, could conceivably prevail under FMLA.[82]

D. The Present State of Insurance for Infertile Couples

In light of the abovementioned defenses, the only group of infertile persons certain to be legally entitled to infertility insurance is those whose health policy specifically provides coverage for infertility treatments. Those who live in states where infertility insurance is mandated may or may not have it, depending upon the state they reside in and other criteria. Those whose claim for infertility insurance is based on the ADA or Title VII may have a valid legal argument that they are entitled to infertility insurance, but it is doubtful that this argument will prevail.[83]

IV. STATE ACTIONS TO GUARANTEE INFERTILITY INSURANCE

Currently, thirteen states have some sort of mandate regarding infertility insurance.[84] Wisconsin seeks to become the fourteenth state in the next legislative session.[85] These state plans fall into two broad categories: those which mandate

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[80] *See* The Baby Center Editorial Team, *Can Infertility Cause Depression?* (visited Mar. 25, 2002) <http://www.babycenter.com/expert/preconception/fertilityproblems/6098.html>
[I]nfertility interferes with your marriage, your sex life, your relationship with family and friends, as well as your job and financial situation. Infertile women are much more likely than fertile women to have symptoms of depression. In fact, infertile women have levels of anxiety and depression equivalent to women with cancer, heart disease, and HIV+ status.
Id. Alice D. Domar, Ph.D., a psychologist specializing in infertility issues, contributed to this web page. Domar is director of the Mind/Body Center for Women' s Health at the Mind/Body Medical Institute at Harvard University Medical School. She is the co-author of HEALING MIND, HEALTHY WOMAN: USING THE MIND-BODY CONNECTION TO MANAGE STRESS AND TAKE CONTROL OF YOUR LIFE (1999) and SIX STEPS TO INCREASED FERTILITY: AN INTEGRATED MIND/BODY PROGRAM TO PROMOTE CONCEPTION (2001).

[81] *See* Marrero v. Camden County Bd. of Soc. Servs., 164 F. Supp. 2d 455, 465 (D. N.J. 2001); Fulham v. HSBC Bank USA, No. 99 Civ. 110 54(JGK), 2001 WL 1029051 (S.D.N.Y. Sept. 4, 2001).

[82] *See* Collins v. NTN Bower Corp., 272 F.3d 1006, 1008 (7th Cir. 2001).

[83] *See* Saks v. Franklin Covey Co. 117 F. Supp. 2d 318 (S.D.N.Y. 2000).

[84] *See* RESOLVE: Nat' l Infertility Ass'n, *State Infertility-Treatment Insurance Laws* (May 8, 2001) <http://www.insure.com/health/infertilitylaws.html>.

[85] *See* RESOLVE of Wisconsin, *Wisconsin Advocacy Update* (Nov. 2001) <http://www.resolvewi.org/au-nov2001.html> (discussing the introduction of an Assembly Bill that would require insurance plans to cover diagnosis and treatment of

that insurers *provide* infertility insurance, and those which mandate that insurers *offer* infertility insurance.[86] Arkansas, Hawaii, Illinois, Maryland, Massachusetts, Montana, New York, Ohio, Rhode Island, and West Virginia fall into the first category.[87] Within the states that require insurers to provide infertility insurance, the mandates vary considerably. For example, someone living in Montana or Ohio and belonging to an HMO will be entitled to infertility insurance.[88] However, someone living in Arkansas or Maryland and belonging to an HMO will be exempt from the state mandate.[89] Additionally, while Massachusetts residents are entitled to "co mprehensive infertility diagnosis and treatment," New York residents will find that their mandate covers far fewer infertility treatments.[90]

California, Texas and Connecticut are states that fall into the second category.[91] However, California residents will find that while insurance carriers must offer infertility insurance, the plan does not need to include in vitro fertilization.[92]

The inconsistency of these mandates illustrates the need for uniformity. This can only be achieved through a federal mandate.

V. FEDERAL MANDATE WILL PROVIDE UNIVERSAL COVERAGE

While the legal precedents relevant to infertility insurance are in a state of flux, a few things do appear certain. Depending upon the state that they reside in, infertile couples whose health coverage does not expressly provide coverage for infertility treatments (or expressly excludes infertility treatments) can face a monumental task if they attempt to force their insurer to provide the coverage under the terms of their contract. Additionally, it is difficult to counter the logical argument that insurers should not be forced to provide insurance for a risk they are not charging premiums for.

Moreover, the Supreme Court' s hesitation in *Bragdon* to mandate infertility insurance through the ADA and Title VII appears to signal its desire to leave the issue to the legislature. Therefore, the only way our society can effectively and legitimately guarantee infertility insurance to those who need it is to create a federal mandate. However, while sound reasons exist for a federal mandate of infertility insurance, legitimate reasons also exist in opposition.

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infertility, with certain limits and exclusions).

[86] *See* Cole, *supra* note 4, at 724.

[87] *See* RESOLVE: Nat' l Infertility Ass' n, *supra* note 84.

[88] *See id.*

[89] *See id.*

[90] *See id.*

[91] *See id.*

[92] *See* RESOLVE: Nat' l Infertility Ass' n, *supra* note 84.

A. High Costs

Even those disinterested in the debate of whether there should be a federal mandate for infertility treatment insurance coverage are of the opinion that infertility treatments (specifically in vitro fertilization) are very, very expensive. Furthermore, insurers contend that if they are forced to provide coverage for infertility treatments, it will increase the cost of health insurance to the point where few can afford it.[93] Additionally, there is also the belief that coverage for in vitro fertilization is not cost effective since it is rarely successful.[94]

The cost of infertility treatments ranges from $1,500 to $10,000 per cycle.[95] However, since only a fraction of couples covered by the policy would use in vitro fertilization, the cost, when spread out among numerous insured couples, becomes minimal. For example, in Massachusetts, where all infertility treatments (including in vitro fertilization) are mandated, the typical increase on a family plan was only $10 a year.[96]

Additionally, providing insurance coverage for infertility treatments is cost effective. First, most infertility treatments actually have a high success rate.[97] Second, while it is difficult to measure the cost on society that infertility has, when one considers the loss of productivity of infertile workers due to depression and anxiety and the health impact that these devastating effects have, it is most certainly substantial.[98]

B. Theological Reasons

Some people vehemently oppose certain infertility treatments since they can result in the destruction of embryos.[99] To those whose religious beliefs are offended by infertility treatments, it is difficult to fashion an argument that they should be required to support such treatments through a national mandate. On the other hand, there are those whose religious beliefs prevent them from obtaining general health care. Few would argue that this is a justifiable reason not to have national health insurance, although numerous reasons for not having a national health care system do exist.

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[93] *See* Sonfeld, *supra* note 1, at 4.

[94] *See* Neumann, *supra* note 3, at 1218-19.

[95] *See id.*

[96] *See* Gilbert, *supra* note 35, at 46-57.

[97] *See* Cole, *supra* note 4, at 724.

[98] *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 (1999).

[99] *See* Congregation for the Doctrine of the Faith Donum Vitae, *Instruction on Respect for Human Life in Its Origin and on the Dignity of Procreation Replies to Certain Questions of the Day* (Feb. 22, 1987) <http://www.catholic.org/pfl/magisterium/donumvitae.htm>.

C. *Unfairness*

Finally, some people opposed to mandatory infertility insurance assert that it is unfair for fertile individuals in the insurance pool to have to pay for the treatment of infertile individuals in the pool.[100] This argument completely lacks logic as the very essence of insurance is risk pooling.[101] If only the individuals who incurred the risk were responsible for the costs, insurance plans would be transformed into quasi-savings accounts.

Therefore, while legitimate arguments can be raised in opposition to a federal mandate for infertility insurance, reason and logic weigh on the side of passing the needed legislation. As a model, Congress need not look any further than Massachusetts for a workable, cost-efficient model.

VI. CONCLUSION

Only two percent of married women are voluntarily childless.[102] In addition to the cost of infertility treatments, many infertile couples experience severe personal disappointment and chronic depression. They must also deal with society's negative attitudes toward childless couples.[103] A federal mandate would correct this problem. It would provide couples with moderate to low incomes the opportunity to become parents. It would also be cost effective when one considers the costs to society that would be saved.

Granted, we live in an environment of limited resources where issues such as children without health insurance and seniors without prescription drug plans should be attended to first. However, many infertile couples can be successfully treated, and if the cost is spread out among the nation's insured couples, the impact will be minimal.

Until a federal mandate is passed, the sad reality for those who face the infertility hurdle is simply that the technology exists for many to overcome this obstacle and achieve perhaps the most endearing journey in life, parenthood. Yet, in the absence of a federal mandate, far too few will have the financial access to such treatments.

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[100] *See* Cole, *supra* note 4, at 724.

[101] *See* JOHN ABRAHAM, INSURANCE LAW (3d. ed.).

[102] *See* Kerr, *supra* note 98.

[103] *See id.*