ARTICLE

FINANCING FERTILITY

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Fertility clinics and financing companies often offer refund programs in which patients pay a premium up front for fertility treatments. If the treatment fails, clinics refund part of the fee. This is an innovative tool for financing fertility treatments that is virtually unparalleled in other areas of medicine. Despite the prevalence of this financing tool, academic commentary has offered little analysis of how it operates, how fertility clinics promote it, and how patients evaluate whether to use it. Moreover, academic commentary has not assessed whether current regulations adequately protect patients who use refund programs to finance their treatments. This Article offers the first in-depth study of how fertility refund programs are presented to patients. The author conducted an empirical assessment of the website of every United States fertility clinic that is a member of the Society for Assisted Reproductive Technology, coding the information presented on these websites about refund programs. The findings are surprising. According to the study, clinics largely fail to comply with professional self-regulations that mandate the disclosure of specific information about their refund program. Additionally, clinics often present information about refund programs deceptively or in a manner that exploits poor patient decision-making. Using the data in the study and applying insights from behavioral law and economics, the author argues for additional consumer protection regulations for refund programs. Refund programs currently operate in a regulatory vacuum, and voluntary self-regulation has failed to promote accurate and effective disclosures. Moreover, evidence suggests that patients evaluating refund programs make predictable, systematic mistakes and that clinics offering refunds frame the program in a way that exploits patients' defective reasoning. To protect patients considering refund programs, the author proposes that policymakers require refund providers to make certain mandatory disclosures when presenting information about their refund programs.

Fertility treatments are an anomaly in the world of healthcare finance. One common treatment, in vitro fertilization "IVF,"[1] costs over $12,000 for

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[1] Jody Lyneé Madeira explains the process of an IVF cycle:

> IVF consists of four main steps. First, the woman uses injectible medications to stimulate the ovaries to produce multiple eggs, and undergoes frequent monitoring via ultrasound and blood hormone level measurements. When the eggs are mature, the woman uses a "trigger" hCG shot and shortly thereafter undergoes a surgical procedure performed under anesthesia to remove the eggs from her ovaries by means of an ultrasound-guided needle inserted into the ovarian follicles through the vaginal wall. The "harvested" eggs are then placed in petri dishes together with sperm to facilitate fertilization and form embryos; the average fertilization rate is from 60 to

a single cycle.[2] But unlike other expensive treatments, fertility treatments are not covered by most health insurance programs,[3] leaving patients to determine how to pay for treatments on their own. Given these prohibitive costs, only a small fraction of those seeking IVF treatment can afford it.[4]

To fill this void, clinics and finance companies have become creative. Seeing the financial opportunity in the billion-dollar-a-year IVF industry,[5] companies began offering an innovative financing tool that is virtually unparalleled in other areas of medicine: refunds. Under fertility refund programs, patients pay a premium up front, but they are guaranteed multiple cycles of IVF and a refund if they fail to conceive.[6]

The laws regarding IVF financing, however, have lagged behind these innovations. IVF refund programs are functionally unregulated by federal and state law.[7] Instead, the only regulations governing these programs are voluntary self-regulations.[8] Even academic commentary has paid little critical attention to how IVF refund programs operate, how clinics participate in promoting them, and how patients perceive and use them. Commentators have called for a wide variety of regulations for the fertility industry, but no one has made the case to specifically regulate IVF refund programs.[9]

This Article offers an analysis of IVF refund programs, evaluates the case for regulating them, and proposes a mandatory disclosure regime to govern them. To understand how IVF refund programs work and are presented to patients, the author conducted an empirical assessment that fo-

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> 70 percent. Three or five days after the egg removal procedure, one or more embryos are transferred back into the woman's uterus with the goal of establishing a pregnancy. The transfer procedure is minor, requires no anesthesia, and takes about five minutes. Any remaining embryos that are not transferred are then frozen. A pregnancy test is administered 14 days after the egg retrieval.

Jody Lyneé Madeira, Common Misconceptions: Closing the Gap Between Legal Constructions of Infertile Women and Women Considering Abortion (Aug. 8, 2009) (unpublished manuscript, on file with the author).

[2] Joshua Kleinfeld, Comment, *Tort Law and In Vitro Fertilization: The Need for Legal Recognition of "Procreative Injury"*, 115 YALE L.J. 237, 244 n.30 (2005).

[3] *See* Thomas D. Flanigan, Note, *Assisted Reproductive Technologies and Insurance Under the Americans with Disabilities Act of 1990*, 38 BRANDEIS L.J. 777, 777 (2000) (noting that ninety-three percent of health insurance plans exclude coverage for fertility treatments).

[4] *See* DEBORA L. SPAR, THE BABY BUSINESS: HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION 30 (2006) ("In this market, therefore, price acts harshly as a constraint on demand. The desire is there, as we know. So, increasingly, is the supply. Yet the price of this supply is still too high for many potential buyers, leaving supply and demand to meet at a point well below their full potential.").

[5] *See* Anna Mulrine, *Making Babies*, U.S. NEWS & WORLD REP., Sept. 27, 2004, at 60 ("Spending on IVF alone is up 50 percent in the past five years, to over $1 billion last year.").

[6] *See* discussion *infra* Part I.A.

[7] *See* discussion *infra* Parts II.A, II.B.

[8] *See infra* Part II.A.

[9] *See, e.g.*, MAURA A. RYAN, ETHICS AND ECONOMICS OF ASSISTED REPRODUCTION: THE COST OF LONGING (2001) (analyzing the economics of fertility treatments and suggesting regulations without mentioning financing); Lyria Bennett Moses, *Understanding Legal Responses to Technological Change: The Example of In Vitro Fertilization*, 6 MINN. J. L. SCI. & TECH. 505, 526–28 (2005) (listing reasons to regulate IVF without mentioning financing).

cused on coding the information presented about IVF refund programs on the website of each United States fertility clinic that is a member of the Society for Assisted Reproductive Technology ("SART").[10] Part I presents the results of this study, referred to as the Fertility Website Study,[11] which provides a description of the IVF refund transaction, the participants in the IVF refund market, and the way clinics present information about refund programs.

The observations from the Fertility Website Study inform the normative argument presented in Part II, which evaluates the argument for additional regulations of IVF refund programs. It argues that additional regulations are needed to protect consumers considering IVF refund programs. These programs are presented by IVF refund providers in ways that often exploit common consumer decision-making biases, as well as biases specific to patients in the fertility industry. For instance, IVF refund providers commonly advertise refund programs as the total cost that patients will have to pay for multiple cycles of IVF. As a result, patients incorrectly anchor their expectations of the total price of multiple cycles to the stated refund program's cost, and neglect to account for the significant additional costs that refund programs do not typically cover. Despite this risk of deceptive practices, no specific government regulation requires refund providers to make any disclosures to patients about their programs' costs, disadvantages, excluded costs, eligibility criteria, or success criteria. And, the Fertility Website Study demonstrates that self-regulations created by fertility trade organizations have failed to promote adequate disclosures.

Part III responds to the problems in the current market by suggesting that legislators enact a mandatory disclosure regime. Disclosures that provide basic information about the program—such as the program's definition of success, the eligibility requirements for participation, and the fact that participation in the program does not guarantee a successful pregnancy—would combat common consumer misunderstandings regarding how refund programs operate. Disclosures about the absolute cost of treatment under the program, and about the cost of the program relative to paying for multiple cycles of IVF individually, would help patients overcome the faulty reasoning they are prone to use when evaluating plans. Part III contends that the mandatory disclosure regime is politically and economically feasible. The small step of requiring disclosures could offer significant protection to patients considering refund programs without banning or altering the programs or causing providers to exit the market.

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[10] SART - Society for Assisted Reproductive Technology, http://www.sart.org (last visited Nov. 4, 2009).

[11] *See infra* app. I.

I. The IVF Refund Program Market

The primary goal of this Part is to provide a descriptive account of how IVF refund programs function. Several overlapping strategies were used to collect available information: conducting interviews with key industry participants, examining journalistic accounts and descriptions in scholarly literature, and most significantly, conducting an empirical study reviewing the material fertility clinics publish on their websites. The goal of the Fertility Website Study was to determine how clinics present information about IVF refund programs on their websites. For a discussion of the methodology used in performing the study, see Appendix I.

Sections A and B of this Part use the Fertility Website Study, along with interviews with key industry participants, to describe how IVF refund programs operate and who populates the market.

A. The IVF Refund Transaction

IVF refund programs have expanded greatly in the fifteen years since they were first offered.[12] The Fertility Website Study found that 135 of the 381 SART clinics with websites (35.4%) advertise IVF refund programs on their websites. This number likely understates the actual number of clinics offering refunds because it does not include clinics without websites and does not include clinics that only offer refunds to patients in person. Still, the data demonstrate a significant increase from 2005, when Abusief et al. reported that just 20% of websites, or 57 websites, advertised refund programs.[13]

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[12] A few clinics began offering refund programs in 1994 and 1995. It appears that Shady Grove, a clinic in Maryland, was the first to begin offering IVF refund programs in 1994. Kristen Gerencher, *The Promise of a Child*, MarketWatch, July 19, 2000, http://www.marketwatch.com/story/investing-in-the-promise-of-a-child. Dr. Widra at Shady Grove developed the program to help uninsured people "hedge their bets on infertility treatments." *Id.* Dr. Sher, a doctor at the Sher Institute of Reproductive Medicine, has consistently pushed the boundaries of fertility practice, was also a pioneer in IVF refund programs; he began offering his IVF refund program in 1995. Judith VandeWater, *Fertility Doctors Use Advertising and Refund Offers to Woo Couples; Pricing Packages, Money-Back Guarantees and Unconventional Methods Have Caused Some Physicians to Become Concerned for Patients' Health When the Emotional and Financial Stakes Are High*, St. Louis Post-Dispatch, Feb. 5, 2001, at BP10. Finally, Dr. Jacques Stassart in Minnesota, also began offering eighty percent IVF refunds in 1995. Chen May Yee & Josephine Marcotty, *Miracles for Sale: With Rising Competition, Some IVF Clinics are Offering Money-Back Guarantees and Going Farther Afield to Look for Patients*, Star Trib., Oct. 23, 2007, at A1.

[13] Mary E. Abusief et al., *Assessment of United States Fertility Clinic Websites According to the American Society for Reproductive Medicine (ASRM)/Society for Assisted Reproductive Technology (SART) Guidelines*, 87 Fertility & Sterility 88, 88–89 (2007).

Refund programs go by a variety of names, including: Shared-Risk,[14] Success-Based Risk Sharing Plan,[15] IVF Success Guarantee Program,[16] the IVF Baby Guarantee or Your Money Back Plan,[17] and Pregnancy Guarantee Program.[18] The general term "IVF refund programs" encompasses two types of programs: (1) programs in which each patient pays a one-time non-refundable fee for as many cycles as it takes for the patient to become pregnant, up to a predetermined number of IVF cycles; and (2) programs in which the patient pays a one-time fee that is partially refundable if the IVF cycle is unsuccessful.[19] Some clinics offer a hybrid of the two in which patients are offered a defined number of cycles at a set price with the promise of a refund if the cycles are unsuccessful.[20]

To understand the IVF refund transaction, it is useful to look at a single IVF refund program in detail. The ART Fertility Program of Alabama, a SART member,[21] offers a "Three Cycle Option" of the "Shared Risk Refund Plan."[22] Under the program, patients pay $17,500 for up to three "fresh cycles"[23] over a twelve-month period.[24] If a fresh cycle yields frozen embryos,[25] the clinic will also implant them as part of the program.[26] The clinic retains the entire fee if the couple has a live birth.[27] If the couple does not

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[14] IntegraMed Fertility Network, The Attain IVF Program, http://www.integramedfertility.com/inmdweb/content/cons/shared.jsp (last visited Oct. 2, 2009).

[15] San Diego Fertility Center, San Diego IVF (In Vitro Fertilization) Guarantee, http://www.sdfertility.com/guarantee.htm (last visited Oct. 2, 2009).

[16] *See* Marie McCullough, *Clinics Promise Fertilization or Refund; No Guarantees When It Comes to Pregnancy? Think Again*, PHILA. INQUIRER, Aug. 17, 2003, at A1.

[17] Washington Fertility Center, Baby Guarantee or Your Money Back, http://www.washingtonfertility.com/pages/guarantee.html (last visited Oct. 4, 2009) [hereinafter Washington Fertility Baby Guarantee].

[18] Genetics and IVF Institute, Guarantee Programs, http://www.givf.com/financialprograms/guaranteeprograms.cfm (last visited Oct. 4, 2009).

[19] *See* Abusief et al., *supra* note 13 (using this definition of IVF refund programs). When patients do not use an IVF refund program, they pay fees for each cycle of IVF individually. These arrangements are called fee-for-service arrangements. *See* David Hyman & Charles Silver, *You Get What You Pay For: Result-Based Compensation for Health Care*, 58 WASH. & LEE L. REV. 1427, 1441-42 (2001).

[20] The Fertility Website Study found that 93.3% (n=126) of the websites advertising IVF refund programs offered actual refunds to patients.

[21] Society for Assisted Reproductive Technology, SART National Summary, http://www.sart.org/find_frm.html (last visited Nov. 3, 2009).

[22] ART Fertility Program of Alabama, Three Cycle Option, http://octane8.cre8ive.com/art2/default.aspx?id=387 (last visited Oct. 4, 2009) [hereinafter ART Three Cycle Option].

[23] These are cycles using embryos that have been recently created and have never been frozen.

[24] ART Three Cycle Option, *supra* note 22.

[25] A fresh cycle can yield frozen embryos if more embryos are created than the patient uses in the cycle. Davis v. Davis, 842 S.W.2d 588, 592 (Tenn. 1992) ("Using [cryogenic preservation], if more ova are aspirated and fertilized than needed, the conceptive product may be cryogenically preserved (frozen in nitrogen and stored at sub-zero temperatures) for later transfer if the transfer performed immediately does not result in a pregnancy.").

[26] ART Three Cycle Option, *supra* note 22.

[27] *Id.*

have a live birth after three fresh cycles and any frozen cycles, the clinic refunds the patient $10,500 of the $17,500 paid initially.[28]

Patients can participate in the program only if the following conditions are satisfied: (1) the female is younger than thirty-six years old (or if she is older than thirty-six, she must meet additional criteria), has not had more than two miscarriages, and satisfies other medical criteria; (2) the male is younger than fifty-six years old and has sufficient sperm; and (3) the couple has not had more than one unsuccessful IVF cycle in the past.[29] In addition to these requirements, patients surrender some decision-making authority if they enroll in the program. They must "inseminate all eggs," "accept embryo cryopreservation," "agree to/accept embryo transfer recommendation of the Plan, based on [American Society of Reproductive Medicine] guidelines," and, if the patients are older than thirty-six years old, "accept PGD (preimplantation genetic diagnosis) for evaluation of normalcy of embryos, if recommended."[30]

The $17,500 program fee includes the retrieval and fertilization of the female's eggs, Intracytoplasmic Sperm Injection ("ICSI"), assisted embryo hatching, the transfer of the embryos into the uterus, and cryogenical preservation and storage of the frozen embryos for up to twelve months.[31] The $17,500 program fee does not include, among other costs, the initial office visit, prescreening, monitoring,[32] medication, pregnancy testing, preimplantation genetic diagnosis testing, the cost of any procedures not performed at the clinic's facilities, and the cost of storing frozen embryos for over twelve months.[33] The program provides a mechanism to charge other fees even beyond these fees that the clinic states are not covered: "Addi-

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[28] *Id.*

[29] *Id.*

[30] *Id.* ART Fertility Program of Alabama's restrictions on patients' choices are not unique. *See* Judith VandeWater, *Fertility Doctors Use Advertising and Refund Offers to Woo Couples; Pricing Packages, Money-Back Guarantees and Unconventional Methods Have Caused Some Physicians to Become Concerned for Patients' Health When the Emotional and Financial Stakes Are High*, ST. LOUIS POST-DISPATCH, Feb. 5, 2001, at BP10 ("Ahlering said the women in the financial risk-sharing program, who represent roughly half the practice, must follow the doctor's recommended course of treatment—even if the prescriptive is, like immune globulin or Viagra, out of the mainstream."); University of Iowa Health Care, About IOWArranty, http://www.uihealthcare.com/depts/med/obgyn/infertility/sharerisk/aboutus.html (last visited Jan. 30, 2009) ("However, as risk sharing participants, you must agree to the fertilization of all available mature oocytes (eggs), and culturing (incubating) more embryos than transferred to allow the selection of the best possible embryos for transfer. You must agree to the freezing (cryopreservation) of residual embryos.").

[31] ART Three Cycle Option, *supra* note 22. The ART Fertility Program of Alabama's inclusion of ICSI and assisted embryo hatching is atypical. Most IVF refund programs exclude these charges. *E.g.*, Fertility Specialists of Dallas, IVF SharedDreams Program, http://www.fertilitydallas.com/IVF_fertility_dallas_shared_dreams.html (last visited Nov. 3, 2009); The Center for Advanced Reproductive Medicine & Fertility, In Vitro Fertilization Refund Plan, http://www.infertilitydocs.com/infertility/about.html#3 (last visited Nov. 3, 2009).

[32] The clinic offers a separate monitoring package, which only includes monitoring costs, for an additional $3,000 non-refundable fee. ART Three Cycle Option, *supra* note 22.

[33] *Id.*

tional costs may be incurred based on additional parameters."[34] These uncovered fees can be the same as or more expensive than the costs of the program itself.[35]

Either the clinic or the patient can terminate the program at the end of each completed cycle without any cost.[36] If either party terminates the program, the patient is required to pay the clinic the fees the clinic usually charges for all of the services the patient received prior to the termination.[37] The Plan advises, however, that the clinic will usually not cancel the program but will recommend that patients proceed to another cycle if the first cycle fails.[38]

B. Participants in the IVF Refund Market

The ART Fertility Program of Alabama offers its refund program directly to patients.[39] That is, the clinic itself is the party accepting the extra payment if pregnancy is achieved earlier in the process, and the clinic itself will take a loss if a live birth is not achieved until later in the process. The Fertility Website Study found that 79 of the 135 clinics (58.5%) with IVF refund programs offer them directly from the clinic.

In contrast to the ART Fertility Program of Alabama, a significant number of refund programs are offered by an independent company that partners with the clinic. The two largest independent companies that offer IVF refund programs are IntegraMed America, Inc. ("IntegraMed") and Advanced Reproductive Care, Inc. ("ARC").[40] IntegraMed is a publicly-held company[41] that works with some clinics as "Partners" and with some as "Affiliates."[42] Partners are entitled to IntegraMed's IVF refund program as well as their "full suite of products and services," in which IntegraMed "provide[s] the

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[34] *Id.*

[35] *See infra* notes 159–60 and accompanying text.

[36] ART Three Cycle Option, *supra* note 22.

[37] *Id.*

[38] *Id.* Other termination clauses are structured differently than ART Fertility's clause. *See, e.g.*, Advanced Fertility Center of Chicago, IVF Cost Plan with Risk Sharing and Money Back If It Doesn't Work, http://www.advancedfertility.com/ivfriskshare.htm (last visited Oct. 4, 2009) [hereinafter Chicago IVF Cost Plan with Risk Sharing] ("We reserve the right to terminate the patient's participation after each completed cycle (this is very rare). Likewise, the couple has the right to terminate its participation after each completed cycle (after all fresh and frozen embryos are transferred). If our center terminates the couple's shared risk refund program early (before the completion of all 3 or 4 fresh IVF attempts), the refundable amount will be returned to the couple. Likewise, the couple is also free to quit the program before they complete all of their allotted fresh cycles. The refundable portion is given to the couple if they are not pregnant and all frozen embryos have been transferred.").

[39] ART Three Cycle Option, *supra* note 22.

[40] Melynda Dovel Wilcox, *Having an In Vitro Baby Can Be Easier Than Figuring Out How to Pay the Bill*, KIPLINGER'S PERS. FIN., Sept. 2002, *available at* http://www.nobabyonboard.com/miracle.html.

[41] IntegraMed is listed on NASDAQ under the symbol INMD.

[42] IntegraMed Am., Inc., Annual Report (Form 10-K), at 2 (Mar. 14, 2008) [hereinafter IntegraMed 2008 10-K].

equipment, facilities and support necessary to operate the center, and employ[s] substantially all non-physician personnel."[43]

Affiliates can offer patients IntegraMed's IVF refund program, patient financing, and pharmaceutical products. Furthermore, IntegraMed will support Affiliates' marketing activities.[44] IntegraMed typically works with one clinic in a market.[45] It selects which clinics to work with by verifying the physicians' credentials and by determining if the clinic's success rate is equal to or above the national average.[46]

Partners pay IntegraMed "(i) a tiered percentage of net revenues generally between 3% and 6%; (ii) [costs IntegraMed incurs for services for or payments on behalf of the clinic]; and (iii) either a fixed amount or a percentage of the center's earnings, which currently ranges from 10% to 20% . . . ."[47] Each Affiliate pays a fee to be the only clinic in its market offering IntegraMed, but the purpose of the fee is to allow IntegraMed to recoup administrative costs.[48] IntegraMed's profit from Affiliates comes from patients using its refund program.[49] In 2001, 150 endocrinologists were associated with IntegraMed.[50] In 2007, IntegraMed generated $15.3 million in revenue from its IVF refund program, which represented a growth of 26.7% over the prior year.[51] The Fertility Website Study found that 31 of the websites offering IVF refund programs were offering the refund through IntegraMed (55.4%).

ARC is a privately-held company.[52] In 2001, it had 220 reproductive endocrinologists in its network.[53] From 2001 to 2004, it grew from having 65 clinics as members[54] to having 75 clinics as members.[55] Though past news accounts state that each member of ARC usually invested $10,000 to join,[56] ARC's CEO Dr. David Adamson claims that "ARC does not charge physicians for membership in the network."[57] If a patient uses ARC financing, ARC pays the clinic directly for treatments, and the clinic gives ARC a ten

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[43] *Id.* at 3–4.

[44] *Id.* at 5.

[45] Telephone Interview with Pamela T. Schumann, President, Consumer Service Division, IntegraMed America, Inc. (Feb. 12, 2009) [hereinafter Schumann Interview].

[46] *Id.*

[47] IntegraMed 2008 10-K, *supra* note 42, at 4.

[48] Schumann Interview, *supra* note 45.

[49] *Id.*

[50] Greg Borzo, *National Networks Try to Attract Infertility Patients*, OB/GYN NEWS, Feb. 15, 2001, at 30.

[51] IntegraMed 2008 10-K, *supra* note 42, at 20.

[52] Borzo, *supra* note 50.

[53] *Id.*

[54] *Id.*

[55] Lisa Barrett Mann, *A Baby, or Cash Back; Some IVF Centers Offer Risk-Sharing Deals*, WASH. POST, May 18, 2004, at F1.

[56] Borzo, *supra* note 50.

[57] E-mail from David Adamson, Chief Executive Officer, Advanced Reproductive Care, Inc., to author (Mar. 1, 2009, 14:34 CST) [hereinafter E-mail from Adamson] (on file with author).

percent discount on patient services.[58] Thirty-five of the websites (25.9%)[59] in the Fertility Website Study offer ARC's refund program.

Some press commentaries on IVF refund programs favor independent companies because these companies prevent any problems associated with incentives. A clinic operating its own refund program may over-treat a patient to achieve pregnancy in the fewest number of cycles.[60] In contrast, a clinic working with an independent company would not over-treat patients because the doctor treating the patient would not know if the patient had purchased a refund program.[61] With IntegraMed, for instance, the consumer purchases the IVF program from IntegraMed, and IntegraMed pays the fertility clinic a defined reimbursement for each treatment given to the patient.[62] Thus, the doctors' compensation is not tied to obtaining pregnancy through a small number of cycles.

Even with independent providers, however, doctors may still have perverse incentives for fear that the independent provider may drop them if the provider has to pay out too many refunds. ARC, for instance, "retains the right to . . . terminate membership at any time if members do not meet [its] standards."[63] Similarly, IntegraMed reviews its Affiliates' overall success rates, but it has never removed a clinic from its network for low success rates.[64]

The IVF refund transaction itself is notable because of the unique way it compensates physicians based on the results of treatment. More remarkable is the regulatory void in which these transactions operate. Part III examines the current regulations applicable to IVF refund programs and argues that legislators should impose regulations designed to govern IVF refund programs.

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[58] *Id.*

[59] The percentage of clinics offering each type of program adds up to more than 100% when combined because a small number of clinics offer refunds through multiple providers.

[60] *See* Borzo, *supra* note 50.

[61] *See id.* ("But some physicians and groups disapprove of money-back guarantees, saying such arrangements push infertility physicians to over treat patients, contributing to the problem of multiple births. That's one reason ARC administers the refund rather than leaving it up to the physicians providing care. 'Our physicians don't necessarily know who purchased a guarantee,' Dr. Adamson said."); Mann, *supra* note 55 ("[ARC, as an independent company,] ensures that doctors' decisions are based on good medicine, not remuneration . . . ."); Wilcox, *supra* note 40 ("Both [IntegraMed and ARC] sidestep the conflict-of-interest issue by having patients purchase the packaged plan through the network rather than through the individual clinic. The network then reimburses the clinic for each round of IVF, just as an insurance company would do."); Yee & Marcotty, *supra* note 12 ("Even as warranty programs spread around the country, Kuneck's clinic held back. He says he isn't comfortable with the clinic acting as financier. In 2004, the clinic began offering warranties through a New York company, to maintain a wall between business and medicine. 'This is a gentlemanly way of doing it,' Kuneck said. 'So I never have to question a medical choice based on finance.' ").

[62] IntegraMed 2008 10-K, *supra* note 42, at 4.

[63] E-mail from Adamson, *supra* note 57.

[64] Schumann Interview, *supra* note 45.

II. Arguments for Regulating IVF Refund Programs

This Part argues that legislators should enact new regulations for IVF refund programs. It is primarily concerned with how clinics and companies present IVF refund programs to patients, and how the refund market operates defectively. This Part does not discuss whether refund programs skew physicians' incentives or encourage implanting too many embryos in a single cycle.[65] Additionally, this Part does not contend that physicians' involvement in financial issues sullies the treatments or the profession or transforms children into products.[66] Instead, this Part's critique is limited to the ways in which refund providers exploit consumer biases or misrepresent information about refund programs.

Section A contends that the current self-regulations have failed because clinics have not complied with the guidelines enacted by the American Society for Reproductive Medicine ("ASRM"). Section B surveys regulations that have already been enacted that could apply to refund programs. Surprisingly, few regulations govern refund programs, and those that do lack the power to discipline refund providers.

The lack of regulation of IVF refund programs would not be a problem if the IVF refund market operated efficiently, but it does not. Patients are misled by a variety of biases, faulty heuristics, and misrepresentations about refund programs. Section C offers evidence of four ways in which refund providers lead patients toward sub-optimal decisions. Also, it notes the vast information asymmetry that exists between refund providers and the patients considering these programs.

Finally, Section D discusses the benefits IVF refund programs offer. Although any regulation risks driving some participants out of the IVF refund market, the disclosure regime envisioned in this Article will not drive legitimate IVF refund program providers from the market.

A. The Self-Regulation of IVF Refund Programs Has Failed

Self-regulation is the dominant form of regulation in the fertility industry,[67] and it is currently the most significant form of regulation for IVF re-

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[65] *See* John A. Robertson & Theodore J. Schneyer, *Professional Self-Regulation and Shared-Risk Programs for In Vitro Fertilization*, 25 J.L. Med. & Ethics 283, 288–89 (1997) (arguing that clinics offering shared-risk have no greater incentive to transfer extra embryos or prescribe additional medicine than clinics operating on a fee-for-service basis because both have a powerful incentive to maximize their success rates). *See generally* Hyman & Silver, *supra* note 19; David A. Hyman & Charles Silver, *IVF Shared-Risk Programs*, 26 J.L. Med. & Ethics 79 (1998).

[66] For such an argument, see Thomas H. Murray, *Money-Back Guarantees for IVF: An Ethical Critique*, 25 J.L. Med. & Ethics 292 (1997), which analogizes IVF to divorce and claims that contingent fees lead us to regard children as products.

[67] *See* Shaun D. Pattinson, *Current Legislation in Europe*, *in* The Regulation of Assisted Reproductive Technology 7, 8 (Jennifer Gunning & Helen Szoke eds., 2003) ("The paucity of legislation indicates that many countries are relying on alternative regulatory mech-

fund programs. There is a robust debate about whether self-regulation is an effective strategy for fertility clinics. Advocates claim that self-regulation is more adept than legislation at responding to rapidly developing technologies[68] and is promulgated by experts in fertility care.[69] Critics argue that self-regulations lack teeth because they are voluntary[70] and unenforceable.[71]

Financing presents a novel context in which to consider the utility of self-regulation. Instead of judging the merits of the general debate over self-regulation, this Section argues that, in the context of IVF refunds, self-regulation has failed to promote the disclosure of information that patients need before enrolling in IVF refund programs.

The Fertility Website Study offers the only systematic evaluation of whether clinics follow voluntary guidelines for IVF refund programs. The Fertility Website Study measured SART members' compliance with each of the ASRM Ethics Committee's suggestions on what IVF refund programs must disclose in order to ethically offer IVF refund programs. The Ethics Committee recommends:

> that the criterion of success is clearly specified, that patients are fully informed of the financial costs and advantages and disadvantages of such programs, that informed consent materials clearly inform patients of their chances of success if found eligible for the shared-risk program, and that the program is not guaranteeing pregnancy and delivery. It should also be clear to patients that they will be paying a higher cost for IVF if they in fact succeed on the

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anisms. Legislation is, after all, only one of many possible regulatory responses, ranging from constitutional provision to professional self-regulation."); Lisa C. Ikemoto, *The In/Fertile, the Too Fertile, and the Dysfertile*, 47 HASTINGS L.J. 1007, 1031 (1996) ("[T]he standard approach has been to refrain from legal intervention, and in effect, to delegate the regulatory function to medicine.").

[68] Moses, *supra* note 9, at 508 ("Our intuition that the law faces problems following the introduction of a new technology is correct, and is reflected in metaphors of law struggling to keep up. However, the reflexive response that legislation is required to facilitate the law's adaptation to technological change may be wrong; legislation is inferior to the alternatives in some circumstances.").

[69] *See* Judith F. Daar, *Regulating Reproductive Technologies: Panacea or Paper Tiger?*, 34 HOUS. L. REV. 609, 626–27 (1997).

[70] *See* Stacey A. Huse, *The Need for Regulation in the Fertility Industry*, 35 U. OF LOUISVILLE J. OF FAM. L. 555, 556 (1996–97) ("Medical professional organizations adopt guidelines for the industry, but membership in the organizations is voluntary and the guidelines are not mandatory.").

[71] *See* Note, *In Vitro Fertilization: Insurance and Consumer Protection*, 109 HARV. L. REV. 2092, 2104 (1996) ("SART does not independently verify that its member clinics conform to its guidelines."). For a more detailed analysis, *see* Moses, *supra* note 9, at 544–45 ("Although compliance with ASRM, SART, and ACOG standards is not generally compulsory, it may be required in particular circumstances. Some health insurance contracts that cover the cost of IVF for patients, for example, limit coverage to IVF performed by members of organizations such as SART or to procedures complying with guidelines issued by ACOG or ASRM. The reason for this limitation can often be found in state insurance requirements. However, a person with resources and the willingness to travel can obtain treatment deemed unethical by the relevant professional societies. Also, many of the guidelines are themselves worded as advice rather than mandatory requirements.").

> first or second cycle than if they had not chosen the shared-risk program, and that, in any event, the costs of screening and drugs are not included.[72]

The results of the Fertility Website Study are summarized in Table 1:

Table 1: Clinic Website Compliance with ASRM Ethical Guidelines

	Percentage Disclosing	**Number Disclosing**
Criterion of Success	67.4%	91
Financial Cost of Participating	35.5%	48
Advantages of Participating	83.7%	113
Disadvantages of Participating	6.6%	9
Chances of Success if Found Eligible	0	0
Program Does Not Guarantee Pregnancy and Delivery	14.0%	19
Patients Will Pay More if Succeed on First or Second Attempt	2.2%	3
Screening and Drug Costs are Excluded	40.0%	54

The Fertility Website Study found a low level of compliance with the ASRM Ethical Guidelines.[73] The first piece of information—the criterion of success—is disclosed on many, though far from all, websites: 67.4% of

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[72] The Ethics Committee of the American Society for Reproductive Medicine, *Shared-Risk or Refund Programs in Assisted Reproduction*, 82 FERTILITY & STERILITY S249, S250 (2004) [hereinafter *ASRM Ethics Committee Report*].

[73] The Fertility Website Study's findings are similar to a recent study by doctors Abusief, Hornstein, and Jain, which tested the level of compliance with ASRM/SART general advertising standards. Abusief et al., *supra* note 13. They found that "the majority of fertility clinic websites do not follow the 2004 SART/ASRM mandatory guidelines for advertising." *Id.* at 91. They report:

> Success rates were published on 51% of fertility clinic websites (117 private, 31 academic), the majority of which were private clinics (p=.025). The percentage of fertility clinic websites adhering to ASRM/SART guidelines was low in all categories (ranging from 2.8% to 54.5% in private centers and 1.3% to 37.2% in academic centers). Fewer than half of all clinics publishing success rates (35.5% of private clinics and 21.8% of academic clinics, p=.037) provided information about the numerator and denominator used for calculation. Live-birth data were reported on a minority of both private and academic clinics (p=.468). The ASRM/SART guideline-mandated disclaimer statement, "A comparison of success rates may not be meaningful because patient medical characteristics and treatment approaches may vary from clinic to clinic," (10) was present on only 65 clinic websites (43.9%) publishing success rates.

Id. at 90.

websites, or 91 websites, revealed what the refund provider considered a success. Only 35.5% of websites, or 48 websites, disclosed the second listed requirement, the financial costs. The one category in which clinics excel in their disclosures was their disclosure of the advantages of IVF refund programs, with 83.7% of websites, or 113 websites, offering potential participants information on the benefits of the refund program.

On the other hand, a mere 23.7% of websites, or 32 websites, disclosed the disadvantages to the refund program. Of those 32 websites that disclose disadvantages, all but 9 claim that the disadvantage to their refund programs is that the patient will pay more for the refund program if pregnancy is achieved on the first attempt than the patient would have paid if the patient had not participated in the refund program. This is misleading. For most refund programs, a patient will pay more for not only a successful first attempt, but also potentially for second and third attempts at IVF through a refund program.[74] Thus, in actuality, only 6.6% of websites, or 9 websites, present the actual disadvantages to the refund programs they sell.

No websites "clearly inform patients of their chances of success if found eligible for the shared-risk program," though this is not surprising since ASRM's guidelines explicitly state that only a clinic's informed consent materials must make this disclosure.[75] But, the fact that ASRM specifies that this information, and not the rest of the information presented in Table 1, must be in the informed consent materials indicates that ASRM intends for clinics to disseminate the other disclosures more broadly than the disclosure of the likelihood of success.

Only 14% of websites, or 19 websites, state that "the program is not guaranteeing pregnancy and delivery," and 40% of websites, or 54 websites, disclose that "the costs of screening and drugs are not included."[76] Finally, the following disclosure requirement garners the least compliance: only 3 clinics (2.2%) make it "clear to patients that they will be paying a higher cost for IVF if they in fact succeed on the first or second cycle than if they had not chosen the shared-risk program."[77]

The failure of clinics to comply with ASRM disclosure requirements confirms, in this context, the fears held by critics of self-regulation. Clinics have generally opted not to follow guidelines when making disclosures on their websites. The next Section examines whether patients are instead protected through regulations enforced by the state.

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[74] *See infra* Part II.C.1.
[75] *See ASRM Ethics Committee Report*, *supra* note 72, at S250.
[76] *Id.*
[77] *Id.*

B. The Current Governmental Regulations for IVF Refund Programs Are Weak

In light of the failure of voluntary policing measures, consumers might look to binding regulations promulgated by legislatures or the common law for protection. It turns out, however, that very few regulations protect consumers entering into IVF refund programs. When compared to the general regulations governing other financing transactions, the regulations applicable to IVF refund programs verge on non-existent. For example, unlike the usury laws that govern lending,[78] there are no provisions that restrict the price IVF providers can charge. Also, unlike lending's advertising regulations,[79] there are no specific requirements regarding what refund advertisements may say. Shockingly, IVF refund programs lack even the barest consumer protection requirement: mandatory disclosure requirements such as those found in the Truth in Lending Act[80] and comparable state disclosure laws. This Section surveys the current regulations that could potentially apply to IVF refund programs, concluding that these regulations likely do not apply.

1. Informed Consent

One common law doctrine that we might think regulates doctors' presentations of information about IVF refund programs is the doctrine of informed consent. Informed consent requires doctors to fully disclose the facts needed for a patient to make an intelligent decision about a medical treatment, including the risks and benefits of the treatment and alternative procedures.[81] The doctrine exists because patients place significant trust in their physicians,[82] because physicians have a disproportionate amount of power and information in the relationship,[83] and because patients are in a vulnerable state when visiting a doctor.[84]

Peter Schuck has argued that the case for informed consent is strongest for "credence goods." These are goods "whose evaluation depends on the opinion of experts (usually physicians) who act as gatekeepers to treat-

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[78] *See, e.g.*, CAL. CONST. art. XV, § 1, cl. 1 (limiting interest rates to ten percent for loans used for "personal, family, or household purposes").

[79] 12 C.F.R. § 226.24 (2008).

[80] Pub. L. No. 90-321, tit. I, 82 Stat. 146, 146–59 (1968) (codified as amended at 15 U.S.C. §§ 1601–1667f (2006)).

[81] JAMES E. LUDLAM, INFORMED CONSENT 6 (1978).

[82] *See* Eric Flisser et al., *Patient-Friendly IVF: How Should It Be Defined?*, 88 FERTILITY & STERILITY 547, 548 (2007) ("Because the doctor-patient relationship is based on mutual trust and respect, physicians are expected to be above personal material interests in the pursuit of the best medical care for patients.").

[83] *See* Peter H. Schuck, *Rethinking Informed Consent*, 103 YALE L.J. 899, 928 (1994).

[84] *See* Richard S. Saver, *Medical Research and Intangible Harm*, 74 U. CIN. L. REV. 941, 969 (2006).

ment."[85] Conversely, the case for informed consent weakens significantly for "search goods." Search goods are goods "whose qualities consumers can ascertain by pre-purchase inspection" because they are generally standardized and because the people purchasing the consumer products are often repeat purchasers.[86] Both of these characteristics ensure that purchasers do not need expert advice to assess the merits of the product. Credence goods, on the other hand, implicate informed consent because the expert providing advice about the goods has more information and power than the purchaser.[87]

The relationship between physicians and patients in the IVF refund transaction seems to implicate both these policy rationales. First, IVF refunds raise concerns about information asymmetries, the trust patients place in providers, and the power physicians have over patients. Doctors are experts in evaluating the likelihood that patients will conceive through IVF, a key factor in determining whether a refund program is a wise decision.[88] Because of this expertise, physicians exert substantial influence over a patient's choice to enter into an IVF refund program.[89] Fertility patients, as discussed below,[90] are often in a vulnerable state, and the doctors who treat them are offering a service that the patients want intensely.[91] The result is "an extreme imbalance in the power sharing between the care givers and receivers."[92]

Secondly, IVF refund programs invoke the policy rationales for informed consent because they are credence goods rather than search goods. Patients will have a difficult time estimating the likelihood that they will need a refund program "through prepurchase inspection."[93] In order to make this decision, patients would need to know the likelihood of conception. However, doctors act as gatekeepers for IVF refund programs as that information is within their expertise and not directly available to the patient.

Although policy rationales might suggest informed consent govern IVF refund programs, in its current form, the doctrine probably does not apply to IVF refund programs. The traditional definition of informed consent focuses on medical information, not financial information.[94] The physician must inform the patient of the medical risks and benefits of the treatment, not the

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[85] Schuck, *supra* note 83, at 929.

[86] *Id.* at 929–30.

[87] *Id.* at 929.

[88] *See infra* Part II.C.5.

[89] IntegraMed claims that its IVF refund program is a word of mouth driven business. IntegraMed America, Inc., *Investor Overview – 3Q 2008*, available at http://library.corporate-ir.net/library/10/108/108428/items/318486/5B828F72-AB4B-4965-B662-607DE4ED3277_INMDInvestorPPT112108.pdf (last visited Feb. 20, 2009).

[90] *See infra* note 201 and accompanying text.

[91] Daar, *supra* note 69, at 663.

[92] *Id.*

[93] Schuck, *supra* note 83, at 917.

[94] *See* BLACK'S LAW DICTIONARY 779 (6th ed. 1990) (defining informed consent as requiring the disclosures to permit a patient "faced with a choice of undergoing the proposed treat-

financial costs.[95] Thus, the doctrine of informed consent does not obligate physicians to tell patients anything about the financial aspects of treatment.[96] Because of this doctrinal limitation, patients considering IVF refund programs are not protected by the doctrine of informed consent, and thus physicians do not have to make any disclosures about refund programs.

2. Warranty Law

Another source of law that we might suppose protects patients is warranty law. IVF refund programs resemble warranties offered on goods and services: if a good or service fails, the seller either replaces it or refunds the buyer's money. In fact, some IVF refund program providers specifically describe their programs as warranties.[97] Despite the similarities between refund programs and warranties, however, warranty law does not protect consumers using refund programs.

A logical first place to determine whether warranty law applies to refund programs is the federal Magnuson-Moss Warranty—Federal Trade Commission Improvement Act (the "Magnuson-Moss Act").[98] The purpose of the Act is "to provide minimum disclosure standards for written consumer product warranties, and to define minimum content standards for those warranties."[99] Therefore, the Act protects consumers by, among other things, requiring a seller to disclose information about the warranties it offers before a consumer makes a purchase.[100] The Act creates a cause of action for consumers when warrantors violate its provisions.[101] Despite the fact that patients purchasing IVF refund programs need these disclosures to help them understand the terms of the refund before buying such a program, the Magnuson-Moss Act does not apply to refund programs. The Act is explicitly limited to "consumer products," defined as "any tangible property which is distributed in commerce . . . ."[102] IVF refund programs are not

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ment, or alternative treatment, or none at all, [to] intelligently exercise his judgment by reasonably balancing the probable risks against the probable benefits").

[95] *Id.*

[96] *See* Jim Hawkins, *Doctors as Bankers: Evidence from Fertility Markets*, 84 TUL. L. REV. (forthcoming 2010) (manuscript at 40–44), *available at* http://ssrn.com/abstract=1435610.

[97] For instance, one clinic calls its refund program the "Fertility Cost Warranty Program." Reproductive Medicine & Infertility Associates, Financial Matters, http://www.rmia.com/pages/fina_warranty.asp (last visited Aug. 11, 2009).

[98] Pub. L. No. 93-637, 88 Stat. 2183 (1975) (codified at 15 U.S.C. §§ 2301–12 (2006)).

[99] E. Allan Farnsworth, *Developments in Contract Law During the 1980's: The Top Ten*, 41 CASE W. RES. L. REV. 203, 222 (1990).

[100] 15 U.S.C. § 2302(b)(1)(A); 16 C.F.R. § 702.3(a)–(b) (2009).

[101] 15 U.S.C. § 2310(d)(1).

[102] *Id.* § 2301(1).

"tangible" property like toasters or automobiles, so they fall outside of the Act's coverage.[103]

Furthermore, although state warranty laws vary, most do not apply to refund programs. The express and implied warranties contained in the Uniform Commercial Code do not apply because refund programs are not goods—they are not moveable things.[104] Warranties that apply to transactions not involving goods are governed by the common law, but in most states these warranties do not apply to IVF refund programs. States have developed common law warranties for purchases of homes[105] and services[106] but not for the purchase of intangibles, like refund programs.[107] Without a warranty law directed specifically at refund programs or their intangible counterparts more broadly, consumers cannot make the claim that they are protected by warranty law.

An Illinois warranty case is illustrative. A plaintiff purchased a corporation's assets, but the district court held that no warranty accompanied the sale because there were no Illinois cases establishing a common law warranty for the sale of a corporation's assets.[108] Since courts in most states have not established a common law warranty for the sale of intangibles, patients purchasing IVF refund programs are probably not protected by state warranty law.

3. Common Law Causes of Action and Consumer Protection Regulations

Unlike the doctrine of informed consent and warranty law, some common law and statutory consumer protection laws do apply to IVF refund programs. However, this Section argues that common law theories are often unhelpful for patients, and many consumer protection statutes do not apply to refund programs. More importantly, none of these laws constrains refund providers because of a more fundamental problem: patients never use these theories to sue providers.

A patient could sue refund program providers under common law theories for fraud or breach of contract if a provider misrepresented the refund program or broke a promise. These common law causes of action, however, are ill-suited to protect consumers. Fraud, for instance, can be prohibitively

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[103] *Cf.* James C. McKay, Jr., *UCITA and the Consumer: A Response to Professor Braucher*, CYBERSPACE LAW., Nov. 2000, at 9 (noting it is unclear whether the Act applies to software or other computer information because these items are not plainly tangible).

[104] U.C.C. § 2-105(1) (2005) ("'Goods' means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale . . . .").

[105] *See, e.g.*, Naiditch v. Shaf Home Builders, Inc., 512 N.E.2d 1027, 1038 (Ill. App. Ct. 1987); Humber v. Morton, 426 S.W.2d 554 (Tex. 1968).

[106] *See, e.g.*, Harmon v. Dawson, 530 N.E.2d 564, 567 (Ill. App. Ct. 1988); Melody Home Mfg. Co. v. Barnes, 741 S.W.2d 349 (Tex. 1987).

[107] *See* Lee Kissman, Comment, *Revised Article 2 and Mixed Goods/Information Transactions: Implications for Courts*, 44 SANTA CLARA L. REV. 561, 577 (2004).

[108] Fink v. DeClassis, 745 F. Supp. 509, 516 (N.D. Ill. 1990).

difficult for patients to prove. Unlike many consumer protection statutes, fraud requires plaintiffs to prove that the defendant *intended* to make a misrepresentation and that the plaintiff *relied* on the misrepresentation,[109] both elements so notoriously difficult to prove that they often prevent legitimate suits.[110] Likewise, breach of contract claims protect patients against blatant attempts by providers to break promises, but they do not protect consumers who enter into these contracts based on a misunderstanding or insufficient information.[111]

In contrast, state consumer protection laws are well suited to protect patients enrolling in refund programs. But, like their federal counterparts, many state regulations explicitly do not cover intangibles like refund programs.[112] For instance, Texas' Deceptive Trade Practices Act only applies to "goods and services,"[113] and the promise of a refund is likely an intangible, thereby falling outside of the definition of both goods and services.[114] In some states, consumer protection legislation applies to intangibles,[115] but even in some of those states, courts have limited the application of the legislation.[116]

The most important problem with both common law fraud and consumer protection statutes affecting refund providers' conduct is that patients do not sue providers under these theories. Patients who might otherwise sue

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[109] *See, e.g.*, Webb v. Clark, 546 P.2d 1078, 1080 (Or. 1976) (en banc).

[110] *See generally* John L. Hill, Introduction, *Consumer Protection Symposium*, 8 ST. MARY'S L.J. 609 (1977) (describing the inadequacies of the common law fraud cause of action).

[111] *See generally* U.C.C. § 1-304 (2005) (imposing an obligation of good faith on parties in the performance and enforcement of contracts, but not in the formation of contracts).

[112] *See* Brock v. Baskin Robbins, USA, Co., No. 5:99-CV-274, 2003 U.S. Dist. LEXIS 3840, at *14–18 (E.D. Tex. Jan. 17, 2003) (holding a franchisee could not recover under either the Louisiana or Texas deceptive trade acts for a franchisor's deceptive conduct because the franchise was not a "consumer" under the law since the purchase only involved intangible rights); E.F. Hutton & Co. v. Youngblood, 741 S.W.2d 363 (Tex. 1987) (noting that, as of 1987, eight states' courts had determined that securities transactions were not covered by their unfair trade practices acts and one state had determined they were covered); Michael L. Rustad, *Making UCITA More Consumer-Friendly*, 18 J. MARSHALL J. COMPUTER & INFO. L. 547, 551–52 (1999) (explaining that consumer protection laws were developed for durable goods, so their application to intangibles such as software is uncertain).

[113] TEX. BUS. & COM. CODE ANN. § 17.45 (Vernon 2007).

[114] *See* Riverside Nat'l Bank v. Lewis, 603 S.W.2d 169 (Tex. 1980) (holding money is intangible and not a good covered by the Texas Deceptive Trade Practices Act).

[115] *See, e.g.*, IDAHO CODE ANN. § 48-602(6) (West 2009) (stating the Idaho Consumer Protection Act applies to "property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value"); TENN. CODE ANN. § 47-18-103(2) (West 2009) (stating the Tennessee Consumer Protection Act applies to "property, tangible or intangible, real, personal or mixed, and any other article, commodity or thing of value").

[116] *See* Idaho First Nat'l Bank v. Wells, 596 P.2d 429, 432 (Idaho 1979) ("Appellants argue that their guaranteeing of the Powell Feed Lots' loan constituted a purchase of goods thus falling under the purview of the act. We disagree with appellants' analysis of the scope of the Idaho Consumer Protection Act. Although 'goods' defined under the act include intangible property which could encompass money, it would take a strained construction of the act to be able to hold that the signing of a personal guarantee for a loan to a corporation was a '*purchase* of goods.'").

refund providers for unfair or deceptive conduct do not do so because they are generally distracted by the birth of their new babies. As a result, the small amount of current consumer protection law that does apply to IVF refund programs does not discipline providers due to a lack of enforcement.

Patients who invest in IVF refund programs and achieve a pregnancy in the first or second cycle, thereby paying sometimes over $10,000 more than they otherwise would, tend to not regret their decisions to use the IVF refund program. Patients undergoing IVF treatments have often spent years trying to conceive.[117] When they overpay for IVF refund programs, they do not experience the usual dissatisfaction with the transaction because the joy of having a child overrides the financial disappointment of significantly overspending. For example, one new parent said of her new child: "When I look at Jack, I don't even think about the money."[118]

However, this response is irrational: participants in refund programs who became pregnant on the first IVF attempt would have gotten pregnant if they were paying per cycle.[119] The only difference in using a refund program is that the patient pays much more money. Patients mistake happiness about pregnancy with happiness about using a refund program. It is like a person who is charged double for a lottery ticket being happy she paid double for the lottery ticket because it won. The person would have won whether or not she overpaid for the ticket. Therefore, she should be upset and demand the extra money back. But, her happiness of winning is blurred into her happiness about buying the ticket.

Interviews with patients who have lost money through an IVF refund program demonstrate that patients disregard overpayments (i.e., the premium for the IVF refund program) because of the elation of successful pregnancies.[120] Patients link the happiness of having a child to the years of infertility when explaining why they do not care that they overpaid. One patient said, "I don't mind that we paid more, because we're having a baby after being infertile for years."[121] Patients even go so far as to call their significant overpayments "a great return on the money" because of the immediate pregnancy.[122]

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[117] *See* discussion *infra* Part II.C.4.

[118] Mary Jo Feldstein, *Creative Financing Plans Aimed at Steep Infertility Treatment Costs*, ST. PAUL PIONEER PRESS (Minn.), Sept. 3, 2006, at 7E.

[119] The medical services patients receive do not vary at all if the patient pays for each cycle individually or participates in a refund plan.

[120] *See, e.g.*, Debra Gordon, *Fertility Clinic in Los Angeles Offers a Baby or Your Money Back*, THE ORANGE COUNTY REG., Mar. 27, 1998, *available at* http://www.encyclopedia.com/doc/1G1-20433572.html (reporting that a couple would recommend a refund program despite the fact they spent $5300 more using it); *NBC Nightly News: Fertility Clinics with a Money-Back Guarantee*, (NBC television broadcast Aug. 1, 1998) (reporting that a couple who knew that they overspent had "no regrets" about their experience).

[121] Ann Wozencraft, *It's a Baby, Or It's Your Money Back*, N.Y. TIMES, Aug. 25, 1996, § 3, at 1 (internal quotations omitted).

[122] Mann, *supra* note 55 (internal quotations omitted).

IntegraMed's promotional literature highlights the high satisfaction rate of IntegraMed customers who became pregnant during the first IVF cycle: ninety-eight percent of customers who became pregnant during the first cycle would recommend IntegraMed to friends and family.[123] In fact, patients who become pregnant after the first cycle are even more likely to recommend IntegraMed than IntegraMed customers overall.[124] "Over the hundreds of Shared Risk Program patients we have seen," says Dr. Michael Levy of Shady Grove Fertility Reproductive Science Center ("Shady Grove"), "not once have I been approached by a patient who got pregnant on her first cycle who regretted enrolling in Shared Risk—not once."[125]

Clinics recognize this phenomenon and capitalize on it to prevent patients who overpay from becoming disgruntled with the IVF refund program. One news writer reports that "[Dr.] Sher says he makes sure patients undergoing cutting-edge procedures fill out informed-consent forms. But the best protection, he adds, is hewing to a simple rule: 'We have to deliver good results.'"[126] A consultant to clinics offering refunds echoes Dr. Sher's sentiment: "If a woman becomes pregnant after the first cycle the couple will obviously be paying a lot more, but at least they will have the joy of having the baby they want."[127]

There are two important consequences of this lack of patient dissatisfaction when they pay more for IVF refunds. First, because IVF refund providers know that patients who overpay will not be dissatisfied, they have no incentive to ensure that prices for IVF refund programs are efficient. In other contexts, overpayment leads to consumers complaining to friends or on consumer forums. To protect its reputation, a company must ensure relatively efficient pricing.[128] However, because fertility consumers are unconcerned with overpayment after becoming pregnant, they do not bring this pressure to bear on refund providers.

Second, and more importantly, satisfied patients are much less likely to sue IVF refund providers, even if the providers engage in illicit conduct. As of March 2009, there are no reported cases of an IVF refund participant suing the refund provider.[129] IntegraMed has never been sued by a single

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[123] INTEGRAMED AM., INC., SHARED RISK REFUND CASE STUDIES VOL. 4, 2 (2006), *available at* http://www.seattlefertility.com/downloads/sharedRiskCaseStudies.pdf (last visited Oct. 24, 2009).

[124] *Id.* at 1 (reporting that ninety-six percent of general customers would recommend IntegraMed compared to the ninety percent who get pregnant on the first try).

[125] *Id.* at 4.

[126] Justin Martin, *A Baby Or Your Money Back*, FORTUNE, Nov. 10, 2003, at 198[B], *available at* http://money.cnn.com/magazines/fsb/fsb_archive/2003/11/01/358298/index.htm.

[127] Ian Murray, *IVF Clinic Offers 'No Baby, No Fee' Treatment Deal*, TIMES (London), Sept. 10, 1998, at 2.

[128] *E.g.*, *There's Something About Mary*, CHAIN STORE AGE EXECUTIVE WITH SHOPPING CENTER AGE, at 39 (Dec. 1, 2001).

[129] The author conducted a search on September 29, 2009 on LexisNexis with the following terms: "(in vitro fertilization or IVF) and (refund or shared-risk or fee-for-service or result-based-compensation-agreement)". It generated no relevant responses.

patient with regard to its IVF refund program.[130] Because people are so happy to have a baby, this Section has argued, they do not worry about the excessive costs incurred with the refund program and they do not sue to recover these costs. This absence of lawsuits means that the current laws that do apply to refund programs do not discipline refund providers. Refund providers cannot be deterred by laws that they know will probably never be enforced. As such, even when current laws apply, they are ineffective.

While the doctrine of informed consent, warranty law, common law fraud, and consumer protection laws seem like natural candidates to govern IVF refund transactions, for the most part they do not apply to these transactions. And, even when they do apply, they are not effective in policing the transaction because happy parents do not sue providers who engage in illicit conduct or who fail to make accurate or full disclosures. Thus, the IVF refund market largely escapes regulatory influence. The market, however, is plagued with a variety of failures that demand regulation. The next Section explores these failures.

C. Market Failure in the IVF Refund Market

This Section identifies several ways in which the IVF refund market fails to obtain efficient outcomes. First, patients rely on several significant misrepresentations about refund programs when deciding whether to purchase programs or pay for each cycle individually. In addition to this overt fraud, clinics, intentionally or not, exploit patients' poor decision-making more subtly by framing the IVF refund transaction to take advantage of systematic cognitive biases that patients exhibit. This Section identifies four faulty heuristics and patient biases that operate in the IVF refund market.

Second, in addition to misrepresentations and exploitative conduct, this Section argues that the IVF refund market fails because of the profound information asymmetry between IVF refund providers and patients. Patients have virtually no way to evaluate whether they will achieve pregnancy through an IVF cycle, but refund program providers are equipped with medical knowledge and statistical data that enable the company to make informed decisions about whether to offer a refund program to a given patient. This information asymmetry prevents patients from exerting the pressure required to cause efficient pricing.

These problems in the IVF refund market are particularly troubling because many of the patients considering refund programs are in vulnerable states. One study has found that a majority of patients dealing with infertility are depressed, exhibiting a similar level of depression as patients diagnosed with cancer.[131] Though IVF patients are thought of as sophisticated, many

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[130] Schumann Interview, *supra* note 45.

[131] Alice D. Domar et al., *The Prevalence and Predictability of Depression in Infertile Women*, 58 FERTILITY & STERILITY 1158, 1158, 1161–62 (1992).

would fit more closely into a vulnerable consumer group.[132] Thus, it is especially problematic for refund providers to exploit their superior knowledge as well as the systematic decision-making biases patients exhibit.

1. The "Two Times to Break Even" Heuristic

Patients considering refund markets are consistently misled about the cost of refund programs relative to paying for each IVF cycle individually. Clinics offer a large variety of IVF refund programs, but the programs typically involve an up front cost for three "fresh" IVF cycles with the promise of a refund if the cycles are ineffective.[133] Consistently, doctors and refund providers lead patients to incorrectly analyze the cost of IVF refund programs in comparison to fee-for-service arrangements by causing patients to apply what could be called the 'two times to break even' heuristic (the "two-times heuristic"). Refund providers imply that patients using IVF refund programs break even with patients paying for each cycle individually if the refund participants undergo two cycles, that refund participants are worse off if they undergo only one cycle, and that refund participants are better off if they undergo more than two cycles. This claim is made repeatedly by the media,[134] academics,[135] clinics' marketing materials,[136] doctors,[137] and the

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[132] *See* Hawkins, *supra* note 96, at 27–31.

[133] *See* discussion *supra* Part I.A.

[134] *See, e.g.*, Mann, *supra* note 55 ("Leanna and Dan both had health insurance, but their policies did not cover IVF. In 1999 they signed up for the shared-risk program at Shady Grove Fertility Reproductive Science Center in Rockville. The Currys paid an upfront fee of $20,000—roughly what it would have cost them to make two IVF attempts using the conventional pay-as-you-go approach."); Martin, *supra* note 126 ("If IVF works on the first cycle, the patient has obviously overpaid."); Wozencraft, *supra* note 121 ("That said, had she become pregnant on her first try, she would have been better off by far with the standard plan. Had she become pregnant on the second try, her costs under either plan would have been comparable."); Yee & Marcotty, *supra* note 12 (suggesting IVF refund programs are a bad deal only to those who get pregnant after one cycle: "By paying up front for a package of three tries, patients who got pregnant on the first try subsidized those who got pregnant on a third.").

[135] In one important paper, David Schmittlein and Donald Morrison claim that IVF clinics market a la carte programs at $7500 per attempt and IVF refund programs at $15,000. David Schmittlein & Donald Morrison, *A Live Baby or Your Money Back: The Marketing of In Vitro Fertilization Procedures*, 49 MGMT. SCI. 1618, 1618 (2003). These figures reflect the two times to break even heuristic exactly. Patients who take two attempts to become pregnant pay $15,000 whether they use a la carte programs or the IVF refund programs. This assumption is essential to Schmittlein and Morrison's claim that patients who have failed with non-IVF fertility treatments should participate in IVF refund programs because they will break even after two attempts. *Id.* at 1633; *see also* Amy B. Monahan, *Value-Based Mandated Health Benefits*, 80 U. COLO. L. REV. 127, 165 n.160 (2009) (stating that "[i]f a shared-risk patient is successful in her first round of IVF, she ends up paying considerably more for the treatment than she would have if she had not enrolled in the shared-risk program," but also noting that "[t]he nation's largest infertility treatment network, IntegraMed, charges slightly more than the cost of two IVF cycles to participate").

[136] *See, e.g.*, Houston IVF, Financing Infertility, http://www.houstonivf.net/houstonivf/about/financinginfertility.asp (last visited Oct. 9, 2009) ("Patients who take home a baby after one IVF cycle pay more than patients not participating in the Program, but conversely, patients who fail to take a baby home pay much less than comparable couples not participating in the Attain Program."); Mid-Iowa Fertility, Cost Sharing Plus Program, http://www.midiowa

large independent companies offering IVF refund packages through clinics.[138] The following example is typical of how the refund program is presented:

> Think of shared risk as a three-cycle special. You may be asked to pay $25,000 up front—much more than the $10,000 you would for a single standard IVF cycle—and in exchange you're promised three tries. If you become pregnant on the first attempt, you've spent more than you would have otherwise. If the second attempt is successful, you roughly break even. If you become pregnant on

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fertility.com/financial.asp#costsharing (last visited Oct. 24, 2009) ("It is possible that if a pregnancy is achieved in the first cycle, the couple will have spent much more than they would have otherwise by paying for the cycle individually. That is an element that must be considered when looking into program participation. While there is the possibility that it would cost more if success is achieved in the first cycle, the program also provides significant savings if pregnancy is not achieved or is achieved on a later cycle."). The Fertility Website Study found at least twenty-three websites that claim that a patient will pay more using the refund program if pregnancy is achieved on the first attempt. Though this information was not coded in the Fertility Website Study, clinics making these claims were examined because researchers were asked to state any disadvantages the website disclosed regarding the use of the refund program.

[137] *See, e.g.*, Laurie Smith Anderson, *Center Offers Shared Risk Program for Infertility Treatment*, THE ADVOC. (Baton Rouge, La.), Jan. 26, 2005, at 1-C ("In response to patient requests for a shared risk program, the Woman's Center for Fertility and Advanced Reproductive Medicine is now offering a program where qualified couples can pay for two in vitro fertilization procedures and receive three, if necessary. 'It's a hedge against failure,' said Dr. Bobby F. Webster, the center's medical director. 'If in vitro works in the first attempt, the couple will have paid more than if they had not chosen this option. If it works the second time, they break even. The third time, they save money. And, if it doesn't work after three attempts, they will receive a significant refund so that they can still pursue adoption or other options.'"); Mann, *supra* note 55 ("Shady Grove Fertility's brochure lays out the costs for IVF: A single cycle of IVF, on a pay-as-you-go basis, costs $8,500 plus a substantial additional amount for the required drugs. It's an additional $1,350 per cycle to freeze embryos, and $2,150 for each implantation of thawed embryos. Under the shared-risk program, the patient pays $20,000 up front, which is a global fee covering all IVF, embryos freezing and implantations. . . . 'If the patient gets pregnant on the first cycle, they pay more than they would for fee-for-service,' said Stillman [of Shady Grove]. 'At the second cycle, it's about break-even. At three or four, it's a savings. Our risk is that, if the patient doesn't get pregnant, we've spent our resources without remuneration.'"); *The NewsHour with Jim Lehrer: New Frontier* (PBS television broadcast Jan. 27, 1997) ("Dr. Jacques Stassart, Fertility Specialist: What we tell our patients and we tell them very bluntly when we give them our orientation is that the ones who become pregnant the first time around are going to be subsidizing the ones who take three attempts to become pregnant, and, most importantly, the ones who do not become pregnant at all, even in spite of three attempts. The ones that take two attempts we can pretty much break even. It's a lottery. And how much we think we know, we never know who's going to get pregnant and who's not going to get pregnant.").

[138] *See The Early Show: Dr. David Adamson of Advanced Reproductive Services and Parise and Jon Pak, Dr. Adamson's Patients, Discuss the Fertility Treatment Services Offered at Advanced Reproductive Services* (CBS News television broadcast Sept. 27, 2000) [hereinafter *The Early Show*] ("We've put the packages of services together. And that's a three-cycle IVF option. So a patient can get one, two or three cycles of IVF. And if they're not pregnant after the first, they get a second, they're not pregnant after the second, they get a third. *So the third package of IVF is essentially free if the patient hasn't had success on the first two.*") (quoting ARC representative Dr. David Adamson) (emphasis added).

> the third attempt—at this point, your odds have risen to a decent 75% or better—then you've saved money.[139]

The result of these claims is that patients evaluating IVF refund programs view them as a good deal if they have to undergo more than one IVF cycle.

However, the two-times heuristic is flawed. Consider the example of Advanced Fertility Care ("AFC"), a fertility clinic in Arizona that offers an IVF refund program directly to patients. At AFC, the cost of the three-cycle refund program is $25,750 for patients under 35 years of age and $27,750 for patients between the age of 35 and 37.[140] The cost for a single round of IVF with fresh eggs is $10,000 for patients of all ages.[141] These prices contradict the two-times heuristic because the cost of two cycles of IVF with fresh eggs ranges from $17,000 to $18,500, over $7000 less than the refund program's cost. A 2004 report of the refund program of a fertility clinic called Shady Grove repeats this finding: a single cycle of IVF at Shady Grove costs $8500, and participation in the refund program costs $20,000.[142] After two cycles, a patient enrolled in this refund program will have paid $3000 more than a patient paying a fee for each cycle. Furthermore, these figures do not account for the money patients lose on interest as they provide "the interest-free financing" to the refund provider.[143] Instead of earning interest on the tens of thousands of dollars they pay the refund provider, patients earn nothing. This lost interest income is a real cost to the patient. Yet, despite these numbers, Shady Grove still asserts, "At the second cycle, it's about break-even."[144]

The two-times heuristic is also false because patients do not always need fresh eggs. In later IVF attempts, some patients use frozen eggs generated in the first cycle.[145] A cycle of IVF using frozen embryos at Advanced Fertility Care costs $3000.[146] The possibility of this lower amount changes the break-even point, as demonstrated by Table 2[147]:

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[139] Wilcox, *supra* note 40, at 116.

[140] AFC, IVF 100% Money Back Guarantee, http://www.advancedfertilitycare.com/financial-plans/ivf-guarantee.html (last visited Aug. 6, 2009) [hereinafter AFC 100% Money Back Guarantee].

[141] AFC, IVF Flat Fee Pricing, http://www.advancedfertilitycare.com/financial-plans/ivf-flat-fee.html (last visited Oct. 4, 2009) [hereinafter AFC Flat Fee].

[142] Mann, *supra* note 55.

[143] IntegraMed 2008 10-K, *supra* note 42, at 24.

[144] Mann, *supra* note 55 (quoting a Shady Grove representative) (internal quotations omitted).

[145] In 2006, around 25% of the IVF cycles for all women under 35 years old were frozen cycles and around 23% of the IVF cycles for all women between 35 and 37 years old were frozen. SART, Clinic Summary Report, https://www.sartcorsonline.com/rptCSR_PublicMultYear.aspx?ClinicPKID=0 (last visited Nov. 2, 2009) [hereinafter SART Clinic Summary Report] (reporting 37,178 fresh IVF cycles and 9114 frozen IVF cycles for women under 35, and 21,339 fresh IVF cycles and 4814 frozen IVF cycles for all women between 35 and 37).

[146] AFC Flat Fee, *supra* note 141.

[147] These figures do not include the cost of pharmaceuticals because they are not covered by any refund program. *Id.* The price of these pharmaceuticals remains the same regardless of which option the patient chooses.

Table 2: Comparison of Costs under IVF Refund Program and Fee-for-service Arrangements

Cycle Number	Cost under IVF Refund Program for Patients Under 35 Years of Age[148]	Cost if Patient Pays a la Carte[149]	Extra Cost for Using IVF Refund Program
1	$25,750	$10,000 (for single fresh cycle)	$15,750
2	$25,750	$13,500 (for one fresh cycle and one frozen cycle)	$12,750
3	$25,750	$23,500 (for two fresh cycles and one frozen cycle)	$2,750
4	$25,750	$27,000 (two fresh cycles and two frozen cycles)	($1,250)
5	$25,750	$37,000 (three fresh cycles and two frozen cycles)	($11,250)

Thus, when accounting for the possibility that patients will sometimes use frozen cycles, the break-even point is much closer to four cycles than two cycles. After four cycles, patients using fee-for-service will have only paid $1000 more than patients using the IVF refund program.

Given the figures in Table 2, one might wonder why patients do not realize that the two-times heuristic is wrong. The likely answer is that "[c]onsumers are . . . hobbled by innumeracy," preventing them from processing basic numerical concepts.[150] That is, patients make systematic mistakes when evaluating decisions involving numbers. Studies have demonstrated that people accessing healthcare options, like consumers considering credit cards,[151] are very often unable to perform the calculations

[148] AFC 100% Money Back Guarantee, *supra* note 140.

[149] AFC Flat Fee, *supra* note 141.

[150] Carl E. Schneider & Mark A. Hall, *The Patient Life: Can Consumers Direct Health Care?*, 35 Am. J.L. & Med. 7, 37 (2009).

[151] Susan Block-Lieb & Edward J. Janger, *The Myth of the Rational Borrower: Rationality, Behavioralism, and the Misguided "Reform" of Bankruptcy Law*, 84 Tex. L. Rev. 1481, 1538 (2006) ("When thousands of adults from across the country were given tests of basic math and basic literacy, a significant portion of the population was unable to make the comparisons necessary to assess the cost of credit card debt.").

necessary to assess the best course of action.[152] Thus, lacking the ability to calculate whether using a refund program or paying for each cycle individually is more cost-effective, patients simply rely on the two-times heuristic repeated to them by seemingly reliable sources including doctors, the media, and academics.[153]

2. The Total Cost Heuristic

IVF refund providers also exploit poor patient decision-making by focusing attention on the quoted cost of the IVF refund program, rather than on the actual total cost of purchasing treatments, which is significantly higher. Behavioral economists have observed that consumers tend to focus on obvious or convenient numbers when considering the costs of a transaction.[154] They call this phenomenon the "anchoring effect."[155] "[A]lthough individuals adjust their perceptions upward or downward, they continue to skew their estimates toward the anchor."[156] For instance, consider a consumer deciding whether to purchase a car. The consumer tends to focus on the monthly payment the car salesperson states. But, the consumer typically does not factor in other costs, such as insurance, even though such extra costs increase the monthly payment and the total cost of the transaction. Businesses exploit the anchoring effect by framing transactions in a way that directs the consumer's attention to the price on which the business wants the consumer to focus. Thus, framing makes some costs salient, while minimizing or obscuring other costs.[157]

In the IVF refund market, evidence suggests that providers are successful in focusing patient perception on the IVF refund, and minimizing the attention paid to additional costs not covered by the refund program. This result can be explained by the anchoring effect. Patients have an easier time focusing on the refund program's static price, but find it much more difficult to factor in the additional fees that vary with each patient and each cycle.[158] As a result, patients skew their estimates of the cost of the transaction by only focusing on the cost of the program itself and thereby fail to account for additional costs.

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[152] *See* Schneider & Hall, *supra* note 152, at 37 (discussing a study in which "people were asked to: (1) guess how often a flipped coin would come up heads in 1,000 tries, (2) asked to calculate 1% of 1,000, and (3) turn a proportion (1 in 1000) into a percentage" and reporting that "[t]hirty percent of respondents had 0 correct answers, 28% had 1 correct answer, 26% had 2 correct answers, and 16% had 3 correct answers") (internal quotations omitted).

[153] *Id.*

[154] *E.g.*, Block-Lieb & Janger, *supra* note 151, at 1533.

[155] *Id.*

[156] *Id.* For an explication of the anchoring effect in another consumer credit transaction, *see* Jim Hawkins, *Renting the Good Life*, 49 Wm. & Mary L. Rev. 2041, 2096–98 (2008).

[157] Patricia A. McCoy, *A Behavioral Analysis of Predatory Lending*, 38 Akron L. Rev. 725, 737 (2005).

[158] *See supra* notes 154–57, *infra* notes 159–63 and accompanying text.

There are, however, significant additional costs when patients select an IVF refund plan. In one reported example, a patient paid $19,000 for a refund program that guaranteed three IVF cycles.[159] But, by the time the three cycles were complete, the patient had paid $21,000 in additional fees.[160] These additional fees come from a variety of sources. For example, nearly every program excludes the cost of medications, which can range from $2000 to $5000.[161] These medication costs alone can equal one-fourth of the cost of an IVF cycle.[162] Many programs also exclude services that only some patients will use, such as ICSI and assisted hatching, both of which can cost over $1000.[163] Additionally, programs typically exclude monitoring before and after the retrieval and transfer, anesthesia, cryopreservation of surplus embryos, and the storage of frozen embryos.[164] In light of these extra fees, the cost of the IVF refund program itself is a poor indicator of the total cost a patient will have to expend. Although an IVF refund program's cost is a poor proxy for the patient's total cost, some patients want to rely on it, in part because they seek assurance that they can know the definite total cost of their treatments. Even if the price is staggering, it is "defined," so patients believe they will not have to endure further stress over costs.[165] When the upfront cost of the IVF refund program is the only cost patients think they have to pay, patients report feeling at ease. For example, one IVF refund participant remarked, "One thing that helped me get through [multiple cycles] was knowing that the treatments were already paid for."[166] Another

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[159] *See* Wilcox, *supra* note 40, at 118.

[160] *Id.*

[161] Letitia Stein, *Couples Share Difficult Experience of Infertility*, ST. PETERSBURG TIMES (Tampa Bay, Fla.), Apr. 26, 2009, at 1B.

[162] Wilcox, *supra* note 40, at 119 ("Expensive medications account for about one-fourth of the cost of IVF.").

[163] *See, e.g.*, Advanced Fertility Center of Chicago, Cost of IVF at Advanced Fertility Center of Chicago, Illinois, http://www.advancedfertility.com/ivfprice.htm (last visited Sept. 28, 2009) [hereinafter Chicago Cost of IVF] (reporting the price of $1200 for ICSI); Washington Fertility Center, Our Fees, http://www.washingtonfertility.com/pages/fees.html (last visited Sept. 28, 2009) (reporting the price of $1290 for assisted hatching).

[164] *E.g.*, Chicago Cost of IVF, *supra* note 163.

[165] Marie McCullough, *Money-Back In Vitro Programs Expand as Success Rate Grows*, PHILA. INQUIRER, Aug. 17, 2003, at A1 ("While refund packages may not reduce patients' costs, the deals provide something rare in infertility treatment: less stress. The price tag, however staggering, is defined.").

[166] Wilcox, *supra* note 40, at 118 (internal quotations omitted). After the process is complete, a patient can of course see the extra costs associated with the program. As one patient posted on a fertility support website:

> I am currently in the final stage of my first IVF treatment. We just had retrieval on Thursday, and we're expecting a transfer this Tuesday or Wednesday. I have the Capital One loan, and I have been very disapointed [sic] to find that the amount that we were financed was also part of a package with ARC (Assisted Reproductive Care). They told me they have a set discout [sic] package price with my RE, this was $8,800, plus ICSI $1700, plus their pharm plan (which was good, they sent all meds to me ups next day) - $3,000 plus my husband's extraction with Urologist $1,000. I figured that would be enough right?
>
> WRONG.

patient recalled her relief even after using her life savings to enroll in a refund program because an upfront payment of a single fee allowed her to move past the stress of the financial aspects of IVF and concentrate on getting pregnant.[167] Media accounts commonly mischaracterize the cost of IVF refund programs as the cost of undergoing IVF under the programs, failing to mention the additional costs not covered by the refund programs.[168]

Patients' perceptions that the price of refund programs are their sole cost is further revealed by their feelings that they are not taking any risks. One couple stated, "You're guaranteed a full-life baby or your money back. You have nothing to lose."[169]

In actuality, patients have a lot to lose. Even under a refund program, patients are only refunded part of what they spend on treatments if the IVF is unsuccessful because patients pay for costs beyond the costs of the program. Although patients pay out of pocket for costs beyond the refund program, some programs claim that patients can get 100% of their money back.[170]

Even by itself, the anchoring effect makes refund programs problematic. However, the need for regulation becomes even more apparent when one considers how clinics frame IVF refunds to exploit this cognitive defect. First, some clinics explicitly perpetuate the myth that the IVF refund is the total cost the patient will pay. These clinics do this by insinuating that the patient bears no risk of spending money with an IVF refund program:

> With our IVF or Donor Egg Baby Guarantee or Your Money Back Program, you take no risk. We take all the risks! . . . Here's something you can take comfort in. With our IVF Baby Guarantee or Your Money Back Plan, you pay one fixed fee. *This eliminates the*

> There have been so many additional ridiculous fees. Like it only covers 6 E/2 's, 5 U/S for follicular development, and one pregnancy test. Additionally, on the package, it mentioned having anaesthesia [sic] covered, but my RE had to charge me for the meds . . . what's up with that? If you get a package, it should include everything, right???
>
> Anyway, be aware that we have already spent $2,500 in extra fees with another $800 to go.

Posting of hopefulmom2B to http://www.fertilethoughts.com/forums/financing-your-ivf/542039-capital-one-healthcare-finance.html (Nov. 4, 2007, 08:20 EST).

[167] Mann, *supra* note 55.

[168] *Cf.* Martin, *supra* note 126 ("After six years of struggling with infertility, Melissa Hoggatt, 32, and her husband, Bill, 35, were spent, emotionally and financially. The couple decided to have one last try at having a biological child. To raise $14,900 for the Sher Institute's outcome-based plan, they saved, borrowed on their credit cards, and even took out a second mortgage on their home in Slidell, La."); Yee & Marcotty, *supra* note 122 ("This summer, [the Foxes] came to Woodbury and paid $25,000 for three tries at in-vitro fertilization, commonly called IVF. The clinic offered a 100 percent money-back guarantee if they don't end up with a baby. To pay, they took out a medical loan for $20,000 and cleaned out the $5,000 in Greg's flexible spending account at work.").

[169] Gordon, *supra* note 120 (internal quotations omitted).

[170] Advanced Fertility Center of Chicago, IVF Cost Option That Refunds All Money If It Doesn't Work – 100% Refund If No Baby, http://www.advancedfertility.com/ivfpr100.htm (last visited Oct. 25, 2009) ("We offer a pricing option with a 100% refund of the fee for the IVF cycle (medications not included) if you do not deliver a baby.").

> *financial risk that is associated with multiple IVF attempts*, which are often necessary.[171]

ARC also recognizes and capitalizes on patients' yearnings to obtain a fixed price for multiple attempts. Dr. David Adamson, ARC's chief executive officer, stated in a televised interview that, "[i]nfertility is a very, very stressful problem, and we want our patients to know that they *only have to pay a certain amount of money* and that they'll have a very good chance of getting their baby . . . ."[172] ARC specifically addresses patients' desires to know in advance the cost of their treatments, claiming ARC "can make it more predictable for the patient. They can know exactly what it's going to cost."[173] IntegraMed makes a similar claim in a promotional video: the patient can "pay just once [b]ut get several tries at IVF."[174] Of course, these statements ignore the extra costs that IVF refund programs do not cover. The patients still bear the risk of losing all the money for these extra costs, despite the first advertisement's contrary suggestion. Similarly, despite ARC's prediction that it can let patients know the exact cost of treatments, the costs remain unpredictable because additional costs vary for each patient and each cycle.

A second way clinics exploit patients' tendencies to think that the IVF refund price is the total cost of the transaction is by failing to make clear that the refund program does not cover these additional costs. The ASRM ethics committee, advising on the issue of IVF refund programs, seemed to anticipate that patients would not understand that some fees were not included in the cost of refund programs. Thus, it recommended that refund program providers ensure that patients are fully informed of what costs are not covered in the refund program.[175] The Fertility Website Study, however, found that clinics often fail to meet this mandate. Of the 135 websites offering IVF refund programs, only 40%, or 54 clinic websites mention the specific costs that are excluded from the IVF refund program.

3. The Insurance Heuristic

A third way IVF refund providers lead patients to erroneously evaluate the worth of refund programs is by presenting IVF refund programs as insurance policies. The Fertility Website Study found that 70 of the 135 websites advertising refund programs present the programs as insurance either explic-

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[171] Washington Fertility Baby Guarantee, *supra* note 17 (emphasis added); *see also* Infertility and IVF Center of St. Louis, How to Qualify for Our Treatment Plan Options, http://www.ivfctrstl.org/How%20to%20Qualify.html (last visited Oct. 23, 2009) ("The end result is containment of cost with all costs known before treatment begins.").

[172] *The Early Show*, *supra* note 138.

[173] *Id.*

[174] Fertility Centers of Illinois, Shared Risk IVF Refund Program, http://www.fcionline.com/Video_Shared_Risk_Program.htm (last visited Jan. 30, 2009) [hereinafter Illinois Shared Risk IVF Refund Program].

[175] *ASRM Ethics Committee Report*, *supra* note 72, at S250.

itly or implicitly. For example, some clinics do so implicitly by claiming that participants in the programs share the risk of failure among themselves,[176] while others do so by suggesting that the patient shares the risk of failure with the refund providers.[177] Many clinics, however, are more explicit in the claim that IVF refund programs are insurance: "For all practical purposes, they are buying insurance."[178] One patient-education presentation on a clinic's website calls IVF refund providers "Shared Risk Insurers."[179] Another website claims that its refund program "insures you financially."[180] A third website likens its refund plan to an "insurance policy."[181] And a final website reports that the "[American Medical Association] ethics committee considers this an insurance product."[182]

ASRM also explicitly calls IVF refund programs insurance products: "[P]atients who meet program qualifications should know that they are otherwise good candidates for successful IVF and thus might not need to purchase this form of insurance."[183] News reports adopted the rhetoric and often conceptualize IVF refund programs as allocating risk among the participants in the program.[184]

In reality, however, IVF refund programs are not insurance policies, and participants in refund programs do not have the same legal protections

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[176] *See* Colorado Center for Reproductive Medicine, Infertility Financing, http://www.colocrm.com/Financing.htm (last visited Oct. 25, 2009) [hereinafter Colorado Infertility Financing] ("In the Attain IVF Program, the financial risks associated with IVF treatment is [sic] distributed among all patients participating in the Program.").

[177] *See, e.g.*, ART Fertility Program of Alabama, Shared Risk Refund program, http://www.artprogramal.com/default.aspx?id=140 (last visited Oct. 16, 2009) ("In other words, we will share the risk with you and do everything we can for you to achieve a live birth."); Gerencher, *supra* note 12 ("If we're willing to sit down with you and tell you this great story about how good a chance of success you have, we're willing to share the risk that we're wrong.") (quoting Dr. Widra at Shady Grove) (internal quotations omitted); Infertility and IVF Center of St. Louis, *supra* note 171 ("In the Joint Venture Plan, both the couple and the Center are sharing the risk.").

[178] Gary Wisby, *Fertility Clinic's Cash on the Line: Women Who Don't Conceive Get Refund*, CHI. SUN-TIMES, June 13, 1999, at 10 (quoting Dr. Norman Gleicher) (internal quotations omitted); *see also* Mann, *supra* note 55 ("The program, [Dr. Robert Stillman at Shady Grove Fertility] said, 'functions as a self-insurance trust. It's an option for those without insurance.'").

[179] Atlanta Center for Reproductive Medicine, Patient Financial Services, http://www.atlantainfertility.com/financial-financial-services.html (last visited Jan. 27, 2009).

[180] University Reproductive Associates, IVF Refund Program, http://www.uranj.com/index.php?option=com_content&task=view&id=89&Itemid=138 (last visited Feb. 13, 2009).

[181] OREGON REPRODUCTIVE MEDICINE, OUR PROMISE: AN IVF REFUND PLAN AT OREGON REPRODUCTIVE MEDICINE 3 (2009), *available at* http://www.oregonreproductivemedicine.com/files/Our%20Promise%20_An%20IVF%20Refund%20Plan_1.pdf.

[182] Infertility Solutions, P.C., IVF Refund and Shared Risk Program, http://www.infertilitysolutions.com/IVFrefund.html (last visited Oct. 25, 2009).

[183] *ASRM Ethics Committee Report*, *supra* note 72, at S249.

[184] Mann, *supra* note 55 ("The 28-year-old who pays $28,000 and gets pregnant in one try is subsidizing the 38-year-old who takes four times.") (internal quotations omitted); Yee & Marcotty, *supra* note 12 ("By paying up front for a package of three tries, patients who got pregnant on the first try subsidized those who got pregnant on a third.").

as enrollees in insurance plans. Insurance codes contain numerous protections for consumers that surpass protections for IVF refund participants. For instance, the Texas Insurance Code prohibits misrepresentations about "the benefits or advantages promised by the policy"[185] and discrimination among "individuals of the same class and equal life expectancy."[186] Additionally, it requires insurance companies to "attempt in good faith to effectuate a prompt, fair, and equitable settlement of" claims "with respect to which the insurer's liability has become reasonably clear."[187] Most strikingly, the Insurance Code sets price controls on insurance rates: "Rates used under this code must be just, fair, reasonable, adequate, not confiscatory and not excessive for the risks to which they apply, and not unfairly discriminatory."[188]

Other statutes also protect people with insurance from the risk of an insurance company's insolvency. They require insurance companies to retain capital reserves,[189] provide ways for insured people to continue to have their claims paid in the midst of a company's insolvency,[190] and do not hold insureds liable for medical care that would have been covered by the insolvent company.[191] In many states, the attorney general can sue insurance companies on the insureds' behalves.[192]

In contrast, IVF refund providers do not have the same constraints or obligations. IVF refund providers have no statutory obligation to effectuate prompt refunds in good faith.[193] They have no statutory requirement to have reserves sufficient to effectuate refunds; so, if a refund provider becomes insolvent, refund program participants could be left without both refunds and additional IVF cycles. Some states' consumer protection statutes may provide consumers with protection against misrepresentations.[194] But, these protections are not specifically tailored to IVF refund programs like the insurance codes' prohibitions are tailored to insurance policies. Most importantly, no price control exists to limit what IVF refund programs can charge participants. Thus, although IVF refund providers, doctors, the media, and

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[185] TEX. INS. CODE ANN. § 541.051(1)(C) (Vernon 2008).

[186] *Id.* § 541.057.

[187] *Id.* § 541.060(a)(2)(A).

[188] *Id.* at art. 1.02(b).

[189] Allison Overbay & Mark Hall, *Insurance Regulation of Providers that Bear Risk*, 22 AM. J.L. & MED. 361, 366 (1996). For Texas's provision, for instance, see § 421.001.

[190] John D. Blum, *Safeguarding the Interests of People with AIDS in Managed Care Settings*, 61 ALB. L. REV. 745, 773 (1998).

[191] *Id.*

[192] *See* § 541.201(a) ("The attorney general may bring an action under this section if the attorney general has reason to believe that: (1) a person engaged in the business of insurance in this state is engaging in, has engaged in, or is about to engage in an act or practice defined as unlawful under: (A) this chapter or a rule adopted under this chapter; or (B) Section 17.46, Business & Commerce Code; and (2) the action is in the public interest.").

[193] Contractually, IVF refund providers may be obligated to pay the refund, but having a contractual duty and having a statutory duty are very different. For instance, the state's attorney general can enforce a statutory duty but not a contractual duty.

[194] *See supra* Part II.B.3.

ASRM portray IVF refunds as insurance products, refund participants do not have the same protections as insurance plan participants.

One response to this charge is that IVF providers are not claiming IVF refund programs are insurance but instead are recognizing the fact that refund programs shift risks, like all contracts. This response does fit the description of certain IVF refund programs, such as "Shared Risk,"[195] which does not explicitly mention insurance. The response does not, however, refute the numerous examples of refund providers and ASRM explicitly calling IVF refund programs a form of insurance. Additionally, even those plans that merely use risk-shifting language evoke insurance law more than general contract law, misleading patients into believing IVF refund programs have the same attributes as insurance contracts.

4. The Pessimism Bias

Usually, people evaluating financial products suffer from a phenomenon called the optimism bias[196]—people think they will be unlikely in the future to spend too much money, unlikely to incur additional charges while using the financial product, and unlikely to face financial crisis.[197] In reality, the chance of these possibilities occurring is greater than they think.[198] This Section argues that IVF patients deciding whether to enter IVF refund programs likely suffer from the pessimism bias[199]—that is, patients underestimate the likelihood that they will achieve pregnancy in an early cycle of IVF. IVF refund providers' advertising capitalizes on this pessimism bias to entice people to participate in refund programs.

There have been no empirical studies of first-time IVF patients to determine whether they are optimistic about the chances that they will become pregnant,[200] but social science literature documents pessimism bias in other

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[195] IntegraMed Fertility Network, The Attain IVF Program, http://www.integramedfertility.com/inmdweb/content/cons/shared.jsp (last visited Oct. 16, 2009).

[196] Oren Bar-Gill, *Seduction by Plastic*, 98 Nw. U. L. Rev. 1373, 1400 (2004).

[197] *Id.*

[198] *Id.*

[199] Edward C. Chang et al., *Cultural Variations in Optimistic and Pessimistic Bias: Do Easterners Really Expect the Worst and Westerners Really Expect the Best When Predicting Future Life Events?*, 81 J. Personality & Soc. Psychol. 476, 486 (2001).

[200] Some commentary suggests patients are overly optimistic. *See* Katherine T. Pratt, *Inconceivable? Deducting the Costs of Fertility Treatment*, 89 Cornell L. Rev. 1121, 1194–95 (2004) ("Patients may also overestimate the odds of success in later individual cycles due to the 'gambler's fallacy.' For example, patients may assume that, with a twenty percent per cycle success rate for IVF, the odds of success after four unsuccessful cycles would be much higher than twenty percent in their next IVF cycle. In fact, the chance of success may remain the same for each IVF cycle regardless of how many times the couple has tried IVF in the past."). Spar argues that women facing infertility "tend to overestimate their chances of conception by an extremely wide margin." Spar, *supra* note 4, at 53. Spar cites to two surveys to prove her claim, but both surveys include women who have never struggled with infertility. *Id.* at 53 n.55. Given the unique experiences of those who have failed to conceive naturally, the results of a general population survey cannot be equated with the results of a survey of infertile women.

contexts, such as the tendency to overestimate the likelihood that one will suffer from life-threatening risks.[201]

Several factors suggest that first-time IVF patients are pessimistic about their chances of success. First, patients usually undergo IVF only after they have repeatedly failed to become pregnant.[202] Most patients attempt natural methods for a few years.[203] During this time, couples often experience disappointment each month as they learn that they did not conceive: "[M]ost infertile couples experience monthly cycles of hope and optimism, followed by despair at menstruation."[204] This is often followed by a battery of infertility treatments less aggressive than IVF, where patients face not only the same periodic disappointments but also a new type of defeat: paying for services, all of which are not covered by insurance.[205] Only after failing in each of these ways do most patients opt for IVF.[206] After this multi-year process of failing to conceive, patients are likely to be pessimistic about the chances of early success even with a different infertility treatment.

Depression is another cause for patients' pessimism about their chances of success in IVF treatments. This Article has already argued that this depression makes patients vulnerable.[207] But this depression also likely makes patients pessimistic regarding their chances of becoming pregnant. One study found a correlation between the length of time a patient had attempted

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[201] *See* Cass R. Sunstein, *Hazardous Heuristics*, 70 U. CHI. L. REV. 751, 773 (2003) ("One survey finds general overestimates of personal risk levels for such hazards as breast cancer (where women rate their actual risk as 40 percent, with the actual risk being roughly 10 percent); prostate cancer (where men rank their actual risk as 40 percent, with the actual risk again being roughly 10 percent); lung cancer (estimated at 35 percent, compared to an actual risk of under 20 percent); and stroke (estimated at 45 percent, compared to an actual risk of roughly 20 percent)."); *see also* Michael A. McCann, *Social Psychology, Calamities, and Sports Law*, 42 WILLAMETTE L. REV. 585, 620 (2006) (suggesting professional athletes may suffer from "pessimism bias when considering that risk [of terrorism] in foreign playing opportunities"). One commentator has argued that scholars applying behavioral law and economics, like the author in this Article, exhibit a pessimism bias by discounting "research findings contrary to their view of legal decisionmakers as afflicted by numerous judgmental biases and decision-making errors, while simultaneously interpreting ambiguous research findings as supportive of their pessimistic view of human rationality." Gregory Mitchell, *Taking Behavioralism Too Seriously? The Unwarranted Pessimism of the New Behavioral Analysis of Law*, 43 WM. & MARY L. REV. 1907, 1911 (2002).

[202] Schmittlein & Morrison, *supra* note 135, at 1618.

[203] *Id.*

[204] Domar et al., *supra* note 131, at 1159.

[205] For evidence that spending money on non-IVF fertility treatments causes patients to use IVF refund programs, see Barri Bronston, *21st Century Triplets*, TIMES-PICAYUNE (New Orleans, La.), May 13, 2001, at E-1 ("Having already spent more than $30,000 in medical costs—the bulk of which had not been covered by medical insurance—the Manieris especially liked Sher's money-back guarantee. Patients who fail to get pregnant through Sher's clinic receive a full or partial refund, depending on their age.").

[206] Schmittlein & Morrison, *supra* note 135, at 1617 ("Typically, such a couple has already attempted natural conception, the use of fertility-enhancing drugs, and intrauterine insemination without success.").

[207] *See supra* Part II.C.

to become pregnant and the level of depression the patient experienced.[208] Patients report that they join IVF refund programs precisely because of their mental states. In response to an interviewer's statements that "patients end up paying thousands more" with IVF refund programs and that often "only patients most likely to succeed are accepted," a patient who used a refund program stated: "But I think if you are coming from the place where we were initially, where we were in such despair, the money-back guarantee was important to us."[209]

The most important piece of evidence of the pessimism bias is that many IVF patients enter IVF refund programs. Patients accepted into IVF refund programs should realize that the IVF refund program administrators believe that approved patients will become pregnant in an early IVF cycle—that is how refund programs make money.[210] The national average rate of pregnancies and live births for IVF cycles for all women under 35 years old, both those who could qualify for a refund program and those who could not qualify, was 44.7% and 38.8%, respectively, in 2006.[211] The success rate for those who qualify for IVF refund programs was unquestionably higher because refund programs screen out some undesirable applicants. Some individual clinics that offer IVF refunds had substantially higher success rates for IVF cycles. For instance, a clinic in Colorado had 71.3% of cycles result in pregnancy for all women under 35 years old (62.2% live birth) in 2006.[212] Despite these high averages, the clinic still offered an IVF refund program, which patients continued to participate in.[213] The pessimism bias explains why people enter a program which will essentially penalize them thousands of dollars if they do become pregnant on the first cycle.

Clinics use the tendency of IVF patients to be pessimistic about their chances of conceiving to nudge them into IVF refund programs in two ways. First, they exploit patients' pessimism by recommending that patients join the refund program to have money for adoption if IVF does not work. Second, some clinics capitalize on patients' fear that they will not become pregnant by suggesting that patients are more likely to become pregnant if they use the refund program.

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[208] Domar et al., *supra* note 131, at 1160 ("Women with a 2-to-3 year history of infertility had significantly higher BDI scores than women with durations of <1 year or >6 years.").

[209] *NBC Nightly News: Fertility Clinics with a Money-Back Guarantee* (NBC television broadcast Aug. 1, 1998).

[210] *ASRM Ethics Committee Report*, *supra* note 72, at S249 ("[P]atients who meet program qualifications for these plans should know that they are otherwise good candidates for successful IVF, and thus might not need to purchase this form of insurance.").

[211] SART Clinic Summary Report, *supra* note 145.

[212] Colorado Center for Reproductive Medicine, 2005 Infertility and IVF Statistics, http://www.colocrm.com/rates2006.htm (last visited Oct. 25, 2009).

[213] Colorado Infertility Financing, *supra* note 176.

a. Money left for adoption.

A common benefit people cite for IVF refunds is that the refunded money can be used for adoption if the patient fails to have a child. Doctors claim to offer IVF refunds specifically for this purpose,[214] independent IVF refund providers claim a participant's ability to pursue adoption is a benefit of the program,[215] and academics repeat the rhetoric that the motivation behind IVF refund programs is to leave "the couple financially capable of building a family through adoption or other alternatives."[216] At least twenty-two percent, or twenty-eight of the websites that offer refunds in the Fertility Website Study suggest that having money for adoption is a benefit of participation in the refund program.[217] What is important from the perspective of this Article is that patients enrolled in IVF refund programs state that the option of pursuing adoption was an important reason to be in a refund program.[218]

However, the appeal to using refunded money for adoption does not reflect reality. Most people accepted into IVF refund programs will not need money to pursue adoption. For some patients, the quest is for a biological child, so adoption is not an attractive option. For others, the refund will only inspire more IVF attempts, rather than adoption.[219] For many patients adop-

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[214] Anderson, *supra* note 137 (quoting one doctor lamenting that "I've had patients who got a second mortgage on their homes to pay for in vitro, and if it doesn't work, they don't have anything left to pursue adoption," but concluding that a refund program "would give them that option") (internal quotations omitted); Wisby, *supra* note 178 (highlighting Dr. Norbert Gleicher's concern that patients "spend to their last dime, and if they don't get pregnant, they don't have anything left for adoption, which isn't cheap, either") (internal quotations omitted); Chicago IVF Cost Plan with Risk Sharing, *supra* note 38 ("It might be considered an ideal payment option for those couples who are considering in vitro fertilization but are concerned that if they are not successful, they will not be financially able to pursue adoption."); Washington Fertility Baby Guarantee, *supra* note 17 ("If you succeed, we will have earned our fee. If you do not bring home a baby, you owe nothing and receive 100% of your money back. You will then still have the financial resources to pursue other options of starting a family, such as adoption.").

[215] *The Early Show*, *supra* note 138.

[216] Michael Feinman, *Economics Versus Ethics in Reproductive Medicine*, 21 WHITTIER L. REV. 409, 411–12 (1999).

[217] The Fertility Website Study did not code websites for references to adoption, but the study protocol required researchers to list the advantages each website provided for the refund program. Without specifically looking for websites mentioning adoption, the study found twenty-six that do.

[218] Dennis Douda, *Fertility Clinic Offers Money-Back Guarantee*, WCCO-TV, Nov. 29, 2006, http://wcco.com/local/Fertility.clinic.money.2.363242.html ("'We may entertain the idea of adoption,' Stacy said. 'Without having the money-back guarantee, we would be out that money and it would be very difficult to come up with another amount of money to pursue adoption.'").

[219] Even after three attempts under the IVF refund program fail, patients are more likely to continue with IVF attempts using the refund money provided by the refund program because of the "house money" effect. Decision-process literature predicts people have a heightened tendency to use "found money" to engage in risky transactions (such as a fourth or fifth IVF attempt), further encouraging repeated IVF attempts and preventing patients from stopping IVF treatments when medically indicated. Schmittlein & Morrison, *supra* note 135, at 1629.

tion will not be necessary because IVF will be successful. Instead of reflecting a true patient need, the appeal to money for adoption reflects the pessimism bias that leads people to think that they will need to pursue adoption because IVF will fail.

b. More likely to get pregnant via refund program.

The second way in which some IVF refund providers exploit patients' pessimism is by insinuating that participation in the program makes success more likely. For instance, the names of IVF refund programs often signal that participation in the program will lead to pregnancy. A news report about one IVF refund program revealed the reporter's concern that the name of the program confuses prospective patients.[220] When the reporter mentioned the name of the "IVF Success Guarantee Program," the reporter quickly clarified that "[i]t guarantees a partial refund, not success."[221] ASRM recognizes the risk that patients will believe participation in a refund program will guarantee a pregnancy, and thus it instructs members to state explicitly that participation in the refund program does not increase the likelihood of pregnancy.[222] Based on the Fertility Website Study, however, almost all clinics' websites fail to comply with this instruction. Only 19 of 135 websites clarify that participation does not guarantee pregnancy.

Ambiguous statements on websites may mislead patients as well. One site states, "[P]re-apply to our special IVF Refund Program. High success."[223] Though it is unclear what this sentence means, one possible reading is that high success rates of pregnancy accompany participation in the IVF refund program. Other doctors claim that patients participating in a refund program have "better odds of success than patients" not in the program.[224]

Patients rely on the signaling effect of refund programs when they apply for them. One IVF refund customer who became pregnant after the first IVF attempt said that she did not regret paying the high price tag for the refund program because "[t]he fact that we were accepted to the shared risk program in the first place was a boost to our confidence that IVF would eventually work."[225] Another patient explained that he was encouraged by his doctor's "willingness to share the financial risk with the couple. 'He's

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One clinic encourages patients to use the IVF refund program to pursue more treatments: "This program enables us to share our success with our patients and by reimbursing IVF fees permitting them to continue and pursue further treatment." Midwest Fertility Center, When You're Ready but Nature's Not, http://ivf.us/index.cfm/PageID/6655 (last visited Oct. 4, 2009).

[220] *See generally* McCullough, *supra* note 16.

[221] *Id.*

[222] *ASRM Ethics Committee Report*, *supra* note 72, at S250.

[223] IntegraMed Fertility Network, Infertility and IVF Financing—Apply For a Loan, http://www.integramed.com/inmdweb/content/cons/financing.jsp (last visited Oct. 4, 2009).

[224] Marilynn Marchione, *Infertility Expert's Offer: No Pregnancy, No Bill*, MILWAUKEE J. SENTINEL, Aug. 22, 1999, at 1A (reporting the opinion of Dr. K. Paul Katayama).

[225] Laura Lewis Brown, *Financing Your Way Through Fertility Treatment*, REVOLUTION HEALTH, Jan. 19, 2007, http://www.revolutionhealth.com/conditions/reproductive-health/infertility/decision/financing (internal quotations omitted).

gambling, too. For him to take a chance on us made us feel we had a real good shot at this.'"[226] Doctors understand that the patients' desire to feel assured drives patients' participation in IVF refund programs.[227] One clinic uses the refund as a way to prove the clinic believes in its success rates, the refund program "makes a strong statement of confidence regarding our ability to achieve outstanding IVF birthrates, even in the most difficult cases."[228]

Some clinics use a more sophisticated technique to suggest that refund programs yield a greater chance of success, by suggesting that IVF refund programs that allow multiple attempts for a single cost maximize a patient's chances of getting pregnant. As one website explains, IntegraMed's product provides "for a multi-cycle course of treatment, which helps maximize your chance to have a baby through IVF. In fact, *three out of four participants in the Attain IVF Program take home a baby*."[229] A video advertising IntegraMed's product puts it more crassly: "3 out of 4 get a baby."[230] The website suggests that enrolling in the program will "almost double [the] chances of having a baby" because the patient will commit to more cycles.[231] These types of advertisements are inaccurate. It is true that undergoing more cycles of IVF maximizes the chances of a live birth, but it is not true that paying for all the cycles upfront maximizes the chances of a live birth.

The inaccuracies in these advertisements are symptomatic of a larger pattern of IVF refund providers capitalizing, even if unintentionally, on the suboptimal decisions patients make when evaluating IVF refund programs. As a result, patients underestimate the costs of refund programs and overvalue the refund programs themselves, both as a form of insurance and as an important component of their pessimistic outlook. Because refund providers perpetuate fertility patients' systematic mistakes, there is a need for regulations to protect fertility patients.

5. Informational Asymmetry

The IVF refund market also fails because of the vast informational asymmetry between refund providers and patients. Providers of IVF refund programs have substantially more information than potential customers about whether a refund program would be beneficial to a particular pa-

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[226] Marchione, *supra* note 224.

[227] *See* Gerencher, *supra* note 12 (noting that Dr. Widra of Shady Grove said that "patients who fit the profile of being under 38 and having normal ovarian function feel reassured" by the IVF refund program).

[228] Sher Institutes for Reproductive Medicine, Accessibility, http://www.haveababy.com/SIRM/aboutSIRM/centers/nycaccess.html (last visited Feb. 12, 2008).

[229] Atlanta Center for Reproductive Medicine, The Attain IVF Program, http://www.atlantainfertility.com/financial-shared-risk.html (last visited Oct. 31, 2009).

[230] Illinois Shared Risk IVF Refund Program, *supra* note 174.

[231] ATTAIN IVF, PAYING FOR IVF (IntegraMed 2009), *available at* http://www.integramedfertility.com/inmdweb/content/cons/paying-for-ivf.jsp.

tient.[232] This disparity in information prevents efficient pricing because patients cannot accurately evaluate whether they should participate in refund programs.

Most patients know little about the actual likelihood that they will conceive in the early stages of IVF treatments. Though numerous networks provide information to those suffering from infertility,[233] individual patients still lack the specific expertise and statistical data to predict accurately how many IVF attempts it will take for them to conceive.

Clinics and businesses that offer IVF refunds, on the other hand, are experts in predicting treatment outcomes and have tremendous amounts of data to guide their decisions. It is not difficult to argue that doctors who are trained to treat infertility and who do so daily know much more about the likelihood that a particular patient will conceive early in IVF treatments than patients, who are lay people.

Even more important than the disparity in expertise is the disparity in statistical data. Clinics that offer IVF refund programs often have extensive information about their patients and the likelihood that they will become pregnant.[234] For instance, the Sher Institute has a million dollar electronic record-keeping system, allowing them to more accurately predict the success of IVF cycles.[235]

Compared to individual clinics offering refunds, independent IVF refund providers have an extremely large amount of data. ARC, for instance, requires that all ARC physicians "agree to share their clinical data, which may require them to use a different information system to facilitate the collection of that data."[236] That means that in 2001, ARC had the data from 220

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[232] In a related argument, some contend that clinics have an obligation to inform patients of the general risks of IVF in addition to the odds of IVF succeeding because clinics have superior knowledge. *See* Suzanne Leigh, *Fertility Patients Deserve to Know the Odds—and Risks*, USA TODAY, July 7, 2004, at 11A ("The slick sales pitches used by some of the nation's 400 or so fertility clinics are hard to miss. 'With our (in-vitro fertilization) 100% money-back-guarantee program, you'll have no risk,' reads one clinic's Web site. 'Take home a baby or we will refund 70% of your money,' reads a second, which also offers 'a raffle entry for a chance to win a free IVF cycle.' Baby? No risk? Make that possible babies and possible risks. In 2001, 46% of infants conceived as a result of in-vitro fertilization and related procedures were twins; 8% were triplets or more. Clinics' marketing materials doesn't mention, of course, the brain damage, blindness, cerebral palsy and mental retardation that accompany many multiple births because of their prematurity.").

[233] *See, e.g.*, *'No Baby, No Fee'*, ABERDEEN PRESS & J. (Scot.), Aug. 26, 2006, at 6 (discussing the Infertility Network Scotland, "a charity providing support and information to those suffering the effects of infertility").

[234] Martin, *supra* note 126.

[235] *See id.* ("Sher has also sunk $1 million into a proprietary electronic record-keeping program called ReproLink. It makes it possible to crunch a huge number of variables and figure out the most promising protocol for a woman. Say there's a patient with the following profile: 39 years old, a history of miscarriages, and a blood-clotting disorder. ReproLink lets doctors locate the records of former Sher Institute patients with similar profiles to puzzle out the course of treatment that has proved most effective. The program has been invaluable in bolstering the Sher Institute's success rates, which in turn makes the clinics more profitable on the outcome-based plan.").

[236] Borzo, *supra* note 50.

reproductive endocrinologists[237] to determine how likely a patient was to conceive. IntegraMed similarly offers members access to its information technology[238] and explained its use of statistical models in its 2008 Annual Report as follows:

> Due to the characteristics of the program, we assume risk for unsuccessful treatments. In order to moderate and manage this risk, we have developed a sophisticated statistical model and case management program in which Shared Risk patients are medically preapproved prior to enrollment in the program. We also continuously review their clinical criteria as they undergo treatment. If, while undergoing treatment, a patient's clinical response falls outside our criteria for participation in the Shared Risk Refund program, we have the right to remove that individual from the program, with an applicable refund to the patient.[239]

As IntegraMed's Annual Report illustrates, the information asymmetry grows as patients get treatments pursuant to IVF refund programs. Clinics and independent businesses can gather even more detailed data about the patient—data which are largely meaningless to the untrained and unconnected patient—and can use these data in the decision whether to terminate or continue the IVF refund agreement.[240]

Nevertheless, this point should not be overstated: clinics and independent refund providers cannot overcome the uncertainty inherent in any medical diagnoses. As Dr. Jerome Groopman has written: "Sherlock Holmes is a model detective, but human biology is not a theft or a murder where all the clues can add up neatly. Rather, in medicine, there is uncertainty that can make action against a presumed culprit misguided."[241] In some cases, Dr. Groopman notes, physicians cannot rely "on a large database to assign probabilities to a certain diagnosis, or the outcome of a certain treatment."[242] While physicians cannot predict treatment outcomes with absolutely certainty, however, they are much better equipped than patients to make these

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[237] *Id.*

[238] IntegraMed 2008 10-K, *supra* note 42, at 5 ("ARTworks Clinical Information System - a proprietary electronic medical record (EMR) system focused exclusively on the unique requirements of providing clinical care to patients seeking fertility treatment. We maintain this application at our data center in New York, with contracted fertility centers gaining access via a dedicated communications link. This structure allows our customers to minimize their investment in information systems and relieves them of software maintenance obligations. The application is also interfaced with commonly used laboratory equipment and our practice management information systems.").

[239] *Id.* at 6.

[240] Schmittlein & Morrison, *supra* note 135, at 1624 (explaining how clinics learn valuable information through a single IVF cycle and how clinics can use that information to push patients with remote prospects of success to other treatments).

[241] JEROME GROOPMAN, HOW DOCTORS THINK 149 (2007).

[242] *Id.* at 151 (internal quotations omitted).

sorts of predictions. IVF refund providers do not have to be right all of the time to have a significant informational advantage.

The result of this asymmetry is predictable: patients enter into IVF refund agreements when such agreements are a bad deal for them, and businesses enter into IVF refund agreements when it is likely that they will realize a profit. Schmittlein and Morrison have demonstrated through modeling that clinics can operate profitably only by accepting relatively fertile patients for IVF refund programs, and by directing patients who should be using less aggressive treatments to IVF.[243] Schmittlein and Morrison's conclusion is even more striking because the authors use data from 1996, which involved lower success rates than exist today.[244] Because IVF success rates of first cycles are increasing, the need for repeat IVF cycles is becoming less common.[245]

Schmittlein and Morrison's theoretical work is reflected by how IVF refund programs operate: businesses only offer IVF refunds to people from whom they are most likely to realize profit; others are excluded by a variety of qualifications.[246] Reports indicate that firms only accept IVF refund candidates "who, based on their age and diagnosis, have a 50% to 60% probability of getting pregnant on the first try."[247] Clinics are candid that the qualifications for IVF refund programs ensure that the clinics' fertility program will be profitable. One doctor explained to a reporter that "[c]ouples must fit criteria that mean 50 percent would achieve pregnancy with in vitro the first time, increasing to 75 percent the second time and 85 to 90 percent the third time."[248] Most women receiving IVF treatment become pregnant after two IVF cycles,[249] but among patients enrolled in IVF refund programs, there is a higher percentage of women who become pregnant after the very first cycle.[250]

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[243] Schmittlein & Morrison, *supra* note 135, at 1617 (concluding that "the marketing of money-back guarantees is inducing couples who would previously used—successfully—other less invasive" methods.). The conclusion is understated because the model assumes that clinics must keep patients who do not succeed after one attempt in the IVF refund program. *See id.* at 1624 (only accounting for some learning that clinics acquire through multiple cycles but neglecting to account for learning "that the prospects for IVF success are remote" because it does not "actually benefit a clinic offering a money-back guarantee."). In reality, clinics can often terminate their agreements with patients that only have a remote prospect for success. Thus, the model underestimates the learning effect.

[244] *Compare id.* at 1620 (assuming 22% of IVF transfers resulted in a live birth), *with* Society of Assisted Reproductive Technology, Clinic Summary Report, https://www.sartcorsonline.com/rptCSR_PublicMultYear.aspx?ClinicPKID=0 (last visited Nov. 3, 2009) (reporting that over 43% of IVF transfers in 2007 resulted in a live birth).

[245] Flisser et al., *supra* note 82, at 547.

[246] *E.g.*, Douda, *supra* note 218 ("RMIA's") [Reproductive Medicine & Infertility Associates in Woodbury, Minn.] 100 percent money-back plan is limited to women under age 35, boosting the odds of success.").

[247] Wilcox, *supra* note 40, at 118.

[248] Anderson, *supra* note 137.

[249] *Id.*

[250] Mann, *supra* note 55.

Therefore, eligibility requirements for these programs often disqualify many potential or actual IVF patients.[251] IntegraMed admits that it "cannot afford to take on people who have a lower than average chance of success."[252] A perverse result of the combination of patients' desire for peace of mind through assurance from IVF refund programs and clinics' restrictive entrance policies is that clinics, perhaps even unwittingly, engage in a bait-and-switch scheme. Patients come to the clinic because of the refund program, but are denied enrollment and must pursue IVF on a fee-for-service basis.[253] One solution to this problem would be for clinics to disclose the eligibility requirements for the refund program upfront.[254] But the Fertility Website Study found that only 42.9%, or 58 of the websites with refund programs disclose any eligibility requirements.

Because patients lack the vast information that IVF refund providers have, patients are unable to properly value IVF refund programs, thereby creating a market failure. To ensure a functional market, additional disclosure regulations should be imposed on IVF refund programs.

D. Risking the Benefits IVF Refund Programs Provide

One cannot evaluate whether additional regulations are needed for IVF refund programs without understanding the benefits these programs provide—benefits that would be at risk if regulations cause some providers to exit the market. This Section evaluates two benefits that refund programs may provide. One benefit is that IVF refund programs expand access to IVF. Another benefit is that refund programs decrease multi-fetal pregnancies. However, despite these social benefits, the need for regulation to cure the failure in the current market more than offsets the loss of the beneficial value.

1. Expanded Access to IVF

Because IVF is so expensive, many groups, including minorities and the poor, have been unable to access IVF as a treatment.[255] This inaccessibil-

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[251] McCullough, *supra* note 16 (reporting that seventy percent of IntegraMed's patients meet the IVF refund requirements).

[252] *Id.* (quoting IntegraMed's Schumann).

[253] Gina Kolata, *Fertility Inc.: Clinics Race to Lure Clients*, N.Y. TIMES, Jan. 1, 2002 at F1 ("Most patients, in a sort of bait-and-switch scheme, are told when they show up that they are not eligible for the guarantee . . . .").

[254] Robertson and Schneyer make this very suggestion: "[T]he danger [of IVF refund programs being used in a bait-and-switch advertising scheme] is easily countered by insisting that each clinic's promotional materials identify its eligibility criteria." Robertson & Schneyer, *supra* note 65, at 287.

[255] *See* Ikemoto, *supra* note 67, at 1030 (noting that the high cost of fertility treatments screens out poor populations and arguing that the majority of couples using IVF are white and that "[p]rocreative technology use has become a racially-specific, class-based method of family formation").

ity has been a great concern, and writers have offered a variety of solutions.[256]

It is not immediately obvious how IVF refund plans could allow more people to access IVF treatments. Simply put, a single cycle is too expensive for many people to afford.[257] IVF refund plans can be around three times the cost of a single cycle, plainly not putting IVF within the reach of otherwise excluded populations.[258] Despite this drawback, refund plans are still beneficial. They encourage people to use IVF and provide access for patients to continue to have more IVF cycles if the first few fail. Without refund programs, some patients would not use IVF treatments at all. Because IVF is so expensive, patients see the refund as offering a sense of security,[259] thereby allowing patients to absorb the high costs of failed IVF.[260] ARC explicitly states that its goal is to increase the number of people undergoing IVF treatments,[261] and ARC has succeeded. IVF refund programs "are bringing patients to clinics in greater numbers than ever before."[262] One doctor argues that people will go to clinics with IVF refund programs even if the programs do not apply to them.[263]

And, while IVF refund plans may not expand access to excluded populations for the first IVF cycle, they likely allow patients to obtain more cycles after the first few cycles fail. After a patient has decided to undergo IVF, IVF refund programs encourage[264] and enable[265] patients to go through additional cycles if the first or second cycles fail. The basic expenses of

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[256] *Compare* Judith F. Daar, *Accessing Reproductive Technologies: Invisible Barriers, Indelible Harms*, 23 BERKELEY J. GEN. L. & JUST. 18, 37 (2008) (suggesting states should mandate that insurance cover fertility treatments), *with* Hawkins, *supra* note 96 (arguing that increased access to credit could expand access to fertility treatments).

[257] SPAR, *supra* note 4, at 30.

[258] Monahan, *supra* note 135, at 182–83 ("[S]hared-risk plans are of limited value in truly expanding access, as they require a couple to pay more than the cost of a single cycle of IVF. The monetary threshold to participate is therefore likely to be prohibitively high for many patients.").

[259] Yee & Marcotty, *supra* note 12 ("For them, it was the guarantee that did it. 'If not, then it would be a lot of money,' Greg Fox said.").

[260] Tracy Boyd, *Health News*, DETROIT NEWS, Nov. 21, 2000, at 3F ("[ARC] will help build families for people who could not otherwise absorb the financial risk associated with fertility treatments.").

[261] *The Early Show*, *supra* note 138.

[262] Mulrine, *supra* note 5.

[263] Barbara Fitzsimmons, *Fertile Business*, SAN DIEGO UNION-TRIB., Sept. 13, 1996, at E-1.

[264] The fact that IVF refund programs encourage patients to undergo additional cycles is not likely a matter of dispute—the reason people agree to pay a set fee upfront is to allow them to have additional cycles if the first are unsuccessful. Anecdotal evidence illustrates how this works:

> All told, the Lohs paid $40,000, which included three rounds of IVF, drugs and a refund guarantee of about $19,000. "One thing that helped me get through was knowing that the treatments were already paid for," says Nancy. Discouraged at the end of round two, she says, "I might not have done the third cycle if not for the packaged plan. It helped us hang in there."

Wilcox, *supra* note 40.

these cycles are covered by the upfront IVF refund program fee, so patients who otherwise could not afford a third, fourth, or fifth cycle may be able to do so if they have purchased an IVF refund program. Thus, those offering refunds claim that IVF refund programs will prevent people from giving up due to a lack of money.[266]

Of course, the ability to pursue six cycles of IVF is not without its drawbacks. For some, the quest to conceive must have an obvious stopping point in order to overcome the emotional push to continue to try to have a child.[267] One doctor even went so far as to stop offering an IVF refund program because he found his patients were continuing to pursue IVF "to get their money's worth," even though continued treatment was contraindicated.[268]

In summary, although refund programs may encourage people to pursue IVF and may enable multiple cycles, refund programs do not appear to expand access to traditionally excluded populations, and they may go too far in encouraging treatment.

2. Decreasing Multi-Fetal Pregnancies

Another potential benefit of IVF refund programs is that they may decrease multi-fetal pregnancies by encouraging patients to transfer fewer embryos in an IVF cycle. Patients on a fee-for-service IVF plan face the prospect of paying a significant amount for a second round of IVF if the current one fails. Therefore, in an attempt to increase the odds that the current cycle will succeed, patients and physicians feel pressure to transfer multiple embryos in a given cycle.[269] Multi-fetal pregnancies are expensive for society because multiples have higher than average health problems,[270] and patients deciding how many embryos to transfer are ill-equipped to evaluate these long-term costs.

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[265] Douda, *supra* note 218 ("Stassart said without a warranty program, [or] some kind of money-back guarantee, only about half of the couples who don't conceive on the first cycle will try again and virtually none can afford to risk a third try.").

[266] Murray, *supra* note 127 ("Jonathon West, the consultant in charge of the clinic, said that the new formula should encourage couples not to give up trying to have the baby they want because of the cost.").

[267] *See* Susan Golombok, *Psychological Functioning in Infertility Patients*, 7 HUM. REPROD. 208, 210 (1992).

[268] VandeWater, *supra* note 30 ("Dr. Ronald B. Wilbois, medical director of the Infertility and IVF Center in Town & Country, said he stopped offering a three-cycle package because he found that women who prepaid felt pressure to go through all three cycles to get their money's worth, even when they didn't respond well to their first treatment. Wilbois said his patients now pay per cycle, but those who fail to conceive after the third cycle are refunded the money for that procedure.").

[269] Tarun Jain & Mark D. Hornstein, *To Pay or Not to Pay*, 80 FERTILITY & STERILITY 27, 27 (2003).

[270] *See generally* E.R. Myers et al., *The Personal Economics of IVF: Impact of Time Horizon, Number of Embryos Transferred, Quality of Life, and Choice of Outcome on Cost-Effectiveness from the Couple's Perspective*, 88 FERTILITY & STERILITY S135 (2007).

If patients participate in a refund program, however, they have already pre-paid part of the cost for multiple cycles. Thus, the prospect of an additional cycle under a refund program, while still costly emotionally and financially due to additional costs not covered by the refund program, is much less costly than if the patient had to pay the full cost of another cycle out-of-pocket. Studies have found that multi-fetal pregnancies are more uncommon in states that mandate IVF coverage, suggesting the possibility that inexpensive future cycles discourage patients from transferring multiple embryos.[271] Other articles have argued that multi-fetal pregnancies can be discouraged by allowing tax deductions for fertility treatments[272] or by expanding access to credit for fertility treatments.[273] Refund plans offer a more immediate impact on patient decision-making than either of these solutions because having paid in advance is much more like having insurance coverage than either a tax subsidy or access to credit.

One factor that may mitigate the effects of refund programs in decreasing multi-fetal pregnancies is that doctors have an incentive under refund programs to achieve pregnancy as quickly as possible to maximize profit. For critics who believe refund programs skew physician decision-making, this charge will undermine the benefit of refund programs.[274] The pressure for doctors to obtain pregnancy quickly does differentiate IVF refund programs from mandated insurance coverage because in states with mandated coverage, the physician gets paid more if patients undergo multiple cycles, whereas physicians make less money if a patient undergoes multiple cycles under a refund program.

That one limitation set aside, decreasing multi-fetal pregnancies offers a true social benefit. Thus, in crafting regulations, legislators have to be careful to not cause IVF refund providers to exit the market.

The next Part outlines the regulations that are necessary to ameliorate the problems presented by the IVF refund market. The regulations rely primarily on disclosure obligations, which are unlikely to drive a significant number of providers out of the market. However, the proposed regulations are worth pursuing even if they cause IVF providers to leave the market because the benefit of fewer multi-fetal pregnancies does not justify subjecting vulnerable patients to fraudulent activity.

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[271] Marie McCullough, *Infertile Couples Get New Ammo*, CHARLESTON GAZETTE, July 9, 2000, at 5B.

[272] Pratt, *supra* note 200, at 1197–98 (arguing that subsidizing IVF through a tax deduction will decrease the instances of multi-fetal pregnancies).

[273] Hawkins, *supra* note 96, at 26 (arguing that expanding access to credit will decrease the multi-fetal pregnancies).

[274] *See* Robertson & Schneyer, *supra* note 65, at 288.

III. Regulating the IVF Refund Market

Having demonstrated why the IVF refund market is not operating efficiently, this Part argues for a specific regulatory structure to address the problems in the market. Largely following ASRM's lead, Section A outlines a set of disclosures that refund providers should be required to make in any material mentioning the provider's IVF refund program. These disclosures address the problems in the current market. Section B explains that legislators will not face strong opposition when creating a disclosure regime because key industry participants favor disclosure requirements.

A. Mandatory Disclosures

In response to the misrepresentations made to patients considering programs, patients' own cognitive failures, and the information asymmetry in refund transactions, legislators should set mandatory disclosure requirements for clinics offering refunds or independent refund providers. Fortunately, legislators do not have to start from scratch in crafting these disclosure requirements. ASRM has already drafted a rough set of disclosures that clinics should make, which should serve as a baseline for a new legislatively set mandatory disclosure regime.[275]

1. Basic Refund Program Information

First, refund providers should disclose basic information about the refund program. This basic information should include some of ASRM's disclosure requirements: the criterion for success and the fact that participation in the program does not guarantee pregnancy or delivery. Stating the criterion for success allows patients to compare an important feature of different programs because some programs define success as a clinical pregnancy while others define success as delivering a healthy baby. This difference is significant, because 12.9% of pregnancies obtained from IVF in 2006 for women under thirty-five did not result in live births.[276]

Further, the requirement that providers state that participation in the refund program does not guarantee pregnancy will combat the perception among some patients that using a refund program makes pregnancy more likely. IVF refund providers have exploited patients' pessimism bias by giving patients the impression that participation in a plan will make pregnancy more likely. Thus, a requirement that providers explicitly state that pregnancy is not guaranteed will help to undermine the power of this misrepresentation.

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[275] *ASRM Ethics Committee Report*, *supra* note 72, at S249–50.
[276] SART Clinic Summary Report, *supra* note 145.

In addition to ASRM's requirements discussed here, legislators should require disclosure of the eligibility requirements to participate in the program. Requiring providers to state the guidelines that they use to determine who qualifies for the program prevents patients from going to a clinic because of the refund program, but then being told that they do not qualify for the program. If patients know these guidelines upfront and are able to determine whether they are eligible for the refund program, they can use that information to select a clinic. Additionally, to the extent the eligibility requirements are important to patients, disclosing this information allows patients to compare different programs' requirements.

Finally, in presenting basic information about the program, refund providers should be required to disclose that refund programs are not a form of insurance. As discussed above, refund providers and even ASRM have perpetuated the myth that refund programs are a form of insurance. Disclosing to patients that refund programs are not insurance will help to make sure that patients do not overvalue the programs by assuming that refund providers are held to the same legal standards as insurance companies.[277]

2. Absolute Costs

In addition to basic information about the transaction, refund providers should be required to disclose information about the absolute costs of the refund program. This disclosure should include: (1) the cost of participating in the program; (2) what goods and services are not included in the program; and (3) the cost of items not included in the program.

The danger in presenting the cost of the program separately from the cost of the goods and services not included is that patients will anchor their expectation of the total cost to the program's cost, ignoring the extra costs of excluded items. One way to discourage this behavior is to require that providers project total estimated projected costs for each cycle. The disclosure should list the following:

(1) the estimated cost of the first cycle;
(2) the amount of the program; and
(3) the cost of the estimated fees of excluded items for one cycle.

The price estimate for the total cost of the second cycle would include the costs of the first cycle and would add the cost of the excluded items for the second cycle. This would continue for each additional cycle. The provider could then separately list the cost of the program and the excluded items, but the patients' first impression of the cost would be closer to what it actually is.

Requiring that providers present cost information in this manner will combat the tendency of patients to believe that the cost of the refund pro-

[277] *See supra* Part II.C.3.

gram alone is the total cost that they will pay. Instead of anchoring their expectations to the program's cost alone, patients would have more realistic estimates when considering the cost of treatments. Moreover, presenting the additional fees a patient would have to pay for each cycle will challenge the false confidence of patients using refund programs that the cost of their treatment is fixed when they pay for the refund program. Finally, clear disclosures of the total costs of treatment will further facilitate price comparisons between varying programs.

3. Relative Costs

Finally, refund providers should be required to disclose information about the cost of the refund program relative to paying for each cycle individually. The ASRM guidelines require providers to state the advantages and disadvantages of the refund programs,[278] but providers may have trouble complying with a similar legislative requirement because the requirement is vague and open-ended. Instead, more explicit requirements are needed. Providers should offer patients a chart comparing the expense of the refund program versus the expense of paying for each cycle individually so that patients can see when the program is advantageous. Additionally, providers should be required to disclose data on the success rates for patients who qualify for the program.

First, providers should give patients a table similar to Table 2 in this Article. Table 2 lists the cost of paying for the program for six cycles and the cost of paying for six cycles individually. Like Table 2, this mandatory chart should contain information about the cost of frozen embryo transfers because some patients will be able to use frozen embryos. In addition to the chart, the text of the disclosure should state when the program is more expensive than paying for each cycle individually.

Listing the cost of the refund program next to the cost of paying for each cycle a la carte would help prevent people from enrolling in refund programs based on a false belief that the program is about as expensive as two cycles. Moreover, requiring the provider to perform the calculations comparing the costs eliminates the need for patients to do so, which may be important for those patients unable to perform the required calculations.[279]

Second, providers should be required to present previous data on the success rates of patients enrolled in the refund programs. This disclosure would state what percentage of patients enrolled in the program succeeded (under the program's definition of success) after one cycle, after two cycles, and so on. While the data could not predict whether an individual patient will succeed, a mandate to include that disclaimer with this disclosure would give patients some idea about if the program generally makes financial

[278] *ASRM Ethics Committee Report*, *supra* note 72, at S249.
[279] *See supra* notes 150–52 and accompanying text.

sense. Providers would still have superior knowledge about the likelihood that the specific patient would succeed in an early cycle, but providing patients some data narrows the knowledge gap.[280] Providing statistical data also works against the pessimism bias by showing prospective patients that other patients enrolled in the program are often successful on their first or second cycle, and thus do not need the guarantee of a refund.

B. The Feasibility of Disclosure Requirements

Disclosure requirements may have little hope of becoming law if they are opposed by industry participants or other interested parties. If disclosures would push a significant number of providers out of the IVF refund market, regulation would risk sacrificing any benefit of refund programs. This proposed disclosure regime is politically feasible, and it will only drive out market participants whose programs are so misleading to consumers that disclosures would be detrimental to their existence.

Both of the large independent IVF refund providers, IntegraMed and ARC, seem unlikely to oppose the disclosure regulations proposed in this Article. Both companies already aim to comply with ASRM's guidelines,[281] the baseline for the proposed legislation. There is no reason to believe that clinics offering refund programs directly have different views of disclosures, so it is likely that the market's leaders represent the views of the larger market generally. Further, academic proponents of results-based compensation agreements like IVF refunds support disclosure requirements,[282] realizing the potential for disclosure regulation to enhance, not stymie, such agreements. Thus, disclosure regulations would probably not be opposed by either the industry or the academics supporting IVF refund programs.

Disclosures are unlikely to push legitimate providers from the market because disclosures do not forbid any practices or place heavy compliance burdens on companies. Disclosures are generally considered to be a minimal

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[280] *See generally* William M. Sage, *Regulating Through Information: Disclosure Laws and American Healthcare*, 99 COLUM. L. REV. 1701, 1715–16 (1999) ("Certainly, theoretical support exists for enhancing competition through information disclosure. . . . If information is asymmetric, with the asymmetry favoring sellers over buyers, disclosure laws can restore the balance of knowledge and allow consumers to make efficient choices among market offerings. Indeed, imbalances of information and the authority it confers have long been identified as the principal reason health care markets might fail.").

[281] Schumann Interview, *supra* note 45; E-mail from Adamson, *supra* note 57.

[282] *See*, *e.g.,* Hyman & Silver, *supra* note 19, at 1461 ("A disclosure requirement would suffice and would have the added advantage of ensuring that patients receive better information about treatment risks. Providers are already expected to tell patients about these risks when obtaining consent for medical procedures. Mandated disclosure of the variability of outcomes associated with procedures paid for by [results-based compensation agreements] would fit comfortably within this model. In fact, lawyers who enter into contingent fee arrangements routinely disclose in their engagement letters that success is not and cannot be guaranteed. It is difficult to see how patients can have 'unrealistic expectations' when disclosure statements tell them that medical procedures are risky.").

market invasion.[283] They are a classic example of a policy that is asymmetrically paternalistic because they benefit people who are boundedly rational without preventing people who are fully rational from benefiting from the transaction.[284] Providers can still offer refund programs, and patients can still participate in them. The only disadvantage is that providers would incur additional costs to draft disclosure statements which would be included in any material discussing their refund programs. These costs seem slight compared to the probable benefits of regulating the information presented to patients in the IVF refund market.

IV. Conclusion

The option to participate in an IVF refund program is an important innovation in the fertility market that has been under-explored and under-appreciated by commentary. The empirical study in this Article has attempted to remedy this deficiency by offering a comprehensive look at how clinics' websites present information about refund programs. By evaluating all SART clinics' websites, this Article offers new information about the IVF refund market as well as the extent to which refund providers comply with voluntary self-regulation of refund programs.

This Article has argued that state-sponsored regulations do not effectively discipline refund providers and that refund providers largely refuse to comply with voluntary, industry-sponsored regulations. Patients, who appear to make systematic errors when evaluating refund programs, are left to fend for themselves in a market that lacks basic checks to ensure efficient pricing. To prevent market failure in the IVF refund market, patients need protection.

Innovations in fertility treatments have frequently left the law behind as it struggles to adapt to new technologies. But in the case of IVF refund programs, the law already has a structure to protect consumers—the same disclosure-driven regime used in other financial contexts. Legislatures do not have to invent a new type of regulation to address the fertility industry's innovative financing tools. They merely need to extend the same legal principles that already protect consumers in other contexts to protect consumers who are financing fertility. Without significant intrusion into the market, disclosure requirements would help potential participants make rational, informed decisions when evaluating the merits of refund programs.

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[283] *See* Bar-Gill, *supra* note 196, at 1378 (noting that disclosures are "the least controversial mode of legal intervention").

[284] Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case for "Asymmetric Paternalism,"* 151 U. Pa. L. Rev. 1211, 1219 (2003) ("[A] policy is asymmetrically paternalistic if it creates large benefits for those people who are boundedly rational . . . while imposing little or no harm on those who are fully rational . . . ."); *id.* at 1230–37 (discussing disclosure regimes as an example of asymmetric paternalism).

Appendix I: Methodology for the Fertility Website Study

I, with the aid of two research assistants, located the website addresses for a majority of the Society for Assisted Reproductive Technology's ("SART") members using SART's website.[285] For SART members that did not list their website addresses with SART, we used standard Internet search engines or called the members directly to determine if they had websites.[286] Of the 401 fertility clinics listed on SART's website as of February 2009, 95.01% or 381 clinics had working websites.[287] SART, which is the largest fertility organization in the United States, represents more than 95% of the fertility clinics in the nation.[288] Thus, although the sample is not complete, it captures almost every clinic in the United States.

For each of the functioning websites, my research assistants and I coded the information the clinic presented about its IVF refunds, and entered the information into a custom-designed Microsoft Excel database. We coded: (1) whether the clinic offered an IVF refund program; (2) what program the clinic offered; and (3) what disclosures the website contained about the respective refund program (e.g., listing the disadvantages to enrolling, the costs excluded from the program that the patient will have to pay separately, the eligibility requirements for being accepted into the program, and the criteria for success). Each researcher followed the same detailed coding protocols that I developed and received detailed training on coding protocol, which included coding websites jointly with me. I reviewed each coder's data and reevaluated any websites when there appeared to be an error.

One inherent limitation of the study is that websites cannot present data concerning what clinics actually tell patients in-person, and what disclosures patients obtain during and after applications for refund programs. It is possible that clinics present detailed disclosures to patients who inquire about refunds in-person, and this study does not account for that possibility. However, from a consumer-protection standpoint, this limitation is not as significant as it may initially appear. Consumers often decide whether to engage in a transaction before reading the disclosures received in-person, so whatever disclosures made in the transaction's contract are of little relevance.[289] More-

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[285] SART, SART National Summary, http://www.sart.org/find_frm.html (last visited Sept. 30, 2009).

[286] This technique mirrors those in other studies of fertility websites, though we captured more websites by calling clinics when we could not locate websites through SART or search engines. *See, e.g.*, Abusief et al., *supra* note 13 (explaining the authors only used SART's data and Internet search engines to generate their list of websites); Jack Y.J. Huang et al., *Quality of Fertility Clinics Websites*, 83 Fertility & Sterility 538, 539, 543 (2005) (reporting the authors did not actually contact fertility clinics to determine if they had websites).

[287] This number is significantly higher than the number of websites clinics had in 2005, as reported by Abusief et al. *See* Abusief et al., *supra* note 13, at 89 (reporting that 75.3% of clinics (n=289) had functional websites).

[288] Huang et al., *supra* note 286, at 543.

[289] *See* Ronald J. Mann & Jim Hawkins, *Just Until Payday*, 54 UCLA L. Rev. 855, 904 (2007) (arguing that presenting disclosures to debtors at the time of the transaction is too late

over, information presented early in a transaction often has more weight than information presented later, thereby making information on websites particularly salient.[290] Laws governing other consumer transactions recognize that information presented on websites is at least as important as information presented in contractual disclosures.[291] Studies indicate that a significant number of fertility patients use the Internet to learn about infertility,[292] so information presented on fertility clinics' websites is significant.

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because the customer cannot easily comparison shop at that point); Lauren E. Willis, *Decisionmaking and the Limits of Disclosure: The Problem of Predatory Lending: Price*, 65 MD. L. REV. 707, 749 (2006) ("The law recognizes that consumers need written price disclosures to make a decision, yet it fails to give them the disclosures until a point in time when, as a practical matter, many consumers will not be able to price shop.").

[290] For a discussion of how a consumer often anchors her perception of the costs of a transaction to a convenient number presented early in a transaction, see *supra* notes 154–156 and accompanying text.

[291] For instance, in Texas, insurance websites must contain all of the disclosures that are usually presented in the transaction contract if the website "(1) describes specific policies or coverage available in this state; or (2) includes an opportunity for an individual to apply for coverage or obtain a quote from an insurer for an insurance policy or certificate or an evidence of coverage." TEX. INS. CODE ANN. § 541.082(b) (Vernon 2008). Even websites that do not contain specific policy information must conform to advertising guidelines. *Id.* § 541.082(d) ("Web pages of an Internet website that do not refer to a specific insurance policy, certificate of coverage, or evidence of coverage or that do not provide an opportunity for an individual to apply for coverage or request a quote from an insurer are considered to be institutional advertisements subject to rules adopted by the commissioner relating to advertising.").

[292] *E.g.*, LeeAnn Kahlor & Michael Mackert, *Perception of Infertility Information and Support Sources Among Female Patients Who Access the Internet*, 91 FERTILITY & STERILITY 83, 83 (2009) (reporting that eighty percent of Americans have searched the Internet for health information and that it is believed that at least forty percent of fertility patients search for fertility information on the Internet).