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Wisconsin Implications of the Dobbs Decision

Jul 11 2022

Practice Area: Health Law

On Friday, June 24, the United States Supreme Court overturned *Roe v. Wade* and reversed long-established precedent that the Constitution protects a pregnant woman's liberty to choose to have an abortion. In holding that the Constitution does not confer a right to abortion, *Dobbs v. Jackson Women's Health* returns "the authority to regulate abortion to the people and their elected representatives." Essentially, the decision seeks to have each state formulate its own laws regulating abortion access.

Since the Supreme Court overturned *Roe v. Wade*, several individual states have filed lawsuits challenging their state abortion laws. Wisconsin has several potentially conflicting statutes regulating abortion and on Tuesday, June 28, in Dane County Circuit Court, a lawsuit was filed seeking a declaration that a Wisconsin statute criminalizing abortion, which dates back to 1849, is unenforceable. The lawsuit was filed by Attorney General Josh Kaul (at the direction of Gov. Tony Evers), the Wisconsin Department of Safety and Professional Services, and the Wisconsin Medical Examining Board.

The Wisconsin statute at issue made it illegal to perform an abortion after conception unless it was "necessary to preserve the life of the mother." When *Roe v. Wade* was decided in 1973, the Supreme Court listed Wisconsin's statute as one example of a statute that criminalized abortion that was unconstitutional. Subsequently, without expressly repealing the 1849 law, Wisconsin passed a series of laws to regulate lawful abortion, which generally prohibit abortion after 20 weeks gestation, with certain exceptions to preserve the life and health of the mother.

The Attorney General's lawsuit makes two arguments in support of overturning the 1849 law:

- First, the statute is unenforceable because of the series of laws that Wisconsin passed post *Roe v. Wade* allowing abortions until viability or if they are necessary to preserve the life or health of the women. These laws, passed after *Roe v. Wade*, are fundamentally inconsistent with the broad ban against abortions in Wisconsin found in the earlier statute.
- Second, the statute is unenforceable because it has not been used in the 50 years since *Roe v. Wade*. When a law falls out of common usage and becomes obsolete because of disuse, the law may become unenforceable based on notions of fairness or reliance.

The Attorney General's case seeks declaratory relief that the 1849 law is unenforceable. Based on the Complaint, the case primarily raises issues of statutory interpretation. In this type of case, there will likely be an early dispositive motion. Depending on the briefing and argument schedule the circuit court orders, a decision is possible by the end of the summer. An appeal is expected, and the parties—or the Court of Appeals—may "fast track" the case to the Wisconsin Supreme Court through bypass or certification. Thus, the case may be in the Supreme Court of Wisconsin by sometime this fall, making a decision by the end of the year possible.

This is the first lawsuit in Wisconsin challenging the state's abortion laws since the *Dobbs* decision. There may be additional challenges to these statutes by other parties who have standing, or challenges if prosecutors begin enforcing the 1849 abortion statute. This area of the law is in flux and it remains unclear what other lawsuits may arise.

It may be some time until the status of the existing Wisconsin abortion law is clarified. In the meantime, we encourage health care providers and other organizations to take stock of the activities within their organizations that may be impacted. The direct administration of an intentional abortion is not the only service impacted by these changes in the law. Below are just a couple of the services and situations that may require ongoing analysis:

- Patient counseling and treatment for pregnancy-related complications.
    - Examples: early rupture of membranes prior to viability, medical management of a miscarriage (including the use of medications that can also be used to cause intentional abortion), ectopic pregnancy, fetal abnormalities incompatible with life, and fertility treatments involving selective pregnancy reduction and/or discard of cryopreserved embryos. These situations can involve the interaction of multiple laws at the state and federal level. For example, the Centers for Medicare & Medicaid Services have reinforced that the duty to provide stabilizing medical treatment under the Emergency Medical Treatment and Labor Act preempts any directly conflicting state law.

- Providers with licensure in multiple states or who refer patients to out-of-state providers for care that is unavailable locally due to state law restrictions.
    - Concern has been raised about the potential for "aiding and abetting" charges related to counseling or referring patients for care out of state that is prohibited by criminal law in the state in which the patient is seen or resides.
    - Providers can face discipline, up to and including loss of licensure, for "unprofessional conduct" under administrative rules governing provider licensure. Several such rules may be implicated. For example, Wisconsin Administrative Code Med 10.03 defines unprofessional conduct to include "violation or conviction of any laws or rules of this state, *or of any other state*, or any federal law or regulation that is substantially related to the practice of medicine and surgery." (Emphasis added.) It further defines unprofessional conduct to include "violating or being convicted of" certain listed criminal statutes and "any successor statute criminalizing the same conduct, *or if in another jurisdiction, any act which, if committed in Wisconsin would constitute a violation of*" the listed statutes. (Emphasis added.) The listed statutes include murder, and forms of intentional and reckless homicide. Some state legislators in other jurisdictions have put forward bills characterizing intentional abortions in this manner.

Because of the uncertainty over Wisconsin's 1849 abortion law, health care providers will need to keep abreast both of the ongoing litigation initiated by the Attorney General and by prosecutorial decisions made by local prosecutors, in addition to monitoring the law in the states in which any physicians or other providers are licensed.
