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## Surrogacy and Insurance: The Call for Statutory Reform in Ohio

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# SURROGACY AND INSURANCE: THE CALL FOR STATUTORY REFORM IN OHIO

SASHA M. SWOVELAND\*

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## I. INTRODUCTION

Carrie Mathews of Windsor, Colorado, became a surrogate to provide another couple with the gift of child.<sup>1</sup> Mathews began her journey by contacting the National Adoption and Surrogacy Center, which introduced her to several families looking for a surrogate.<sup>2</sup> After reviewing various profiles, Mathews opted to become the surrogate mother for the Bakos, an Austrian couple in their fifties, who had been trying to have a child for twenty years.<sup>3</sup> Instantly, Mathews and the Bakos formed an adoring relationship.<sup>4</sup>

Having already given birth to three children, Mathews had no reason to believe that serious complications would ensue during her pregnancy.<sup>5</sup> Prior to undergoing in vitro fertilization, Mathews and the Bakos signed a contract that outlined payment for different situations and complications that could arise during pregnancy.<sup>6</sup> Under this contract, Mathews would receive \$25,000 to carry the child.<sup>7</sup> The Bakos would place \$2,000 per month in an escrow account and Mathews would have access to the money upon giving birth.<sup>8</sup>

In vitro fertilization was successful, and Mathews gave birth to twins.<sup>9</sup> Despite her belief that the surrogate pregnancy would go smoothly, she encountered significant complications.<sup>10</sup> Mathews became extremely sick, experienced severe swelling, developed preeclampsia<sup>11</sup> and HELLP syndrome.<sup>12</sup> After giving birth,

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<sup>1</sup> Mikaela Conley, *Surrogate Mom Stuck with a \$200,000 + Medical Bill*, ABC NEWS (Oct. 27, 2011, 6:05 PM), <http://abcnews.go.com/blogs/health/2011/10/27/surrogate-mom-stuck-with-a-200000-medical-bill/#.TrdOlw1JCA.email>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Corey Rose, *Surrogate Mother Left with Huge Bill; Babies in Austria*, 9 NEWS (Oct. 25, 2011, 9:12 PM), <http://www.9news.com/news/article/226368/188/Surrogate-mother-left-with-huge-bill-babies-in-Austria>.

<sup>8</sup> *Id.*

<sup>9</sup> Conley, *supra* note 1.

<sup>10</sup> Conley, *supra* note 1.

<sup>11</sup> Preeclampsia is defined as high blood pressure and excess protein in the urine after twenty weeks of pregnancy in a woman who previously had normal blood pressure. *Preeclampsia*, MAYO CLINIC FOUND., <http://www.mayoclinic.com/health/preeclampsia/DS00583> (last visited Dec. 18, 2012). Left untreated, preeclampsia can lead to serious and sometimes even fatal complications for the mother and the baby. *Id.*

<sup>12</sup> Rose, *supra* note 7. HELLP is a syndrome characterized by hemolysis, elevated liver enzyme levels, and a low platelet count. Maureen O'Hara Padden, *HELLP Syndrome: Recognition and Perinatal Management*, 60 AM. FAMILY PHYSICIAN 829, 829-36 (1999),

Mathews experienced additional health problems and had to be rushed into an emergency operation to stop internal bleeding.<sup>13</sup> Mathews explained that “while I was in the operating room, I died and had to be resuscitated.”<sup>14</sup> After giving birth, she remained hospitalized for twenty days.<sup>15</sup> In the meantime, the Bakos returned to Austria with their twins.<sup>16</sup> Mathews now owed more than \$217,000 in medical expenses related to the birth of the Bakos’ twins.<sup>17</sup>

Mathews’s story was so remarkable that an unaffiliated surrogate advocate commented on it in the media.<sup>18</sup> The program administrator for the Center for Surrogate Parenting (CSP)<sup>19</sup> explained that under CSP’s policy, intended parents must enroll in an insurance program, and surrogate mothers must have medical insurance to cover the pregnancy related costs while she is the patient.<sup>20</sup> Although Mathews had insurance, her policy excluded maternity benefits for surrogate mothers.<sup>21</sup>

Though CSP has stricter internal policies regarding insurance coverage to prevent situations like the one Mathews is facing, meeting the insurance requirement

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available at <http://www.aafp.org/afp/1999/0901/p829.html>. Many investigators consider the syndrome to be a variant of preeclampsia, but it may be a separate syndrom. *Id.*

<sup>13</sup> Rose, *supra* note 7.

<sup>14</sup> Rose, *supra* note 7.

<sup>15</sup> Rose, *supra* note 7.

<sup>16</sup> Rose, *supra* note 7.

<sup>17</sup> Conley, *supra* note 1. The Bakos deny owing Mathews money. Corey Rose, *Austrian Couple Defends Actions With Surrogate Mother*, 9 NEWS (Oct 28, 2011), <http://www.9news.com/rss/story.aspx?storyid=226888>. The Bakos told 9 News that Mathews received a lot of money from them and that they paid her more than what was required by the contract. *Id.* The Bakos also claim that they do not owe Mathews money for incurred medical expenses even though the contract states that “intended parents shall pay all medical expenses . . . not covered by Gestational Carrier’s medical insurance policy.” *Id.* Mathews brought a suit to recover her out of pocket expenses. *Id.* As a result, the Bakos are countersuing for \$3,000 that they claim to have overpaid and \$1,600 for attorney’s fees. *Id.* Mathews and her family have lost their furniture and car and are battling to keep their home. *Id.*

<sup>18</sup> *About the Center of Surrogate Parenting*, CTR. OF SURROGATE PARENTING INC., [http://www.creatingfamilies.com/SM/SM\\_Info.aspx?Type=115](http://www.creatingfamilies.com/SM/SM_Info.aspx?Type=115) (last visited Jan. 11, 2012).

<sup>19</sup> *Id.* “CSP has a worldwide reputation as being the leader in the field of surrogacy and egg donation.” *Id.* CSP takes great pride in taking care of its surrogates and their families. *Id.*

<sup>20</sup> Conley, *supra* note 1.

<sup>21</sup> Conley, *supra* note 1. Many surrogates make a huge mistake by assuming that if their policy states it covers maternity services and the contract does not exclude services for surrogacy, that the insurance company will cover surrogacy claims. *Surrogacy Ins. Myths*, NEW LIFE AGENCY, INC., [http://www.newlifeagency.com/surrogate\\_maternity/surrogate\\_advocacy.cfm](http://www.newlifeagency.com/surrogate_maternity/surrogate_advocacy.cfm) (last visited Jan. 20, 2012). New Life Agency, Inc. explains that “[t]his is not the case! Many insurance companies are realizing that surrogacy is a risk they are unwilling to undertake.” *Id.* Insurance companies have many ways of denying surrogacy claims. *Id.* They can deny claims based on the interpretation that surrogacy is not the same thing as maternity or they can review the surrogate’s application forms and look for any mistakes the surrogate made to cancel her policy and not pay her claims. *Id.*

can be difficult.<sup>22</sup> Some insurance companies exclude coverage of surrogate mothers though the insurer may cover pregnancy services generally.<sup>23</sup> This practice occurs because, despite the valuable services that a surrogate provides to couples, surrogacy remains largely unregulated.<sup>24</sup> Therefore, it is important that parties diligently select an agency and execute a thorough surrogacy contract.<sup>25</sup>

While Mathews's case may be an extreme example, it is far too common for surrogate related pregnancies to be excluded from health care insurance. April is currently several months pregnant as a gestational surrogate.<sup>26</sup> When April first considered becoming a surrogate, her insurance company informed her that the pregnancy and birth would be covered; however, her insurance company now claims that no part of the pregnancy will be covered.<sup>27</sup> Michael and his partner have a surrogacy arrangement with a surrogate from Ohio, who has a policy with Blue Cross.<sup>28</sup> Blue Cross told Michael and his surrogate that her policy will not cover anything related to the surrogacy.<sup>29</sup> Rachel has a policy through United Healthcare and her policy excludes "surrogate parenting."<sup>30</sup> In 2008, Tera<sup>31</sup> was covered under Medical Mutual of Ohio and the insurer covered surrogacy related services, but now her policy excludes surrogacy.<sup>32</sup> Other cases, like these, have likely not caught the attention of the media because many surrogate mothers do not realize that they may have a cause of action against an insurer or the intended parents.<sup>33</sup> Surrogates and surrogate advocates accept the premise that it is permissible for insurers to exclude surrogates from pregnancy related services.<sup>34</sup>

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<sup>22</sup> SURROGATE MOTHERS ONLINE, LLC, <http://www.surromomsonline.com/answers/10.htm> (last visited Feb. 9, 2012).

<sup>23</sup> See *MercyCare Ins. Co. v. Wisconsin Comm'r of Ins.*, 786 N.W.2d 785 (Wis. 2010).

<sup>24</sup> Conley, *supra* note 1.

<sup>25</sup> Conley, *supra* note 1.

<sup>26</sup> SURROGATE MOTHERS ONLINE, LLC, *supra* note 22.

<sup>27</sup> SURROGATE MOTHERS ONLINE, LLC, *supra* note 22.

<sup>28</sup> SURROGATE MOTHERS ONLINE, LLC, *supra* note 22.

<sup>29</sup> SURROGATE MOTHERS ONLINE, LLC, *supra* note 22.

<sup>30</sup> *SMO Message Bds.: United Healthcare Exclusion???*, SURROGATE MOTHERS ONLINE, LLC, <http://www.surromomsonline.com/support/showthread.php?t=143405> (last visited Feb. 9, 2012).

<sup>31</sup> *SMO Message Bds.: Now WHAT??!! Ins. Co. Added Surrogacy Exclusion!*, SURROGATE MOTHERS ONLINE, LLC, <http://www.surromomsonline.com/support/showthread.php?t=124578> (last visited Feb. 9, 2012) (Tera is a fictitious name offered to protect the confidences of the writer, the writer uses a screen name to communicate with the online community on the message board).

<sup>32</sup> *Id.*

<sup>33</sup> See Karen Farmer, *The Health Insurance for Surrogate Motherhood*, EZINE ARTICLES (Sept. 11, 2009), <http://ezinearticles.com/?The-Health-Insurance-For-Surrogate-Motherhood&id=2870297>.

<sup>34</sup> *Id.*

This Note examines the practice of excluding maternity services for surrogate mothers under insurance plans that cover maternity services. This Note also introduces two different surrogate arrangements and illustrates the different familial situations that may necessitate the use of a surrogate. Part II defines surrogacy and offers a general overview of the surrogacy process. Part III demonstrates that surrogates need insurance for pregnancy related services. It also argues that the exclusion of coverage for surrogates is pregnancy discrimination. Part IV explains why current legal remedies are insufficient to make surrogates whole. Part V analyzes the state of surrogacy by examining Ohio cases, regulations, and statutes. Part VI provides a model statute that the Ohio General Assembly should adopt.

## II. DEFINING AND UNDERSTANDING THE SURROGACY PROCESS

Like many couples, the Bakos' decision to become parents was frustrated by their inability to conceive.<sup>35</sup> However, they are not alone; approximately 2.5 million American couples are involuntarily infertile.<sup>36</sup> In addition to those who are infertile, there are couples who have issues carrying a fetus to term.<sup>37</sup> Faced with serious infertility issues, couples are left with only a few options: come to terms with childlessness, adopt, or employ an alternative reproductive method.<sup>38</sup>

Coping with childlessness is far easier said than done. Psychologically, parenthood is a major transition into adulthood for both sexes.<sup>39</sup> The stress of wanting a child is associated with a variety of emotions such as anger, depression,

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<sup>35</sup> Shari O'Brien, *Commercial Conceptions: A Breeding Ground for Surrogacy*, 65 N.C. L. REV. 127 (1986) (discussing the evolution of surrogacy arrangements while highlighting the debate and overall uncertainty surrounding commercial surrogacy).

<sup>36</sup> Sharon L. Tiller, *Litigation, Legislation, and Limelight: Obstacles to Commercial Surrogate Mother Arrangements*, 72 IOWA L. REV. 415, 415 (1987). Tiller's Note advocates for the regulation of commercial surrogacy arrangements in the United States. *Id.* Tiller's Note also discusses the legal obstacles to enforcing surrogacy arrangements and how those legal obstacles can be resolved. *Id.*

<sup>37</sup> As an indicator, a 2002 study concluded that 1.2 million women had an infertility-related medical appointment during that year. Christopher J. Bean et al., *Fertilization In Vitro Increases Non-Disjunction During Early Cleavage Divisions in a Mouse Model System*, 17 HUMAN REPROD. 2362 (2002), available at <http://humrep.oxfordjournals.org/content/17/9/2362.full.pdf+html>. Infertility is defined as "the absence of conception after at least one year of regular, unprotected intercourse." *State Laws Related to Insurance Coverage for Infertility Treatment*, NAT'L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/default.aspx?tabid=14391> (last visited Jan. 20, 2012). Another 2002 study indicated that infertility affects 7.3 million people in the United States. *Fast Facts About Infertility*, RESOLVE, <http://www.resolve.org/about/fast-facts-about-fertility.html> (last visited Jan. 20, 2012). Roughly 12% of U.S. women of childbearing age, one in eight couples, have received assistance for infertility. *State Laws Related to Insurance Coverage for Infertility Treatment*, NAT'L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/default.aspx?tabid=14391> (last visited Jan. 20, 2012).

<sup>38</sup> O'Brien, *supra* note 35, at 1.

<sup>39</sup> Prasanta Kumar Deka & Swarnali Sarma, *Psychological Aspects of Infertility*, 3 BRIT. J. OF MED. PRAC. 336, 336 (2010), <http://www.bjmp.org/files/2010-3-3/bjmp-2010-3-3-a336.pdf> (discussing the psychological impact of childlessness on infertile couples).

anxiety, and feelings of worthlessness.<sup>40</sup> Couples also experience social stigma, a sense of loss, and diminished self-esteem due to their infertility.<sup>41</sup> The option to pursue adoption is also a path that couples are sometimes reluctant to take.<sup>42</sup> This could be because of the shortage of adoptable children or the three to seven year waiting period associated with the process.<sup>43</sup>

One of the fastest growing alternative reproductive methods is the use of a surrogate.<sup>44</sup> Surrogacy is often selected as an alternative reproductive method because the intentional parents can have an established genetic link to their child.<sup>45</sup> Statistics are hard to come by because no government agency or private group tracks surrogate births; however, estimates range from a few hundred to a few thousand births per year.<sup>46</sup>

#### A. Defining Surrogacy

In a surrogate arrangement, a couple secures a third-party female to bear their child.<sup>47</sup> With the assistance of the third-party female, the couple has two options: pursue a traditional surrogacy arrangement or pursue a gestational surrogacy arrangement.<sup>48</sup>

Under the traditional model, the surrogate mother provides her own egg to be fertilized by either the intended father<sup>49</sup> or a sperm donor.<sup>50</sup> The process of

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> Danny R. Veilleux, Annotation, *Validity and Construction of Surrogate Parenting Agreement*, 77 A.L.R.4th 70 (1989).

<sup>43</sup> *Id.*

<sup>44</sup> O'Brien, *supra* note 35, at 1.

<sup>45</sup> Suzanne F. Seavello, *Are You My Mother? A Judge's Decision in In Vitro Fertilization Surrogacy*, 3 HASTINGS WOMEN'S L.J. 211, 218 (1992).

<sup>46</sup> Mark Hansen, *... and Baby Makes Litigation: As Surrogacy Becomes More Popular, Legal Problems Proliferate*, 97 A.B.A.J. 52 (2011).

<sup>47</sup> Most advocacy centers have programs that cater to the health and wellbeing of surrogate mothers. See *Surrogate Mother Step-by-Step*, CENTER FOR SURROGATE PARENTING, [http://www.creatingfamilies.com/SM/SM\\_Info.aspx?Type=117](http://www.creatingfamilies.com/SM/SM_Info.aspx?Type=117) (last visited Dec. 4, 2011). The initial phase of the program requires that the surrogate-to-be complete an initial consultation with the center's staff. *Id.* If the surrogate-to-be indicates that she is still interested in the process, she is then sent for a consultation with a suggested counselor. *Id.* During an educational consultation, the suggested counselor screens the surrogate-to-be for potential psychological risks. *Id.* The cost of psychological exams, consultations, and counseling differ depending on the surrogate agency and participating medical clinics. The estimated costs range from \$450 to \$5,525. See *Anticipated Surrogacy Costs*, AGENCY FOR SURROGACY SOLUTIONS, [http://www.agency4solutions.com/surrogacy\\_costs.php](http://www.agency4solutions.com/surrogacy_costs.php) (last visited Jan. 8, 2011); see also *Intended Parents: Gestational Surrogacy (IVF) Estimated Costs*, CENTER FOR SURROGATE PARENTING, INC., [http://www.creatingfamilies.com/IP/IP\\_Info.aspx?Type=42](http://www.creatingfamilies.com/IP/IP_Info.aspx?Type=42) (last visited Jan. 8, 2011).

<sup>48</sup> O'Brien, *supra* note 35, at 130-33.

<sup>49</sup> BLACK'S LAW DICTIONARY 1222 (9th ed. 2009) (intended parent is defined as "the person whose idea it is to have and raise a child and who (1) enters into a surrogacy contract

fertilization under this model is referred to as artificial insemination.<sup>51</sup> Under this method, the intended mother and child are not genetically related.<sup>52</sup> The intended mother must adopt the child when it is born to be recognized as its legal parent.<sup>53</sup>

Under the second model, the gestational surrogacy arrangement, the surrogate is impregnated with an egg and sperm to which she is not genetically related.<sup>54</sup> Under this model, the intended parents provide the genetically related egg.<sup>55</sup> To produce the egg, the intended parents undergo in vitro fertilization (IVF), which stimulates the intended mother's ovaries to produce eggs.<sup>56</sup> To complete the process, the mature eggs are harvested from the intended mother, fertilized by the intended father or sperm donor in a Petri dish, and then transferred into the uterus of the gestational surrogate.<sup>57</sup> Unlike the traditional model, the intended mother is genetically related to the child.<sup>58</sup>

In contrast to other alternative reproductive methods, some surrogacy arrangements allow alternative families to produce children who are genetically related to the intended parents.<sup>59</sup> With the use of a surrogate, couples with infertility issues, same sex couples, and women who are unable to carry a child to term can raise genetically related children.<sup>60</sup>

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with a surrogate mother, and (2) is the legal parent of the child regardless of any genetic link to the child”).

<sup>50</sup> Michelle Ford, *Gestational Surrogacy Is Not Adultery: Fighting Against Religious Opposition to Procreate*, 10 BARRY L. REV. 81, 83 (2008); see also BLACK'S LAW DICTIONARY 1582 (9th ed. 2009) (traditional surrogacy is defined as “a pregnancy in which a woman provides her own egg, which is fertilized by artificial insemination, and carries the fetus and gives birth to a child for another person”).

<sup>51</sup> Ford, *supra* note 50, at 83. Artificial insemination is now more commonly known as intrauterine insemination (IUI). *Infertility 101: Get the Facts*, THE NAT'L INFERTILITY ASS'N, <http://www.resolve.org/national-infertility-awareness-week/infertility-101.html> (last visited Dec. 4, 2011). The National Infertility Association is a non-profit organization “mandated to promote reproductive health and to ensure equal access to all family building options for men and women experiencing infertility or other reproductive disorders.” *Id.*

<sup>52</sup> Ford, *supra* note 50, at 83.

<sup>53</sup> Ford, *supra* note 50, at 83.

<sup>54</sup> Ford, *supra* note 50, at 83.

<sup>55</sup> Ford, *supra* note 50, at 83; see also BLACK'S LAW DICTIONARY 1582 (9th ed. 2009) (gestational surrogacy is defined as “[a] pregnancy in which one woman (the genetic mother) provides the egg, which is fertilized, and another woman (the surrogate mother) carries the fetus and gives birth to the child”).

<sup>56</sup> LIZA CHARLESWORTH, *THE COUPLE'S GUIDE TO IN VITRO FERTILIZATION: EVERYTHING YOU NEED TO KNOW TO MAXIMIZE YOUR CHANCES OF SUCCESS 3* (Da Capo Press 2004).

<sup>57</sup> See *id.* at 3-4.

<sup>58</sup> See BLACK'S LAW DICTIONARY 1222 (9th ed. 2009).

<sup>59</sup> See Seavello, *supra* note 45.

<sup>60</sup> *Id.*

Once the intended parents secure a third-party female, their respective legal representatives begin drafting the surrogacy contract.<sup>61</sup> When parties enter into a surrogacy arrangement, they should always execute written, detailed, and independently counseled agreements that clearly document all parties' intentions and expectations of the arrangement.<sup>62</sup> Since the laws governing surrogacy are unsettled and evolving, "the contract requires drafters to anticipate and address various theoretical possibilities not necessarily known to them at the signing of the agreement."<sup>63</sup> Like any other contract, "the expectation is that the parties intend to be bound by the terms of their mutually negotiated and legally advised agreement."<sup>64</sup>

For this reason, it is very important that the contract address all insurance matters including, but not limited to, which party is responsible for health insurance premiums, what procedures the surrogate's health insurance will cover, which procedures the intended parents will pay for, and life insurance for the child and surrogate mother.<sup>65</sup> In addition to clarifying insurance, the contract should clarify when and how the payments for particular expenses will be distributed.<sup>66</sup>

### B. Cost of Getting Pregnant

Once the contracts are drafted and executed, the surrogate undergoes the necessary medical procedures.<sup>67</sup> Whether the parties take the traditional or gestational route, a fertility specialist is required.<sup>68</sup> Under the traditional model, the average cost of artificial insemination in the United States is between \$300 and \$700 per cycle.<sup>69</sup> In addition to this initial cost, there is an associated fee for ultrasound monitoring and medication.<sup>70</sup> These associated fees increase the total lost to the range of \$1,500 to \$4,000 per cycle.<sup>71</sup> Since artificial insemination in women younger than 35 years of age is successful in only 41% of cases, many women have to undergo more than one cycle.<sup>72</sup>

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<sup>61</sup> Meryl B. Rosenberg, *Critical Legal Considerations for All Parties to Surrogacy Arrangement*, 34 FAM. ADVOC. 23, 24 (2011) (discussing legal considerations that parties should consider when drafting a surrogacy contract).

<sup>62</sup> *Id.* at 23.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 26.

<sup>66</sup> *Id.* at 27.

<sup>67</sup> See *Surrogate Mother Step-by-Step*, CENTER FOR SURROGATE PARENTING, [http://www.creatingfamilies.com/SM/SM\\_Info.aspx?Type=117](http://www.creatingfamilies.com/SM/SM_Info.aspx?Type=117) (last visited Dec. 4, 2011).

<sup>68</sup> *Id.*

<sup>69</sup> *Fertility Treatment: Artificial Insemination (IUI)*, BABY CENTER, [http://www.babycenter.com/0\\_fertility-treatment-artificial-insemination-iui\\_4092.bc?page=2#articlesection7](http://www.babycenter.com/0_fertility-treatment-artificial-insemination-iui_4092.bc?page=2#articlesection7) (last visited Dec. 4, 2011).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Reproductive Health: Infertility FAQ's*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/reproductivehealth/Infertility/#13> (last visited Dec. 4, 2011). As the age of the egg donor increases, the success of the procedure decreases. *Id.* The

Under the gestational model, the average cost per IVF cycle in the United States is \$9,547.<sup>73</sup> The total cost of the pregnancy can easily double or triple given that IVF on average is only successful in 30% to 35% of women under the age of 35.<sup>74</sup> Unfortunately, the success rate continues to decrease as the age of the intended mother increases.<sup>75</sup>

Since the costs associated with artificial insemination and IVF are so high, insurance companies often exclude infertility treatment from their covered services.<sup>76</sup> The exclusion of a category of treatment such as fertility treatments for the entire class of insureds may be permissible and is not the focus of this Note.<sup>77</sup>

### III. SURROGATES NEED INSURANCE

Surrogates need insurance for two significant reasons: (1) the cost of pregnancy and delivery is astounding; and (2) the exclusion of surrogate mothers from maternity services under a plan that generally offers maternity services to pregnant women discriminates against surrogates based on their intent at conception.<sup>78</sup> Though insurance coverage is a social issue, the act of treating surrogates differently than all other mothers is a legal issue.<sup>79</sup> By excluding maternity services for

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Centers for Disease Control and Prevention reports that procedure is successful 32% of the time for women between the ages of 35 to 37 and is successful only 5% of the time for women who are between the ages of 43 and 44. *Id.*

<sup>73</sup> John Collins, *An International Survey of the Health Economics of IVF and ICSI*, 8 HUMAN REPROD. UPDATE 265 (2002), available at <http://humupd.oxfordjournals.org/content/8/3/265.short>.

<sup>74</sup> *In Vitro Fertilization: IVF*, AM. PREGNANCY ASS'N, <http://www.americanpregnancy.org/infertility/ivf.html> (last visited Dec. 4, 2011). The American Pregnancy Association is a national health organization committed to promoting reproductive and pregnancy wellness through education, research, advocacy, and community awareness. *Mission*, AM. PREGNANCY ASS'N, <http://www.americanpregnancy.org/main/mission.html> (last visited Dec. 4, 2011).

<sup>75</sup> AM. PREGNANCY ASS'N, *supra* note 74 (The American Pregnancy Association reports that the success rate is 25% for women ages 35 to 37 while the success rate is 6%-10% for women over 40).

<sup>76</sup> *See* Farmer, *supra* note 33. Since the 1980s, some states enacted laws requiring some form of coverage for infertility. *See* NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 37. In fact,

[Fifteen] states have passed laws that require insurers to either cover or offer coverage for infertility diagnosis and treatment. Thirteen states have laws that require insurance companies to cover infertility treatment. Louisiana prohibits the exclusion of coverage for a medical condition otherwise covered solely because the condition results in infertility. Two states [have] laws that require insurance companies to offer coverage for infertility treatment. While most states with laws requiring insurance companies to offer or provide coverage for infertility treatment include coverage for in vitro fertilization, California, Louisiana, and New York have laws that specifically exclude coverage for the procedure.

*See* NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 37.

<sup>77</sup> *See* MercyCare Ins. Co. v. Wisconsin Com'r of Ins., 786 N.W.2d 785, 785 (Wis. 2010).

<sup>78</sup> *See* Hansen, *supra* note 46.

<sup>79</sup> Hansen, *supra* note 46.

surrogate mothers, society is allowing insurers, employers, and in some cases, the government to treat a subgroup of people differently than the general class. Legally speaking, the insurer, employer, and the government are discriminating against surrogate mothers. To ensure equality for all, action must be taken to prohibit this exclusionary practice.

*A. Surrogates Need Insurance to Cover the Cost Associated with Pregnancy and Delivery*

Above all else, surrogates are expectant women who will give birth to a child.<sup>80</sup> As a result, surrogates face the same potential health complications and physiological conditions as any other pregnant woman. Due to the staggering costs associated with impregnation, pregnancy, labor, and delivery, surrogates *need* health insurance coverage that is available to other women. Unfortunately, several health insurance policies specifically exclude maternity coverage for women acting as surrogates.<sup>81</sup>

1. Cost of an Uncomplicated Pregnancy and Delivery

Even when a pregnancy progresses to term without complications, the mother usually suffers from basic “discomforts.”<sup>82</sup> These discomforts may include back and abdominal pain, chronic fatigue, anemia, insomnia, swollen feet, breast tenderness, leg cramps, shortness of breath, mood swings, headaches, dizziness, bleeding and swollen gums, heartburn, vulvar burning, urinary tract infections, constipation, and hemorrhoids.<sup>83</sup> In addition to the discomforts associated with pregnancy, women have to pay for the costs of prenatal care. On average, prenatal care totals \$2,000 for visits and diagnostic care throughout the pregnancy.<sup>84</sup> Women who are uninsured

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<sup>80</sup> *Medical Dictionary*, WEBMD, <http://dictionary.webmd.com/terms/surrogate-mother> (last visited Oct. 13, 2012).

<sup>81</sup> Hansen, *supra* note 46; *see also Information for Potential Gestational Surrogates*, FERTILITY ALT. INC., <http://www.fertilityalternatives.com/surro.html> (last visited Feb. 7, 2012) (explaining that most insurance companies will not cover a surrogate pregnancy); Lauren Farrelly, *What Insurance Will Cover Surrogate Pregnancy?*, EHOW, [http://www.ehow.com/about\\_5448210\\_insurance-cover-surrogate-pregnancy.html](http://www.ehow.com/about_5448210_insurance-cover-surrogate-pregnancy.html) (last visited Feb. 7, 2012) (explaining that insurance companies consider surrogacy as a type of infertility and often do not cover any associated costs).

<sup>82</sup> *See, e.g.*, Lucy J. Puryear, *Understanding Your Moods When You're Expecting-The Conspiracy of Silence*, STORKNET, <http://www.storknet.com/cubbies/pregnancy/moods-silence.htm> (last visited Oct. 13, 2012).

<sup>83</sup> *See Health & Pregnancy Guide, Common Pregnancy Pains and Their Causes*, WEBMD, <http://www.webmd.com/baby/guide/pregnancy-coping-with-discomforts> (last visited Dec. 2, 2011); *see also Risk Factors that Develop During Pregnancy*, MERCK MANUAL OF MED. INFO., [http://www.merckmanuals.com/home/womens\\_health\\_issues/pregnancy\\_at\\_high-risk/risk\\_factors\\_that\\_develop\\_during\\_pregnancy.html](http://www.merckmanuals.com/home/womens_health_issues/pregnancy_at_high-risk/risk_factors_that_develop_during_pregnancy.html) (last visited Dec. 4, 2011).

<sup>84</sup> S. R. Machlin & F. Rohde, *Health Care Expenses for Uncomplicated Pregnancies*, AGENCY FOR HEALTHCARE RESEARCH & QUALITY (2007), [http://meps.ahrq.gov/mepsweb/data\\_files/publications/rf27/rf27.pdf](http://meps.ahrq.gov/mepsweb/data_files/publications/rf27/rf27.pdf). This study uses data gathered “from three panels of the Household Component of the Medical Expenditure Panel Survey (MEPS-HC) to estimate medical expenditures (in 2004 dollars) associated with an uncomplicated pregnancy and in-hospital delivery.” *Id.*

often postpone or delay prenatal care.<sup>85</sup> Postponed prenatal care limits or eliminates a physician's ability to catch a complication early on in the pregnancy, which invariably increases the cost of the pregnancy.<sup>86</sup>

In addition to the physical and prenatal costs of being pregnant, there is the actual cost of childbirth.<sup>87</sup> Between 2007 and 2009, the average cost of a vaginal birth in a hospital ranged from \$8,000 to \$9,600 for uncomplicated births.<sup>88</sup> If a mother underwent a caesarian, the costs ranged from \$14,800 to \$15,700 per birth.<sup>89</sup>

## 2. Cost of Complicated Pregnancy and Delivery

When pregnancies become complicated, they can be life threatening and more expensive.<sup>90</sup> Examples of life threatening complications include gestational diabetes, heart disease, hemorrhaging, jaundice, severe nausea, and seizing causing high blood pressure.<sup>91</sup> All of these conditions exhibit symptoms prior to giving birth.<sup>92</sup>

Once in labor, the stakes for a complicated pregnancy are even higher.<sup>93</sup> Each year, hundreds of thousands of women worldwide die in childbirth.<sup>94</sup> The risk of death remains significant enough that surrogacy contracts often require that the surrogate mother have life insurance.<sup>95</sup> With complications, the associated cost per birth increases from \$8,000 to \$9,600 to the range of \$10,600 to \$12,500.<sup>96</sup> When

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<sup>85</sup> See Marian F. MacDorman & T.J. Mathews, *Recent Trends in Infant Mortality in the United States* (2008), <http://www.cdc.gov/nchs/data/databriefs/db09.pdf>.

<sup>86</sup> *Id.*

<sup>87</sup> *Average Facility Labor and Birth Charge By Site and Method of Birth, United States, 2007-2009*, CHILD BIRTH CONNECTION, <http://childbirthconnection.org/pdfs/birthcharges.pdf> (last visited Dec. 4, 2011).

<sup>88</sup> *Id.* The quoted figures do not include additional anesthesia service charges, additional newborn care charge for birth in a hospital, and the additional maternity provider charges. *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> See MERCK MANUAL OF MED. INFO., *supra* note 83.

<sup>91</sup> MERCK MANUAL OF MED. INFO., *supra* note 83.

<sup>92</sup> MERCK MANUAL OF MED. INFO., *supra* note 83.

<sup>93</sup> See Bharati Sadasivam, *The Rights Framework in Reproductive Health Advocacy-A Reappraisal*, 8 HASTINGS WOMEN'S L. J. 313, 343 (1997).

<sup>94</sup> *Id.* "A staggering 585,000 women worldwide die every year due to complications associated with pregnancy and childbirth." *Id.* The World Health Organization reports that "the number of women dying as a result of complications during pregnancy and childbirth has decreased by 34% from 546,000 in 1990 to 358,000 in 2008." *World Health Statistics 2011*, WORLD HEALTH ORG., 15 (2011), [http://www.who.int/gho/publications/world\\_health\\_statistics/EN\\_WHS2011\\_Full.pdf](http://www.who.int/gho/publications/world_health_statistics/EN_WHS2011_Full.pdf).

<sup>95</sup> See AGENCY FOR SURROGACY SOLUTIONS, *supra* note 47.

<sup>96</sup> CHILD CONNECTION, *supra* note 87. These figures do not include additional anesthesia service charges, additional newborn care charges for birth in a hospital, and the additional maternity provider charges. *Id.*

complications necessitate a caesarian,<sup>97</sup> the costs increase significantly to the range of \$18,900 to \$21,400 per birth.<sup>98</sup>

### 3. Surrogate's Life Postpartum

Although the surrogate mother has survived the physical demands of childbearing, the surrogate oftentimes has psychological barriers to overcome.<sup>99</sup> In many cases, the psychological effects of pregnancy are just as serious as the physical and financial costs of childbearing.<sup>100</sup> Many women report feeling an overwhelming assortment of emotions including: empowerment and terror, blissfulness and exhaustion, encouragement and vulnerability all at once during labor and delivery.<sup>101</sup> Approximately 80% of women recovering from childbirth experience postpartum blues, which is characterized as extreme sensitivity, moodiness, and sleep deprivation.<sup>102</sup> Due to major shifts in hormones during pregnancy and after birth, 10% of childbearing women experience Postpartum Major Depression (PMD).<sup>103</sup> The disorder can have serious adverse effects on the mother and her relationship with others.<sup>104</sup> Symptoms of PMD include change in appetite, feelings of worthlessness, agitation or irritability, significant anxiety, and thoughts of death or suicide.<sup>105</sup>

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<sup>97</sup> "A cesarean section, or C-section, is the surgical delivery of an infant through an incision in the mother's abdomen and uterus. Some cesarean sections are planned when a known medical problem would make labor dangerous for the mother or baby, while others are done when a quick delivery is needed to ensure the mother's and infant's well-being." *Cesarean Section*, WEBMD, <http://www.webmd.com/hw-popup/cesarean-section> (last revised Feb 24, 2010).

<sup>98</sup> CHILDBIRTH CONNECTION, *supra* note 88.

<sup>99</sup> See CHRISTIANE NORTHRUP, *WOMEN'S BODIES, WOMEN'S WISDOM* 477-94 (Bantam Books 1998); *THE BUSINESS OF BEING BORN* (Barranca Productions 2008).

<sup>100</sup> Northrup, *supra* note 99, at 477-94.

<sup>101</sup> Northrup, *supra* note 99, at 477-94.

<sup>102</sup> *Postpartum Depression*, UNIV. OF MICH. DEPRESSION CTR., <http://www.depressiontoolkit.org/women/postpartum.asp> (last visited Dec. 2, 2011) (explaining that in most cases the problem resolves without treatment within one to two weeks after giving birth).

<sup>103</sup> Neill Epperson, MD., *Postpartum Major Depressions: Detection and Treatment*, 59 AM. FAM. PHYSICIAN 2247 (1999), available at <http://www.aafp.org/afp/1999/0415/p2247.html>. Maternal depression is responsible for a portion of the approximately \$26.1 billion dollars spent annually on direct medical care for depression and the \$51.5 billion dollars for workplace costs. See Paul E. Greenberg et al., *The Economic Burden of Depression in the United States: How Did it Change Between 1990 and 2007*, 64 J. CLINIC. PSYCH. 1465, 1468 (2003), <http://www.psychiatrist.com/issues/greenberg.pdf>.

<sup>104</sup> Epperson, *supra* note 103, at 2247.

<sup>105</sup> *Postpartum Depression*, PUBMED HEALTH, <http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0004481/> (last visited Oct. 13, 2012).

To help overcome PMD, a surrogate may need to utilize additional counseling, antidepressants, or hormone therapy.<sup>106</sup> For these reasons, some surrogacy agencies warn intended parents that there may be additional costs for therapy postpartum.<sup>107</sup> Like any other incurred cost associated with prenatal care, pregnancy, and labor and delivery, the surrogate will ultimately be held liable because the bills are in the surrogate mother's name, as she is the patient receiving care.<sup>108</sup> If the bills go unpaid, the surrogate runs the risk of being taken to court.<sup>109</sup>

*B. Mandating Equality: the Pregnancy Discrimination Act of 1978 and the Newborns' and Mothers' Health Protection Act of 1996*

American society has traditionally valued treating similarly situated individuals similarly.<sup>110</sup> When insurers, employers, and state actors engage in the policy of excluding pregnancy related services from surrogate mothers, these actors are discriminating against surrogate mothers.<sup>111</sup> It has been recognized by courts that "a policy which offers disparate benefits to one group of society as a class because of an innate characteristic of the members of that class is discriminatory."<sup>112</sup> In the instance of surrogacy, the actor excludes the subgroup of surrogates from coverage based on the surrogate's intention at conception.<sup>113</sup> These actors, however, do *not* exclude pregnancy related services for mothers who decide after conception to give their children up for adoption.<sup>114</sup>

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<sup>106</sup> *Postpartum Depression: Treatments and Drugs*, MAYO CLINIC, <http://www.mayoclinic.com/health/postpartum-depression/DS00546/DSECTION=treatments-and-drugs> (last visited Oct. 13, 2012).

<sup>107</sup> See AGENCY FOR SURROGACY SOLUTIONS, *supra* note 47 (explaining that some surrogate arrangements require additional counseling with a therapist that may cost an additional \$1,500).

<sup>108</sup> See *Legal Overview*, CTR. FOR SURROGATE PARENTING, [http://www.creatingfamilies.com/SM/SM\\_Info.aspx?Type=125](http://www.creatingfamilies.com/SM/SM_Info.aspx?Type=125) (last visited Feb. 7, 2012); see also *Bad Surrogacy Journeys: Problems with Surrogacy Motherhood*, INFO. ON SURROGACY, <http://www.information-on-surrogacy.com/bad-surrogacy-journeys.html> (last visited Feb. 7, 2012).

<sup>109</sup> See CTR. FOR SURROGATE PARENTING, *supra* note 108.

<sup>110</sup> See U.S. CONST. amend. XIV.

<sup>111</sup> *MercyCare Ins. Co. v. Wis. Com'r of Ins.*, 786 N.W.2d 785, 785 (Wis. 2010).

<sup>112</sup> Kandice Engle, *Pregnancy Discrimination in the Insurance Industry 1994*, 34 U. LOUISVILLE J. FAM. L. 177, 178 (1996).

<sup>113</sup> Angela Smith, *Obtaining Surrogate Insurance Coverage*, SURROGATE MOTHER, <http://surrogatemother.ning.com/forum/topics/obtaining-surrogacy-insurance> (last visited Sept. 25, 2012).

<sup>114</sup> See Andrea B. Carroll, *Reregulating the Baby Market: A Call for a Ban on Payment of Birth-Mother Living Expenses*, 59 U. KAN. L. REV. 285, 326 (2010) (reasoning that "when pregnant women considering adoption for their unborn children live in poverty, their medical expenses in connection with the pregnancy are typically covered by Medicaid").

Although the actors are treating subgroups of similarly situated individuals differently, a surrogate could not bring suit under the Fourteenth Amendment.<sup>115</sup> The Fourteenth Amendment of the United States Constitution prohibits states from denying persons within its jurisdiction the equal protection of the law.<sup>116</sup> Specifically, the Equal Protection Clause reads:

[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>117</sup>

There is no constitutional provision that prohibits the federal government from denying individuals equal protection of law.<sup>118</sup> However, the Supreme Court has held that equal protection applies to the federal government through the Due Process Clause of the Fifth Amendment.<sup>119</sup> The Court reasoned in *Bolling v. Sharpe* that “[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.”<sup>120</sup>

The equal protection clause is not intended to mandate equality among individuals; rather, it only requires equal application of the law.<sup>121</sup> The Supreme Court reasoned that “[e]qual protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made.”<sup>122</sup> The constitutional guarantee of equal protection, however, is limited by the concept of state action.<sup>123</sup> This means that the constitution only forbids the local, state, and federal governments from discriminating against individuals and does not bar discrimination by private organizations.<sup>124</sup>

### 1. Pregnancy Discrimination Act

If a surrogate wanted to bring a cause of action against an insurer, employer, or government actor for excluding coverage for pregnancy related services, the

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<sup>115</sup> See *MercyCare Ins. Co.*, 786 N.W.2d at 809 (holding that insurance provisions denying coverage to surrogate mothers is discriminatory without relying on a Fourteenth Amendment Equal Protection argument).

<sup>116</sup> U.S. CONST. amend. XIV § 1.

<sup>117</sup> *Id.*

<sup>118</sup> *Equal Protection*, LEGAL INFORMATION INSTITUTE, [http://www.law.cornell.edu/wex/Equal\\_protection](http://www.law.cornell.edu/wex/Equal_protection) (last visited Feb. 20, 2012).

<sup>119</sup> *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

<sup>120</sup> *Id.*

<sup>121</sup> *Baxstrom v. Herold*, 383 U.S. 107, 111 (1968).

<sup>122</sup> *Id.*

<sup>123</sup> LENORA M. LAPIDUS ET AL., *RIGHTS OF WOMEN 2* (Eve Carey ed., New York University Press 4th ed. 2009).

<sup>124</sup> *Id.*

surrogate would have to employ another statutory provision, such as the Civil Rights Act, to challenge the discrimination.<sup>125</sup> Over thirty years ago, the Civil Rights Commission held an industry-wide hearing regarding discrimination by insurance companies against women and minorities.<sup>126</sup> A significant portion of scholarly material during that time centered on the insurance industry's policy of discriminating against women on the basis of gender by excluding health insurance coverage for routine pregnancy costs.<sup>127</sup> To combat the discriminatory practice, practitioners brought suit under the Fourteenth Amendment arguing the practice was sex discrimination.<sup>128</sup> The Supreme Court in *Geduldig v. Aiello*, however, held that discrimination on the basis of pregnancy is not sex discrimination.<sup>129</sup>

In that case, California had a state-mandated disability program which replaced worker's wages for every type of physical disability that prevented the workers from working.<sup>130</sup> However, the program excluded coverage for disability periods related to pregnancy and delivery.<sup>131</sup> The court found that the program did not discriminate between men and women, but rather between pregnant and non-pregnant persons and therefore, was not discrimination based on sex.<sup>132</sup> Thus, if a surrogate wanted to file suit against an actor for discriminatory treatment for excluding coverage for pregnancy related services, she would also have to employ another statutory provision enacted to protect discrimination based on sex.<sup>133</sup>

Since *Geduldig*, Congress has passed laws that define pregnancy discrimination as a form of sex discrimination in the employment context and in some education contexts.<sup>134</sup> Title VII of the Civil Rights Act of 1964 (Title VII) was enacted to protect employees from workplace discrimination.<sup>135</sup> Title VII prohibits discrimination on the basis of gender, pregnancy, color, race, national origin, and religion.<sup>136</sup> Specifically, the Pregnancy Discrimination Act (PDA) "expanded the definition of discrimination 'on the basis of sex' to prohibit employers from making pregnancy-based distinctions."<sup>137</sup> Accordingly, all women in the workforce are

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<sup>125</sup> *Id.*

<sup>126</sup> Engle, *supra* note 112.

<sup>127</sup> Engle, *supra* note 112.

<sup>128</sup> *Geduldig v. Aiello*, 417 U.S. 484, 494-95 (1974).

<sup>129</sup> *Id.* at 497.

<sup>130</sup> *Id.* at 486.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 496.

<sup>133</sup> *Id.* at 497.

<sup>134</sup> LAPIDUS, *supra* note 123, at 9.

<sup>135</sup> LAPIDUS, *supra* note 123, at 27.

<sup>136</sup> LAPIDUS, *supra* note 123, at 27.

<sup>137</sup> LAPIDUS, *supra* note 123, at 29.

protected by the PDA and are not required to do anything to qualify for its protection.<sup>138</sup>

Under the PDA, an employer or union who employs fifteen or more employees cannot provide less favorable disability benefits to employees based on their pregnancy status.<sup>139</sup> The Supreme Court and Equal Employment Opportunity Commission's (EEOC) guidelines forbid an employer or insurance company from giving fewer benefits to a woman simply because the employer or insurance company can prove that it costs more to provide the service to women as compared to men.<sup>140</sup> The American Civil Liberties Union (ACLU) reasons:

Title VII forbids averaging costs by gender, just as it would forbid averaging costs<sup>141</sup> by race . . . . Title VII says that women are to be judged as individuals, and the cost of the group is therefore irrelevant. Although employers and insurance companies have contested this concept, EEOC guidelines have prevailed.<sup>142</sup>

If the PDA prevents employers from offering fewer services to women because the services are more expensive than those offered to men, the PDA would prohibit offering fewer services to surrogates because the alternative, offering the services, is more expensive.<sup>143</sup> In 2010, the Wisconsin Supreme Court dealt with a similar issue in *Mercy Care* and ultimately held that a Wisconsin statute permitted an insurer to exclude or limit services and procedures, as long as the exclusion or limitation applied to *all policies*.<sup>144</sup> The court reasoned, however, that an insurer could not make routine maternity services that are covered under the policy unavailable to a specific subgroup of insureds, surrogate mothers, based solely on the insured's intent at conception.<sup>145</sup>

Though the PDA attempts to eliminate discrimination in the employment sector, it does not extend to the private sector of insurance.<sup>146</sup> The PDA is, however, relevant because two-thirds of women in the nation are insured through their own employer or their spouse's employer.<sup>147</sup> To date, no surrogate has brought a cause of

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<sup>138</sup> *The Pregnancy Discrimination Act*, AM. ASSOC. OF UNIV. WOMEN, <http://www.aauw.org/act/laf/library/pda.cfm> (last visited Feb. 20, 2012).

<sup>139</sup> *Id.*

<sup>140</sup> LAPIDUS, *supra* note 123, at 53.

<sup>141</sup> Averaging is the way of attributing to an individual the experience of the group even when the individual does not conform to the average group behavior. LAPIDUS, *supra* note 123, at 53.

<sup>142</sup> LAPIDUS, *supra* note 123, at 53.

<sup>143</sup> LAPIDUS, *supra* note 123, at 53.

<sup>144</sup> *MercyCare Ins. Co. v. Wisconsin Com'r of Ins.*, 786 N.W.2d 785, 801 (Wis. 2010).

<sup>145</sup> *Id.* at 803.

<sup>146</sup> Kyla Davidoff, *Time to Close the Gap: Women in the Individual Health Insurance Market Deserve Access to Maternity Coverage*, 25 WIS. J.L. GENDER & SOC'Y 391, 400 (2010).

<sup>147</sup> Henry J. Kaiser Family Found., *Women's Fact Sheet: Women's Health Insurance Coverage 2*, KAISER FAMILY FOUND. (2009), <http://kff.org/womenshealth/upload/6000-08.pdf>.

action under Title VII against an employer or insurer for excluding maternity benefits for surrogates.<sup>148</sup>

## 2. Newborns' and Mothers' Health Protection Act

Even though the PDA is responsible for coverage of two-thirds of women, its limited application to the government and to employers excludes coverage for the "fourteen million women who are insured in the individual market."<sup>149</sup> To address exclusions in the individual market, Congress enacted the Newborns' and Mothers' Health Protection Act (NMHPA).<sup>150</sup> Unfortunately, the NMHPA does not cover all women in the individual market and does not provide a mandate for full maternity care; rather, NMHPA requires insurance companies who offer maternity coverage to also provide minimum hospital stays postpartum.<sup>151</sup> Under the NMHPA, insurers are still permitted to exclude maternity benefits to all classes of persons.<sup>152</sup>

Neither the PDA nor NMHPA require that an insurer, employer, or government program offer maternity services.<sup>153</sup> Both PDA and NMHPA, however, require that certain services be offered if the actor decides to offer maternity insurance generally.<sup>154</sup> It is highly unlikely that Congress would prohibit treating women differently based on their pregnancy status, but would permit insurers, employers, and the government to treat a subgroup of pregnant women differently based on their intent at conception.<sup>155</sup>

Since surrogate mothers experience the same costs as any other mother, surrogates *need* insurance. By excluding coverage for surrogates, insurers, employers, and government programs are discriminating against a subgroup of insureds.<sup>156</sup> This exclusionary practice is contrary to the notion of equality.

### *C. Existing Contract Remedies to Recover Associated Costs Are Insufficient*

Like the Bakos' surrogacy arrangement with Mathews, most agreements require that the intended parents immediately take responsibility for the child's care postpartum.<sup>157</sup> Once the baby is released from the hospital, the intended parents are free to take the newborn child home.<sup>158</sup> Regardless of the residency of the intended parents, contractual clauses and provisions dealing with the payment of medical bills

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<sup>148</sup> Author searched Westlaw database and found no cases where a surrogate mother has brought a Title VII action for denial of maternity benefits.

<sup>149</sup> Davidoff, *supra* note 146, at 395.

<sup>150</sup> 42 U.S.C. § 300gg-25 (West 2012); *see* 142 Cong. Rec. S4640 (daily ed. May 2, 1996).

<sup>151</sup> 42 U.S.C. § 300gg-25 (West 2012).

<sup>152</sup> *Id.*

<sup>153</sup> Davidoff, *supra* note 146, at 403.

<sup>154</sup> Davidoff, *supra* note 146, at 403.

<sup>155</sup> Davidoff, *supra* note 146, at 403.

<sup>156</sup> *See* MercyCare Ins. Co.v. Wisconsin Com'r of Ins., 786 N.W.2d 785 (Wis. 2010).

<sup>157</sup> CENTER FOR SURROGATE PARENTING, *supra* note 47.

<sup>158</sup> CENTER FOR SURROGATE PARENTING, *supra* note 47.

and other associated fees can be difficult to enforce,<sup>159</sup> leaving surrogates responsible for incurred expenses.<sup>160</sup>

Like any other contractual situation, a surrogate is left with a narrow set of options to recover costs incurred if the intended parents or the insurer fails to perform their end of the bargain.<sup>161</sup> In these situations, the surrogate can cover the costs herself, bring a lawsuit against her insurer, or bring a lawsuit against the intended parents for breach of contract.<sup>162</sup> Even though the surrogate can bring a cause of action against the insurer or the intended parents, these remedial efforts are insufficient. The surrogate may still be unable to recover associated costs because other countries refuse to enforce surrogacy contracts or because a state may find the surrogacy contract void and refuse to issue a court order.<sup>163</sup>

### 1. Filing Suit Against the Insurer

If the surrogate believes that her insurance policy covers maternity services and does not exclude surrogacy coverage, the surrogate can file a suit against her insurer.<sup>164</sup> There are only two examples where a surrogate was successful in filing a suit against her insurance company for excluding her surrogacy related maternity expenses.<sup>165</sup> These two examples were only successful because the states where the suits were filed had unique statutory schemes that allowed the courts to interpret statutory language broadly in favor of the surrogates.<sup>166</sup>

The first successful case was based on the interpretation and application of statutory language governing insurance benefits in Wisconsin.<sup>167</sup> In that case, the Wisconsin Supreme Court held that excluding a subgroup of insureds from maternity benefits that were generally offered to the entire class of woman violated Wisconsin Statute section 632.895(7).<sup>168</sup> The court reasoned that the insurer's policy to exclude all maternity services for surrogate mothers contravened the statute, which stated that "the coverage for all persons covered under the policy could not be subject to exclusions or limitations which were not applied to other maternity coverage under the policy."<sup>169</sup> The quoted statutory language facially prohibits exclusions and

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<sup>159</sup> Rose, *supra* note 7.

<sup>160</sup> Rose, *supra* note 7.

<sup>161</sup> Rose, *supra* note 7.

<sup>162</sup> CTR. FOR SURROGATE PARENTING, *supra* note 108.

<sup>163</sup> See *infra* Part IV. A-B.

<sup>164</sup> See *MercyCare Ins. Co. v. Wisconsin Com'r of Ins.*, 786 N.W.2d 785 (Wis. 2010).

<sup>165</sup> See *id.*; see also Jodi Hausen, *Insurer Ordered to Pay Bozeman Surrogate Mother's Covered Pregnancy Costs*, BOZEMAN DAILY CHRONICLE, Nov. 10, 2011, [http://www.bozemandailychronicle.com/news/crime/article\\_a69f0132-0b5c-11e1-ae2a-001cc4c002e0.html](http://www.bozemandailychronicle.com/news/crime/article_a69f0132-0b5c-11e1-ae2a-001cc4c002e0.html).

<sup>166</sup> See WIS. STAT. ANN. § 632.895(7) (West 2012); see also MONT. CODE ANN. § 49-2-39 (West 2012).

<sup>167</sup> *MercyCare Ins. Co.*, 786 N.W.2d at 789.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 801.

limitations which are not applied to other maternity coverage.<sup>170</sup> The Wisconsin statute is unique in this aspect.

In the Wisconsin case, MercyCare Insurance Company and MercyCare HMO, Inc. (collectively MercyCare) offered a group disability insurance policy that provided maternity coverage for eligible persons covered under the policies.<sup>171</sup> Two different women, J.M. and C.S., were eligible persons to receive coverage under MercyCare's 2002 Certificate of Coverage ("the 2002 Contract"),<sup>172</sup> both women also agreed to act as gestational surrogates,<sup>173</sup> and both women received pregnancy related services.<sup>174</sup> J.M.'s medical expenses amounted to \$16,774.63 for various laboratory tests, ultrasounds, maternity care, physician visits, inpatient hospital care, anesthesia and delivery.<sup>175</sup> C.S. received comparable services totaling \$18,510.84.<sup>176</sup> During their pregnancies, MercyCare denied coverage for the maternity related services for both women,<sup>177</sup> and MercyCare sought to recoup the money it had already paid for claims related to the pregnancies.<sup>178</sup>

After C.S. filed a complaint with the state insurance commissioner,<sup>179</sup> MercyCare filed a new group disability policy insurance (the 2005 Contract) form for approval.<sup>180</sup> The insurance commissioner disapproved the 2005 Contract because it revised the language of the surrogate mother services exclusion that was present in the 2002 Contract.<sup>181</sup> In the disapproval letter, the commissioner explained that the new exclusion had to be deleted because "[a] policy that provides maternity coverage may not limit the coverage based on method of conception, as such a limitation is unfairly restrictive and discriminatory."<sup>182</sup> The Wisconsin Supreme Court ultimately affirmed earlier findings that "MercyCare may not exclude maternity coverage of otherwise covered persons based on their status as surrogate

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<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 789.

<sup>172</sup> C.S. was ensured as a dependent, and J.M. was insured as an employee. *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 789.

<sup>178</sup> *Id.* MercyCare notified J.M. by letter that "MercyCare is unable to authorize coverage for all services related to this pregnancy. Services provided from 5-10-04 through 1-7-05 are not eligible for reproductive services benefits or pregnancy benefits. Any benefits paid for the services will be recouped." *Id.* Thankfully for C.S. and J.M., their medical expenses were paid for by a third party. *Id.* at 790.

<sup>179</sup> *Id.* at 790.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 791.

mothers” because this exclusion is a violation of Wisconsin Statute section 632.895(7).<sup>183</sup>

Lynn Bodi, owner of the Madison-based Surrogacy Center, reported to the media that the court properly ruled that insurance companies should not treat various classes of pregnancy differently.<sup>184</sup> Bodi explained: “[t]his is a good decision by the Wisconsin Supreme Court because it makes it clear that all pregnant women with insurance will enjoy the same pregnancy coverage regardless of how or why they become pregnant.”<sup>185</sup>

The second example of a successful suit against an insurer was predicated on a unique Montana statute.<sup>186</sup> This case, however, was not resolved in court because Montana Commissioner of Securities and Insurance, Attorney Jameson C. Walker, intervened and decided in the plaintiff’s favor.<sup>187</sup> Walker explained that the underlying condition that New West was denying coverage for was pregnancy and childbirth. These conditions exclusive to women<sup>188</sup> and, likewise, New West unlawfully discriminated against surrogates.<sup>189</sup> As a result of the unlawful discrimination, New West was ordered to reimburse Anicee Acosta-Yearick for costs associated with her 2009 surrogate pregnancy.<sup>190</sup>

In that case, Acosta-Yearick filed suit against her insurance company for refusing to pay more than \$11,500 in maternity expenses related to her surrogate pregnancy.<sup>191</sup> The insurer, New West, did not include an exclusion of surrogate services within its contract, but the insurer made an addendum to the policy after Acosta-Yearick asked about her benefits and became pregnant with the understanding that her costs would be covered.<sup>192</sup> Upon rejection of coverage, Acosta-Yearick filed an appeal to New West which was reviewed by Walker.<sup>193</sup>

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<sup>183</sup> The subsection provides that “every group disability insurance policy which provides maternity coverage shall provide maternity coverage for all persons covered under the policy. Coverage required under this subsection may not be subject to exclusions or limitations which are not applied to other maternity coverage under the policy.” *Id.* at 796.

<sup>184</sup> Ted Sullivan, *MercyCare: Court’s Ruling in Surrogate Case Will Raise Costs*, THE JANESVILLE GAZETTE, July 17, 2010, <http://gazettextra.com/news/2010/jul/17/mercycare-courts-ruling-surrogate-case-will-raise-/>.

<sup>185</sup> *Id.*

<sup>186</sup> Hausen, *supra* note 165.

<sup>187</sup> Hausen, *supra* note 165.

<sup>188</sup> Hausen, *supra* note 165.

<sup>189</sup> Hausen, *supra* note 165.

<sup>190</sup> Hausen, *supra* note 165.

<sup>191</sup> Hausen, *supra* note 165.

<sup>192</sup> Jodi Hausen, *Bozeman Nurse Suing Billings Clinic Over Firing*, BILLINGS GAZETTE, Oct. 12, 2011, [http://billingsgazette.com/news/local/bozeman-nurse-suing-billings-clinic-over-firing/article\\_b156efc6-d5bf-561d-8b21-ba6bf3e92424.html](http://billingsgazette.com/news/local/bozeman-nurse-suing-billings-clinic-over-firing/article_b156efc6-d5bf-561d-8b21-ba6bf3e92424.html).

<sup>193</sup> Hausen, *supra* note 165.

Walker's reasoning was based on Montana Supreme Court's interpretation of Montana Statute section 49-2-39. The statute prohibits discrimination based on sex in insurance policies.<sup>194</sup> The statute reads:

[i]t is an unlawful discriminatory practice for a financial institution or person to discriminate solely on the basis of sex or marital status in the issuance or operation of any type of insurance policy, plan, or coverage or in any pension or retirement plan, program, or coverage, including discrimination in regard to rates or premiums and payments or benefits.<sup>195</sup>

In 1993, the Supreme Court of Montana questioned, in a case of first impression, whether an individual major medical expense insurance policy that excluded coverage for normal pregnancy and childbirth services violated section 49-2-309.<sup>196</sup> In finding for the insured, the court reasoned that "because pregnancy occurs only to women, any classification which relies on pregnancy as the determinative criterion is a distinction based on sex,"<sup>197</sup> and this distinction is impermissible.<sup>198</sup> In that case, the charging party entered into an insurance contract with Bankers Life wherein the contract excluded coverage for normal pregnancy and childbirth.<sup>199</sup> In addition to its policy, Bankers Life offered an optional Maternity Benefits Rider that would cover normal pregnancy and childbirth expenses.<sup>200</sup> Upon giving birth, the charging party submitted the maternity expenses to Bankers Life which subsequently denied coverage.<sup>201</sup> Since Bankers Life's policy excluded coverage for pregnancy and childbirth, the court ultimately held that the policy unlawfully discriminated against female policyholders in violation of section 49-2-309.<sup>202</sup>

In both the Wisconsin and Montana cases, unique statutory provisions existed in the statutory scheme to allow the court or commission to render decisions in favor of the plaintiff.<sup>203</sup> Though these statutes are powerful tools for surrogates in those states, surrogates in other states are left unprotected.

#### *D. Filing Suit Against the Intended Parents*

In an attempt to recover some costs or to enforce the surrogacy contract, the surrogate may elect to sue the intended parents for breach of contract. Though a successful breach of contract claim may make the surrogate whole, there are major

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<sup>194</sup> MONT. CODE ANN. § 49-2-309 (2011).

<sup>195</sup> *Id.*

<sup>196</sup> *Bankers Life & Cas. Co. v. Peterson*, 866 P.2d 241, 241 (Mont. 1993).

<sup>197</sup> *Id.* at 242.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> See *MercyCare Ins. Co. v. Wisconsin Com'r of Ins.*, 786 N.W.2d 785, 296 (Wis. 2010); *Bankers Life & Cas. Co. v. Peterson*, 866 P.2d 241, 241 (Mont. 1993).

complications with enforcement of the order.<sup>204</sup> Given that surrogacy law is unsettled in many states, surrogates may enter into contracts that the courts deem void or unenforceable, leaving the surrogate without a sufficient remedy.<sup>205</sup>

### 1. International Surrogacy

International surrogacy arrangements, like the Mathews-Bakos agreement, are becoming more popular in the United States.<sup>206</sup> Within the last five years, intended parents from as far as Istanbul and Uruguay have turned to healthy American mothers to serve as surrogates.<sup>207</sup> It is estimated that, in the United States, over 1,400 babies are born each year for international parents with the assistance of a surrogate.<sup>208</sup> Since various countries ban, limit, or refuse to recognize surrogacy agreements,<sup>209</sup> a surrogate dealing with international parents may be unable to recover costs associated with her surrogacy agreement.

For instance, voters in countries such as Sweden, Spain, France, and Germany have rejected movements to allow surrogate motherhood within their borders.<sup>210</sup> Other countries, such as Canada, prohibit commercial surrogacy,<sup>211</sup> but allow altruistic surrogacy.<sup>212</sup> Still, other countries, including South Africa, the United Kingdom, and Argentina, employ independent ethics committees to evaluate

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<sup>204</sup> See *infra* Part IV. B.1-3.

<sup>205</sup> Hansen, *supra* note 46.

<sup>206</sup> Nara Schoenberg, *Born in the USA*, CHI. TRIB., Apr. 13, 2011, [http://articles.chicagotribune.com/2011-04-13/health/ct-news-surrogate-mom-20110413\\_1\\_surrogacy-center-for-surrogate-parenting-international-parents](http://articles.chicagotribune.com/2011-04-13/health/ct-news-surrogate-mom-20110413_1_surrogacy-center-for-surrogate-parenting-international-parents).

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* In Illinois, for example, at least two-dozen children were carried to term for international parents in 2010. *Id.*

<sup>209</sup> See Anuj Chopra, *Childless couples Look to India for Surrogate Mothers*, THE CHRISTIAN SCI. MONITOR (Apr. 3, 2006), <http://www.csmonitor.com/2006/0403/p01s04-wosc.html> (discussing the recent increase in international surrogacy, while focusing on the use of Indian surrogates).

<sup>210</sup> *Id.*

<sup>211</sup> Recently there has been an increasing trend towards the use of gestational surrogacy, sometimes now called “commercial surrogacy,” in which a fertile man’s sperm and a fertile woman’s eggs are combined outside the woman’s body using IVF and then a surrogate gestates the resulting fertilized egg(s). Emily Stehr, *International Surrogacy Contract Regulation: National Governments’ and International Bodies’ Misguided Quest to Prevent Exploitation*, 35 HASTINGS INT’L & COMP. L. REV. 253, 253 (2012).

<sup>212</sup> *Paid Surrogacy Driven Underground in Canada: CBC Report*, CBC NEWS, (May 2, 2007), <http://www.cbc.ca/news/health/story/2007/05/01/surrogates-pay.html>. Altruistic surrogacy is defined as the practice whereby a woman agrees, for no financial gain, to become pregnant and bear a child for another person or persons to whom she intends to transfer the child’s care at, or shortly after, the child’s birth. *Altruistic Surrogacy*, REPROD. TECH. COUNCIL, <http://www.rtc.org.au/glossary/index.html> (last visited Dec. 15, 2011). In these agreements, expenses incurred associated with the pregnancy and birth, may be reimbursed. *Id.*

surrogacy requests on a case-by-case basis.<sup>213</sup> With the recognition of surrogacy arrangements differing greatly, the enforcement of surrogacy contracts against international intended parents, even with a United State's court order, will differ greatly depending on the specific country in which the intended parents reside.<sup>214</sup>

If the intended parents are from a country that prohibits or limits surrogacy, the surrogate will not be able to collect from the intended parents because these countries will not recognize the surrogacy contract.<sup>215</sup> In this regard, even if the surrogate successfully brings a suit against the intended parents and secures a court order for damages against the intended parents, the order will be meaningless unless the residential country is willing to enforce the court order.

In Austria, the country where the Bakos reside, surrogacy is completely banned.<sup>216</sup> Since surrogacy is banned in Austria, the Mathews-Bakos contract will not be enforced.<sup>217</sup> As a result, neither the Bakos nor Mathews have a viable cause of action because there is no treaty between Austria and the United States to resolve this issue.<sup>218</sup> As it stands, Mathews remains responsible for the expenses incurred and the intended parents will not be held liable.<sup>219</sup>

## 2. Surrogacy in the States

In the United States, there is no national policy that governs surrogacy, and state laws governing surrogacy agreements vary greatly.<sup>220</sup> Various states hold surrogacy agreements to be void, unenforceable, or criminal.<sup>221</sup> In these states, a surrogate mother would be unable to recover associated costs from her surrogacy agreement and would remain financially responsible for incurred costs because the state would not recognize the contract that makes the intended parents liable.<sup>222</sup>

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<sup>213</sup> Chopra, *supra* note 209.

<sup>214</sup> Sarah Mortazavi, Note, *It Takes a Village to Make a Child: Creating Guidelines for International Surrogacy*, 100 GEO. L.J. 2249, 2273 (2012).

<sup>215</sup> *See id.*

<sup>216</sup> *Surrogacy*, AUSTRIAN FOREIGN MINISTRY, <http://www.bmeia.gv.at/en/embassy/dublin/practical-advice/your-travel-to-austria/surrogacy.html> (last visited Jan. 19, 2011). According to the Austrian Civil Code, the mother of a child is always the woman who gave birth to the child, meaning the surrogate, not the intended parent, is the mother of the child in every case. *Id.* Furthermore, the child of a foreign surrogate will not acquire Austrian citizenship, a passport, or an Austrian identity. *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> Rose, *supra* note 17.

<sup>219</sup> Rose, *supra* note 17.

<sup>220</sup> Hansen, *supra* note 46.

<sup>221</sup> *See Guide to State Surrogacy Laws*, CTR. FOR AM. PROGRESS, <http://www.americanprogress.org/issues/women/news/2007/12/17/3758/guide-to-state-surrogacy-laws/> (last visited Dec. 17, 2007).

<sup>222</sup> *Id.*

Several states expressly prohibit surrogacy, declaring all such agreements void<sup>223</sup> and unenforceable<sup>224</sup> as a matter of public policy.<sup>225</sup> If a surrogate brings a suit to recover damages against the intended parents in a state that finds surrogacy contracts to be void, the court will not enforce the contract.<sup>226</sup> Since the contract is the document that makes intended parents liable for expenses, the surrogate will not be able to recover associated costs with a void contract. The assignment of liability will not be upheld because the contract did not exist in these states.<sup>227</sup>

Some states make it a crime to pay for surrogacy.<sup>228</sup> In these states, if the intended parents fail to uphold their end of the surrogacy contract, the surrogate will also have no cause of action to recover incurred costs if the contract included payment provisions.<sup>229</sup> In other states, if the surrogate filed a suit to recover the costs, she could be charged with a crime for entering into a surrogacy contract.<sup>230</sup>

Other states permit and recognize surrogacy arrangements but restrict the arrangement to married couples, or to cases where at least one of the intended parents has a genetic link to the child.<sup>231</sup> In these cases, only surrogates who meet the requirements defined by statute would be able to file a suit to recover incurred costs.<sup>232</sup>

A surrogate, therefore, will not be successful in bringing a suit against the intended parents in many states. As a result, filing a suit against the intended parents is usually an insufficient remedy to recover incurred costs.

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<sup>223</sup> BLACK'S LAW DICTIONARY 374 (9th ed. 2009) (A void contract is defined as "a contract that is of no legal effect, so that there is really no contract in existence at all"). Some states void contracts and penalize surrogates for entering into surrogate contracts. CTR. FOR AM. PROGRESS, *supra* note 221. These states include Michigan and New York. CTR. FOR AM. PROGRESS, *supra* note 221. Other states simply void the contract. CTR. FOR AM. PROGRESS, *supra* note 221. These states include Indiana, Kentucky, Louisiana, and Nebraska. CTR. FOR AM. PROGRESS, *supra* note 221. Other states ban the agreements. CTR. FOR AM. PROGRESS, *supra* note 221. These states include Arizona and the District of Columbia. CTR. FOR AM. PROGRESS, *supra* note 221.

<sup>224</sup> BLACK'S LAW DICTIONARY 374 (9th ed. 2009) (An unenforceable contract is defined as "a valid contract that, because of some technical defect, cannot be fully enforced; a contract that has some legal consequences but that may not be enforced in an action for damages or specific performance in the face of certain defenses").

<sup>225</sup> CTR. FOR AM. PROGRESS, *supra* note 221.

<sup>226</sup> Jessica Arons, *Future Choices Assisted Reproductive Technologies and the Law*, CTR. FOR AM. PROGRESS, 24-25 (2007), [http://www.americanprogress.org/wp-content/uploads/issues/2007/12/pdf/arons\\_art.pdf](http://www.americanprogress.org/wp-content/uploads/issues/2007/12/pdf/arons_art.pdf).

<sup>227</sup> *Id.*

<sup>228</sup> Hansen, *supra* note 46.

<sup>229</sup> Arons, *supra* note 226, at 24-26.

<sup>230</sup> CTR. FOR AM. PROGRESS, *supra* note 221. In fact, six jurisdictions including the District of Columbia, Florida, Michigan, New York, Utah, and Washington impose criminal penalties on parties to surrogate contracts in addition to declaring surrogate contracts void and unenforceable. *See* HOWARD O. HUNTER, MODERN LAW OF CONTRACTS § 24:19 (2012 ed.).

<sup>231</sup> Arons, *supra* note 226, at 26.

<sup>232</sup> CTR. FOR AM. PROGRESS, *supra* note 221.

Unfortunately, “a majority of states . . . have no laws directly addressing surrogacy, leaving many such arrangements in legal limbo and raising a number of vexing social, legal and ethical issues.”<sup>233</sup> Experts suggest that the same analysis and arguments employed in the Wisconsin case “could be made in other states where insurers routinely exclude maternity coverage for women serving as surrogates.”<sup>234</sup>

#### IV. SURROGACY IN OHIO

Ohio is a state that does not have laws addressing surrogacy.<sup>235</sup> Ohio is, however, considered a surrogacy-friendly state.<sup>236</sup> Though Ohio surrogacy law is relatively unsettled,<sup>237</sup> various court decisions indicate that surrogacy agreements are considered lawful in Ohio; however, no Ohio court has ruled on the practice of excluding surrogacy coverage in insurance policies that cover maternity expenses.<sup>238</sup> Although an official policy regarding surrogacy contracts is not established in Ohio, case law indicates that surrogacy contracts will be upheld and enforced when the contract is reduced to writing.<sup>239</sup> Even though surrogacy contracts have been upheld in Ohio, Ohio regulatory law permits discrimination towards surrogates, and Ohio does not have any statutes explicitly discussing coverage of surrogate mothers.<sup>240</sup>

Since Ohio is considered to be surrogate-friendly state, and entering into a surrogacy contract is not against Ohio public policy, the Ohio General Assembly should adopt a statute to prohibit the exclusion of surrogates when insurers, employers, or government programs offer maternity services generally. The Ohio General Assembly can prevent the exclusion of surrogacy coverage in insurance contracts by enacting a statute, which incorporates the Unfair and Deceptive Trade Act, to explicitly prohibit the exclusion of maternity coverage for surrogate mothers.<sup>241</sup> If Ohio amends its statutory language to explicitly include coverage of surrogacy related maternity services, insurers would be encouraged to refrain from the exclusionary and discriminatory practice, and Ohio would be one of the few states that actually prohibits pregnancy discrimination.

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<sup>233</sup> Hansen, *supra* note 46.

<sup>234</sup> Hansen, *supra* note 46.

<sup>235</sup> See CTR. FOR AM. PROGRESS, *supra* note 221.

<sup>236</sup> Brian Parker, *Will Sarah Jessica Parker's Surrogate Get Visitation Rights?*, SLATE MAGAZINE (June 25, 2009, 6:37 PM), [http://www.slate.com/articles/news\\_and\\_politics/explainer/2009/06/will\\_sarah\\_jessica\\_parkers\\_surrogate\\_get\\_visitation\\_rights.html](http://www.slate.com/articles/news_and_politics/explainer/2009/06/will_sarah_jessica_parkers_surrogate_get_visitation_rights.html).

<sup>237</sup> *Seymour v. Stotski*, 611 N.E.2d 454, 458 (Ohio Ct. App. 1992).

<sup>238</sup> The Wisconsin case was a case of first impression. See *MercyCare Ins. Co. v. Wisconsin Comm'r of Ins.*, 786 N.W.2d 785, 792-93 (Wis. 2010).

<sup>239</sup> *J.F. v. D.B.*, 879 N.E.2d 740, 741 (Ohio 2007).

<sup>240</sup> See OHIO ADMIN. CODE 5101:3-4-28 (2011) (West).

<sup>241</sup> OHIO REV. CODE ANN. §§ 3901.20- 3901.21 (West 2012). It is generally understood that state governments are better equipped to deal with insurance companies excluding coverage of surrogate mothers. See *McCarran-Ferguson Act*, 15 U.S.C. § 1011 (2011). In 1945, Congress passed the *McCarran-Ferguson Act* with the intent to preserve for states the continued ability to regulate and to tax the business of insurance. D.T. Armentano, *Antitrust and Insurance: Should the McCarran Act be Repealed?*, 8 CATO J. 729, 730-31 (1989).

*A. Governing Ohio Case Law*

Ohio case law regarding surrogacy remained relatively unsettled until the last few years.<sup>242</sup> Early cases indicated that surrogacy contracts were open to substantial scrutiny.<sup>243</sup> In 2007, the Supreme Court of Ohio held that gestational surrogacy contracts were enforceable and not a violation of public policy.<sup>244</sup> That case did not shed any light on the state of traditional surrogacy in Ohio.<sup>245</sup> It is open to debate whether the traditional model would violate a public policy.<sup>246</sup>

In 1992, an Ohio Court of Appeals denied custody to an intended mother in a traditional surrogacy agreement because she had no biological tie to the child and because there was no written surrogacy agreement.<sup>247</sup> In *Seymour*, the court did not discuss how it would have ruled if the case contained a written contract, but it did conclude that the legality of surrogacy agreements in Ohio is “unsettled and open to considerable scrutiny.”<sup>248</sup>

In 2007, the Supreme Court of Ohio held that “no public policy of Ohio is violated when a gestational-surrogacy contract is entered into, even when one of the provisions requires the gestational surrogate not to assert parental rights regarding children she bears that are of another woman’s artificially inseminated egg.”<sup>249</sup> In *J.F. v. D.B.*, the biological father brought action against the gestational surrogate and her husband after a custody dispute arose, asserting a breach of the gestational-surrogacy contract.<sup>250</sup> The contract provided that the surrogate would “not attempt to form a parent-child relationship with any child conceived pursuant to the contract” and would “‘institute proceedings’ to ‘terminate [her] parental rights’ upon the birth of the children.”<sup>251</sup> The *J.F.* holding is legally significant because the court upheld a surrogacy contract that required the surrogate mother to terminate her parental rights.<sup>252</sup> Because of this and related holdings, surrogate advocacy groups consider Ohio to be a surrogate-friendly state.<sup>253</sup>

In 2010, the Tenth District of the Court of Appeals of Ohio held that “nothing in Ohio law prohibits [gestational] surrogacy agreements or the enforcement of the

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<sup>242</sup> Compare *Seymour*, 611 N.E.2d at 458, with *J.F.*, 879 N.E.2d at 741.

<sup>243</sup> *Seymour*, 611 N.E.2d at 458.

<sup>244</sup> *J.F.*, 879 N.E.2d at 741.

<sup>245</sup> *Id.* at 742.

<sup>246</sup> *Id.*

<sup>247</sup> *Seymour*, 611 N.E.2d at 458.

<sup>248</sup> *Id.*

<sup>249</sup> *J.F.*, 879 N.E.2d at 741-42.

<sup>250</sup> *Id.* at 740.

<sup>251</sup> *Id.*

<sup>252</sup> *Id.* at 741-42.

<sup>253</sup> See *Overview of U.S. Surrogacy Law by State – Ohio*, CTR. FOR SURROGATE PARENTING, INC., [http://www.creatingfamilies.com/home/surrogacy\\_law\\_state.aspx?State=OH](http://www.creatingfamilies.com/home/surrogacy_law_state.aspx?State=OH) (last visited Sept. 21, 2012).

terms of surrogacy agreements.”<sup>254</sup> In that case, the court reasoned that the surrogacy agreement was valid and enforceable because the agreement was set forth in writing after extensive negotiations: “the surrogacy agreement includes an acknowledgement by the parties that they entered into [it] voluntarily and with the aid of counsel . . . in consideration, [the intended mother] [paid] for all of [gestational surrogate’s] unreimbursed medical costs . . . the cost of a \$200,000 term life insurance policy . . . and an additional \$15,000 for living expenses.”<sup>255</sup> In that case, the intended mother to a child conceived under a gestational surrogacy agreement brought an action seeking a declaration disestablishing the maternity of the surrogate while seeking custody of the child.<sup>256</sup> This case is significant because as a matter of first impression, the court determined the parties’ surrogacy agreement was valid and enforceable by looking at the law of contracts to determine the validity of the surrogacy agreement.<sup>257</sup>

Ohio case law suggests that surrogacy contracts, at least gestational contracts, will be enforced if the contract includes all of the essential elements of a contract,<sup>258</sup> is reduced to writing, and both parties enter into the contract freely.<sup>259</sup>

#### B. Governing Ohio Regulations

Ohio does not have any regulations regarding surrogacy coverage generally, but Ohio has enacted one administrative regulation that governs the maternity coverage for surrogates under the Ohio Medicaid Program.<sup>260</sup> This provision, Ohio Administrative Code section 5101:3-4-28, lists services which are excluded under the Ohio Medicaid Program, and this provision excludes coverage for pregnancy

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<sup>254</sup> S.N. v. M.B., 935 N.E.2d 463, 470-71 (Ohio Ct. App. 2010).

<sup>255</sup> *Id.* at 471.

<sup>256</sup> *Id.* at 465-66.

<sup>257</sup> *Id.* at 471.

<sup>258</sup> Essential elements of a contract include an offer, an acceptance, contractual capacity, consideration, a manifestation of mutual assent, and legality of object and of consideration. *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> See OHIO ADMIN. CODE 5101:3-4-28 (2011) (West). Medicaid is “a cooperative federal–state program that pays for medical expenses for qualifying individuals who cannot afford private medical services. The program is authorized under the Social Security Act.” BLACK’S LAW DICTIONARY 1071 (9th ed. 2009). Medicaid’s low-income beneficiaries include mostly pregnant women, children, seniors, and those with disabilities. Julie Rovner, *Governors: Medicaid More a Budget Buster Than Ever*, NPR (Feb. 28, 2011), <http://www.npr.org/2011/02/28/134113416/governors-medicaid-more-a-budget-buster-than-ever>.

The Federal Medicaid program provides a growing safety net for a broad cross-section of the population, and in particular for those with severe and costly health care needs. *Meeting Medicaid’s Cost and Quality Challenges: The Role of AHCP Research*, AGENCY FOR HEALTHCARE RESEARCH & QUALITY, <http://www.ahrq.gov/research/mednote.htm> (last visited Jan. 20, 2012). The program currently pays for a third of all births, finances health care for one in four American children, and covers 60% of the poor. *Id.* Medicaid also pays for half of all nursing home care, subsidizes acute care for poor Medicare enrollees, and has a large and increasing responsibility for people with disabilities and AIDS. *Id.*

related services for surrogate mothers.<sup>261</sup> With the implementation of this regulation, Ohio discriminates between subgroups of pregnant women based on their intent at conception. Arguably, this practice is a violation of the PDA.

The general guidelines for Medicaid funding are determined by the federal government, but each state is allowed to implement its own specific requirements.<sup>262</sup> If a pregnant woman meets the qualifications for the program, Medicaid will cover “all care related to the pregnancy, delivery and any complications that may occur during pregnancy and up to 60 days postpartum.”<sup>263</sup> Though Medicaid covers pregnancy related medical expenses incurred by women, it excludes the coverage of medical expenses incurred by surrogates.<sup>264</sup> The Ohio Administrative Code reads that the following physician services are not covered:

[p]regnancy related services pertaining to a pregnancy that is a result of a contract for surrogacy services. For the purposes of this rule, “surrogacy services” means a woman agrees to become pregnant for the purpose of gestating and giving birth to a child she will not raise, but hand over to a contracted party.<sup>265</sup>

Under this regulation, Medicaid includes coverage of pregnancy related medical expenses for women who enter into adoption contacts;<sup>266</sup> however, it excludes coverage for women who enter into surrogacy contracts.<sup>267</sup> Under this regulation a surrogate, in the same position as a biological mother who intends to give her child up for adoption, is treated differently under the law. The regulation vests authority in the government to discriminate against a subgroup of mothers based on intent; however, the intent to give the child to another family is the same for a surrogate mother as a biological mother who intends to relinquish her parental rights in an adoption proceeding. Ultimately, the state is treating similarly situated persons differently without a rational reason.

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<sup>261</sup> See OHIO ADMIN. CODE 5101:3-4-28 (2011) (West).

<sup>262</sup> *Medicaid for Pregnant Women*, AM. PREGNANCY ASSOC., <http://www.americanpregnancy.org/planningandpreparing/medicaid.html> (last visited Sept. 21, 2012). To be considered categorically needy, one must have an income that is at or below 133% of the Federal Poverty Level. *Id.*; see also *Module 12: Medicaid & the Children’s Health Insurance Program*, CTRS. FOR MEDICARE & MEDICAID SERVS., 13 (2012), <http://www.cms.gov/Outreach-and-Education/Training/NationalMedicareTrainingProgram/Downloads/2012-Medicaid-and-the-Children%E2%80%99s-Health-Insurance-Program-CHIP-Workbook.pdf>.

<sup>263</sup> AM. PREGNANCY ASSOC., *supra* note 262.

<sup>264</sup> See OHIO ADMIN. CODE 5101:3-4-28 (2011) (West).

<sup>265</sup> OHIO ADMIN. CODE 5101:3-4-28(R) (2011) (West). Medicaid will not knowingly pay for a surrogacy, and some state surrogacy laws restrict women already receiving Medicaid from entering into a surrogacy agreement, even if they do not plan to use their Medicaid assistance for their surrogacy arrangement. Christopher Cross, *Will Medicaid Cover Surrogacy Pregnancy*, E-HOW, [http://www.ehow.com/about\\_5557401\\_medicaid-cover-surrogates-pregnancy.html](http://www.ehow.com/about_5557401_medicaid-cover-surrogates-pregnancy.html) (last visited Sept. 21, 2012). If the surrogate is caught using Medicaid for a surrogacy arrangement, the surrogate and the intended parents face hefty fines and even jail time for fraud. *Id.*

<sup>266</sup> See OHIO ADMIN. CODE 5101:3-4-28 (2011) (West).

<sup>267</sup> *Id.*

The exclusion of coverage for surrogates from the Medicaid program likely exists because the government is apprehensive about the costs associated with covering surrogate mothers.<sup>268</sup> Though costs may be a valid financial concern, it is inconsistent to permit the government to exclude a subgroup from coverage because of costs, while the government prohibits employers from engaging in the same practice. Under the PDA, the practice of excluding services merely because the average cost of a group is higher has been rejected by both the Supreme Court and the EEOC's guidelines.<sup>269</sup>

### C. Governing Ohio Statutes

Without targeted laws designed to specifically protect surrogates in Ohio, surrogates must resort to breach of contract claims, which can be difficult to enforce. The legal remedies, however, were not enacted as remedies to address the exclusion of maternity coverage for surrogate mothers.<sup>270</sup> As a result, the current law does not sufficiently deter insurance companies from engaging in exclusionary practices. The current law also insufficiently protects surrogates from assuming financial responsibility when the surrogates have contracts that are intended to protect the surrogate's financial interests.

The Ohio General Assembly enacted the Unfair or Deceptive Trade Practices Act,<sup>271</sup> which requires that "no person shall engage in this state in any trade practice which is defined . . . [as] or determined . . . to . . . be, an unfair or deceptive act or

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<sup>268</sup> After the decision handed down by the Wisconsin Supreme Court, Mercy Health System General Counsel Ralph Topinka, said "[w]hile we are respectful of the Wisconsin Supreme Court, we are disappointed in the court's ruling which will have the effect of raising insurance costs." Ted Sullivan, *MercyCare: Court's Ruling in Surrogate Case Will Raise Costs*, THE JANESVILLE GAZETTE, July 17, 2010, <http://gazettextra.com/news/2010/jul/17/mercy-care-courts-ruling-surrogate-case-will-raise-/>; see also *The Long-Term Outlook for Medicare, Medicaid, and Total Health Care Spending*, CONG. BUDGET OFFICE, 1, 21 (2009), <http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/102xx/doc10297/06-25-ltbo.pdf>. "CBO projects that without significant changes in policy, total spending for health care will be 31% of GDP by 2035 and will increase to 46% by 2080." *Id.* Total spending for Medicare is projected to increase to 8% of GDP by 2035 and to 15% by 2080. *Id.*

Finding a way to control costs and improve the quality of Medicaid services has provided a growing challenge for both Federal and State policymakers. Although Medicaid expenses in the past grew more slowly than private health care spending, program costs increased dramatically in the late 1980s and early 1990s, thanks to rapid eligibility expansion, a national recession, inflation in health care spending, and State use of statutory loopholes to leverage Federal dollars. Between fiscal years 1988 and 1993, annual Federal and State Medicaid expenditures rose from \$54 billion to \$131 billion. Between fiscal years 1994 and 1995 these expenditures rose from \$144 billion to \$159 billion.

AGENCY FOR HEALTHCARE RESEARCH & QUALITY, *supra* note 260.

<sup>269</sup> See AM. ASSOC. OF UNIV. WOMEN, *supra* note 138.

<sup>270</sup> General contract remedies predate surrogate capabilities. Contract remedies were not created to specifically address breaches in surrogacy contracts where the parties are dealing with human life.

<sup>271</sup> See OHIO REV. CODE ANN. § 3901.20 (West 2011).

practice in the business of insurance.<sup>272</sup> Among the list of practices that are defined as unfair and deceptive is refusing to make maternity benefits available to policy holders when the insurer offers maternity benefits.<sup>273</sup> The section provides that an unfair and deceptive act includes

[r]efusing, when offering maternity benefits<sup>274</sup> under any individual or group sickness and accident insurance policy, to make maternity benefits available to the policyholder for the individual or individuals to be covered under any comparable policy to be issued for delivery in this state, including family members if the policy otherwise provides coverage for family members.<sup>275</sup>

Under the current statutory scheme, a surrogate mother whose insurance company is denying her maternity coverage would have the strongest cause of action under the Unfair and Deceptive Practices Act because the provision prohibits this type of discrimination generally.<sup>276</sup> Furthermore, the statutory provision has a sophisticated procedural process and offers an extensive list of remedies.<sup>277</sup> Though the provision exists, it does not deter insurance companies from excluding maternity benefits for surrogate mothers when the insurance company offers those services to other policy holders. The provision is deficient for two reasons: first, the exclusionary practice still occurs, and second, the provision does not permit the surrogate to recover private remedies.<sup>278</sup>

#### V. MODEL SURROGACY STATUTE

The generally accepted principle is that federal constitutional rights are intended to be a floor, as opposed to a ceiling.<sup>279</sup> The federal floor allows states to offer more

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<sup>272</sup> *Id.* “This statute applies to any person, as defined by § 3901.19, regardless of whether the person is licensed or required to be licensed.” *Id.*

<sup>273</sup> OHIO REV. CODE ANN. § 3901.21(O) (West 2011).

<sup>274</sup> “Maternity benefits” is defined as “those benefits calculated to indemnify the insured for hospital and medical expenses fairly and reasonably associated with a pregnancy and childbirth.” OHIO REV. CODE ANN. § 3901.19(C) (West 2011).

<sup>275</sup> OHIO REV. CODE ANN. § 3901.21(O) (West 2011). Provides that the statute does not “prohibit an insurer from imposing a reasonable waiting period for such benefits under an individual sickness and accident insurance policy issued to an individual who is not a federally eligible individual or a non-employer-related group sickness and accident insurance policy, but in no event shall such waiting period exceed two hundred seventy days.” OHIO REV. CODE ANN. § 3901.21(O) (West 2011).

<sup>276</sup> OHIO REV. CODE ANN. § 3901.22 (West 2011).

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*

<sup>279</sup> Ruth A. Moyer, *Why and How a Lower Federal Court’s Decision That a Search or Seizure Violated the Fourth Amendment Should be Binding In a State Prosecution: Using “Good Sense” and Suppressing Unnecessary Formalism*, 36 VT. L. REV. 165, 175 (2011) (explaining that “[t]he process of incorporation under the Fourteenth Amendment has ensured a minimum floor for the protection of federal constitutional rights that states may not descend below”).

protection of individual rights.<sup>280</sup> Currently, twenty-three states<sup>281</sup> have constitutions that either explicitly prohibit gender discrimination or contain provisions that are interpreted to provide more protection than the United States Constitution.<sup>282</sup> In this regard, the Ohio General Assembly should amend the Ohio Unfair and Deceptive Trade Practices Act to include a specific section about insurance coverage for surrogates, which prohibits the exclusionary practice and provides a civil remedy for the private individual.

By enacting a statute section substantially similar to the proposed model, the General Assembly can achieve two major objectives. First, the General Assembly can deter insurance companies from excluding maternity coverage for surrogate mothers. Second, the General Assembly can preemptively align the Ohio Statutory provisions with the PDA. By enacting a statutory provision that prohibits the exclusion of surrogates from maternity benefits, the Ohio General Assembly can be a leader in surrogate rights and advocacy. Furthermore, the assembly can prevent federal scrutiny which would result if a surrogate brought a cause of action under the PDA, saving money, time, and effort that would be tied up in future litigation. If the General Assembly enacts a statute to govern surrogacy insurance, it should adopt a statute substantially similar to the following model:

#### Surrogacy Coverage

##### (A) Definitions

- (1) As used in this section, “maternity benefits” means those benefits calculated to indemnify the insured for hospital and medical expenses fairly and reasonably associated with a pregnancy and childbirth.<sup>283</sup>
- (2) As used in this section, “surrogate” means a woman who carries out the gestational function and gives birth to a child for another, typically on behalf of an infertile couple, and who relinquishes any parental rights she may have upon the birth of the child. A surrogate mother may or may not be the genetic mother of a child.<sup>284</sup>

##### (B) It is an unlawful practice for any person to discriminate solely on the basis of pregnancy status, including discrimination in regard to rates, premiums, payments, and benefits<sup>285</sup>

- (1) in the issuance or operation of any type of insurance policy, plan, or coverage; or
- (2) in any pension, retirement plan, program, or coverage.

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<sup>280</sup> *Id.*

<sup>281</sup> LAPIDUS, *supra* note 123, at 9-10.

<sup>282</sup> LAPIDUS, *supra* note 123, at 9-10.

<sup>283</sup> OHIO REV. CODE ANN. § 3901.19 (West 2011).

<sup>284</sup> BLACK’S LAW DICTIONARY 1106 (9th ed. 2009).

<sup>285</sup> MONT. CODE ANN. § 49–2–309 (West 2011).

- (C) This section does not do any of the following:
- (1) mandate that insurers offer maternity services; or
  - (2) mandate the coverage of infertility related services.
- (D) Whoever violates this section has engaged in an unfair and deceptive act or practice in the business of insurance under sections 3901.19 to 3901.26 of the Revised Code.
- (1) Any person aggrieved with respect to any act that the person believes to be an unfair or deceptive act or practice in the business of insurance, can pursue any of the remedies available pursuant to Revised Code section 3901.22.
  - (2) Any person aggrieved with respect to any act that the person believes to be an unfair or deceptive act or practice in the business of insurance can pursue any of the remedies available pursuant to subsection (E) of this section.
- (E) Private Civil Remedies:
- (1) Whoever violates subsection (B) of this section is liable for compensatory and exemplary damages to the surrogate.
  - (2) A person who brings a civil action or proceeding pursuant to this division against a person who is alleged to have violated division (B) of this section may use in the action or proceeding reports of other incidents of known or suspected exclusions.

#### *A. The Procedural Process*

To bring a cause of action under this statutory scheme, a surrogate would make use of section 3901.22, which allows aggrieved persons to file an application with the superintendent of insurance to secure a hearing to determine if there was a violation.<sup>286</sup> The statute reads:

any person aggrieved with respect to any act that the person believes to be an unfair or deceptive act or practice in the business of insurance, as defined in section 3901.21 or 3901.211 of the Revised Code or in any rule of the superintendent, may make written application to the superintendent for a hearing to determine if there has been a violation.<sup>287</sup>

The application must state the grounds relied upon by the applicant when filing the application.<sup>288</sup> Upon review, if the superintendent finds (1) the application to have been made in good faith; (2) that the applicant would be aggrieved if the applicant's grounds are established; and (3) that the application stated grounds to justify a hearing, the superintendent shall hold a hearing to determine whether the act was a violation of section 3901.20.<sup>289</sup>

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<sup>286</sup> OHIO REV. CODE ANN. § 3901.22 (West 2011).

<sup>287</sup> *Id.*

<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

At the conclusion of the hearing, if the superintendent finds by written order that any person has violated section 3901.20, the superintendent shall issue an order requiring that person to cease and desist<sup>290</sup> from engaging in the violation.<sup>291</sup> In addition to the cease and desist order, the superintendent may impose any or all of the following administrative remedies upon the violator: (1) suspend or revoke the persons license to engage in the business of insurance;<sup>292</sup> (2) order the insurance company or agency not to employ the person;<sup>293</sup> or (3) order the person to return any payments received as a result of the violation.<sup>294</sup> As applied to surrogacy, none of these remedies would make the surrogate whole and alleviate the economic costs associated with pregnancy and delivery.

If the superintendent has reasonable cause to believe that an order issued pursuant to the aforementioned hearing has been violated in whole or in part, the superintendent may request that the attorney general commence and prosecute an action on behalf of the state against the person.<sup>295</sup> In addition to the penalties imposed by the superintendent, the court may impose additional remedies including but not limited to a civil penalty of no more than \$3,500 for each violation<sup>296</sup> or a civil penalty for a violation of the cease and desist order of no more than \$10,000 per violation.<sup>297</sup>

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<sup>290</sup> A cease and desist order is defined as “a court’s or agency’s order prohibiting a person from continuing a particular course of conduct.” BLACK’S LAW DICTIONARY 252 (9th ed. 2009).

<sup>291</sup> OHIO REV. CODE ANN. § 3901.221 (West 2011). If a violation of section 3901.221 “has caused, is causing, or is about to cause substantial and material harm, the superintendent of insurance may issue an order that the person cease and desist from any activity violating such section.” *Id.*

<sup>292</sup> OHIO REV. CODE ANN. § 3901.22(D)(1) (West 2011).

<sup>293</sup> *Id.*

<sup>294</sup> OHIO REV. CODE ANN. § 3901.22 (D)(3) (West 2011). The statute provides that “[i]f the superintendent issues an order pursuant to division (D)(3) of this section, the superintendent shall order the person to pay statutory interest on such payments.” OHIO REV. CODE ANN. § 3901.22(D)(4) (West 2011). Furthermore, “[i]f the superintendent does not issue orders pursuant to divisions (D)(3) and (4) of this section, the superintendent shall expressly state in the cease-and-desist order the reasons for not issuing such orders.” *Id.*

<sup>295</sup> The attorney general’s action may include the commencement of a class action suit on behalf of policyholders, subscribers, applicants for policies, and other customers for damages. OHIO REV. CODE ANN § 3901.221(E) (West 2011).

<sup>296</sup> OHIO REV. CODE ANN. § 3901.22 (West 2011) (states that “for each act or practice found to be in violation of section 3901.20 of the Revised Code, a civil penalty of not more than three thousand five hundred dollars for each violation but not to exceed an aggregate penalty of thirty-five thousand dollars in any six-month period, provided that a series of similar acts or practices prohibited by section 3901.20 of the Revised Code and committed by the same person but not in separate insurance sales transactions shall be considered a single violation.”).

<sup>297</sup> *Id.*

*B. Evaluation of the Provisions*

This proposed model provides a broad and expansive definition of both “maternity benefits” and “surrogacy.”<sup>298</sup> The definition of maternity benefits is expansive enough to include all medical expenses reasonably related to pregnancy and childbirth, but limited enough to exclude infertility expenses.<sup>299</sup> The definition of surrogacy is broad enough to include traditional and gestational surrogacy arrangements.<sup>300</sup> The provided definition of surrogacy will mandate coverage for any surrogate regardless of the genetic relationship of the child to the surrogate mother or intended parents. This definition is more effective than the definition provided by the Medicaid regulation wherein “‘surrogacy services’ means a woman agrees to become pregnant for the purpose of gestating and giving birth to a child she will not raise, but hand over to a contracted party.”<sup>301</sup>

This model incorporates language from section 49–2–309 of the Montana Revised Code, which prohibits discrimination in insurance policies based on sex.<sup>302</sup> In contrast to Montana, Ohio does not mandate that insurance companies offer maternity benefits, but Ohio has made other statutory amendments to eliminate sex discrimination in the insurance business.<sup>303</sup> The addition of subsection 3901.21(O) is an example of Ohio’s desire to eliminate discrimination based on sex. This subsection was amended by Amended Substitute Senate Bill 425<sup>304</sup> with the intent to eliminate discrimination on the basis of sex in the business of insurance.<sup>305</sup> The intent to eliminate sex discrimination is evidenced by the contextual sexually neutral amendments to various sections<sup>306</sup> and the addition of a new section<sup>307</sup> that precludes insurance companies from denying disability insurance because the applicant’s occupation is managing a household.<sup>308</sup>

Subsection (C) is included in the model to explicitly state that this statute does not require an insurer to offer maternity services, nor does the statute require that the

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<sup>298</sup> See model statute *supra* Part VI.

<sup>299</sup> OHIO REV. CODE ANN. §3901.19(C) (West 2011).

<sup>300</sup> BLACK’S LAW DICTIONARY 1106 (9th ed. 2009).

<sup>301</sup> See OHIO ADMIN. CODE 5101:3-4-28 (2011)(West).

<sup>302</sup> MONT. CODE ANN. § 49–2–309 ( 2011).

<sup>303</sup> *McDiarmid v. Econ. Fire & Cas. Co.*, 604 F. Supp. 105, 109 (S.D. Ohio 1984).

<sup>304</sup> *Id.*

<sup>305</sup> See Susan Garner Eisenman et al, *Toward Equality for Ohio Men and Women: The ERA and Legislative Response*, 37 OHIO ST. L. J. 537, 557 (1976).

<sup>306</sup> See OHIO REV. CODE ANN. § 3911.10 (West 2011) (“Proceeds Exempt from Claims of Creditors”); OHIO REV. CODE ANN. § 3911.11 (West 2011) (“Person May Insure Life of Spouse”); OHIO REV. CODE ANN. § 3911.12 (West 2011) (“Policy Assigned to a Married Person”).

<sup>307</sup> OHIO REV. CODE ANN. § 3901.21(N) (West 2011).

<sup>308</sup> OHIO REV. CODE ANN. § 3901.22 (West 2011) (provides that an individual has committed deceptive and unfair act by “refusing to make available disability income insurance solely because the applicant’s principal occupation is that of managing a household.”); See also *McDiarmid*, 604 F.Supp. at109.

insurer cover fertility services.<sup>309</sup> The PDA does not require that an insurer offer certain services either; instead, it requires that an employer and insurer offer the same level of coverage to all applicable employees.<sup>310</sup> The model statute remains congruent with that requirement.

The model also incorporates sections 3901.19-3091.221 of the Unfair and Deceptive Acts provision. The incorporation of these provisions keeps this statute consistent with the legislative intent to allow the superintendent of insurance to ensure that the laws relating to insurance are executed and enforced.<sup>311</sup> With the incorporation of this statute into the Unfair and Deceptive Acts provision, the superintendent remains empowered to hold hearings, order and enforce remedies, and request the assistance of the attorney general.<sup>312</sup>

The inclusion of subsection (E) grants surrogates the right to pursue private civil remedies.<sup>313</sup> By allowing the Commissioner of Insurance and the individual surrogate to seek remedies, this statute should deter insurance companies from engaging in the practice of excluding surrogate mothers from maternity benefits because the insurer could be held liable to two parties. Furthermore, the private remedy allows the surrogate mother to be made whole under the law. The current statute does not create private remedies when insurers engage in wrongful or deceptive trade practices. The Ninth Appellate District of Court of Appeals of Ohio held that “nowhere in the Ohio statutory or regulatory framework proscribing deceptive trade practices in insurance does it provide a civil remedy to a private party aggrieved by an insurer.”<sup>314</sup>

In that case, *Westfield Companies*, the Court of Appeals of Ohio had to determine whether Ohio Revised Code section 3901.21 created a civil remedy to a private individual.<sup>315</sup> The court reasoned that “[a] review of Ohio [Administrative] Code 3901-1-07 and [Revised Code] Chapter 3901 does not reveal any legislative intent to either create or deny a private cause of action in favor of an insured.”<sup>316</sup> The court further explained that “the inference of a private cause of action would be inconsistent with the existing administrative enforcement scheme now in force.”<sup>317</sup>

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<sup>309</sup> See model statute *supra* Part VI.

<sup>310</sup> LAPIDUS, *supra* note 123, at 30.

<sup>311</sup> *Strack v. Westfield Companies*, 515 N.E.2d 1005, 1008 (Ohio Ct. App. 1986).

<sup>312</sup> OHIO REV. CODE ANN. § 3901.221(E) (West 2011).

<sup>313</sup> See model statute *supra* Part VI.

<sup>314</sup> *Strack*, 515 N.E.2d at 1007.

<sup>315</sup> *Id.*

<sup>316</sup> *Id.* Four appellate districts in Ohio have held that the legislature neither established nor implied a right of private action by the beneficiary or insured where the insurance company failed to comply with all of the requirements of the Ohio Rev. Code. See *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 1995 Ohio App. LEXIS 2975 (Ohio Ct. App., July 12, 1995); *Springfield Impregnators v. Ohio State Life Ins. Co.*, 1994 Ohio App. LEXIS 1168 (Ohio Ct. App., Mar. 23, 1994); *Elwert v. Pilot Life Ins. Co.*, 602 N.E.2d 1219, (Ohio Ct. App., 1991); see also *Orra v. Ohio Fair Plan Underwriting Ass’n.*, 1988 Ohio App. LEXIS 1102 (Ohio Ct. App., Mar. 31, 1988).

<sup>317</sup> *Strack*, 515 N.E.2d at 1007.

Supplying a tort remedy will not necessarily further the policy behind Ohio Adm. Code 3901-1-07.<sup>318</sup>

In that case, Maynard and Dorothy Stracks' home was destroyed by fire, and the couple submitted an insurance claim under their comprehensive homeowner's insurance policy with Westfield Companies (Westfield).<sup>319</sup> After its investigation, Westfield refused to honor the Stracks' claim.<sup>320</sup> The Stracks filed a complaint against Westfield alleging breach of contract and tortious, bad-faith failure to settle their claim.<sup>321</sup> The Stracks eventually filed an amended complaint that requested damages for Westfield's alleged violation of insurance regulations.<sup>322</sup>

The court ultimately affirmed the district court ruling and reasoned that "the existing remedies [are] more than adequate to deter any unfair or deceptive trade practices."<sup>323</sup> As far as surrogacy arrangements are concerned, the existing remedies are not deterring the practice of excluding surrogate mothers from maternity coverage. With the rationale and precedent set by the court in *Westfield Companies*, surrogates are unable to recover the money needed to indemnify the costs incurred by the pregnancy.<sup>324</sup> Thus, a surrogate would be in same position as she would have been without a lawsuit, except for the legal expenses incurred from litigation.

## VI. CONCLUSION

Although surrogates provide incalculable benefits to people who are unable to have children, the current statutory scheme subjects surrogates to a legal minefield where remedies and rights are not clear.<sup>325</sup> Mathews,<sup>326</sup> C.S. and J.M.,<sup>327</sup> and Acosta-Yearick<sup>328</sup> are prime examples of the growing problem of excluding coverage for surrogate mothers. Permitting insurers, employers, and the government to exclude coverage for surrogate mothers vests the power in those actors to discriminate against a subgroup of women without a rational or legitimate reason.<sup>329</sup> Though discrimination may be permissible in other settings, Congress intentionally enacted statutes to prohibit pregnancy discrimination.<sup>330</sup>

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<sup>318</sup> *Id.*

<sup>319</sup> *Id.*

<sup>320</sup> *Id.*

<sup>321</sup> *Id.*

<sup>322</sup> *Id.*

<sup>323</sup> *Id.* at 1008.

<sup>324</sup> *See id.*

<sup>325</sup> Hansen, *supra* note 46.

<sup>326</sup> *See* Conley, *supra* note 1.

<sup>327</sup> *MercyCare Ins. Co. v. Wisconsin Comm'r of Ins.*, 786 N.W.2d 785, 789-801 (Wis. 2010).

<sup>328</sup> *See* Hausen, *supra* note 165.

<sup>329</sup> *MercyCare*, 786 N.W.2d at 801.

<sup>330</sup> *See e.g.* 42 U.S.C. § 2000(e)k.

Ohio's unique position in this area provides the Ohio General Assembly an opportunity to resolve the legal minefield surrounding surrogacy and pregnancy discrimination.<sup>331</sup> With this opportunity, the Ohio General Assembly should lead the way in developing a statutory scheme that prohibits the discriminatory practice of excluding surrogate mothers from maternity coverage. Specifically, Ohio legislators should enact a statute governing maternity coverage of surrogate mothers and incorporate it into the Deceptive and Unfair Acts provision.<sup>332</sup> By incorporating the new statute into the Deceptive and Unfair Acts provision, Ohio would keep the statutory scheme consistent and expressly prohibit the exclusionary practice.<sup>333</sup> Within the new statute, the Ohio legislatures should overtly regard the exclusionary practice as a deceptive and unfair act.<sup>334</sup> The Ohio legislatures should also allow surrogate mothers to pursue civil remedies against the actor to discourage the practice. In doing so, Ohio would set a precedent for the rest of the country by protecting the rights of the entire class of pregnant women.

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<sup>331</sup> See discussion *supra* Part V.

<sup>332</sup> See OHIO REV. CODE ANN. § 3901.22 (West 2011).

<sup>333</sup> See discussion *supra* Part VI.

<sup>334</sup> See discussion *supra* Part VI.