Marquette Law Review

Volume 107 | Issue 4 Article 7

2024

Delayed Emergency Care: How Professional Liability Insurance Affects Doctors' Decisions After *Dobbs* and What Needs to Change

Erin Stuart

DELAYED EMERGENCY CARE: HOW PROFESSIONAL LIABILITY INSURANCE AFFECTS DOCTORS' DECISIONS AFTER *DOBBS* AND WHAT NEEDS TO CHANGE

In 2022, the U.S. Supreme Court overruled Roe v. Wade*, ushering in a new era for abortion regulation. In some states, like Wisconsin, abortion was instantly re-criminalized. In rare but serious instances, health care providers faced the dilemma of deciding whether to delay care for emergency abortion services to save the life of a mother, for fear of criminal prosecution. As a result, some providers wondered if their professional liability insurance plan would provide a legal defense in the event of a criminal charge of illegally performing an abortion, though the facts may show it was to save the life of a mother.*

This Comment explores how professional liability insurance coverage is a solution to prevent providers from delaying care. Specifically, this Comment explains the current legal landscape of abortion in the state of Wisconsin and across the country, and explains how criminal acts exclusions in professional liability plans impact coverage. Next, this Comment discusses how plans may be construed through common law principles to find insurance coverage for providers, and thus provide them with a legal defense. After this explanation, this Comment describes how states, such as Wisconsin, have historically attempted to prevent defensive medicine and would thus also be served by my suggested solution. Lastly, this Comment considers remaining barriers to finding coverage for providers.

I. INTRODUCTION

In June 2022, *Roe v. Wade*[1] fell, and abortion once again became criminal in many states across the country.[2] In Wisconsin, an 1849 law went back into effect that prohibits all abortions except those necessary to save the life of the mother.[3] One obvious result of such a law is to put health care providers under extra scrutiny when they perform an abortion.[4] Stories across the country reveal a pattern of doctors delaying care in fear of being charged with a crime, then turning to their lawyers for advice regarding their medical decisions.[5] In the circumstances that a woman's life is questionably in danger, doctors are delaying care in fear of criminal charges, thus creating a scheme that encourages worse care for mothers. But there is more behind the story that causes delay in care and worse health outcomes: a problem with professional liability insurance.

All providers have professional liability insurance, as required by law. For example, chapter 655 of the Wisconsin Statutes details the requirements for Wisconsin providers.[6] Professional liability plans generally include language promising coverage for claims that arise out of the provider's professional duties.[7] Professional liability plans most obviously provide coverage for civil malpractice claims. However, these plans usually exclude coverage for intentional or criminal acts.[8] Therefore, in the context of an abortion to save the life of the mother, where doctors fear they may be perceived to be breaking the

1. 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

2. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 302 (2022).

3. WIS. STAT. § 940.04(5) (2021–22).

4. Abigail Abrams, *'Am I a Felon?' The Fall of* Roe v. Wade *Has Permanently Changed the Doctor-Patient Relationship*, TIME (Oct. 17, 2022, 7:00 AM), https://time.com/6222346/abortion-care-after-roe-doctors-lawyers [https://perma.cc/2PSX-ZEQ8].

5. *Id.*; *see also* Lauren Coleman-Lochner, Carly Wanna & Elaine Chen, *Doctors Fearing Legal Blowback Are Denying Life-Saving Abortions*, BL (July 12, 2022, 9:30 AM), https://www.bloomberglaw.com/bloomberglawnews/health-law-and-business/XEI66HVC000000?bna_news_filter=health-law-and-business#jcite [https://perma.cc/2Z6T-UM92].

6. *See generally* WIS. STAT. ch. 655 (2021–22).

7. *See infra* Section II.A.

8. *See infra* Section II.A.

law in the eyes of the state, doctors know their professional liability insurance may not cover their charges or legal defense if criminally charged. On the other hand, doctors know that if they delay care or purposefully wait for the mother's health to get worse, their professional liability insurance will cover any claims arising from malpractice. Thus, between the threat of having to foot one's own legal bills and face bankruptcy, or face a malpractice charge that insurance will cover, doctors are incentivized to delay care because the financial risk is lower. Quite simply, the balance of incentives weighs in favor of delayed care for women when high-risk complications occur.

This Comment argues that criminal acts exclusions in professional liability insurance policies should not be applicable when the facts show that the provider was acting in good faith to follow the law when terminating a pregnancy—that is, to save the life of the mother. This Comment will start by setting the scene of the current legal landscape surrounding abortion, and then explain criminal acts exclusions and how courts may find professional liability coverage for providers facing criminal charges. Next, it analyzes possible changes to Wisconsin's common law that would benefit providers seeking coverage, and a legal defense from their insurer for a criminal charge. Finally, this Comment explains the public policy reasons that professional liability insurance can be a key solution to mitigating delayed care and therefore improving quality of care for patients.

At the outset, it is important to establish that this discussion is purposefully limited to the context of those abortions where the facts show a mother's life was in danger and the doctor believed she was acting within the bounds of the law when terminating a pregnancy. Therefore, the abortions in this discussion are those that are not clearly criminal under the law—rather they are legal close calls. This Comment does not seek to make any statement or argument regarding elective abortions nor abortion policy in general, as those decisions are now made by legislatures and voters throughout the states. By narrowing in on emergency terminations of pregnancies, the goal of this Comment is to suggest a solution whereby patients do not suffer from delayed care.

II. THE CURRENT LANDSCAPE

Dobbs v. Jackson Women's Health Organization held that the right to abortion is not a right found in the Constitution, and that it is permissible for states to regulate abortion for legitimate purposes.[9] As a result of this landmark ruling, some states' pre-*Roe* laws swung back into effect, including

9. 597 U.S. 215, 300 (2022).

Wisconsin.[10] Wisconsin's relevant law provides that an abortion is legal only when necessary to save the life of the mother.[11] Such a standard is not clear-cut, as doctors question, "What does the threat of death have to be?"[12] And, "How imminent must it be?"[13] These unanswered questions leave providers wondering whether it is legally permissible to intervene by ending a pregnancy.[14]

Examples of providers delaying care are apparent across the country.[15] And the key driver is fear of criminal liability.[16] There are a multitude of pregnancy complications that may arise that risk a mother's life and may unfortunately require a termination of pregnancy. One of those common complications is when a woman's water breaks and she develops an infection.[17] Stacey Beck, an M.D. and Assistant Professor at the University of Pittsburgh, explains that, "if a woman breaks her water before 20 weeks . . . it is usually strongly recommended by medical professionals that she considers an abortion," primarily "because there is an extremely high risk that the infection inside of the uterus spreads very quickly into her bloodstream and she becomes septic. If she continues the pregnancy it comes at a very high risk of death."[18]

---

10. Phoebe Petrovic, *Wisconsin Faces a 'Tangled Series' of Abortion Laws Dating Back to 1849 as It Heads Into a Possible Post-Roe Future*, WIS. PUB. RADIO (June 4, 2022), https://www.wpr.org/wisconsin-faces-tangled-series-abortion-laws-dating-back-1849-it-heads-possible-post-roe-future [https://perma.cc/9W3R-6KNU].

11. WIS. STAT. § 940.04(5) (2021–22).

12. Anjali Nambiar, Shivani Patel, Patricia Santiago-Munoz, Catherine Y. Spong & David B. Nelson, *Maternal Morbidity and Fetal Outcomes Among Pregnant Women at 22 Week's Gestation or Less*, 227 AM. J. OBSTETRICS & GYNECOLOGY 648, 649 (2022).

13. *Id.*

14. Lauren Dunn & Kristen Dahlgren, *Pregnant Women in States with Abortion Bans Face the Reality of a Post-Roe World*, NBC NEWS (Aug. 8, 2022, 5:12 PM), https://www.nbcnews.com/health/health-news/abortion-laws-texas-wisconsin-forcing-pregnant-women-wait-care-rcna41678 [https://perma.cc/C3M2-XSMM].

15. Harris Meyer, *Malpractice Lawsuits Over Denied Abortion Care May Be on the Horizon*, CBS NEWS (June 23, 2023, 5:00 AM), https://www.cbsnews.com/news/abortion-laws-medical-malpractice-lawsuits-after-dobbs-ruling [https://perma.cc/SA3G-26DC].

16. Selena Simmons-Duffin, *For Doctors, Abortion Restrictions Create an 'Impossible Choice' When Providing Care*, NPR (June 24, 2022, 4:26 PM), https://www.npr.org/sections/health-shots/2022/06/24/1107316711/doctors-ethical-bind-abortion [https://perma.cc/6UM4-CWX7].

17. Reuters Fact Check, *Termination of Pregnancy Can Be Necessary to Save a Woman's Life*, REUTERS (Dec. 21, 2021, 10:39 AM), https://www.reuters.com/article/factcheck-abortion-false/fact-check-termination-of-pregnancy-can-be-necessary-to-save-a-womans-life-experts-say-idUSL1N2TC0VD [https://perma.cc/9DRB-7RG4].

18. *Id.*

Soon after *Dobbs*, a Wisconsin woman experienced a similar complication when her water broke at eighteen weeks.[19] She was already showing symptoms of an infection and wanted to terminate her pregnancy, but her doctor knew that it was legally a tough call.[20] This exemplifies how doctors feel pressure to delay care and wait for complications to become more obviously fatal to protect against legal liability. Moreover, a University of Texas Southwestern Medical Center report showed that among a sample of twenty-eight Texas women who were presented with a medical indication for delivery before twenty-two weeks had to wait nine days on average for care.[21] Additionally, 57% of the cases resulted in serious maternal morbidity compared to 33% who elected immediate termination under similar clinical circumstances in states with more lenient legislation.[22]

As for Wisconsin, it should be noted that at the time of this writing the state is likely on track to resume the legality of abortions. Soon after *Dobbs*, Attorney General Josh Kaul filed a lawsuit to repeal the 1849 law on the basis that it conflicts with the 1985 state abortion laws that allow for abortion up to the point of "viability."[23] A Dane County judge issued a preliminary ruling in July of 2023, stating she did not believe that the 1849 law made abortion illegal,[24] but rather it was her interpretation that the law made it illegal to attack a woman in an attempt to kill her unborn child.[25] Thus, she found the law inapplicable to consensual abortions.[26] As a result of this ruling, Planned Parenthood began resuming elective abortions in their Milwaukee and Madison clinics in September 2023.[27] In December of 2023, the judge reaffirmed her ruling.[28] If the case is accepted by the Wisconsin Supreme Court on appeal, because the court currently has a liberal majority, the result is likely to stand.[29] In fact, Attorney General Kaul has petitioned the Wisconsin Supreme Court to rule on whether a woman's right to an abortion is protected by the Wisconsin

19. Dunn & Dahlgren, *supra* note 14.

20. *Id.*

21. Nambiar, Patel, Santiago-Munoz, Spong & Nelson, *supra* note 12, at 649.

22. *Id.*

23. Complaint at 3, Kaul v. Kapenga, No. 2022CV001594, 2022 WL 3134176 (Wis. Cir. Ct. June 28, 2022).

24. Julie Bosman, *Planned Parenthood Will Once Again Provide Abortions in Wisconsin*, N.Y. TIMES (Sept. 14, 2023), https://www.nytimes.com/2023/09/14/us/wisconsin-abortion-planned-parenthood.html [https://perma.cc/VS8V-4SYY].

25. Associated Press, *Wisconsin Judge Reaffirms July Ruling that State Law Permits Consensual Abortions*, CBS NEWS MINN. (Dec. 6, 2023, 6:03 AM), https://www.cbsnews.com/minnesota/news/wisconsin-judge-reaffirms-july-ruling-that-state-law-permits-consensual-abortions [https://perma.cc/VE84-4AH8].

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

Constitution.[30] Relatedly, Planned Parenthood of Wisconsin also filed a petition asking the Wisconsin Supreme Court to answer whether the right to an abortion is protected by the Wisconsin Constitution.[31] Thus, an answer to the constitutional question may be on the horizon.

When this Comment is published, it will have been two years since *Dobbs*. States will understandably continue to create their own unique laws regarding abortion, as *Dobbs* empowers states to do.[32] Resultantly, the legal landscape may be constantly changing state by state. Thus, the solutions that are prescribed in this Comment may refer to Wisconsin case law but can be a solution for any state to reduce delayed care for mothers.

As will be discussed further below, professional liability plans cover claims arising out of malpractice but generally not criminal acts.[33] That is, if a provider delays care, the provider risks a malpractice suit, which will be covered by a provider's professional liability plan. Therefore, the insurer would cover damages caused by malpractice and the fees associated with the defense of the claim.[34] In this scenario, a provider escapes having to pay their own legal fees. On the other hand, when terminating a pregnancy to save the life of the mother in circumstances where it is legally a close call, the provider's liability insurance will likely not cover the fees arising from a criminal defense.[35] In this scenario, a doctor risks financial loss or bankruptcy from legal fees arising from a criminal charge.[36] Ultimately, because doctors cannot rely on insurance covering a potential criminal act, doctors have a financial incentive to delay care and to risk facing a malpractice claim rather than a criminal charge. Given

30. Margaret Faust, *Wisconsin AG Hints at Broader Abortion Lawsuit if State Supreme Court Agrees to Hear Case*, WIS. PUB. RADIO (Mar. 14, 2024), https://www.wpr.org/news/wisconsin-ag-hints-at-broader-abortion-lawsuit-if-state-supreme-court-agrees-to-hear-case [https://perma.cc/5AHQ-B8VB].

31. Todd Richmond, *Planned Parenthood Asks Wisconsin Supreme Court to Find 1849 Abortion Law Unconstitutional*, PBS (Feb. 22, 2024, 1:38 PM), https://www.pbs.org/newshour/politics/planned-parenthood-asks-wisconsin-supreme-court-to-find-1849-abortion-law-unconstitutional#:~:text=MADISON%2C%20Wis.,Supreme%20Court%20invalidated%20Roe%20v [https://perma.cc/W7KN-3MWG].

32. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 302 (2022) ("We end this opinion where we began. Abortion presents a profound moral question. The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. *Roe* and *Casey* arrogated that authority. We now overrule those decisions and return that authority to the people and their elected representatives.").

33. Bernard D. Hirsh, *Insuring Against Medical Professional Liability*, 12 VAND. L. REV. 667, 668–69 (1959).

34. *Id.* at 668.

35. *Id.* at 669.

36. *See* Coleman-Lochner, Wanna & Chen, *supra* note 5.

this reality since *Dobbs*, providers have requested that their professional liability plans cover not only civil malpractice claims, but also legal expenses incurred from defending against a criminal charge of abortion.[37] Without such coverage, there is a perverse incentive to delay care, which is not good for women as patients.

As long as criminal act exclusions preclude coverage for doctors who act in good faith to save the life of a mother, the incentive will remain. The next Section will introduce professional liability insurance, criminal acts exclusions, and recommend a change in interpretation of such exclusions.

A. Criminal Acts Exclusions

In rare but serious circumstances, doctors are delaying care for women with high-risk pregnancy complications. One way to mitigate this problem is to allow professional liability insurance to cover a provider's criminal charges that arise from their good faith efforts to save the life of a mother. However, a professional liability insurance plan generally contains a criminal acts exclusion, which excludes coverage for intentional or criminal acts.[38] A primary solution is for courts to read into these agreements an assumption that, when a provider terminates a pregnancy in good faith believing she is acting within the bounds of the law, it is not an intentional or criminal act.

Courts traditionally refuse to permit insurance coverage for criminal conduct because the purpose of insurance is to protect against unforeseen events, not to protect behaviors that society deems morally reprehensible.[39] One may fairly question whether a doctor's criminal acts should ever be covered by insurance. But first, one must understand professional liability insurance and its exclusions.

A "professional liability policy is usually divided into three sections: Insuring Agreements, Exclusions, and Conditions."[40] In the insuring agreement, the insurer agrees to pay damages of injury arising out of the rendering of professional services and also generally agrees to defend any claim brought against the professional alleging such injury.[41] Described another way,

---

37. *New Insurance Coverage Approved to Help Doctors Who Face Criminal Charges for Providing Legal Abortions*, OFF. INS. COMM'R: WASH. STATE (Sept. 27, 2022), https://www.insurance.wa.gov/news/new-insurance-coverage-approved-help-doctors-who-face-criminal-charges-providing-legal [https://perma.cc/9P64-UYCV].

38. Daniel Eidsmoe & Pamela Edwards, *Home Liability Coverage: Does the Criminal Acts Exclusion Work Where the "Expected or Intended" Exclusion Failed?*, 5 CONN. INS. L.J. 707, 718 (1999).

39. Michael F. Aylward, *Does Crime Pay? Insurance for Criminal Acts*, 65 DEF. COUNS. J. 185, 185 (1998).

40. Hirsh, *supra* note 33, at 668.

41. *Id.*

"[p]rofessional liability policies . . . typically cover claims arising out of any 'wrongful act' or 'any negligent act, error or omission' in connection with the policyholder's perform[ance] of a professional service."[42]

The exclusions state what the policy will not cover and usually say something like, "the policy does not apply . . . to such risks as injury arising out of the performance of a criminal act."[43] Thus, policies usually expressly exclude coverage for intentional or criminal acts, and insurers heavily rely on these broad exclusions to avoid coverage.[44] However, these exclusions are not bulletproof, and in some cases, courts have found coverage.[45]

In analyzing the question of whether professional liability insurance could cover an insured for a criminal charge of abortion, it is wise to consider if there are any other scenarios where providers have achieved coverage for a criminal act from their insurers. In the medical setting, the most obvious example is—oddly enough—courts requiring insurance policies to cover damages arising from a provider's sexual assault of a patient.[46] The reasoning is that an insurer has an obligation to defend its insured when alleged molestation is an "inseparable part of" or "inextricably intertwined" with medical treatment.[47] To be clear, this is a minority approach, and the majority rule is that professional liability policies do not provide coverage for sexual assault.[48] Nonetheless, applying the minority's approach to the context of providers who may terminate a pregnancy believing she is acting in good faith under the law to save the life of the mother, an insurer could have the obligation to defend that provider because the alleged criminal act of abortion was an "inseparable part" and "inextricably intertwined" with medical care.

For example, in *Robert G. ex rel. Steven G. v. Herget*, the Wisconsin Court of Appeals addressed whether a provider's sexual assault of his patients could be deemed "professional services" under his professional liability insurance policy, thus requiring his insurer to cover the claim.[49] Specifically, two patients sued their dentist, Herget, and after settling the case, the insurer sought

42. Mark Grabowski, *United States: Professional Liability Coverage for Knowing, Intentional and Criminal Acts*, MONDAQ (July 11, 2010), https://www.mondaq.com/unitedstates/insurance-laws-and-products/104108/professional-liability-coverage-for-knowing-intentional-and-criminal-acts [https://perma.cc/G232-8EAJ].

43. Hirsh, *supra* note 33, at 669.

44. Grabowski, *supra* note 42.

45. Aylward, *supra* note 39, at 185.

46. *See generally* David S. Florig, *Insurance Coverage for Sexual Abuse or Molestation*, 30 TORT & INS. L.J. 699 (1995).

47. *Id.* at 723.

48. *Id.* at 724.

49. 178 Wis. 2d 674, 678, 505 N.W.2d 422 (Ct. App. 1993).

reimbursement from the dentist on the basis that his actions were not covered in the policy.[50] The language of the policy stated that the insurer covered "damages resulting from . . . providing or withholding of professional services."[51]

The court rejected the dentist's arguments that coverage existed simply because the sexual assault of his patients "flowed from" dental services he rendered.[52] Rather, the court explained "[s]omething more than an act flowing from mere employment or vocation is essential" in determining what constitutes a professional service.[53] Moreover, the act must be a "medical . . . act or service that causes the harm, not an act or service that requires no professional skill."[54] Therefore, for an act to be a professional service that triggers coverage in the policy, there has to be a causal connection or nexus between the professional service performed and the harm done.[55] Thus, in *Robert G. ex rel. Steven G.*, the court concluded that the rendering of dental services had no connection to sexually assaulting patients. Therefore, coverage did not attach because the act was not a professional service.[56]

Of note, the court also distinguished *Robert G. ex rel. Steven G.* from previous cases, one of which held that when a psychiatrist engaged in sexual acts with his patients, he was acting "in the course of his professional services," and therefore the acts were covered under his professional liability policy.[57] The court explained that because psychiatry inherently involves the emotions of a patient and a close relationship between the patient and psychiatrist, engaging in a sexual relationship with a patient amounts to a failure to provide proper treatment.[58] Thus, courts on a few occasions have reasoned that "a sexual relationship between therapist and patient cannot be viewed separately from the therapeutic relationship that has developed between them."[59]

In determining if something is done as a "professional service," the key factor to consider is whether there is a causal connection between the professional service performed—which requires specialized skill—and the harm to the patient.[60] To reiterate, unlike the dentist whose professional dental

50. *Id.* at 680–81.

51. *Id.* at 680.

52. *Id.* at 689–90.

53. *Id.* at 688 (quoting Marx v. Hartford Accident & Indem. Co., 157 N.W.2d 870, 871–72 (Neb. 1968)).

54. *Id.* at 689 (quoting Roe v. Fed. Ins. Co., 587 N.E.2d 214, 217 (Mass. 1992)).

55. *Id.*

56. *Id.* at 678.

57. *Id.* at 686 (quoting L.L. v. Med. Protective Co., 122 Wis. 2d. 455, 462, 362 N.W.2d 174 (Ct. App. 1984)); *see also* Zipkin v. Freeman, 436 S.W.2d 753, 761–62 (Mo. 1968).

58. *Robert G. ex. rel Steven G.*, 178 Wis. 2d at 685–86.

59. *Id.* (quoting *L.L.*, 122 Wis. 2d at 462).

60. *Id.* at 689.

services had no nexus to the harm of sexual assault, courts have held there was such a nexus between a psychiatrist's mishandling of a patient's emotions in the course of performing professional services and the harm done to the patient.[61]

These cases are relevant to the topic of abortion because they show that courts are willing to find liability coverage for the criminal acts of providers—at least when there is a connection between the professional service and the alleged harm. Applying this legal framework to a scenario where a provider performs an abortion to save the life of the mother, it becomes apparent that the professional service has a clear nexus to the alleged crime. Put differently, a provider is engaging in a professional service that requires skill when one makes the judgment to terminate a pregnancy to save a mother's life. Because the alleged crime flows from the professional service, the coverage from the policy should apply.

B. Coverage for Criminal Charges

Now that it is established that criminal acts may be covered by professional liability insurance in civil suits, this Comment goes one step further by arguing that liability insurance may be interpreted to cover providers against the charge of abortion in criminal suits.

Though it is generally accepted that professional liability policies do not extend coverage to criminal acts, let alone criminal suits, it is not unheard of for a court to order a professional liability insurer to defend an insured in a criminal suit.[62] For example, in *Kurland v. Fireman's Fund Insurance Co.*, the Eastern District of New York ordered a professional liability insurer to pay for a lawyer's defense in a criminal action, after the insurer had denied coverage for his criminal conduct.[63] Specifically, the lawyer was indicted on several charges for conspiring to defraud three of his clients—all lottery winners.[64] As is also standard in Wisconsin, the New York court explained that a policy must be interpreted consistent with the "reasonable expectation of the average insured at the time of contracting."[65] Moreover, the burden falls on the insurer to show that an exclusion applies. Before an insurer can avoid coverage, the

61. *See, e.g.*, *id.* at 686.

62. Edward F. Novak & Brea M. Croteau, *"Vague" Insurance Policy Requires Insurer to Defend Lawyer in Criminal Case, New York Judge Rules*, NAT'L L. REV. (July 11, 2022), https://www.natlawreview.com/article/vague-insurance-policy-requires-insurer-to-defend-lawyer-criminal-case-new-york [https://perma.cc/A24Z-ZB4Q].

63. No. 21-06440, slip op. at 1 (E.D.N.Y. Dec. 14, 2022).

64. *Id.* at 3.

65. *Id.* at 8; *see also Robert G. ex. rel Steven G.*, 178 Wis. 2d at 684.

insurer must show the exclusion has no other reasonable interpretation.[66] The insurance policy had promised to pay "Damages for Claims" made against the policyholder and declared a duty to defend against "any suit" naming the policyholder.[67] The key issue was whether the definition of "Claim" in the policy was subject to any other reasonable interpretation.[68]

The insurer argued that the language defining the word "Claim" excluded coverage for proceedings seeking non-monetary relief; therefore, the action against the lawyer should not be a covered claim because the action was seeking non-monetary relief such as imprisonment.[69] However, the court rejected this argument by explaining that the insurer failed to establish that the definition of "Claim" could have no other reasonable interpretation.[70] Moreover, the term "suit"—which was provided in the definition for "Claim"—could reasonably be interpreted as either a criminal or civil suit.[71] Thus, the court ruled the ambiguous terms of the policy supported a holding that the insurer had a duty to defend the lawyer against a criminal suit that sought imprisonment—a form of non-monetary relief.[72]

Although rare, cases like *Kurland* stand for the proposition that courts can, and will, find coverage for insureds facing criminal action. Therefore, it is not overly presumptuous to conclude that courts ought to find coverage for a provider charged with criminally providing an abortion when done to save the life of the mother. Professional liability cases have a central idea in common: policies are supposed to be construed from the standpoint of what a reasonable person in the position of the insured would understand the policy to mean.[73] Of course, the exact language of the policy matters, but there is a reasonable presumption that obstetricians would assume a professional liability policy would cover claims against them that arise from their practice—and now, with the change in abortion laws, more claims against them may be criminal charges.

Though professional liability litigation generally boils down to contract law, there is room for courts to presume coverage exists in certain circumstances. It is established in case law that when a contract is ambiguous, courts will construe the policy in favor of the insured.[74] This is an interpretive

66. *Kurland*, slip op. at 6.
67. *Id.* at 2.
68. *Id.* at 10.
69. *Id.*
70. *Id.*
71. *Id.* at 8–9.
72. *Id.* at 11.
73. *See, e.g.*, Robert G. *ex rel.* Steven G. v. Herget, 178 Wis. 2d 674, 684, 505 N.W.2d 422 (Ct. App. 1993).
74. Folkman v. Quamme, 2003 WI 116, ¶ 13, 264 Wis. 2d 617, 665 N.W.2d 857.

principle known as *contra proferentem*.[75] To illustrate, when there are genuine ambiguities regarding whether providing an abortion to save the life of the mother is an "intentional" or "criminal" act, and thus excluded in a policy, a court should construe this ambiguity in favor of the health care provider.

To give a concrete example, the document explaining the University of Wisconsin-Madison's professional liability coverage for health care providers states that "[c]overage applies for all acts or omissions which are in the course and scope of employment or agency."[76] One could reasonably assume that coverage would apply for an obstetrician who, in the course of her employment, makes a judgment call to terminate a pregnancy to save the life of the mother but now finds herself charged with a crime. Moreover, if a policy excludes criminal or intentional acts from coverage, it is rather ambiguous in this scenario as to whether the obstetrician was acting intentionally or criminally, thus a court could deem coverage exists.

Some professional liability experts strongly assert that a policyholder should not assume that an exclusion defeats coverage.[77] As one expert asserts, "[j]ust because terms such as 'knowing,' 'intentional' or even 'criminal' appear in the claim . . . does not mean that the claim is excluded."[78] Additionally, some have argued that criminal acts exclusions should not apply when the insured did not intend to cause injury, or that criminal acts exclusions should only apply if the insured has been convicted of a criminal offense.[79] Such solutions would certainly weigh in favor of a provider receiving a criminal defense from their liability insurer.

III. PROPOSED CHANGES TO WISCONSIN INSURANCE COMMON LAW

The previous Section illustrates how courts could interpret ambiguous policy provisions in favor of providers, but one may easily imagine a policy that unambiguously denies coverage to a reproductive health provider for a criminal charge. As state common law is the primary source of insurance law,[80] solutions to this problem will therefore require changes in states' common law. Importantly, if one has a basic understanding of insurance, they know that the McCarran Ferguson Act exempts the business of insurance from *most* federal

75. KENNETH ABRAHAM & DANIEL SCHWARCZ, INSURANCE LAW AND REGULATION: CASES AND MATERIALS 45 (Foundation Press 7th ed. 2020).

76. UNIV. OF WIS.-MADISON, PROFESSIONAL LIABILITY PROTECTION FOR COVERED UW-MADISON HEALTH CARE PROVIDERS AND LEARNERS 1 (2021) (alteration in original).

77. Grabowski, *supra* note 42.

78. *Id.* (alteration in original).

79. Aylward, *supra* note 39, at 197.

80. ABRAHAM & SCHWARCZ, *supra* note 75, at 10.

legislation and establishes that insurance regulation is a matter of state law.[81] This Part explains the basic law of insurance and offers solutions by using Wisconsin as an example.

After an event occurs, an insurance company determines whether they have a duty to defend or indemnify under the policy.[82] When deciding whether an insurer has a duty to defend, Wisconsin courts follow the four corners rule.[83] This legal principle prevents courts from looking to extrinsic evidence to determine whether a duty to defend exists.[84] Rather, the allegations in the complaint are compared to the entire insurance policy—without consideration of extrinsic facts—to determine whether the insurer has a duty to defend.[85] However, Wisconsin is among the minority of states that strictly adhere to the four corners rule with absolutely no exceptions.[86] While there is disagreement regarding the rule's implications, many argue the strict rule favors insurers in close cases.[87] By not allowing known extrinsic facts to be considered, Wisconsin courts "turn[] a blind eye to . . . the duty to investigate . . . and the broad application of the duty to defend."[88] In other words, adherence to an unforgiving and strict interpretation of the four corners rule prevents the insured from using relevant extrinsic facts to prove an insurer's duty to defend exists.

Although the term "four corners rule" is not expressly stated in the case, the Wisconsin Supreme Court set forth the general rule in the 1967 case, *Grieb v. Citizens Casualty Co. of New York.*[89] In this case, the plaintiff—an architect who was tasked with supervising the construction of the Mitchell Park Domes in Milwaukee—faced a conspiracy suit brought by taxpayers.[90] After

81. 15 U.S.C. § 1012(a)–(b) (stating that state law is immune unless the federal act specifically relates to the business of insurance).

82. *See* Water Well Sols. Serv. Grp., Inc. v. Consol. Ins. Co., 2016 WI 54, ¶ 6, 369 Wis. 2d 607, 881 N.W.2d 285.

83. The Wisconsin Supreme Court first set out this general rule in 1967. In *Grieb v. Citizens Casualty Co. of New York*, the court held that an insurer's duty defend depends on a comparison of the "four corners" of the complaint and the "four corners" of the policy. 33 Wis. 2d 552, 555, 559, 148 N.W.2d 103 (1967).

84. *Water Well*, 2016 WI 54, ¶ 15.

85. *Id.*

86. As of 2016, Wisconsin is one of fourteen states that do not recognize any exceptions to the four corners rule. As Justice Bradley explained in a dissenting opinion on the matter, "[t]he majority's decision today is at loggerheads with the national trend. It puts Wisconsin among the 14 and ever dwindling number of jurisdictions that have clearly declined any exceptions to the four corners rule." *Id.* ¶ 42 (A.W. Bradley, J., dissenting).

87. The plaintiff in *Water Well* argued that the four corners rule encourages insurers to refuse to defend a policy holder in ambiguous cases. *Id.* ¶ 27.

88. *Id.* ¶ 44 (A.W. Bradley, J., dissenting) (alteration in original).

89. *Id.* ¶ 19; *see also generally* Grieb v. Citizens Cas. Co. of N.Y., 33 Wis. 2d 552, 148 N.W.2d 103 (1967).

90. The claim against Grieb alleged he had conspired with a leading bidder to ensure that the bidder had an advantage in being chosen to construct the domes. *Grieb*, 33 Wis. 2d at 554–56.

successfully defending against the suit, the plaintiff brought a claim against his insurer claiming the insurer had a duty to defend under his professional liability errors-and-omissions policy.[91] Specifically, the policy provided it would pay sums the policyholder may become obligated to pay as damages arising from an act of negligence, error, mistake, or omission while rendering professional services.[92] The plaintiff argued that even though the alleged charge was for conspiracy, his insurer had a duty to defend against any act of negligence, error, mistake, or omission; and he therefore contended his insurer had the duty to defend against the conspiracy charge as long as it could also be interpreted as him committing "any act."[93] However, the court did not agree with this argument, stating the clause did not cover "any act" of negligence, omission, error, or mistake; but rather, it covered liability arising from such acts.[94] Thus, because the damages arose from conspiracy, the policy did not cover his expenses.[95] The key to this conclusion is the four corners rule because the allegations in the complaint (which alleged conspiracy) had to match the terms in the policy (which covered negligence, omission, mistakes, and errors).[96] In denying any extrinsic consideration, the court explained that it does not matter that "the facts alleged might under other circumstances be characterized as . . . negligence, error, mistake or omission."[97] In other words, even though his actions that led to conspiracy could also be considered in another light as negligence, the court was nevertheless bound to the four corners of the contract.

Thus, Wisconsin has a long history of disallowing extrinsic considerations when interpreting an insurer's duty to defend. In 2016, the Wisconsin Supreme Court, in *Water Well Solutions Service Group, Inc. v. Consolidated Insurance Co.*,[98] reaffirmed that Wisconsin follows the strictest version of the four corners rule, and further asserted that "*Grieb* did not adopt any exceptions to the four-corners rule."[99] But in the context of reproductive health providers seeking coverage in the rare but important context of providing an abortion to save the life of the mother, this rule may need to change.

---

91. *Id.* at 555–56.

92. *Id.*

93. *Id.* at 556.

94. *Id.* at 558.

95. *Id.*

96. *See id.* at 557–58.

97. *Id.* at 559.

98. Water Well Sols. Serv. Grp., Inc. v. Consol. Ins. Co., 2016 WI 54, ¶ 24, 369 Wis. 2d 607, 881 N.W.2d 285.

99. There was a passing reference in *Grieb* that could be read to imply there may be an exception to the four corners rule, but the Wisconsin Supreme Court "unequivocally" asserted no such exception in fact exists. *Id.*

For example, consider the provider who has been charged with a criminal act of abortion, but her action in another light shows she acted in good faith to save the life of a mother as a function of her profession. By not allowing any extrinsic facts to be considered when determining a duty to defend, the provider loses out on a legal defense regardless of whether the charge arose from her profession or whether she has a good case. Moreover, it should matter to the court that the facts alleged under other circumstances may be characterized as a provider responsibly doing her job.

On the same day that the Wisconsin Supreme Court heard *Water Well*, the court also heard a related case, *Marks v. Houston Casualty Co.*,[100] regarding whether the court can consider exclusions in an insurance policy when determining if there is a duty to defend.[101] In *Marks*, a policyholder argued that a court may not consider exclusions in the policy if the insurer had unilaterally rejected a duty to defend without first petitioning the court to determine if coverage even exists.[102] In short, this would mean the four corners rule would only contain the complaint and the insuring agreement—and no exclusions. For context, it should be noted that in *Marks*, once the insured sued his insurer, the circuit court found that the insuring agreement offered an initial grant of coverage, but in the next step of analysis the court of appeals determined coverage was denied under the policy's exclusion.[103] The court rejected the insured's argument that the exclusion should not apply and concluded that exclusions are to be considered in the duty to defend analysis.[104]

Though the court denied this legal concept, interpreting policies in this way would certainly favor providers trying to leverage coverage from their professional liability insurer. For example, imagine a provider whose policy states that "[c]overage applies for all acts or omissions which are in the course and scope of employment or agency."[105] This may be interpreted as an initial grant of coverage. However, in this case the policy's exclusion may unambiguously deny coverage for any criminal acts. Under the plaintiff's argument in *Marks*, the court should grant coverage in favor of the medical provider according to the language of the insuring agreement, and then not consider the exclusion whatsoever.[106] Though disregarding an exclusion contradicts the interpretive principle in insurance law that all provisions in the policy are to be given effect,[107] in the current legal landscape, professional acts

100. 2016 WI 53, 369 Wis. 2d 547, 881 N.W.2d 309.
101. *Id.* ¶ 31.
102. *Id.*
103. *Id.* ¶ 47.
104. *See id.* ¶ 82.
105. UNIV. WIS.-MADISON, *supra* note 76.
106. *See Marks*, 2016 WI 53, ¶ 31.
107. ABRAHAM & SCHWARCZ, *supra* note 75, at 45.

that were once considered legitimate care and would be covered—like providing an abortion in the event of emergency—could now fall under a criminal acts exclusion. Thus, for the special category of reproductive health providers, such exclusions could possibly not be given weight or effect.

Finally, the strongest way for providers to overcome unambiguous policies is for Wisconsin to adopt a strong version of the reasonable expectations doctrine—but only for reproductive providers seeking a legal defense and indemnification from their professional liability insurer. The reasonable expectations doctrine is rooted in the idea that courts should honor the "objectively reasonable expectations" of insureds even when terms of the insurance contract negate such expectations.[108] The doctrine, in its strongest form, is a mechanism to overcome unambiguous language to favor coverage for an insured.[109] Importantly, there are at least four approaches to the doctrine,[110] ranging from mild versions that are generally accepted to strong versions some have characterized as "judicial manipulation."[111] Indeed, the strongest doctrinal application is certainly controversial,[112] but a limited application is reasonable and a possible solution.

Wisconsin Supreme Court case law shows that the court has applied the reasonable expectations doctrine under all four of the approaches.[113] However, in the vast majority of cases, the court applies the weakest version of the doctrine.[114] This version of the doctrine considers the reasonable expectations of the insured as a tool to resolve ambiguity.[115] Thus, after a term is found to be ambiguous in the process of construing the contract in favor of the insured, the court then considers the reasonable expectations of the insured.[116] In sum, this common approach used by the Wisconsin Supreme Court is noncontroversial, and simply incorporates the reasonable expectations doctrine into the premise of *contra proferentem*.[117] But this approach offers no assurance to a

108. *Id.* at 59 (quoting Robert E. Keeton, *Insurance Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961, 967 (1970)).

109. *Id.*

110. David J. Seno, *The Doctrine of Reasonable Expectations in Insurance Law: What to Expect in Wisconsin*, 85 MARQ. L. REV. 859*,* 864 (2002).

111. *Id.* at 865.

112. *Id.* at 859 ("Different approaches to the doctrine have emerged, but the stronger approaches, willing to ignore clear insurance contract language and nonetheless honor the insured's reasonable expectations, have caused the most controversy.").

113. *See, e.g.*, *id.* at 883 nn.195–98.

114. *Id.*

115. *Id.* at 873.

116. *Id.* at 874.

117. *See* ABRAHAM & SCHWARCZ, *supra* note 75, at 65.

reproductive health provider who has an unambiguous policy that denies an insurer's duty to defend against a criminal charge, thereby encouraging delayed care.

Therefore, to offer such assurance, the strong form of the reasonable expectations doctrine could be adopted in Wisconsin in the rare circumstance a provider may be criminally charged and expect her insurer to provide a defense. The strong version allows courts to find coverage consistent with the insured's reasonable expectations even if the policy is unambiguous in denying coverage.[118] Defenders of this approach argue that insurance policies contain one-sided terms and lack any sort of bargaining between the two parties, and thus, courts themselves must monitor the fairness of the arrangement.[119] In return, courts can ensure that the reasonable expectations of the policyholder are satisfied.[120] Moreover, this approach can target "situational unfairness," where standard form insurance policies that might be fair and enforceable in many other contexts produce unfair coverage restrictions when applied to a unique policyholder.[121]

There is little question that criminal acts exclusions are generally fair and should be enforced; yet, reproductive health providers as a group are unique policyholders who face the distinct risk of being charged with a crime for performing their jobs. Because providers have a reasonable expectation to receive a criminal defense from their professional liability insurer, the reasonable expectation doctrine ought to be used in court as a safeguard to ensure that providers can give appropriate care in emergency situations without fear of bankruptcy from footing their own legal defense.

IV. DUTY TO DEFEND

Professional liability policies generally establish an insurer's duty to indemnify and to defend.[122] With this in mind, an insurer's duty to defend is broader than the duty to indemnify.[123] This is because after the insurer has complied with its duty to defend, a court may still determine that the claim was not covered and therefore no indemnity is owed.[124] While an insurer can unilaterally decide no duty to defend exists because of an exclusion in the policy, Wisconsin courts highly encourage insurers to follow one of four

118. *Id.* at 66.

119. Mark C. Rahdert, *Reasonable Expectations Revisited*, 5 CONN. INS. L.J. 107, 127 (1998).

120. *Id.*

121. *Id.* at 128; Seno, *supra* note 110, at 867–68.

122. ABRAHAM & SCHWARCZ, *supra* note 75, at 615.

123. Water Well Sols. Serv. Grp., Inc. v. Consol. Ins. Co., 2016 WI 54, ¶ 17, 369 Wis. 2d 607, 881 N.W.2d 285.

124. ABRAHAM & SCHWARCZ, *supra* note 75, at 624.

judicially preferred approaches.[125] First, an insurer may request a bifurcated trial on the issue of coverage and file a motion to stay the liability proceedings until the coverage determination.[126] Second, an insurer may enter into a non-waiver agreement where the insurer defends the insured while the insured recognizes that the insurer still has the right to contest coverage.[127] Third, an insurer may proceed under a reservation of rights whereby the insured provides his or her own defense, but the insurer is still liable for incurred legal costs.[128] Finally, the insurer may provide initial coverage but seek a declaratory judgment to determine whether coverage exists.[129]

All four of these scenarios would likely be more beneficial for a medical provider than the insurer outright and unilaterally denying coverage. A provider needs a legal defense, and some of these options provide it. Moreover, in the event an insurer moves for declaratory judgment, the health care provider may have a chance in proving the ambiguity of the policy, which is to be construed in favor of the insured.[130] It is in these court actions that the judge ought to find coverage for providers facing criminal abortion charges. This is imperative for the public policy reasons described next.

V. BAD PUBLIC POLICY: DEFENSIVE MEDICINE

Obviously, as a basic function of their profession, providers try to avoid bad patient outcomes and improve the health of their patients. Additionally, a primary reason to avoid bad patient outcomes is to decrease the risk of medical malpractice proceedings.[131] In this way, malpractice liability is a positive legal mechanism to promote and enforce standards of care.[132] Malpractice suits are one of many ways the law regulates health care professionals to promote quality of care.[133] However, too much of a good thing can have negative results. For example, in the 1970s the health care industry experienced what was dubbed a "malpractice crisis" where malpractice suits significantly rose, the size of

125. *Water Well*, 2016 WI 54, ¶ 27.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. Folkman v. Quamme, 2003 WI 116, ¶ 13, 264 Wis. 2d 617, 665 N.W.2d 857.

131. Andrew T. Bodoh, *Terminating Hope: Defensive Medicine in Cases of Poor Prenatal Diagnoses*, 12 LIBERTY L. REV. 1, 7 (2019).

132. BRIETTA R. CLARK, ERIN C. FUSE BROWN, ROBERT GATTER, ELIZABETH Y. MCCUSKEY & ELIZABETH PENDO, HEALTH LAW: CASES, MATERIALS, AND PROBLEMS 35 (9th ed. 2022).

133. *Id.*

judgments substantially increased, liability insurance costs skyrocketed, and, in return, providers started practicing "defensive medicine."[134]

The concept of defensive medicine—where the fear of lawsuits influences physicians' medical decisions—is deeply rooted in the medical field.[135] At the outset, defensive medicine can be both negative and positive, and both types drive up the costs of health care.[136] Positive defensive medicine occurs when a physician orders many diagnostic tests (to the point of being unnecessary) or offers excess consultation, treatment, or hospitalization—all to avoid the potential of malpractice liability.[137] Negative defensive medicine occurs when physicians avoid risky procedures that could have benefited a patient—also to avoid malpractice liability.[138] Of course, sometimes such decisions are medically correct, but other times the decision may be directed entirely by fear of litigation.[139] It ought to be the goal of both the medical and legal communities to ensure the latter type of decisions do not happen.

In fact, it has been a policy goal of state governments and the federal government to limit the incentives to practice defensive medicine.[140] A 2002 Department of Health and Human Services report explained that excessive litigation is the main culprit in incentivizing defensive medicine, and thus impedes efforts to improve quality of care.[141] Prior to this federal report, Wisconsin addressed defensive medicine in 1975 by implementing a system to decrease the practice: the Wisconsin Injured Patients and Families Compensation Fund.[142] Under chapter 655 of the Wisconsin Statutes, every health care provider in the state must maintain liability coverage of at least $1 million per malpractice claim, and $3 million for all claims each year—or

134. The Wisconsin legislature recognized and detailed these problems in their legislative findings when creating Chapter 37, Laws of 1975, which established a Patient Compensation Fund in response to the perceived malpractice crisis. Maurin v. Hall, 2004 WI 100, ¶ 116, 274 Wis. 2d 28, 682 N.W.2d 866.

135. *See id.*; *see also* JOSE R. GUARDADO, MEDICAL PROFESSIONAL LIABILITY INSURANCE INDEMNITY PAYMENTS, EXPENSES AND CLAIM DISPOSITION, 2006–2015, AM. MED. ASS'N. 1, 5 (2018).

136. M. Sonal Sekhar & N. Vyas, *Defensive Medicine: A Bane to Healthcare*, 3 ANNALS MED. & HEALTH RSCH. 295, 295 (2013).

137. *Id.*

138. *Id.*

139. *Id.*

140. *See* Mayo v. Wis. Injured Patients & Fam. Comp. Fund, 2018 WI 78, ¶ 14, 383 Wis. 2d 1, 914 N.W.2d 678.

141. OFF. OF THE ASSISTANT SEC'Y FOR PLAN. & EVACUATION, U.S. DEP'T HEALTH & HUM. SERVS., CONFRONTING THE NEW HEALTH CARE CRISIS: IMPROVING HEALTH CARE QUALITY AND LOWERING COSTS BY FIXING OUR MEDICAL LIABILITY SYSTEM 1 (2002), https://aspe.hhs.gov/sites/default/files/migrated_legacy_files//40241/litrefm.pdf [https://perma.cc/T7RS-C86X].

142. *See* WIS. STAT. § 655.27 (2021–22).

qualify as self-insured.[143] Then, the fund guarantees payment for medical malpractice by paying the excess amount of the provider's statutorily mandated coverage amount.[144] In other words, the provider's primary insurer pays $1 million on a claim and then the state's compensation fund kicks in to pay the remaining amount. Mandatory participation in the fund—which limits the amount a provider will be liable for—along with statutory caps on noneconomic damages have the effect of disincentivizing defensive medicine.[145] Because doctors know their malpractice liability insurance will only have to pay a limited judgment and the state fund will cover the rest, there is an incentive not to fear litigation and rather proceed with clinical expertise.

This long history of the interplay between fear of malpractice liability and professional liability insurance exemplifies how public policy has purposefully been aimed at promoting quality of care by disincentivizing defensive medicine. However, now that reproductive providers have a new type of liability to fear—a criminal charge—a new type of incentive exists to practice defensive medicine.

A *JAMA Health Forum* article points out that under criminal abortion laws, the question remains as to how the criminal statutes interact with malpractice liability.[146] When the standard of care in a given medical crisis is to provide an abortion, but that standard of care is now illegal, the doctor possibly acts negligently if she does not provide the abortion, but she acts criminally if she does provide the procedure.

> Where legal uncertainty exists, physicians can be counted on to fill the void with very cautious behavior. Until physicians feel secure practicing emergency care according to their clinical judgment, a new and pernicious form of defensive medicine is likely to predominate, and delays and denials of emergency care will exact a bitter human toll.[147]

Consequently, ensuring that professional liability insurance covers providers in the event of a criminal charge of abortion is key to allowing providers to administer care in their best judgment, thus mitigating the practice of defensive medicine. To reiterate, one can reasonably imagine the calculation a provider may go through in determining whether to perform an abortion to

143. WIS. STAT. § 655.23(4)(b)(2) (2021–22); *Mayo*, 2018 WI 78, ¶ 5.

144. WIS. STAT. § 655.27(1) (2021–22).

145. *Mayo*, 2018 WI 78, ¶ 47.

146. *See* Michelle M. Mello, *Resuscitating Abortion Rights in Emergency Care*, JAMA HEALTH F., Sept. 8, 2022, at 1, https://jamanetwork.com/journals/jama-health-forum/fullarticle/2796297 [https://perma.cc/7SGN-XPTV].

147. *Id.* at 2.

save the life of a mother. In a close call situation, the provider can either negligently delay care, or act quickly while fearing a criminal charge. The current incentive system clearly encourages delayed care for mothers because committing potential malpractice has fewer consequences for multiple legal reasons.[148] A Wisconsin doctor who is required to participate in the fund knows her legal defense would be paid for, and her insurer knows the maximum amount it would be liable for is $1 million.[149] In fact, a common complaint of the Injured Patients and Families Compensation Fund from a plaintiff perspective is that it encourages insurance companies to fight claims in court, rather than settle, because a company knows its maximum loss is $1 million.[150] In other words, in the event of malpractice, a provider's insurer will likely defend against the claim. Moreover, a doctor's lawyer would know that it is statistically difficult for a plaintiff to win a medical malpractice case in Wisconsin[151] and thus could advise that delaying care is legally a low risk.

To prove a medical malpractice claim in Wisconsin, the plaintiff must establish a breach of a duty owed that resulted in injuries or damages.[152] In short, the plaintiff proves a "negligent act or omission that causes an injury."[153] The doctor is required to use the standard of care and skill which a reasonable doctor would use in a similar circumstance, and if a doctor fails to conform to this standard, then he or she is negligent.[154] However, a doctor is not negligent for failing to use the highest degree of care or skill, and he or she is not negligent simply because a bad result occurred.[155] Moreover, establishing causation in medical matters that are beyond the common knowledge of jurors requires expert testimony.[156] In most circumstances, there are major consequences for committing malpractice because state licensure boards are required to report disciplinary actions, and hospitals are supposed to report adverse events.[157] But under the new legal landscape, it is likely more challenging to find an expert to convincingly testify that given the circumstances a provider acted unreasonably by delaying care. In this legal reality, the incentive structure favors delaying

148. *See id.*

149. *See* WIS. STAT. § 655.23(4)(b)(2) (2021–22).

150. Cary Spivak, *Medical Malpractice Lawsuits Plummet in Wisconsin*, MILWAUKEE J. SENTINEL (June 28, 2014, 5:00 PM), https://archive.jsonline.com/watchdog/watchdogreports/medical-malpractice-lawsuits-plummet-in-wisconsin-b99290329z1-264436841.html/ [https://perma.cc/A63M-7GX8].

151. *Id.*

152. Estate of Hegarty *ex rel.* Hegarty v. Beauchaine, 2006 WI App 248, ¶ 153, 297 Wis. 2d 70, 727 N.W.2d 857.

153. Paul v. Skemp, 2001 WI 42, ¶ 17, 242 Wis. 2d 507, 625 N.W.2d 860.

154. Wis. JI–Civil 1023 (2022).

155. *Id.*

156. *Hegarty*, 2006 WI App 248, ¶ 154.

157. CLARK, BROWN, GATTER, MCCUSKEY & PENDO, *supra* note 132, at 48.

care—even if negligently—because the legal consequences are minimal in comparison to self-funding a criminal defense.

On the criminal side of the equation, prosecutors may generally decide to not charge doctors in emergency cases where it is a legally close call,[158] but the mere threat of a criminal charge may be enough to change physician behavior. Anecdotally, providers appear to be more afraid of having to foot their own legal bill and absorb massive costs than they are afraid of actually being convicted of the crime.[159] Most providers think they can win the case, but the real concern is how much money they spend on their victory.[160] For this reason, providers expect financial help from their employers and insurers in the event of a criminal charge.

VI. OTHER TRIED SOLUTIONS

Admittedly, ensuring that professional liability insurance covers criminal charges in these rare medical situations is not the most obvious or straightforward solution to ensuring abortions in emergency situations are not delayed. But this would be a safety net for providers to give timely care to their patients. More obviously, changes in legislation that make criminal abortion laws less ambiguous, or even define what "saving the life of a mother" means, may be a preferred step for most providers. However, as long as legislative solutions in numerous states across the country remain in political limbo, this solution through the courts and insurance companies remains viable.

Meanwhile, federal solutions to ensure emergency abortion care have found mixed results, thus exemplifying the need for a liability insurance safety net. One strategy was to use an already existing law, the Emergency Medical Treatment and Labor Act (EMTALA), which creates a duty for emergency departments within hospitals to provide stabilizing care to any patient with an emergency medical condition.[161] In July of 2022, the Centers for Medicare and Medicaid Services (CMS) released guidance that EMTALA requires hospital staff and physicians to provide abortion care when necessary to stabilize a

158. Mello, *supra* note 146, at 2.

159. Eli Cahan, *Lawsuits, Reimbursement, and Liability Insurance—Facing the Realities of a Post-Roe Era*, 328 JAMA 515, 516 (2022) ("If and when that case goes to court, the provider is going to win . . . [b]ut the problem is that by the time that happens, the provider has had to absorb the cost of defending themselves. They're going to lose a whole lot just by winning.").

160. *Id.*

161. *See* 42 U.S.C. § 1395dd. EMTALA was passed in 1986 to address the rising problem of "patient dumping" whereby hospitals were denying treatment for the uninsured. EMTALA requires hospitals to provide medical screening and stabilizing care for any patient during a medical emergency. Gatewood v. Wash. Healthcare Corp., 933 F.2d 1037, 1039 (D.C. Cir. 1991).

patient's condition.[162] Moreover, the guidance stated that the physician's legal duty under EMTALA preempts any "directly conflicting state law or mandate."[163] However, Texas sued to enjoin the Department of Health and Human Services (HHS) from enforcing its interpretation of EMTALA in the guidance.[164] The Northern District of Texas agreed with the state by holding that CMS exceeded its statutory authority and misconstrued EMTALA.[165] Specifically, the judge explained that the government failed to consider the physician's obligation to not only stabilize the mother, but also the obligation to stabilize the unborn child.[166] The judge explained that this dual obligation certainly causes a dilemma, but it is a conflict that EMTALA leaves unanswered.[167] Thus, because EMTALA remains silent on abortion and protects the mother and the child, it is a conflict to be resolved by doctors in accordance with state laws.[168] This suit has made its way to the Fifth Circuit Court of Appeals; and in January of 2024, the court upheld the district court's decision to enjoin the federal government from implementing the guidance in Texas.[169]

On the other hand, a federal court judge enjoined Idaho from enforcing its criminal abortion law in emergency situations, holding that the law directly conflicted with mandated care required under EMTALA.[170] The Idaho law, which is the most stringent in the country, bans all abortions and only offers a physician an affirmative defense if she can convince a jury that performing an abortion was necessary to prevent death of the mother.[171] Thus, the burden is on the physician to prove her innocence in court. The judge further explained that the intended effect of Idaho's law is to decrease the availability of emergency abortion care.[172] As a result, delayed care is obviously incentivized:

> The primary obstacle is delayed care. Under the status quo, physicians "rely upon their medical judgement or best

162. Memorandum from the Dirs., Quality, Safety & Oversight Grp. (QSOG) and Surv. & Operations Grg. (SOG), Dep't of Health & Hum. Servs., Ctrs. for Medicare & Medicaid Servs. to State Surv. Agency Dirs. (July 11, 2022) (rev. Aug. 25, 2022), https://www.cms.gov/files/document/qso-22-22-hospitals.pdf [https://perma.cc/5SB7-ZVPB].

163. *Id.*

164. Texas v. Becerra, 623 F. Supp. 3d 696, 708 (N.D. Tex. 2022), *aff'd*, 89 F.4th 529 (5th Cir. 2024).

165. *Id.* at 724.

166. *Id.* at 712.

167. *Id.* at 730.

168. *Id.* at 726.

169. Texas v. Becerra, 89 F.4th 529, 546 (5th Cir. 2024).

170. United States v. Idaho, 623 F. Supp. 3d 1096, 1115 (D. Idaho 2022), *stayed pending appeal* 83 F.4th 1130 (9th Cir. 2023), *rehearing en banc and vacated* 82 F.4th 1296 (9th Cir. 2023), *cert. granted sub nom.* Idaho v. United States, 144 S. Ct. 541 (2024).

171. *Id.* at 1101.

172. *Id.* at 1114.

> practices for handling pregnancy complications." But because of the criminal abortion statute, "providers will likely delay care for fear of criminal prosecution and loss of licensure." The incentive to do so is obvious—delaying care so that the patient gets nearer to death and thus closer to the blurry line of the affirmative defense. Providers may also delay care to allow extra time to consult with legal experts.[173]

Thus, the Idaho District Court reasoned that the purpose of EMTALA—to eliminate situations where emergency care is withheld—is frustrated by abortion laws that inhibit emergency care.[174] Therefore, the court prohibited state officials from criminally prosecuting providers who provide an abortion to avoid placing the health of mothers in jeopardy—pursuant to the protection of EMTALA.[175] The Idaho case also remains fluid; in September 2023 a three-judge panel of the Ninth Circuit stayed the lower court decision pending appeal.[176] However, in October 2023, the Ninth Circuit reviewed the decision en banc and reinstated the district court's injunction, which allowed providers to provide abortions when EMTALA is deemed to apply.[177] Then, on January 5, 2024, the U.S. Supreme Court agreed to hear a challenge to Idaho's abortion law and stayed the preliminary injunction that had been put in place by the United States District Court for the District of Idaho, which allowed the Idaho abortion ban to go back into effect.[178] The U.S. Supreme Court heard oral arguments on April 24, 2024, and is expected to decide the outcome by summer of 2024.[179]

In Wisconsin, EMTALA is currently applicable—as only Texas and Idaho are exempted from HHS's guidance for now.[180] However, considering the split

---

173. *Id.* (internal citations omitted).

174. *Id.* at 1112.

175. *Id.* at 1117; 42 U.S.C. § 1395dd(e)(1)(A)(i)–(iii).

176. Cameron McCue, *EMTALA Exception to Idaho's Abortion Law Is in Effect for Now*, HOLLAND & HART (Nov. 27, 2023), https://www.hollandhart.com/emtala-exception-to-idahos-abortion-law-is-in-effect-for-now [https://perma.cc/W8YP-CWU8].

177. *Id.*

178. *See* Idaho v. United States, 144 S. Ct. 541 (2024) (mem.); Adam Liptak, *Supreme Court to Hear Challenge to Idaho's Strict Abortion Ban*, N.Y. TIMES, (Jan. 5, 2024), https://www.nytimes.com/2024/01/05/us/politics/supreme-court-idaho-abortion-ban.html#:~:text=The%20Supreme%20Court%20agreed%20on,that%20allowed%20for%20some%20exceptions [https://perma.cc/JS3M-WYLM].

179. Amy Howe, *Supreme Court Divided Over Federal-State Conflict on Emergency Abortion Ban*, SCOTUSBlog (Apr. 24, 2024, 3:45PM), https://www.scotusblog.com/2024/04/supreme-court-divided-over-federal-state-conflict-on-emergency-abortion-ban/ [https://perma.cc/Z2WJ-N6NL].

180. *Id.*; *see also* Texas v. Becerra, 623 F. Supp. 3d 696, 739 (N.D. Tex. 2022), *aff'd*, 89 F.4th 529 (5th Cir. 2024).

decisions, EMTALA as a protection for emergency abortion care is not on steady grounds. In the meantime, other pathways to ensuring emergency care need to be developed and pursued.

VII. INDEMNIFICATION FOR CRIMINAL ACTS

Returning to the idea earlier discussed—that reproductive health providers are at risk of committing a crime for simply performing their job—there is an argument that reproductive health providers ought to be indemnified like corporate directors and officers are indemnified. For example, Wisconsin Statutes section 181.0872 provides:

> A corporation shall indemnify a director or officer, to the extent that he or she has been successful on the merits or otherwise in the defense of a proceeding, for all reasonable expenses incurred in the proceeding if the director or officer was a party because he or she is a director or officer of the corporation.[181]

Director and officer (D&O) insurance could be a model for coverage because reproductive health providers are arguably susceptible to prosecution due to the nature of their job. While many providers may not fall within the legal definition of directors or officers, hospitals and health systems should be maintaining coverage (whether self-funded or insured) that guarantees indemnity for the expenses providers incur in the event of a criminal charge. Notably, a subsection of the law exempts indemnity for violations of criminal law, unless the director or officer had reason to believe his or her conduct was lawful.[182] If this kind of coverage was available to employees, a doctor could also argue he or she had reason to believe providing the abortion in a close call circumstance was lawful. Therefore, indemnity would attach to the employee.

In fact, Wisconsin Statutes section 180.0856(1) states:

> A corporation shall indemnify an employee who is not a director or officer of the corporation, to the extent he or she has been successful on the merits . . . in defense of a proceeding, for all reasonable expenses incurred . . . if the employee was a party because he or she was an employee of the corporation.[183]

These protections that directors and officers are afforded through Wisconsin law are the protections from which reproductive health providers could also benefit.

181. WIS. STAT. § 181.0872(1) (2021–22).
182. WIS. STAT. § 181.0872(2)(a) (2021–22).
183. WIS. STAT. § 180.0856(1) (2021–22).

VIII. REMAINING BARRIERS TO COVERAGE

Hurdles remain before professional liability insurance can become a strong safety net for providers facing a criminal abortion charge. Such potential barriers come from the state, insurance companies, and possibly health systems themselves.

A. State-Level Barriers

The crux of the argument is that professional liability insurance should cover providers' criminal abortion charges because the claim would arise out of the provider's professional duties. However, it remains unclear whether the Wisconsin Office of the Commissioner of Insurance will allow insurance to be available for these purposes. For example, in Washington, the state's largest medical malpractice insurer began providing coverage for the costs associated with defending against a criminal action arising from providing patient care, including abortion services.[184] The state's insurance commissioner approved the coverage, which would provide up to $250,000 to reimburse a provider who successfully defends against a criminal charge.[185]

However, there are obvious differences between Washington and Wisconsin; importantly, abortion has been legal in Washington since the fall of *Roe* unlike Wisconsin.[186] Therefore, unlike Washington, the Wisconsin Commissioner of Insurance would likely be impeded by the implications of Wisconsin's own abortion laws. The primary function of the Wisconsin Office of the Commissioner of Insurance is to ensure that insurance policies sold within the state meet the requirements set out in state law.[187] Thus, one could argue that it would be counter to the intended public policy of the abortion law for a state agency to allow for insurance to cover costs associated with a criminal charge of abortion. Moreover, Wisconsin's administrative insurance code provides that liability insurance issued by the state's liability plan shall exclude coverage for criminal acts.[188] However, just because the state's fund

184. OFF. INS. COMM'R: WASH. STATE, *supra* note 37.

185. *Id.*

186. *Id.*; Sarah Lehr & Margaret Faust, *Abortions Resume in Wisconsin After 15 Months of Legal Uncertainty*, NPR (Sept. 21, 2023, 11:39 AM), https://www.npr.org/sections/health-shots/2023/09/21/1200610927/abortions-resume-in-wisconsin-after-15-months-of-legal-uncertainty [https://perma.cc/FGB4-4LS3].

187. *About the Wisconsin Office of the Commissioner of Insurance*, WIS. OFF. COMM'R INS., https://oci.wi.gov/Pages/AboutOCI/AboutOCI.aspx#:~:text=OCI%27s%20major%20functions%20include%3A,with%20Wisconsin%20laws%20and%20rules [https://perma.cc/3GTU-48JN] (Mar. 29, 2022).

188. WIS. ADMIN. CODE INS. § 17.25(3)(c) (2021–22).

cannot cover criminal acts does not mean the state cannot approve a private insurer to provide such coverage in their policies.[189] Also of note, the Commissioner of Insurance is appointed by the governor,[190] thereby providing a mechanism for the executive to leverage its own policy preferences.

In sum, the Office of the Commissioner of Insurance may have a pathway to ensuring greater liability coverage for providers if that is the policy position of the state's executive branch. This would also require insurance companies to apply for approval of such coverage.

B. Insurers as a Barrier to Coverage

It remains unclear how most malpractice insurers will handle abortion-related lawsuits.

It is rather self-explanatory that when demand for an insurer's resources rise, the insurer will raise prices and possibly narrow the policy provisions to limit the risk the policy assumes.[191] Insurers could theoretically view abortion-related prosecutions as a risk and, in return, raise premiums.[192] Moreover, malpractice insurance is one of the few factors which accounts for how physician payments are determined.[193] With this in mind, if the cost of malpractice insurance increases, then it is possible that the cost for obstetric services could also increase. To counter this narrative, one may point out that criminal prosecution for emergency abortion care is currently not prevalent (likely because of EMTALA's current protections). Because such prosecutions are so rare,[194] insurers would hardly be bearing more risk and thus a raise in premiums would likely be minimal.

---

189. Of note, section 17.35(3)(a) states that a policy "*may*" exclude coverage for criminal acts. WIS. ADMIN. CODE INS. § 17.35(3)(a). This does not imply that it *must*.

190. Nathan Houdek, appointed by Governor Tony Evers, is currently the Insurance Commissioner. *Senior Leadership*, WIS. OFF. COMM'R INS., https://oci.wi.gov/Pages/AboutOCI/MgmtStaff.aspx [https://perma.cc/3QBJ-29NN] (May 6, 2024).

191. *Risk Control in Professional Liability Insurance*, 1960 DUKE L.J. 106, 107.

192. Cahan, *supra* note 159, at 516.

193. Relative value units (RVUs) determine the value of a service or a procedure and are a component in the Resource-Based Relative Value Scale (RBRVS). RBRVS is the methodology used by the Centers for Medicare and Medicaid Services and most private payers to determine physician reimbursement. There are generally three types of RVUs: physician work, practice expense, and professional liability insurance. Thus, if the cost of professional liability insurance increases, the RVU increases in the equation and therefore increases the overall cost of the service. *See* AAPC Thought Leadership Team, *What Are Relative Value Units (RVUs)?*, AAPC, https://www.aapc.com/resources/what-are-relative-value-units-rvus [https://perma.cc/KB52-JVPE] (Dec. 18, 2023).

194. Bridget Balch, *What Doctors Should Know About Emergency Abortions in States with Bans*, ASS'N OF AM. MED. COLL. (Sept. 26, 2023), https://www.aamc.org/news/what-doctors-should-know-about-emergency-abortions-states-bans#:~:text=To%20date%2C%20no%20physician%20has,should%20they%20perform%20an%20abortion [https://perma.cc/6QB8-G8BU].

Additionally, insurers will likely try to deny coverage and will at times unilaterally decide coverage does not exist. In response, courts can hold insurers accountable for breaching their duty to defend. An alternative idea is for insurance companies or self-funded organizations to use an independent review organization to give an independent analysis as to whether coverage applies, before outright denying a claim.[195] This will help weed out cases that are clearly a violation of the law (i.e., a doctor providing an abortion without evidence of risk to the mother) from those that are legitimately done to save a life. In sum, the insurer should not be so quick to deny coverage.

C. Health Systems Could Do More

Of course, health systems are on the front lines of the *Dobbs* decision and have adapted to the changing legal landscape, which is no easy task. But health systems bear significant responsibility in providing support for their providers, and therefore should be ensuring liability coverage exists for providers performing abortions in emergency situations. Many hospital systems are self-insured (i.e., self-funded) and manage their own professional liability insurance funds.[196] Though self-insured plans still have to comply with Wisconsin Statutes chapter 655 according to administrative code,[197] the current legal landscape provides an opportunity for the self-insured hospital systems to work with the state's insurance commissioner to write and approve policies that offer better support for providers.[198] Along those lines, a potential shift in the administrative code that grants more coverage to self-funded liability plans may be in order.

IX. CONCLUSION

The overturning of *Roe v. Wade* has led to the re-criminalization of abortions in many states, including Wisconsin. While abortion access has been hotly debated for decades, with a variety of opposing viewpoints, most agree

195. An IRO review is common, or even required, when coverage regarding health plans is in dispute. *See Independent Review Process-Denied Health Claim*, WIS. OFF. COMM'R INS., https://oci.wi.gov/Pages/Consumers/IROConsumer.aspx [https://perma.cc/4AU5-7VRP] (Dec. 8, 2021).

196. For example, the Medical College of Wisconsin's Office of Risk Management administers the organization's self-insured professional liability insurance fund. *See Professional Liability*, MED. COLL. WIS., https://www.mcw.edu/education/graduate-medical-education/mcwah-gme-resources/professional-liability [https://perma.cc/SGT8-NRDF].

197. WIS. ADMIN. CODE INS. § 17.50(3)(d) (2021–22).

198. WIS. STAT. § 655.23(3)(a) (2021–22) ("The commissioner may establish conditions that permit a self-insurer to self-insure for claims that are against employees who are health care practitioners and that are not covered by the fund.").

that abortion care in an emergency setting is appropriate and necessary to save a woman's life. While Wisconsin's criminal abortion law, for example, provides such an exception, there is no clear legal definition of what saving a life even means. Therefore, providers are left wondering if they are breaking the law and exposing themselves to criminal liability and legal fees by providing abortions in emergency situations. The obvious incentive is to delay care and wait for complications to worsen—even if this is negligent or inconsistent with the standard of care. To be clear, this is a problem present in many states across the country.

In the past, Wisconsin already addressed the issue of defensive medicine caused by the fear of malpractice suits, and now it and other states must address defensive medicine caused by fear of criminal liability for performing an abortion to save a mother's life. A necessary safety net to rebalance the incentive structure is to ensure that professional liability insurers are defending providers against criminal claims related to emergency abortion care. This will give assurance to providers that they can act quickly for the benefit of a woman's health without risking bankruptcy. This proposal certainly calls for a change in how one thinks about insurance for criminal acts, but ultimately, a narrow shift is necessary to protect women from delayed care and adverse health outcomes.

ERIN STUART*

* J.D. 2024, Marquette University Law School, B.A. 2019, University of Portland. I would like to thank the entire staff at the *Marquette Law Review* for editing and polishing this Comment as it was truly a team effort. I am very grateful to the leadership of the *Marquette Law Review* for giving me the opportunity to publish this Comment, which has inarguably been the highlight of my time in law school.

* * *