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Prescription for Fairness: Health Insurance Reimbursement for Viagra and Contraceptives

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COMMENTS

PRESCRIPTION FOR FAIRNESS: HEALTH INSURANCE REIMBURSEMENT FOR VIAGRA AND CONTRACEPTIVES

INTRODUCTION

On March 27, 1998 the Food and Drug Administration approved Viagra, an oral treatment for male impotence.[1] Patient demand for the drug resulted in 270,000 prescriptions in little over a month.[2] As news reports tallied the insurers who would cover or deny coverage for Viagra, old arguments for health insurance coverage of prescription contraceptives[3] quickly resurfaced.[4] More health plans were caught in the act of reimbursing for Viagra than for prescription contraceptives.[5] Still, about half of insurers denied reimbursement for Viagra.[6]

Viagra relieves impotence so that a man may perform sexually. Contraceptives protect a woman against unwanted pregnancy. Thus, both Viagra and contraceptives serve the same goal: to enable sex at will. Drugs which enable sex at will are medically necessary if (1) medically diagnosed impotence renders sexual intercourse impossible, or (2) unprotected sexual intercourse risks pregnancy when conception is undesired. Health insurance plans which cover other prescription drugs should

1. *See California Man Sues Aetna Over Its Refusal to Cover Anti-Impotence Drug Viagra*, MEALEY'S LITIG. REP.: MANAGED CARE, June 10, 1998, *available in* Westlaw, 2 No. 11 MLRMC 4.

2. *See id.*

3. *See* Debra Baker, *Viagra Spawns Birth Control Issue*, ABA JOURNAL, Aug. 1998, at 36.

4. *See id.* According to the author, expectations were low for a Congressional hearing "anytime (sic) soon" of The Equity in Prescription Insurance and Contraceptive Coverage Act, a bill introduced into the Senate in May 1997, which would require insurers to cover prescription contraceptives if they cover other prescription drugs. *See id.* at 37. *See also infra* text accompanying notes 224-29. Despite the pessimism, the Senate conducted a hearing on the proposal in July, 1998 only a few months after Viagra was approved. *See* David S. Broder, *Thanks, Viagra*, WASHINGTON POST, July 26, 1998.

5. *See infra* text accompanying notes 60, 180-85.

6. *See infra* text accompanying note 60.

reimburse men and women equitably for drugs which achieve the same goal with regard to the human reproductive system.

Part I of this comment outlines the status of health insurance in the United States. Significant trends include managed care arrangements such as Health Maintenance Organizations. Also, federal incentives legislated by the Employee Retirement Income Security Act of 1974 (ERISA) encourage employers to self-insure health benefits plans.

Part II reviews the introduction of Viagra, an oral prescription drug for the treatment of impotence. Impotence affects millions of American men, who previously had a choice of only painful, unpleasant, or more expensive remedies. Part III examines the insurance issues surrounding Viagra. Insurers may deny coverage of the drug based upon a determination that it is not a medical necessity but rather a lifestyle drug.[7] Or, insurers may cite the high cost of the drug as a basis of denial.[8] Policy language and the reasonable expectations of the insured may determine whether coverage can be denied.[9]

Part IV reviews health insurance coverage of prescription contraceptives for women. In the absence of demonstrated willingness of the insurance industry to act on its own, recent legislative developments at federal and state levels propose to mandate prescription contraceptive coverage for ERISA-regulated plans and others.

Part V concludes by calling for the health insurance industry to recognize that sexual (reproductive) health is medically necessary, and as a result, health insurers who provide prescription drug coverage must equitably include treatments for the prevention of unwanted pregnancy as well as for impotence. Insurers who intend to exclude such coverage must explicitly state the exclusions to enable consumers to select appropriate plans for their needs when a choice is available. Insurers' reluctance to cover newly approved drugs because of cost concerns must be minimized in order to encourage research and development of new therapies to improve the quality of life.

I. HEALTH INSURANCE

A. *Current Status*

Managed care and self-insured employers represent the major trends in private

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7. *See Kaiser Permanente Cites Cash Flow in Denying Coverage for Anti-Impotence Drug Viagra,* MEALEY'S LITIG. REP.: MANAGED CARE, June 24, 1998, *available in* Westlaw, 2 No. 12 MLRMC 4 [hereinafter MEALEY'S LITIG. REP., Kaiser Permanente].

8. *See id.*

9. *See* Witcraft v. Sundstrand Health and Disability Group Benefit Plan, 420 N.W.2d 785, 790 (Iowa 1988).

health insurance.[10] Managed care enterprises include Preferred Provider Organizations (PPOs)[11] and Health Maintenance Organizations (HMOs).[12] In order to accomplish the objective of controlling health care costs, physicians in both PPOs and HMOs must subject their medical decisions to utilization review.[13] Utilization review is a means to "control costs and preserve profits" by "prospective or ongoing review of medical decisions."[14] The decisions under review range from diagnostic test authorization to length of hospital stay.[15]

Employers may fully self-insure, "becom(ing) their own insurers,"[16] and may contract with conventional insurers or third party administrators to handle claims.[17] Or they may partially self-insure by carrying a portion of their employees' medical expenses and contracting with an insurer that processes claims and "insures against extraordinary large claims exceeding a set level."[18] Self-insuring allows employers to avoid state insurance regulations under the Employee Retirement Income Security Act of 1974 (ERISA).[19]

Health benefit plans not governed by ERISA are subject to state regulation.[20] While the insurance business is considered interstate commerce, typically subject to control by the federal government,[21] Congress has deferred insurance regulation to the states.[22]

B. ERISA Implications for Health Insurance

More than half of American workers are insured by health benefit plans governed by the Employee Retirement Income Security Act of 1974 (ERISA).[23] ERISA governs most "employee benefit plans established or maintained by employers engaged in commerce or by employee organizations."[24] "ERISA preempts

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10. *See* BARRY R. FURROW ET AL., HEALTH LAW 500 (1995). *See id.* at 498-502 for a historical summary of the development of health insurance. *See also* Jack K. Kilcullen, *Groping for the Reins: ERISA, HMO Malpractice, and Enterprise Liability*, 22 AM. J.L. & MED. 7, 15-28 (1996). The first Health Maintenance Organizations were formed in the 1930s. *See id.* at 26.

11. *See* Kilcullen, *supra* note 10, at 25. "The PPO is an administrative entity which implements an arrangement among a group of health care providers (physicians, hospitals, lab facilities) who agree to offer care at a discounted fee-for-service . . . to a defined group of subscribers." *Id.*

12. *See id.* at 26. The HMO may contract in one of several ways: "with individual practitioners or through an individual physician association, . . . with a group practice," or may employ its own staff in its own facility. *Id.*

13. *See id.* at 22-25.

14. *Id.* at 23.

15. *See id.* at 24.

16. FURROW ET AL., *supra* note 10, at 500.

17. *See id.*

18. *Id.*

19. 29 U.S.C. §§ 1001-1461 (1974).

20. *See* FURROW ET AL., *supra* note 10, at 509.

21. *See id.*

22. *See id.* Congress expressed its intention regarding state regulation of insurance, "subject to limited applicability of the antitrust laws," in the McCarran-Ferguson Act in 1945. *Id.*

23. *See* Kilcullen, *supra* note 10, at 9.

24. FURROW ET AL., *supra* note 10, at 516.

any state law that relates to an employee benefit plan"[25] and thus limits the protection of state laws afforded to participants in non-ERISA governed plans.

ERISA preemption of state laws provides an incentive for employers to fund their own health care plans (self-insured plans). These plans may in turn be administered by a managed care organization.[26] The advantage of preemption is that employee benefit plans will not be subject to conflicting state regulations.[27] Plan sponsors (the employer) and administrators (the insurance company or managed care organization) enjoy protection from state laws, including those mandating specific coverage.[28] However, when an insured is improperly denied benefits, ERISA offers rather limited remedies.[29]

Under ERISA, an insured who is denied benefits may sue for specific performance of the insurance plan terms in federal court.[30] ERISA supersedes state law that "relate[s] to any employee benefit plan,"[31] so, an insured who could otherwise sue under state law for punitive damages is limited to a specific performance remedy. ERISA does not expressly provide for extracontractual damages including consequential and punitive damages.[32] Courts have interpreted ERISA as "foreclos[ing] traditional contractual remedies permitting recovery of extracontractual damages in the benefits-due lawsuit."[33]

Though Congress meant to protect the interests of employee benefit plan participants, the evolution of ERISA interpretation has thwarted its good intentions.[34] As a result, insurers have gained a powerful incentive to deny coverage that is either clearly warranted, or not expressly excluded.[35] An insurer may deny coverage and then pay claims for benefits due to only those who sue.[36] With no threat of extracontractual damages,[37] all the insurer stands to lose is the payment of the benefit,

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25. *Id.* at 517.
26. *See* Kilcullen, *supra* note 10, at 9.
27. *See* FURROW ET AL., *supra* note 10, at 517.
28. *See id.*
29. *See id.* at 516.
30. *See* Barbara J. Williams, *ERISA and State Common Law Causes of Action,* NEW JERSEY LAWYER 29, Aug. 1998, *available in* Westlaw at 192-AUG NJLAW 29.
31. Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1144 (1974).
32. *See* George Lee Flint, Jr., *ERISA: Extracontractual Damages Mandated for Benefit Claims Actions,* 36 ARIZ. L. REV. 611, 612 (1994). ERISA can be interpreted as allowing extracontractual damages in some circumstances. *See generally id.* The Supreme Court interpreted ERISA as prohibiting recovery of extracontractual damages with respect to "other equitable relief" under 29 U.S.C. § 1132(a)(3). *Id.* at 625. But the Court has read 29 U.S.C. § 1132(a)(1)(B) as "the only express provision that might permit recovery of extracontractual damages." *Id.* at 634.
33. *Id.* at 621.
34. *See generally* George Lee Flint, Jr., *ERISA: Reformulating the Federal Common Law for Plan Interpretation,* 32 SAN DIEGO L. REVIEW 955 (1995) (discussing the misinterpretation of ERISA by the courts); Flint, Jr., *supra* note 32 at 617-18 (suggesting an ERISA interpretation that allows extracontractual damages in some cases); and Williams, *supra* note 30 (outlining ERISA preemption of state law).
35. *See* Flint, Jr., *supra* note 32, at 618-19.
36. *See id.*
37. *See generally* Andrews-Clarke v. Travelers Ins. Co., 984 F. Supp. 49 (Mass. Dist. Ct. 1997) (overviewing Congressional intent, judicial interpretation, and practical, untoward effects of ERISA).

now delayed, and "possibly prejudgment interest and attorney's fees."[38]

II. VIAGRA–BACKGROUND

Impotence, or erectile dysfunction, is defined as the persistent inability to attain an erection sufficient to permit penetrative sexual intercourse.[39] Its diagnosis requires a physical examination and medical history.[40] Organic causes of impotence, implicated in 80% of cases,[41] arise from abnormalities in the vascular, neurogenic or hormonal components of successful erection.[42] The most common organic causes in older men are diabetes and prostate surgery,[43] while spinal cord injuries are the more common causes in younger men.[44] The psychogenic component of an erection is implicated in the estimated 20% of men whose impotence results from psychological causes.[45]

Approximately twenty to thirty million American men suffer from impotence,[46] including an estimated 40% of men at age forty, increasing to 67% of men by age seventy.[47] Therapies for impotence include external or implanted devices,[48] vascular surgery,[49] and oral, topical, or injectable agents.[50] The cost of penile implants ranges from $15,000 to $20,000.[51] Side effects from previously available oral drugs and injectable agents include serious liver abnormalities[52] and penile pain and burning.[53]

In contrast, Viagra is an oral medication, advertised as effective regardless of the cause of impotence.[54] Viagra is not safe for any patient who is taking organic nitrates, due to an interaction which can result in dramatic reduction of blood

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38. *See* Flint, Jr., *supra* note 32, at 619. These are the same damages sought by Christine Kraft-Egert in Egert v. Connecticut Gen. Life Ins., 900 F.2d 1032, 35 (7th Cir. 1990).

39. *See* Winifred S. Hayes, Inc., *Impotence, Pharmacological Treatment*, HAYES Directory of New Medical Technologies' Status, Vol. I: Medicine, July 31,1997, *available in* Westlaw at HAYES-MED IMPO0501.01 [hereinafter Hayes, Pharmacological Treatment].

40. *See id.*

41. *See* Winifred S. Hayes, Inc., *Impotence Treatment, Devices*, HAYES Directory of New Medical Technologies' Status, Vol. I: Medicine, *available in* Westlaw at HAYES-MED IMPO0401.05 [hereinafter Hayes, Devices].

42. *See* Hayes, Pharmacological Treatment, *supra* note 39.

43. *See* Hayes, Devices, *supra* note 41.

44. *See id.*

45. *See* Hayes, Pharmacological Treatment, *supra* note 39 (citing C. Evans, *Success with Erectile Dysfunction*, 239 PRACTITIONER 534-39 (1995)).

46. *See id.* (citing O.I. Linet & F.G. Ogring, *Efficacy and Safety of Intracavernosal Alprostadil In Men with Erectile Dysfunction*, 334 NEW ENG. J. MED. 873-77 (1996)).

47. *See id.* (citing M. O'Keefe & D.K. Hunt, *Assessment and Treatment of Impotence*, 79 MED. CLIN. N. AM., 415-34 (1995)).

48. *See* Hayes, Devices, *supra* note 41.

49. *See id.*

50. *See* Hayes, Pharmacological Treatment, *supra* note 39.

51. *See* Olympia J. Snowe & Harry Reid, *In the Age of Viagra, A Call For Prescription Parity*, CHICAGO TRIBUNE, Aug. 16, 1998.

52. *See* Hayes, Pharmacological Treatment, *supra* note 39.

53. *See* Mike Mitka, *Viagra Leads As Rivals Are Moving Up*, 280 JAMA 119 (1998).

54. *See* Pfizer U.S. Pharmaceuticals, 1998, Pfizer Inc. *Brief Summary of Prescribing Information* (printed advertisement) [hereinafter Pfizer].

pressure.[55] However, other documented side effects of Viagra seem relatively minor, and include headache, flushing, and indigestion.[56] Of thirty-nine men who died while using Viagra in the first three months of availability, most had preexisting heart conditions or a reaction with other drugs.[57] Viagra sales during the first three months on the market, totaling $411 million,[58] suggest the overwhelming response to a convenient, relatively safe alternative to impotence.

III. VIAGRA–INSURANCE ISSUES

Though 90% of employer-based health plans cover prescription drugs,[59] the plans reportedly only reimburse 51% of patients for Viagra prescriptions.[60] Some health insurers, including Kaiser Permanente, the nation's largest HMO,[61] refuse to cover Viagra, priced at ten dollars per pill.[62] Kaiser estimated its cost of covering Viagra would reach at least $100 million annually,[63] and warned that the cost threatens affordable access to health care.[64] In order to justify its decision, made for apparently financial reasons, the HMO directed attention to its supposed need to distinguish between "quality of life treatments and medically necessary drugs."[65] Nevertheless, Kaiser announced a twelve percent rate increase for 1999 premiums, with no Viagra coverage.[66] The threat to affordable health care, then, cannot be solely blamed on Viagra.[67]

Besides outright denial to pay, insurers have chosen alternate approaches to Viagra coverage. They may claim to deny coverage due to questions regarding Viagra's safety,[68] or ration coverage of the pills to between four and twelve per

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55. *See id.* Organic nitrates are used by 5.5 million men in the treatment of angina pectoris. *See* Mitka, *supra* note 53. Another 1.5 million men per year will suffer a heart attack and will possibly need nitrate therapy. *Id.*

56. *See* Pfizer, *supra* note 54.

57. *See* Cortenay Edelhart, *Insurers are Vexed by Viagra*, INDIANAPOLIS STAR, Aug. 2, 1998, at E1.

58. *See id.*

59. *See Doctors' Accusing Insurance Firms of Sex Discrimination for Covering Viagra*, JOURNAL RECORD, May 13, 1998.

60. *See Pennsylvania Man Files Viagra Lawsuit, Targets Prudential Plan in Federal Court*, MEALEY'S LITIG. REP.: MANAGED CARE, June 24, 1998, *available in* Westlaw, 2 No. 12 MLRMC 4 [hereinafter MEALEY'S LITIG. REP., Pennsylvania Man].

61. *See California Man Files Suit After HMO Denies Viagra Coverage*, MEALEY'S LITIG. REP.: MANAGED CARE, July 22, 1998, *available in* Westlaw, 2 No. 14 MLRMC 3 [hereinafter MEALEY'S LITIG. REP., California Man].

62. *See* Edelhart, *supra* note 57.

63. *See* MEALEY'S LITIG. REP., California Man, *supra* note 61.

64. *See* MEALEY'S LITIG. REP., Kaiser Permanente, *supra* note 7.

65. *See* MEALEY'S LITIG. REP., California Man, *supra* note 61.

66. *See* J. Brendan Ryan, *Experts see Healthy Hike in Care Rates*, CINCINNATI POST, June 30, 1998, at 3C.

67. Other new drugs are in high demand. For example, one California HMO reports that its costs for a topical toenail fungus medication went from zero to $7 million "virtually overnight." Ron Shinkman, *Purchasers and Payers: Who Foots the Bill? HMOs Confront the Rising Popularity of Designer Drugs*, MODERN HEALTHCARE, June 29, 1998.

68. *See* Edelhart, *supra* note 57.

month.[69] Others cover Viagra following a physical exam to verify impotence and rule out patients who merely seek enhancement of sexual performance.[70] Some insurers may offer supplemental insurance packages to cover Viagra.[71]

A. Viagra–Medical Necessity

In some instances, insurers deny coverage of Viagra prescriptions because they consider the drug a "quality of life" treatment rather than a medical necessity.[72] Insurers seek to buffer themselves from the high cost of new, expensive therapies in two ways. They write policy exclusions for "medically unnecessary services"[73] or review individual cases to determine medical neccessity.[74] An insurance policy that expressly outlines the method for determining medical necessity or specifically excluding certain treatments[75] is more likely to be upheld in court for its denial of coverage.[76]

Policy language is the basis for interpretation of the coverage provided by a particular health insurance contract between an insurer and an individual or group.[77] First, the insurer will determine if the individual seeking health plan coverage suffers from an illness, injury, disease or sickness according to the policy definitions.[78] Then, the terms of the insurance plan or policy are used to determine whether the particular illness in question is one which is covered or excluded by the policy.[79] Thus, an insurer determines whether it considers a treatment medically necessary.

Kaiser-Permanente noted the need to "draw a distinction between quality of life treatments and medically necessary drugs,"[80] in justifying its decision not to cover Viagra. Its executive director stated that it is "difficult if not impossible to determine medical necessity for the drug."[81] Thus the HMO implied that impotence is either not an illness, or that impotence is not an illness which is necessary to treat.

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69. *See id.* Most plans cover six pills per month on the basis of a sexual activity study published in the New England Journal of Medicine.

70. *See id. But see* Hayes, Pharmacological Treatment, *supra* note 39. Physical examination and medical history to diagnose impotence is always necessary before any impotence treatment is initiated. Some underlying causes of impotence may be detected and treated. *Id.*

71. *See* MEALEY'S LITIG. REP., Kaiser Permanente, *supra* note 7.

72. *See* Ryan, *supra* note 66.

73. FURROW ET AL., *supra* note 10, at 504.

74. *See id.*

75. *See id.* at 506.

76. *See id.*

77. *See generally id.* at 502-06.

78. *See* Katskee v. Blue Cross/Blue Shield of Neb., 515 N.W.2d 645, 648-51 (Neb. 1994) (defining illness); Witcraft v. Sundstrand Health and Disability Group Benefit Plan, 420 N.W.2d 785, 787-788 (Iowa 1988) (declaring definition of illness, disease and sickness synonymous); Egert v. Connecticut Gen. Life Ins. Co., 900 F.2d 1032, 1037 (7th Cir. 1990) (defining injury, sickness).

79. *See* FURROW ET AL., *supra* note 10, at 504.

80. MEALEY'S LITIG. REP., California Man, *supra* note 61.

81. *Special Report: Viagra or Bust: Is Pharmacy Cost Crisis Unraveling HMO Utilization Strategy?*, MEDICAL UTILIZATION MANAGEMENT, Aug. 6, 1998, *available in* 1998 WL 10321912 [hereinafter MEDICAL UTILIZATION MANAGEMENT].

A scientific breakthrough encouraged millions of men to access the medical system for impotence treatment–perhaps many for the first time. The nation's largest HMO responded by declaring that it did not consider the treatment of impotence a medical necessity. Kaiser-Permanente's adjustment in its view of the medical necessity of impotence treatment[82] is predictable given the financial impact of Viagra. However, its reasoning is curious since Viagra may be effective regardless of the cause of impotence, has few side effects when properly prescribed, and is less invasive than other treatments.[83]

B. Viagra–Cost Effectiveness

Investigation of impotence, encouraged by the promise of Viagra, can result in detection of underlying diseases that might have otherwise gone undetected and untreated.[84] Earlier detection of illnesses such as depression,[85] hypertension,[86] and diabetes[87] could result in substantial savings for the insurer in the long run. Furthermore, the cost of Viagra is only about one-third the cost of other FDA-approved therapies.[88]

C. Medical Necessity–Judicial Interpretation

When an insured sues his insurer for denial of coverage, the court will look to the policy language. Where it is ambiguous or ill-defined, a court will likely find in favor of the insured's "reasonable expectations."[89] On the other hand, denial of benefits will typically be upheld if the policy specifically lists treatments not covered or details how the insurer determines medical necessity.[90]

Historically, other reproductive health issues have stirred controversy when insurers denied coverage on the basis of their definitions of illness and medical

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82. Kaiser's previous position on medical necessity of impotence treatment is inferred from its newsworthy announcement that it will not cover newly-approved Viagra.

83. *See supra* text accompanying notes 48-56. Along these lines, the cases reveal surprising insurer reasoning in denying reimbursement for less invasive procedures than those the policies would cover. *See* Egert v. Connecticut Gen. Life Ins. Co., 900 F.2d 1032, 1034 (7th Cir. 1990) (holding that policy covered microsurgery to repair blocked fallopian tubes, but not in vitro fertilization); Witcraft v. Sundstrand Health & Disability Group Benefit Plan, 420 N.W.2d 785, 788 (Iowa 1988) (holding that corrective surgery for either husband's or wife's infertility covered under policy as illness, but artificial insemination not covered since the couple was deemed "healthy").

84. *See* Edelhart, *supra* note 57.

85. Depression, affecting 17.6 million Americans annually, is the "eighth leading cause of death," yet is "one of the most treatable mental illnesses." *Clinical Depression, Mentalhealth.com* (visited Nov. 29, 1998) <http://www.mentalwellness.com/4630.htm>.

86. Hypertension, or high blood pressure, can lead to coronary artery disease, congestive heart failure, stroke, kidney disease, and eye disease. *See* VIOLET H. BARKAUSKAS ET AL., HEALTH & PHYSICAL ASSESSMENT 467 (1994).

87. Undiagnosed and untreated, diabetes "can lead to blindness, severe nerve damage, kidney disease, heart disease and strokes." *Controlling Diabetes Begins* (visited Nov. 29, 1998) <http://www.napsnet.com/food/40597.html>.

88. *See* Julie Marquis, *California and the West Insurers should Pay for Viagra,* LOS ANGELES TIMES, Aug. 21, 1998 at A3.

89. FURROW ET AL., *supra* note 10, at 506.

90. *See id.*

necessity. Those issues include infertility treatments such as artificial insemination and in vitro fertilization.[91] Scientific advances may provide medical options, indeed, medically necessary options, which were not anticipated by an insurer at the time an insurance policy was drafted. However, a policy is construed according to the parties' intentions at the formation of the contract.[92]

1. State Law (Non-ERISA) Cases on Medical Necessity

The Iowa Supreme Court considered the definition of illness in *Witcraft v. Sundstrand Health & Disability Group Benefit Plan.*[93] It reviewed a district court's finding that 1) a couple's infertility was an illness within the meaning of their health insurance plan, and that 2) infertility treatment was covered by the plan since it was not specifically excluded.[94] Because Jill Witcraft ovulated irregularly,[95] Thomas Witcraft's sperm count and motility were abnormally low,[96] and a previous attempt to conceive their second child by artificial insemination had failed,[97] the Witcrafts underwent a specialized insemination procedure designed to improve sperm motility.[98] The same health plan which had paid for the earlier treatments denied this claim, because the "services were not performed because of an illness or injury,"[99] the "condition of nonpregnancy is not an illness,"[100] and "artificial insemination to change that condition is not treatment of an illness."[101]

The court, noting the "broad approach"[102] in the plan's illness language, considered the interchangeability of the terms "illness," "disease," and "sickness" in health insurance policies[103] and adopted the definition of disease as a "morbid condition of the body, a deviation from the healthy or normal condition of any of the functions or tissues of the body."[104] The plan, while denying the Witcrafts' insemination procedure, would have covered corrective surgery or treatment for Thomas Witcraft, or would have covered treatment of Jill Witcraft's erratic ovulation.[105] Yet the plan's representative testified that "artificial insemination

91. *See* FURROW ET AL., *supra* note 10 at 505.
92. *See* Katskee v. Blue Cross/Blue Shield of Neb., 515 N.W.2d 645, 649 (Neb. 1994).
93. Witcraft v. Sundstrand Health & Disability Group Benefit Plan, 420 N.W.2d 785 (Iowa 1988).
94. *See id.* at 786.
95. *See id.*
96. *See id.*
97. *See id.* The Witcrafts' first child was born subsequent to successful infertility treatment.
98. *See id.* Poor sperm motility is associated with infertility. *See* 1 PATRICK C. WALSH ET AL., CAMPBELL'S UROLOGY 650 (5th ed. 1986).
99. Witcraft v. Sundstrand Health & Disability Group Benefit Plan, 420 N.W.2d 785, 786 (Iowa 1988).
100. *Id.* at 787.
101. *Id.*
102. *Id.* at 788.
103. *See id.*
104. *Id.* (quoting 45 C.J.S. Insurance § 893, at 969 (1946)).
105. *See Witcraft,* 420 N.W.2d at 788.

performed on a healthy individual" is not a treatment of illness.[106]

The court concluded that Jill was not in fact healthy with respect to her reproductive function,[107] and that together, the couple's infertility was an illness within the plan's meaning.[108] It held that the recommended procedure is a means of treating infertility[109] which was not expressly excluded from the policy in a list of procedures related to reproduction which were excluded.[110] Thus, the average person[111] reading the policy would assume that artificial insemination was meant to be covered.[112]

The insurer's representative implied in testimony that, since the Witcrafts were "healthy individual(s),"[113] and infertility is not an illness,[114] treatment of infertility is a "quality of life" issue rather than a medical necessity. Similarly, insurers may attempt to classify Viagra as a "quality of life" treatment and not a medical necessity.

However, impotence is a deviation from the normal function of the body. Within the *Witcraft* policy interpretation, it is an illness. An insurance policy which covers prescription drugs for illness and does not expressly exclude prescription drugs for impotence treatment should be interpreted as covering Viagra. This is particularly true for policies which cover other impotence treatments.

While the term "infertility" is not included in the definition of impotence, it is obvious that impotence renders the task of fertilization difficult. Classifying impotence as a cause of infertility may or may not affect its status as an illness which necessitates medical treatment.[115]

A policy which covered "any sickness" not arising from employment,[116] and which had covered their previous infertility procedures, denied infertility treatment

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106. *Id.*

107. *See id.* at 789.

108. *See id. But see* Kinzie v. Physician's Liability Ins. Co., 750 P.2d 1140 (Okla. Ct. App. 1987). Under similar facts, a woman's health insurance plan covered both her outpatient and inpatient surgeries in failed attempts to correct an obstructed fallopian tube. *See id.* at 1141. The plan subsequently denied coverage of a successful in vitro fertilization procedure. *See id.* at 1141-42. The Court of Appeals of Oklahoma affirmed the trial court's ruling that in vitro fertilization was elective, not medically necessary, and not required to cure Kinzie. *See id.* at 1141. The court relied on a dictionary definition of "necessary" as "essential," "inescapable," "compulsory," and "required," and concluded that in vitro fertilization was not. *Id.* at 1142. The court did not consider the elective nature of the surgery which the plan covered. Interestingly, the "unnecessary" procedure accomplished the objective of "curing" Kinzie of infertility by rendering her pregnant. While her body, postpartem, returned to its infertile state, she was left with the permanent remedy of a child and rendered, forever, a parent.

109. *See* Witcraft v. Sundstrand Health & Disability Group Benefit Plan, 420 N.W.2d 785, 790 (Iowa 1988).

110. *See id.*

111. *See id.* The court interprets insurance language "from the viewpoint of an ordinary person, not a specialist or expert," citing *Benzer v. Iowa Mut. Tornado Ins. Ass'n*, 216 N.W.2d 385, 388 (Iowa 1974).

112. *See Witcraft*, 420 N.W.2d at 790. The court resolves any ambiguity of meaning due to usage of broad language in favor of the insured, citing *Benzer*, 216 N.W.2d at 388.

113. *Witcraft*, 420 N.W.2d at 788.

114. *See id.*

115. The state of Indiana classified Viagra as a fertility drug to avoid reimbursing Medicaid patients for the drug. Kevin O'Neal, *State Will Stop Paying for Viagra*, INDIANAPOLIS STAR, June 25, 1998, at A1. This comment does not address the issue of whether impotence should be treated as one of infertility.

116. *Witcraft*, 420 N.W.2d at 787.

to the Witcrafts.[117] The Witcrafts' medical goal was to procreate. Suppose the aim is merely to copulate? After all, impotence is only defined in terms of sexual performance, not in terms of reproduction or fertilization.[118] But when managed care officials characterize Viagra as a lifestyle-related drug,[119] they project the notion that "sexual health" and "health" are unrelated. They suggest that sexual health, in this case the ability to engage in sexual intercourse, is optional and unworthy of medical treatment.

Nevertheless, impotency can lead to depression, alcohol and drug abuse, and devastation of families.[120] The significance of a man's sexual health to his mental outlook is demonstrated by one of the first questions a man with a new spinal cord injury asks: Will I be able to have sex again?[121] and his emotional devastation at a negative answer.[122]

In *Katskee v. Blue Cross/Blue Shield of Nebraska,*[123] an insurer denied a claim for surgery which Katskee's surgeons deemed "the most medically appropriate treatment available" for Katskee's breast-ovarian carcinoma syndrome.[124] In that case, the Supreme Court of Nebraska held that a genetic disorder which significantly predisposed a woman to develop breast cancer, ovarian cancer, or both, was an illness within the meaning of her health insurance policy.[125] Specifically, the court found that "illness" designates "any abnormal condition of the body or its components . . . that in its natural progression would be expected to be problematic; . . . an inherent defect of the body; or a morbid physical . . . state which deviates from or interrupts the normal . . . function of any part, organ, or system of the body . . . ."[126]

As a matter of law the court found that the policy language[127] was not ambiguous.[128] It considered the plain and ordinary meaning of the policy's terms as defined by various dictionaries and other courts.[129]

Impotence falls within the plain and ordinary meaning of the term "illness" as defined by the court in *Katskee* since it interrupts the normal function of an organ and

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117. *See id.*

118. Presumably, fertility is not the goal of the majority of Viagra patients, since 80% of the prescriptions have been written for men over the age of fifty. *See* Edelhart, *supra* note 57. However, Viagra was tested on men as young as 19. *See* Pfizer, *supra* note 54.

119. *See* MEDICAL UTILIZATION MANAGEMENT, *supra* note 81.

120. *See* Edelhart, *supra* note 57 (quoting John Mulcahy, urology professor at Indiana University School of Medicine).

121. *See id.* (relating opinion of a member of the Central Indiana Spinal Cord Organization).

122. *See id.*

123. Katskee v. Blue Cross/Blue Shield of Neb., 515 N.W.2d 645 (Neb. 1994).

124. *Id.* at 647-48. The recommended surgery corrected Katskee's "substantial risk of developing cancer." *Id.* at 652. Thus it was arguably cost effective for the insurer.

125. *See id.* at 653.

126. *Id.* at 651.

127. *See id.* at 648-49.

128. *See id.* at 648, 651. "Whether a policy is ambiguous is a matter of law for the court to determine." *Id.* at 649. If a policy is ambiguous, the court will construe it in favor of the insured, but will not construe plain language as ambiguous in order to favor the insured. *See id.*

129. *See Katskee*, 515 N.W. 2d at 649-50.

a system of the body. While the individual consequences of impotence do not match the mortal severity of those likely in breast-ovarian carcinoma syndrome, the collective impact of impotence may be inestimable since it afflicts up to thirty million men across the United States.[130]

Katskee's insurer sought to deny coverage of the cost of her surgery, a little more than $6,000,[131] at a substantial risk it would only later have to cover, or again attempt to deny coverage, for the more devastating costs of cancer surgery, chemotherapy, or radiation treatment in the event of breast or ovarian cancer.[132] Not only did Katskee's insurer have a legal obligation to pay; its financial policy to avoid payment is illogical.

2. Medical Necessity–ERISA

In *Egert v. Connecticut General Life Insurance Co.*,[133] Christine Kraft-Egert sued her husband's employee benefit plan, administered pursuant to ERISA[134] provisions, when it denied coverage of her in vitro fertilization treatment.[135] The plan would have covered microsurgery to attempt repair of her only fallopian tube,[136] but not in vitro fertilization.[137]

The plan did not specifically exclude in vitro fertilization.[138] The plan provided reimbursement for physician-recommended services which are necessary for treatment of an illness.[139] It offered no definition of illness, but in an internal memo the insurer referred to "the illness of infertility."[140] Kraft-Egert alleged the plan's denial was in violation of ERISA provisions:[141]

> 29 U.S.C. 1132(a)(1)(B): A civil action may be brought by a participant or beneficiary to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.
>
> 29 U.S.C. 1132(a)(3): A civil action may be brought by a participant, beneficiary, or fiduciary to enjoin any act or practice which violates any provision of this

130. *See* Hayes, Pharmacological Treatment, *supra* note 39 (citing Linet & Ogring, *supra* note 44).
131. *See Katskee*, 515 N.W.2d at 648.
132. *See generally* PHILIP J. DISAIA & WILLIAM T. CREASMAN, CLINICAL GYNECOLOGIC ONCOLOGY, 500-07 (1993) (discussing surgical and radiation options for breast cancer); *see id.* at 507-12 (discussing chemotherapy for breast cancer); *see id.* at 415-416 (describing surgical, chemotherapy, and radiation treatments for ovarian cancer).
133. Egert v. Connecticut Gen. Life Ins. Co., 900 F.2d 1032 (7th Cir. 1990).
134. *See supra* text accompanying notes 19, 23-38.
135. *See Egert*, 900 F.2d at 1033.
136. *See id.* at 1034.
137. *See id.*
138. *See id.* at 1036.
139. *See id.* at 1033.
140. *Id.* at 1034.
141. *See Egert*, 900 F.2d at 1035.

> subchapter or the terms of the plan, or to obtain other appropriate equitable relief to redress such violations or to enforce any provisions of this subchapter or the terms of the plan.[142]

Under these provisions, Kraft-Egert sought specific performance of the plan, plus prejudgment interest and attorney's fees.[143] The Seventh Circuit Court of Appeals reversed the district court's decision and held that the insurer acted arbitrarily and capriciously[144] when it denied an approved medical procedure to treat a condition it described as an illness.[145]

Roughly half of impotent men taking Viagra are not reimbursed for the drug.[146] The majority of plans denying coverage appear to have made the decision for financial policy reasons,[147] despite the comparable cost of other impotence treatments[148] or cost savings realized from early detection of underlying causes. Of employee-based plans, 90% cover prescription drugs.[149] Financial policy notwithstanding, judicial interpretation will be required to determine those insurers' legal obligation to pay.

D. The Viagra Cases

In May, 1998, Paul Sibley-Schreiber filed the first Viagra class action lawsuit,[150] claiming that Oxford Health Plans denied Viagra coverage to him and approximately one million other men. Sibley-Schreiber's complaint alleges that the Oxford plan, governed by ERISA, provided insurance coverage for medically necessary prescription drugs,[151] but wrongfully denied coverage of Viagra.[152] The Oxford Plan, however, did cover two "invasive" and "painful" impotence treatments which are comparable in cost to Viagra, but have unpleasant side effects such as intense burning.[153]

In addition to benefits denied, the complaint alleges that Oxford breached its

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142. 29 U.S.C.A. § 1132(a)(1)(b), (a)(3) (West, 1998).

143. *See Egert*, 900 F.2d at 1035.

144. *See id.* at 1039. The court cited *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101 (1989) for the appropriate standard of review in this case, arbitrary and capricious. *Id.* at 1035.

145. *See Egert*, 900 F.2d at 1032, 1039.

146. *See* MEALEY'S LITIG. REP., Pennsylvania Man, *supra* note 60.

147. *See id.*

148. *See NY Class Action Seeks Full Coverage for Viagra Treatments*, ANDREWS PHARMACEUTICAL LITIG. REP., June, 1998, *available in* Westlaw, 14 No. 1 ANPHARLR 3.

149. *See* JOURNAL RECORD, *supra* note 59.

150. Paul Sibley-Schreiber v. Oxford Health Plans (NY) Inc., No. CV983671 (E.D.N.Y. filed May 18, 1998), *cited in Florida Suit Filed Against Humana Inc. for Refusal to Cover Viagra Prescription*, MEALEY'S LITIG. REP.: Managed Care, Aug. 12, 1998, *available in* Westlaw, 2 No. 15 MLRMC 5 [hereinafter MEALEY'S LITIG. REP., Florida Suit].

151. *See Class Action Complaint Filed in Federal Court on Behalf of Viagra Users*, MEALEY'S LITIG. REP.: Managed Care, May 28, 1998, *available in* Westlaw, 2 No. 10 MLRMC 3 [hereinafter MEALEY'S LITIG. REP., Class Action Complaint].

152. *See id.*

153. *See NY Class Action*, *supra* note 148. The treatments referred to are a "self-administered penile injection" and a "urethral suppository." *Id.*

fiduciary duty to insureds when it acted in a "discriminatory, arbitrary or capricious manner" toward plan participants.[154] Sibley-Schreiber seeks injunctive relief to prevent the plans from refusing such reimbursement in the future,[155] damages of over ten million dollars for the estimated class of one million men, and attorney's fees and interest.[156]

In another class action lawsuit involving an ERISA-governed plan, John Roe seeks ten million dollars from Aetna Life Insurance Company to reimburse a class of an estimated one million men.[157] Roe's impotence resulted from prostate cancer treatment.[158] Roe alleges that Aetna denied coverage of Viagra, even though the plan provides coverage for drugs used to treat physiological sexual dysfunction.[159] In addition to recovery for benefits due, Roe seeks declaratory judgment on Aetna's duty to reimburse its members for Viagra.[160] These suits under ERISA seek actual damages for denial of benefits, plus interest and attorney's fees, but no extracontractual damages.

In contrast, a suit filed under California state law in July, 1998 seeks punitive and treble damages from Kaiser Foundation Health Plan Inc.[161] Louis Marcil's state law claims[162] assert that Kaiser members have a reasonable expectation that "Kaiser-physician-prescribed, medically necessary medications will be covered"[163] in accordance with "representations made in its marketing and advertising materials."[164] Marcil's urologist prescribed Viagra to treat his impotence, the result of prostate cancer treatment.[165] Marcil alleges his Kaiser plan specifies a seven dollar copayment for a 100-pill prescription filled at a Kaiser pharmacy.[166] The plan specifically covers prescription drugs, with no express exclusions of Viagra.[167] Yet, Kaiser refused to cover Marcil's Viagra prescription.[168]

In a Florida state law case, Philip John Lentini alleges that Humana Inc. denied

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154. *See* MEALEY'S LITIG. REP., Class Action Complaint, *supra* note 151.

155. *See id.*

156. *See id.*

157. Roe v. Aetna Life Ins. Co., C98-2223 (N.D. Cal. filed June 1998), *cited in California Man Sues Aetna Over Its Refusal to Cover Anti-Impotence Drug Viagra,* MEALEY'S LITIG. REP.: MANAGED CARE, June 10, 1998, *available in* Westlaw, 2 No. 11 MLRMC 4.

158. *See California Man Sues Aetna, supra* note 157.

159. *See id.*

160. *See id.* The complaint alleges Aetna failed to evaluate Viagra before denying reimbursement in violation of its duty under ERISA, 29 U.S.C. 1003(a) and 1132(a)(3). *See id.*

161. Marcil v. Kaiser Found. Health Plan Inc., No. BC 193941 (Cal. Super., Los Angeles Co. filed July 8,1998), *cited in* MEALEY'S LITIG. REP., California Man, *supra* note 61.

162. *See* MEALEY'S LITIG. REP., California Man, *supra* note 61 (citing Cal. Business and Professional Code Section 17200; Civil Code Section 1750; and Consumer Legal Remedies Act).

163. *Id.*

164. *Id.*

165. *See id.*

166. *See id.*

167. *See id.* Obviously, since Viagra was only introduced in the spring of 1998, it would have been impossible for a brochure printed previously to exclude the drug. Apparently the brochure does not state an exclusion for any other impotence treatment.

168. *See* MEALEY'S LITIG. REP., California Man, *supra* note 61.

him Viagra coverage[169] even though his Humana Gold Plus plan allowed a $1000 yearly limit on brand name drugs, and he had not reached the limit at the time of the denial.[170] Lentini filed a lawsuit[171] seeking class action status, alleging breach of contract and breach of fiduciary duty.[172] He seeks declaratory judgment on Humana's obligation to cover Viagra, plus over one million dollars in damages for a class of approximately one thousand members.[173]

If, as alleged, the plaintiffs in these and other pending cases were prescribed an FDA-approved drug for impotence following a medical diagnosis, they should be able to show medical necessity for Viagra. Together, physicians and patients decided on a promising course of action which was not expressly prohibited by the health benefit plans. The plans allegedly covered medications prescribed for illness.

The outcome of these cases will be determined by each court's examination of the benefit plan language. They will likely turn on each plan's definition of illness or medical necessity. Where policy language is ambiguous, each court will designate the scope of coverage required by the policy language. Opinions will likely differ on the necessity of sexual function to good health.

Significantly, the cases will indicate whether insurance companies may "regulate sexuality."[174] The cases will reveal insurer rationalization for denial of more advanced, albeit expensive, therapies such as Viagra, in contrast to coverage of other impotence treatments, which are invasive, unpleasant, and of comparable cost. The litigation may offer insight into other curious reasoning by health insurance providers.

Particularly curious is the status of health insurance coverage of prescription contraceptives in America. Incredibly, more health insurance plans provide coverage for Viagra than provide prescription contraceptive coverage for women. Nearly forty years have passed since the introduction of contraceptives[175] and more than thirty years since the U.S. Supreme Court declared that married couples had a right to use contraceptives within a "zone of privacy."[176] Yet 61%[177] to 85%[178] of insurers continue to deny women coverage for their medically appropriate choice of prescription contraceptives. Contrast the Viagra record: half of users were

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169. *See* MEALEY'S LITIG. REP., Florida Suit, *supra* note 150.

170. *See id.*

171. Lentini v. Humana Inc., No. 98-5896 (Div. H, 13th Cir., Hillsborough Co., Fla. filed Aug. 5, 1998), *cited in* MEALEY'S LITIG. REP., Florida Suit, *supra* note 150.

172. *See* MEALEY'S LITIG. REP., Florida Suit, *supra* note 150.

173. *See id.*

174. *See NY Class Action, supra* note 148.

175. *See* Olympia J. Snowe and Harry Reid, *In the Age of Viagra, a Call for Prescription Parity*, CHICAGO TRIBUNE, Aug. 16, 1998.

176. Griswold v. Connecticut, 381 U.S. 479, 485 (1965). Seven years later the Court extended the same right to unmarried persons in *Eisenstadt v. Baird*, 405 U.S. 438, 443 (1972).

177. *See* THE ALAN GUTTMACHER INST., REPRODUCTIVE HEALTH SERVICES & MANAGED CARE PLANS: IMPROVING THE FIT (visited Sept. 7, 1998) <http://www.agi-usa.org/pubs/ibl.html>.

178. *See id.*

reimbursed by their insurance plans from the outset.[179]

IV. PRESCRIPTION CONTRACEPTIVES–A MEDICAL NECESSITY

A. Background

The health insurance system currently affords women inadequate coverage of their need for affordable birth control. Only 15% of traditional indemnity health insurance plans, insuring 60% of privately insured Americans, cover all five types of reversible prescription contraceptives:[180] oral contraceptives ("the pill"),[181] IUD,[182] diaphragm,[183] Norplant,[184] and Depo-Provera.[185] Health maintenance organizations (HMOs) offer the widest range of coverage: 39% cover all five methods.[186]

1. Medical Necessity of Contraceptives

A woman is fertile for approximately half her life.[187] Without reliable birth control, she could sustain twelve to fifteen pregnancies over her lifetime with a likelihood of medical complications.[188] However, most women only want two

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179. *See* MEALEY'S LITIG. REP., California Man, *supra* note 61.

180. *See* THE ALAN GUTTMACHER INST., REPRODUCTIVE HEALTH SERVICES & MANAGED CARE PLANS: IMPROVING THE FIT, *supra* note 177.

181. Oral contraceptives cost between $15 and $25 per month, plus an examination cost of $35 to $125. *See If You Choose the Pill*, Planned Parenthood Ass'n. of Utah (visited Nov. 2, 1998) <http://ww.xmission.com/~ppau/pill.html>. They are 97% to 99.9% effective in preventing pregnancy, and offer other benefits to women, including protection against "ovarian and endometrial cancers, pelvic inflammatory disease, non-cancerous breast tumors and ovarian cysts." *Id.* Additionally, oral contraceptives reduce the incidence of iron deficiency anemia and rheumatoid arthritis. *See id.* Health risks are most significant for smokers over the age of 35. *See id.*

182. The intrauterine device (IUD) is inserted into the uterus, and costs $150 to $300 excluding the exam. *See If You Choose IUD*, Planned Parenthood Ass'n. of Utah (visited Nov. 2, 1998) <http://www.xmission.com/~ppau/iud.html>. The IUD is 97% to 99.2% effective and can remain in place for up to eight years. *See id.*

183. The diaphragm is a shallow latex cup inserted into the vagina prior to intercourse. *See If You Choose Barrier Contraceptives*, Planned Parenthood Ass'n. of Utah (visited Nov. 2, 1998) <http://www.xmission.com/~ppau/diaph.html>. It costs $13 to $25, plus exam, and can last several years. However, it is only 82% to 94% effective. *See id.*

184. Norplant requires the implantation of six capsules under the skin of the upper arm, where it releases hormones. *See If You Choose Norplant*, Planned Parenthood Ass'n. of Utah (visited Nov. 2,1998) <http://www.xmission.com/~ppau/norplant.html>. It is 99.6% effective and lasts five years. The cost ranges from $500 to $600 for examination, the implants and insertion. Removal costs $100 to $200. *See id.*

185. Depo-Provera is a hormone shot administered every twelve weeks. *See If You Choose Depo-Provera*, Planned Parenthood Ass'n. of Utah (visited Nov. 2,1998) <http://www.xmission.
com/~ppau/depo.html>. It costs $30 to $75 per injection, excluding cost of the exam, and is
99.7% effective. Like the pill, it offers beneficial protection against iron deficiency anemia and cancer of the uterine lining. *See id.*

186. *See* THE ALAN GUTTMACHER INST., REPRODUCTIVE HEALTH SERVICES & MANAGED CARE PLANS: IMPROVING THE FIT, *supra* note 177.

187. *See id.*

188. *See* Deborah L. Shelton, *Some Gains in Contraceptive Coverage*, AMERICAN MEDICAL NEWS, Aug. 24/31, 1998 at 20 (quoting Luella Klein, M.D., American College of Obstetricians and Gynecologists).

children.[189] For this reason, a woman will need contraceptives for more than twenty years.[190] Without health insurance reimbursement, she will spend $7000 to $10,000 for contraceptives over her reproductive life.[191]

This expenditure partially accounts for the finding that women spend 68% more in out-of-pocket health care costs than men do.[192] The disparity in gender-related health care costs is compounded by the likelihood that a woman's lifetime earnings may be significantly less than those of a similarly educated man.[193]

The financial consequences of unintended pregnancy are significant.[194] Of the 62 million American women of childbearing age,[195] more than three million conceive unintentionally each year.[196] As a result, 1.1 million unplanned or unwanted babies are born each year,[197] while 1.4 million pregnancies terminate in abortion.[198] The average cost of raising one child to the age of majority ranges from $161,620 for a lower class family, to $224,800 for middle income families and $314,550 for upper class families.[199] Thus, affordable access to prescription contraceptives may be even more crucial for a woman with one or more children because of the financial burden of child rearing.

Women faced with an unintended pregnancy also pay a high personal toll in addition to suffering problems that are strictly financial. The U.S. Supreme Court acknowledged that reproductive control enables women to "participate equally in the economic and social life of the Nation"[200] and to participate fully in the "marketplace and the world of ideas."[201] Women who bear the burden of unintended child-bearing and child-rearing are unable to participate equally in those social and economic arenas. As a result, they are destined to suffer professional and personal disadvantage for years.[202]

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189. *See* THE ALAN GUTTMACHER INST., TITLE X AND THE U.S. FAMILY PLANNING EFFORT (last modified Feb. 1997) <http://www.agi-usa.org/pubs/ibl6/ibl6.html>.

190. *See* THE ALAN GUTTMACHER INST., CONTRACEPTION COUNTS: THE NEED FOR SERVICES (visited Sept. 7, 1998) <http://www.agi-usa.org/state_facts/oklahoma.html>.

191. *See* 144 CONG. REC. S9181-01 (daily ed. July 29, 1998) (statement of Sen. Snowe).

192. *See id.*

193. *See* Jilian Mincer, *Gender Wage Gap Adds Up Over Time*, TULSA WORLD, Sept. 6, 1998, at G3 (citing an example from the AFL-CIO's Equal Pay Website wherein a 29-year-old woman with a college education earns an average annual salary of $34,000, while a man with the same education earns $44,350. This amounts to a lifetime difference of $990,000.).

194. *See* Sylvia A. Law, *Sex Discrimination and Insurance for Contraception*, 73 WASH. L. REV. 363, 364-68 (1998).

195. *See* THE ALAN GUTTMACHER INST., CONTRACEPTIVE SERVICES FACTS IN BRIEF, Aug. 1997.

196. *See* THE ALAN GUTTMACHER INST., CONTRACEPTION COUNTS: STATE-BY-STATE INFORMATION (visited Sept. 7,1998) <http://www.agi-usa.org/pubs/ib22.html>. Total U.S. pregnancies number 6.3 million per year. *See* Law, *supra* note 194, at 364.

197. *See* THE ALAN GUTTMACHER INST., CONTRACEPTION COUNTS: STATE-BY-STATE INFORMATION, *supra* note 196.

198. *See id.*

199. *See* FURROW ET AL., *supra* note 10 at 790 (citing U.S. Dept. of Agriculture, Agricultural Research Service, Family Economics Research Group, Expenditures on a Child by Families, (1992)).

200. Planned Parenthood v. Casey, 505 U.S. 833, 856 (1992), *quoted in* Law, *supra* note 194, at 368.

201. Stanton v. Stanton, 421 U.S. 7, 14-15 (1975), *quoted in* Law, *supra* note 194, at 368.

202. *See* Mincer, *supra* note 193.

2. Cost and Cost Effectiveness of Contraceptive Coverage

It is estimated that, at most, the total cost of adding coverage for all FDA-approved contraceptives[203] is only $21.40 per employee per year.[204] Of that amount, employers would pay $17.12, while employees would pay $4.28 per year.[205] So, additional cost to an employer not currently offering any prescription contraceptive coverage is only $1.43 per month.[206] The additional cost would be less for plans which already cover some, but not all, prescription contraceptive methods.[207] In exchange for this minimal cost, a woman whose physician prescribes oral contraceptives would save between $175 and $300 per year.[208] The oral contraceptive would allow the woman to gain the financial, physical and emotional freedom from the burden of unwanted pregnancy and childbirth.

Compared to the minimal cost of adding prescription contraceptive coverage to health plans, great savings could potentially be realized.[209] The prescription process itself provides increased opportunities for early intervention in various disease processes. A routine physical examination required for obtaining a contraceptive prescription typically includes a Pap smear,[210] breast exam,[211] breast self-examination instruction,[212] and blood pressure measurement.[213] Also, women are tested for sexually transmitted diseases and counseled on HIV risk factors.[214]

This preventive approach to women's health issues is consistent with the supposed "preventive nature" of Health Maintenance Organizations (HMOs),[215] yet

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203. *See* Planned Parenthood Ass'n of Utah, *supra* notes 181-85.

204. *See* THE ALAN GUTTMACHER INST., ADDING CONTRACEPTIVE COVERAGE TO HEALTH PLANS ESTIMATED TO COST LESS THAN $2 PER MONTH, PER ENROLLEE (visited Sept. 7, 1998) <http://www.agi-usa.org/new/archive/newsrelease_ccover.html>.

205. *See id.*

206. *See id.*

207. *See id.*

208. *See* Planned Parenthood Ass'n. of Utah, *supra* note 181. At a monthly cost of $15 to $25, birth control pills for a year cost $175 to $300.

209. For example, the Medicaid program saves three dollars for every dollar spent on contraceptive services. *See* THE ALAN GUTTMACHER INST., CONTRACEPTIVE SERVICES FACTS IN BRIEF, *supra* note 195.

210. *See id.* Pap smears screen for cervical cancer and are "effective in reducing mortality" from cervical cancer. DISAIA & CREASMAN, *supra* note 132, at 1.

211. *See* THE ALAN GUTTMACHER INST., CONTRACEPTIVE SERVICES FACTS IN BRIEF, *supra* note 195. Early diagnosis is the most effective means of fighting breast cancer, the most common cause of death from cancer in women. *See* DISAIA & CREASMAN, *supra* note 132, at 467-68. The best way to detect breast cancer early is by routine medical breast exams and instructing the patient in breast self-examination. *See id.*

212. *See* THE ALAN GUTTMACHER INST., CONTRACEPTIVE SERVICES FACTS IN BRIEF, *supra* note 195. *See also* DISAIA & CREASMAN, *supra* note 132, at 467-68.

213. *See* THE ALAN GUTTMACHER INST., CONTRACEPTIVE SERVICES FACTS IN BRIEF, *supra* note 195. High blood pressure, or hypertension, can lead to coronary artery disease, congestive heart failure, stroke, kidney disease and eye disease. *See* BARKAUSKAS ET AL., *supra* note 86.

214. *See* THE ALAN GUTTMACHER INST., CONTRACEPTIVE SERVICES FACTS IN BRIEF, *supra* note 195.

215. Kilcullen, *supra* note 10, at 26.

less than half of HMOs cover all five methods of prescription contraceptives.[216] In contrast, the majority of all health plans cover tubal ligation,[217] a permanent surgical sterilization procedure for women.[218]

The health insurance industry has "traditionally favored surgical services over other medical services."[219] Obviously the industry recognizes a woman's right to choose to terminate her reproductive capacity. A woman's health plan should provide the same access to reliable, reversible birth control.

Access to affordable birth control through health insurance also provides for significant savings with respect to prenatal care and delivery, which costs ten times the amount of a year's worth of oral contraceptives.[220] Savings are exponential if increased access to birth control reduces the incidence of low birth weight babies, who may require between $14,000 and $30,000 in hospitalization during the first year of life.[221]

Two-thirds of insurers cover the cost of abortion.[222] Since nearly half of unintended pregnancies in the U.S. end in abortion,[223] it is clear that any reduction of unwanted pregnancy would show a proportional reduction in abortion rates and a significant cost savings.

Even if insurers refuse to include coverage of contraceptives as medically necessary for their female insureds, they should do so as a matter of policy. The apparent gender-related disparity in health benefit reimbursement (in favor of men's ability to perform sexually, and against women's need to prevent pregnancy at each performance) proved to be a catalyst for political debate.

B. Proposed Federal Mandated Contraceptive Coverage

Political embarrassment over inequitable insurance coverage for men's sexual performance (Viagra) and women's reproductive defense (contraception) apparently led to an expedited Congressional hearing in July 1998 of the Equity in Prescription

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216. *See* THE ALAN GUTTMACHER INST., REPRODUCTIVE HEALTH SERVICES & MANAGED CARE PLANS: IMPROVING THE FIT, *supra* note 177.

217. D'Andra Millsap, *Sex, Lies, & Health Insurance: Employer-Provided Health Insurance Coverage of Abortion and Infertility Services and the ADA*, 22 AM. J.L. & MED. 51, 53 (1996) (citing Alan Guttmacher Institute finding that "(a)t least 86% of all types of typical plans routinely cover tubal ligation.").

218. *See* JON KNOWLES, FACTS ABOUT BIRTH CONTROL 6. "Tubal sterilization" surgically blocks the fallopian tubes to prevent fertilization and costs from $1000 to $2500. *Id.* at 7. It carries the risks of surgery including reaction to anaesthesia. *See id.*

219. Law, *supra* note 194, at 372.

220. *See* 144 CONG. REC. S9181-01 (daily ed. July 29, 1998) (statement of Sen. Snowe, citing an estimate from the American Journal of Public Health).

221. *See* Law, *supra* note 194 at 365-66. "[S]tudies . . . show that increasing access to contraception is an important step in reducing infant mortality and morbidity." *Id.* at 365.

222. *See* Millsap, *supra* note 217, at 54 (citing a 1994 Alan Guttmacher Institute report that stated that two-thirds of insurers cover abortion when it is deemed "medically necessary or appropriate by the health care provider.").

223. *See* THE ALAN GUTTMACHER INST., CONTRACEPTION COUNTS: STATE-BY-STATE INFORMATION, *supra* note 196.

Insurance and Contraceptive Coverage Act (EPICC).[224] The hearing ensued more than a year after EPICC was introduced[225] but only four months after the introduction of Viagra. EPICC is a proposed amendment to the Employee Retirement Income Security Act of 1974 (ERISA)[226] which would require group health plans to cover FDA-approved prescription contraceptive drugs or devices if the plans cover other outpatient drugs or devices.[227] The Bill is intended to alleviate inequitable treatment of women, who pay 68% more in health care costs than men, largely because of costs relating to reproductive health care.[228]

However, even if EPICC is enacted, it only amends the federal ERISA legislation. ERISA does not apply to all health plans, but only to those which are "established or maintained by employers engaged in commerce or by employee organizations."[229] Other plans are subject to state law regulation.

Also in July 1998, both the House[230] and the Senate[231] approved a limited version of mandated prescription contraceptive coverage for federal employees.[232] The Snowe-Reid Amendment extends coverage to all federal employees who are insured by federal-employee health plans which offer prescription drug coverage.[233] The estimated cost of the amendment, "less than $500,000,"[234] makes equitable coverage available to the 1.2 million women who are insured under the Federal Employees Health Benefit Plan.[235] The provision enables the federal government to demonstrate its leadership[236] in encouraging insurers to provide women equitable access to coverage of their most basic health need.

C. State Mandates

In 1998, eighteen states introduced legislation mandating coverage of prescription contraceptives.[237] In April 1998, Maryland was the first to pass

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224. EPICC was introduced into the Senate on May 20, 1997, *see* S. 766, 105th Cong. (1997). It was introduced in the House of Representatives on July 16, 1997, *see* H.R. 2174, 105th Cong. (1997). The president of the Health Insurance Association of America declined to testify at the July 1998 hearing. *See* Broder, *supra* note 4. The official stated, "We oppose government mandates, but we're not going to spend a dime fighting this." *Id.*

225. *See* Baker, *supra* note 3.

226. 29 U.S.C. §§ 1001-1461. *See supra* text accompanying notes 23-38.

227. *See* S. 766, § 713(a)(1), 105th Cong. (1997).

228. *See* 144 CONG. REC. S9181-01 (daily ed. July 29,1988) (statement of Sen. Snowe).

229. FURROW ET AL., *supra* note 10, at 516.

230. *See* Broder, *supra* note 4.

231. *See* BNA WASHINGTON INSIDER, July 31,1998, *available in* 1998 WL BWI d11.

232. The Snowe-Reid Amendment, Amendment No. 3370, was submitted as an amendment to the 1999 Treasury-Postal Appropriations Bill. *See* 144 CONG. REC. S9181-01 (daily ed. July 29, 1998).

233. *See* 144 CONG. REC. S9181-01 (daily ed. July 29, 1998).

234. *See id.*

235. *See* Insurance News Network, *Growing Support for Contraceptive Coverage* (last modified Aug. 7, 1998) <http://www.insure.com/health/pill.html>.

236. *See* 144 CONG. REC. S9181-01 (daily ed. July 29, 1998) (statement of Sen. Snowe) (characterizing the amendment as a "cost effective approach to effecting the kind of public health policy that should set an example for the rest of the nation's insurers to follow.").

237. *See* Shelton, *supra* note 188, at 21.

legislation requiring equitable coverage similar to that required by EPICC.[238] Seven states had already enacted laws requiring some coverage.[239] State mandates will not apply, however, to health plans governed by ERISA.[240]

Apparently, no single mandate currently proposed, whether by a state, or as a federal amendment to ERISA, will guarantee every insured woman access to guaranteed coverage of the particular prescription contraceptive recommended by her physician.

V. CONCLUSION

In fairness, the health insurance industry must acknowledge the medical necessity of both Viagra and contraceptives. It should abandon its poor performance record on contraceptive reimbursement in favor of covering every insured woman for her medically appropriate choice of prescription contraceptives, if her health plan covers other prescription drugs. This move would be particularly logical in light of the potential savings to be realized. As a matter of policy the health insurance industry should take action to remedy the unfair situation without waiting for federal and state mandates. Delaying remedial action results in increased costs for everyone–insurers, insureds, and taxpayers whose dollars fund the legislative debate.

Additionally, insurers must fairly administer benefits such as reimbursement for Viagra when health plans cover prescription drugs and do not specifically exclude all impotence treatments. Insurers must not change their minds on treatment of an illness when a new drug emerges, but should abide by the terms of their health plan policies in the face of developing technology. The cost of covering new expensive therapies must be weighed against savings realized in the long run.

Viagra and contraceptives are medically necessary prescription drugs which enable the sexes to achieve a common goal, maintaining physical status quo. Men may maintain physical status quo by overcoming impotence in order to engage in sex at will. For women, physical status quo is maintained by the ability to engage in sex at will without risk of pregnancy. As a matter of public policy, health insurance reimbursement must not favor the sexual goal of one gender over the other.

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238. *See id.*
239. *See id.*
240. FURROW ET AL., *supra* note 10, at 517.