

The Legal Environment for IVF and Other Assistive Reproductive Technology After Alabama's Supreme Court and Legislative Decisions

Unlike for individuals or entities providing or receiving services related to in vitro fertilization (IVF), the Alabama IVF Act does not grant immunity to manufacturers, but it limits damages for their violations to the cost of an IVF cycle.

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By Elizabeth Chiarello, Julie Becker, and Rachel Rein

The Alabama Ruling

On February 16, 2024, the Alabama Supreme Court issued a first-of-a-kind decision in *LePage v. Center for Reproductive Medicine, P.C.*¹ This case was consolidated with other cases brought by couples whose frozen embryos were stored at a fertility clinic in Mobile, Alabama, and were destroyed when a patient removed several embryos and inadvertently dropped them on the floor.²

The Court held that frozen embryos used for in vitro fertilization (IVF) are “children” within the meaning of the Alabama Wrongful Death of a Minor Act, and civil liability can attach for such destroyed embryos.³ The Act authorizes punitive damages where, “the death of a minor child is caused by the wrongful act, omission, or negligence of any person.”⁴

The Act does not define “child,” though the Alabama Supreme Court had previously held that “child” includes “unborn children.”⁵ Now, after *LePage*, frozen embryos—which are not gestating in a human womb and may not successfully implant—arguably fall within the definition of “unborn child.” Discarding them for any number of reasons inherent in the IVF process could subject individuals to potential liability, although there are a number of defenses to such IVF litigation.⁶

The Alabama Supreme Court leaves many unanswered questions for the Assistive Reproductive Technology (ART) industry as a whole.⁷ For example, the ruling does not directly address what fertility clinics can do with unused embryos (for example, when a family is complete or when frozen embryos are no longer needed), what such clinics can do with discarded embryos (for example, due to chromosomal abnormalities, failure to properly develop, or genetic disorders), or what duties arise in other scenarios (for example, when embryos are donated to other families, donated to science, or fail to develop in utero after implantation).

Recognizing that the answers to these questions impact how IVF clinics may operate in the State, at least three of the eight IVF clinics in Alabama shut down quickly following the *LePage* decision.⁸ The decision prompted some individuals to consider moving their frozen embryos out of Alabama and certain other states out of concern that those states might copy Alabama.⁹

In response to the impending standstill of the IVF industry in Alabama,¹⁰ the Alabama legislature enacted legislation to address the ruling and ensure that IVF treatment remains available in Alabama.¹¹ On March 6, the legislature passed and the Governor signed SB 159, which grants civil and criminal immunity in connection with death or damage to an embryo to any individual or entity providing or receiving services related to IVF.¹²

Unlike for individuals or entities providing or receiving services related to IVF, the Act does not grant immunity for manufacturers, but it limits damages for their violations to the cost of an IVF cycle.¹³ For example, a couple receiving IVF would get immunity in a situation of death or damage to an embryo, but the manufacturer of the oil used to store the embryo during that same cycle could still be held liable, with capped damages. Accordingly, the Act not only preserves access to IVF, but also supports cost-effective access by limiting liability for the industry.

The Alabama IVF Act also provides the first legislative basis for valuing lost embryos at the cost of a cycle. The legislation reflects a bipartisan coalition's recognition of the important role that ART companies play in the success and safety of IVF.

Other Notable Legislative Proposals

The Alabama IVF Act came on the heels of a failed federal bill blocked by objection in the Senate—the Access to Family Building Act, which would have established a national statutory right to IVF by overriding state limits on ART and giving healthcare providers the right to provide such services and users of such services the right to decide how to use or dispose of their genetic reproductive materials.¹⁴

A bill that would have the opposite effect of the two above was introduced in January 2023 and remains pending in Congress, the Life at Conception Act. That bill declares that the term “human being” means humans at all stages of development, including embryos at the moment of fertilization.¹⁵

Specifically, “the right to life guaranteed by the Constitution is vested in each human being,” which means “at all stages of life, including the moment of fertilization, cloning, or other moment at which an individual member of the human species comes into being.”¹⁶ And several states—including Louisiana,¹⁷ Georgia,¹⁸ Missouri,¹⁹ Florida,²⁰ and Iowa²¹—have either enacted or are considering similar legislation regarding the treatment of extrauterine embryos.

The IVF Litigation Landscape

Litigation over IVF has not been as significant as pharmaceutical or medical device litigation writ large. The most well-known litigation involved failures of freezers that contained genetic material, such as gametes, sperm, and embryos. There were widely publicized alleged freezer failures at clinics in California²² and Ohio,²³ and previous, lesser-known failures in Florida²⁴ and Illinois.²⁵

That litigation was complex, much of it was resolved confidentially or handled through arbitration, and only a few cases went to trial. There have been other lawsuits against the manufacturers of materials used in the IVF process. In one set of lawsuits, for instance, the plaintiffs claim that the media in which the embryos are cultured was defective.²⁶

In another set of lawsuits, plaintiffs claim that clinics implanted degraded or destroyed embryos without telling patients that the embryos were destroyed.²⁷ Litigation over failed IVF cycles is less common because liability and damages are difficult to prove: most IVF cycles are unsuccessful for reasons that have nothing to do with allegedly wrongful or negligent conduct. Subjecting companies and providers to substantial liability may, of course, increase the cost of IVF for everyone.

About the Authors

Elizabeth Chiarello is a partner at Sidley's Chicago office and helps clients in the pharmaceutical industry manage their most complex cases, including preparing high stakes matters for trial and serving as national coordinating and trial counsel in mass litigation.

Julie Becker is a senior managing associate at Sidley's Chicago Office, focusing her practice on the defense of companies in products liability and class action matters in state and federal trial courts across the United States.

Rachel Rein is an associate at Sidley's Chicago Office, focusing her practice on commercial litigation and disputes.

References

1. See No. SC-2022-0515, 2024 WL 656591, at *1 (Ala. Feb. 16, 2024).
2. See *id.*
3. *Id.*
4. *Id.* at *4 (quoting Ala. Code § 6-5-391 (1975)).
5. *Id.* at *4–6.
6. See *id.*; Amanda Zablocki et al., *IVF Caught in the Crosshairs: The Aftermath of the LePage Decision*, Nat. L. Rev. (Mar. 21, 2024), <https://natlawreview.com/article/ivf-caught-crosshairs-aftermath-lepage-decision#:~:text=Alabama%20Legislation%20Following%20LePage,Center%20for%20Reproductive%20Medicine%20decision>.
7. Assisted Reproductive Technology, or ART, “includes all fertility treatments in which either eggs or embryos are handled. The main type of ART is in vitro fertilization (IVF).” *Assisted Reproductive Technology (ART): ART Success Rates*, Ctr. For Disease Control, <https://www.cdc.gov/art/artdata/index.html#:~:text=ART%20includes%20all%20fertility%20treatments,woman's%20uterus%20through%20the%20cervix> (last visited Apr. 26, 2024).
8. Julia Harte, *Three Alabama Providers Halt IVF After High Court Rules Embryos Are Children*, Reuters (Feb. 23, 2024, 5:42 AM), <https://www.reuters.com/world/us/three-alabama-providers-halt-ivf-after-high-court-rules-embryos-are-children-2024-02-22/>; *Assisted Reproductive Technology (ART) Data: Alabama*, Ctrs. for Disease Control & Prevention, https://nccd.cdc.gov/drh_art/rdPage.aspx?rdReport=DRH_ART.ClinicsList&SubTopic=&State=AL&Zip=&Distance=50 (last accessed May 2, 2024) (eight Alabama clinics located).
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10. Riley Griffin, *University in Alabama Pauses Treatment After Embryo Ruling (2)*, Bloomberg News (Feb. 21, 2024, 2:53 PM), <https://news.bloomberglaw.com/health-law-and-business/university-of-alabama-pauses-ivf-treatment-after-states-ruling> (“The [University of Alabama at Birmingham]’s decision [to pause IVF treatments] shows the chilling effect that the recent ruling could have on fertility treatment . . . ‘IVF is likely to become completely inaccessible in the state’”).
11. Other states are also considering or have recently enacted protective legislation, such as New York (S.B. 8973), Missouri (H.B. 2882, 2845; S.B. 1486), Colorado (H.B. 22-1279, enacted as the Reproductive Health Equity Act; H.B. 24-1224, which would have recognized fetal personhood, now defeated), New Jersey (A.R. 122), and Maine (L.D. 1619/ H.P. 1044, signed into law as An Act to Improve Maine’s Reproductive Privacy Laws,, blocked in the Maine House of Representatives; L.D. 780), and Michigan’s new Family Protection Act (H.B. 5207–15) also establishes legal protections for IVF. In Alabama, it is unclear how the state legislature will address or supersede the Alabama Supreme Court’s reliance on the Alabama constitution.

12. S.B. 159, Leg., 2024 Reg. Sess. (Al. 2024); see also Alander Rocha, *Alabama Passed a New IVF Law. But Questions Remain*, Ala. Reflector (Mar. 11, 2024, 7:01 AM), <https://alabamareflector.com/2024/03/11/alabama-passed-a-new-ivf-law-but-questions-remain/#:~:text=The%20bill%20passed%20on%20Wednesday,destroyed%2C%20though%20not%20civil%20immunity>. (indicating that Alabama Governor Kay Ivey signed the bill the evening that it passed).
13. S.B. 159, Leg., 2024 Reg. Sess. (Al. 2024).
14. Rachel M. Cohen, *Why IVF Looks Different in the US Than in the Rest of the World*, Vox (Mar. 26, 2024, 6 AM) <https://www.vox.com/policy/2024/3/26/24104638/abortion-ivf-duckworth-regulation-reproductive-technology>.)
15. Hank Greely, *SLS's Hank Greely Breaks Down the Alabama Wrongful Death Case Involving Frozen Embryos*, S.L.S. Blog (Mar. 4, 2024), <https://law.stanford.edu/2024/03/04/slss-hank-greely-breaks-down-the-alabama-wrongful-death-case-involving-frozen-embryos/>.
16. Life at Conception Act, H.R. 431, 118th Cong. §§ 2–3 (2023) (Right to Life and Definitions, respectively).
17. RS § 9:121 (recognizing IVF embryos as having personhood, extending criminal and civil penalties for the destruction or termination of these embryos); but c.f. HB 833 (protecting IVF providers from criminal and civil liability so long as they act in good faith, if passed; gross negligence is not protected).
18. O.C.G.A. § 1-2-1 (recognizing fetal personhood and protecting rights).
19. MO Stat. § 1.205 (asserting that life begins at conception and accords the unborn child all rights, advantages, and immunities much earlier than other states).
20. SB 476 (The bill would have extended civil liability for wrongful death to those of an unborn child; however, the bill was sidelined following the recent decision and subsequent constituent outcry in Alabama.).
21. HSB 621 (allowing a person who causes the nonconsensual end of a pregnancy to serve a life sentence with no possibility of parole, and formally recognizing an “unborn person” in the state’s laws, if passed).
22. *California Jury Awards \$15M Over Lost Fertility Clinic Eggs and Embryos*, B.B.C. News (June 11, 2021), <https://www.bbc.com/news/world-us-canada-57446504>.
23. John Caniglia, *UH Freezer Malfunction Update: More Than 150 Families Settle Lawsuits in Loss of Embryos*, Cleveland.com (Sept. 29, 2019, 5:00 AM, updated 10:09 AM), <https://www.cleveland.com/news/2019/09/uh-freezer-malfunction-update-more-than-150-families-settle-lawsuits-in-loss-of-embryos.html>.
24. Nathan Crabbe, *Mechanical Glitch Ruins Sperm Stored at UF Center*, The Gainesville Sun (Sept. 3, 2006, 12:01 AM, updated 12:00 AM [sic]), <https://www.gainesville.com/story/news/2006/09/03/mechanical-glitch-ruins-sperm-stored-at-uf-center/31494353007/>.
25. Christopher P. Moutos et al., *Cryostorage Failures: A Medicolegal Review*, 36 J. Assist. Reprod. Genet. 1041, 1043 (2019) (“In the aftermath of the event at Northwestern Memorial Hospital, approximately 65 lawsuits were filed. While financial information is not available for each case, it has been reported that one individual case was settled for \$1 million.”); *Lawsuits: Northwestern Memorial Damaged Sperm Samples*, Chi. Tribune (Aug. 21, 2013, 1:00 AM, updated Nov. 3, 2021, 11:46 PM), <https://www.chicagotribune.com/2013/08/21/lawsuits-northwestern-memorial-damaged-sperm-samples/> (reporting contemporaneously).
26. Complaint, *Walden v. CooperSurgical, Inc.*, No. 4:24-CV- 00903 (N.D. Cal. filed Feb. 15, 2024) (alleging that the embryo culture solution lacked magnesium, necessary for embryo growth).
27. Complaint, *L.N. & T.N. v. FPG Services, LLC d/b/a Ovation Fertility*, No. 30-2024-01395 185-CU-PO-WJC (Cal. Sup. Ct. filed Apr. 22, 2024).

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