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Fertility Fraud: Federal Criminal Law Issues

Recent media attention has focused on medical fertility specialists who have misrepresented the provenance of biological material—for example, inseminating patients with the specialists’ own sperm. Often called “fertility fraud,” this conduct is specifically covered by a number of state criminal laws. *E.g.*, Ark. Code Ann. § 5-13-212 (“Fertility treatment abuse”); Tex. Penal Code Ann. § 22.011(b)(12) (“Sexual Assault”). At the federal level, no statute expressly criminalizes fertility fraud, but federal prosecutors have successfully used generally applicable federal criminal statutes to charge individuals for engaging in conduct connected with fertility fraud schemes.

Federal Criminal Laws

Conduct associated with fertility fraud schemes may implicate a number of generally applicable criminal statutes, including those prohibiting mail and wire fraud and those prohibiting travel fraud. For instance, federal prosecutors used these statutes to indict a medical doctor in connection with a variety of fraudulent conduct, including inducing false pregnancies, diagnosing false miscarriages, and inseminating patients with his own sperm despite guarantees that the samples came from an anonymous donor. *United States v. Jacobson*, 785 F. Supp. 563, 566 (E.D. Va. 1992). Ultimately, the prosecution resulted in a guilty verdict and a sentence of 60 months of imprisonment, which was affirmed on appeal. *United States v. Jacobson*, No. 92-5406, 1993 WL 343172, at *1, *2 (4th Cir. 1993 Sep. 3, 1993) (per curiam).

Mail and Wire Fraud: 18 U.S.C. §§ 1341; 1343

The mail and wire fraud statutes are broad statutes that criminalize conduct related to schemes to defraud—that is, schemes to deprive someone of money, property, or honest services through methods such as trickery or deceit. To prove a violation of the mail fraud statute, the government must prove willful participation in the scheme to defraud; use of the mails in furtherance of the scheme; and intent to defraud the victim of money, property, or honest services. The elements of wire fraud are nearly identical, except rather than proving use of the mails, the government must prove furtherance of the scheme through the use of interstate wires, which may include, among other things, emails, telephone calls, faxes, and statements on websites. Use of the mails or interstate wires need only be reasonably foreseeable to the defendant and incidental to an essential element of the scheme to defraud. Violators of these statutes face significant penalties: generally fines or up to 20 years of imprisonment or both. As *Jacobson* illustrates, fertility fraud schemes could run afoul of the mail and wire fraud statutes. For instance, use of the internet to schedule an appointment at which fertility fraud occurs, or use of the mail to bill the patient for the appointment where it occurred, could potentially satisfy the jurisdictional

requirements of the wire and mail fraud statutes, respectively. The dispositive issue is likely to be the defendant’s state of mind and whether he intended to defraud the patient or instead was motivated by other reasons such as sexual gratification. However, so long as intent to defraud was *one* motivation, it may be sufficient, because ordinarily “a specific intent need not be the actor’s sole, or even primary, purpose.” *United States v. Technodyne LLC*, 753 F.3d 368, 385 (2d Cir. 2014).

Travel Fraud, 18 U.S.C. § 2314

Section 2314 of Title 18 of the U.S. Code imposes fines or up to 10 years of imprisonment, or both, for travel fraud, which occurs when (1) a defendant devises a scheme with intent to defraud a victim of money or property worth at least \$5,000 and (2) a victim is induced to travel in interstate commerce as a result of the scheme. *United States v. Thomas*, 377 F.3d 232, 236 (2d Cir. 2004). The travel fraud statute could potentially encompass fertility fraud schemes, such as those where the victim is induced to cross state lines for the underlying procedure and then charged \$5,000 or more in resulting medical bills. See *Jacobson*, 1993 WL 343172, at *2, *4 (affirming § 2314 conviction where medical provider induced “his out-of-state patients to travel to Virginia in order to undergo fraudulent medical treatment at his infertility clinic”).

Deception of Health Care Benefit Programs

Fertility fraud schemes could potentially violate additional federal criminal statutes if they involve the deception of “health care benefit programs,” a category that encompasses public and private insurers. For example, 18 U.S.C. § 1347 criminalizes certain schemes to defraud health care benefit programs, and 18 U.S.C. § 1035(a)(2) prohibits various false material statements directed to health care benefit programs. Violations of either statute are felonies punishable by imprisonment, fines, or both. With respect to § 1347, an “essential element of health care fraud is that the fraud was perpetrated on a health care benefit program.” *United States v. Anderson*, 822 F. App’x 271, 275 (5th Cir. 2020). Further, at least one federal appellate court has concluded that § 1035(a)(2) encompasses only false statements that are material to health benefit programs. *United States v. Natale*, 719 F.3d 719, 742 (7th Cir. 2013). Therefore, these provisions are likely inapplicable in instances where the patient has been defrauded or deceived but the insurer has not.

Limitations of Federal Criminal Prosecution

Fertility fraud may not be immediately discovered by the victims, and in some instances the underlying conduct may go undiscovered for years or decades. This delay may limit the feasibility of federal prosecution. As a legal matter, pursuant to a default statute of limitation, federal

prosecutions for noncapital offenses must generally be brought within five years of the commission of the offense. 18 U.S.C. § 3282. However, 18 U.S.C. § 3297 creates a new window of time to bring a prosecution, equal to the original period, that runs from when “DNA testing implicates an identified person in the commission of a felony.” In one illustrative case, § 3297 permitted the 2013 indictment of a defendant for a 2003 bank robbery.

Although the initial five-year statute of limitations had expired, the defendant had been linked to the crime by a 2010 DNA test, which initiated a new five-year window. *United States v. Sylla*, 790 F.3d 772, 775 (7th Cir. 2015). In instances where DNA testing of a patient or provider links the provider to fertility fraud, § 3297 might be applicable assuming the fertility fraud amounts to a federal felony such as wire fraud. Depending on the circumstances of the underlying offense, other rules may impact when the statute of limitations begins to run. For example, in criminal conspiracies prosecuted under 18 U.S.C. § 371, the statute of limitations does not begin to run until the last overt act committed in furtherance of the conspiracy is complete. *Fiswick v. United States*, 329 U.S. 211, 216 (1946). As a practical matter, even if an exception to the statute of limitations applies, prosecuting older cases of fertility fraud may prove difficult due to a lack of evidence. For example, establishing the jurisdictional elements of mail fraud and wire fraud may be challenging if records of the mailings, phone calls, or other communications connected to such offenses no longer exist.

Congressional Authority

Under the Constitution, the federal government lacks a general police power, which is instead reserved for the states. Thus, when Congress seeks to enact criminal law, it generally does so pursuant to one of its enumerated constitutional authorities. For example, the Commerce Clause—found in Article I, Section 8, Clause 3, of the Constitution—grants Congress the power to “regulate Commerce . . . among the several States.” This provision gives Congress broad authority, and many federal criminal statutes rely on Congress’s commerce power. In *United States v. Lopez*, 514 U.S. 549 (1995), the Supreme Court held that Congress’s power to regulate pursuant to the commerce power extends to “three broad categories of activity.” Those include:

1. Channels of interstate commerce, such as highways and telecommunications networks;
2. Instrumentalities of interstate commerce or persons or things in interstate commerce, such as vehicles, shipments of goods, telephones, and smartphones;
3. Activities that substantially affect interstate commerce.

If Congress wants to create a new fertility fraud law—for example, by expressly criminalizing the act of inseminating a patient with biological material other than that material consented to by the patient—it is possible to envision a number of jurisdictional hooks that would permit it to do so pursuant to its interstate commerce authority. For example, medical providers may use channels and instrumentalities

of interstate commerce—such as the internet and telephones—to promote and arrange fertility appointments at which the deceptive insemination occurs. Alternatively, the procedures may involve payments made or received through health care benefit programs, which themselves affect commerce. 18 U.S.C. § 24(b). Further, the patients themselves may travel in interstate commerce for the underlying appointments at which the fertility fraud occurs, thus possibility satisfying the jurisdictional requirement.

These types of jurisdictional hooks currently appear in a number of federal criminal statutes. For example, subsection (d) of the female genital mutilation statute—18 U.S.C. § 116—requires that the underlying offense satisfy one of several jurisdictional nexuses. They include, for example: the defendant or victim travels in interstate or foreign commerce in connection with the offense, the defendant transmits a communication related to the offense in interstate or foreign commerce, and the victim makes a payment in interstate commerce in connection with the underlying offense. Subsection (d) also includes a jurisdictional nexus not grounded in Congress’s commerce authority: It also prohibits offenses that occur in the special maritime or territorial jurisdiction of the United States.

Although Congress may regulate fertility fraud in line with these jurisdictional limitations, there is an additional constitutional consideration that may be relevant to potential federal legislation addressing fertility fraud. As a result of the Ex Post Facto Clause of the Constitution—which prohibits retroactive penal laws—any new fertility fraud crime created by Congress would not encompass instances of fertility fraud that occurred prior to enactment, even if those instances were discovered after the enactment of such a law. Federal prosecution of such conduct would therefore depend on the extent to which it violated preexisting federal statutes such as those described above.

Additional Reading

The following CRS products provide additional analysis of legal issues presented in this sidebar:

- CRS Report R41930, *Mail and Wire Fraud: A Brief Overview of Federal Criminal Law*, by Charles Doyle
- CRS Report R45479, *Bribery, Kickbacks, and Self-Dealing: An Overview of Honest Services Fraud and Issues for Congress*, by Michael A. Foster
- CRS Report RL31253, *Statute of Limitation in Federal Criminal Cases: An Overview*, by Charles Doyle
- CRS Legal Sidebar LSB10313, *Congressional Authority to Enact Criminal Law: Female Genital Mutilation (FGM)*, by Michael A. Foster
- CRS In Focus IFI1293, *Retroactive Legislation: A Primer for Congress*, by Joanna R. Lampe

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