

Malpractice lawsuits over denied abortion care may be on the horizon

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A year after the overturning of *Roe v. Wade*, many physicians and hospitals in the states that have restricted abortion reportedly are refusing to end the pregnancies of women facing health-threatening complications, out of fear they might face criminal prosecution or loss

of their medical license.

Some experts predict those providers could soon face a new legal threat: medical [malpractice](#) lawsuits alleging they harmed patients by failing to provide timely, necessary [abortion](#) care.

"We will absolutely see medical malpractice cases emerge," said Diana Nordlund, an emergency physician in Grand Rapids, Michigan, and former malpractice defense attorney, who chairs the Medical-Legal Committee of the American College of Emergency Physicians. When physicians decide not to provide treatments widely accepted as the standard of care because of these [new laws](#), "that's perceived as substandard care and there is increased civil liability."

To some physicians and malpractice attorneys, the question is when—not if—a pregnant patient will die from lack of care and set the stage for a big-dollar wrongful death claim. Abortion rights supporters said such a case could pressure doctors and hospitals to provide appropriate abortion care, counterbalancing their fears of running afoul of state abortion bans, many of which call for criminal prosecution and revocation of medical licenses as punishment for violations.

"If we want to encourage proper care, there has to be some sort of counter-risk to physicians and hospitals for refusing to provide care that should be legal," said Greer Donley, an associate professor at the University of Pittsburgh School of Law who studies the impact of abortion bans. "But most rational people would be more afraid of going to jail."

Some supporters of abortion bans said they would welcome malpractice lawsuits. Providers are refusing to use the exceptions in some [state laws](#) that allow them to perform abortions to save a patient's life or health, they said.

"It could help achieve our goal if it clarifies that the law did not contradict standard medical practice," said John Seago, president of Texas Right to Life, referring to the state's abortion ban.

A new KFF poll has found that 59% of OB-GYNs practicing in states with gestational limits on abortion, and 61% of those in states with bans, are somewhat or very concerned about their legal risk when making decisions about the necessity of an abortion.

Some attorneys are exploring lawsuits on behalf of women who they said have been harmed by a state abortion ban. An attorney for Mylissa Farmer, a Missouri woman who was refused an abortion at two hospitals in August after her water broke about 18 weeks into her pregnancy, said she may sue for malpractice. Missouri's abortion ban, which took effect last year, makes an exception for medical emergencies.

The [federal government](#) recently found that the two hospitals violated a federal emergency care law in denying Farmer an abortion, which experts said could strengthen a malpractice claim. One of the hospitals, Freeman Health System in Joplin, Missouri, did not respond to a request for comment. The other, the University of Kansas Health System in Kansas City, said the care provided "was reviewed by the hospital and found to be in accordance with hospital policy," according to a spokesperson, Jill Chadwick.

Farmer "experienced permanent physical and emotional damage," said Michelle Banker, one of her lawyers at the National Women's Law Center, who added that Farmer and her attorneys are "considering all our legal options."

News reports and [medical studies](#) show that some women with pregnancy complications have suffered serious health consequences when doctors and hospitals did not provide once-routine abortion care.

Last month, researchers released a study identifying dozens of cases in 14 states in which physicians said deficiencies in care due to abortion restrictions led to preventable complications and hospitalizations, with some patients nearly dying.

"The patients were sent home and told to come back when they had signs of infection," said Daniel Grossman, an OB-GYN at the University of California-San Francisco, who led the study. "Many developed serious infections. And it's clear many of these cases were very emotionally traumatic."

He said though the researchers did not track patient outcomes, the lack of timely abortion care in such cases could result in severe health harms including loss of fertility, stroke, or heart attack.

"It's just a matter of time before there will be a death that comes to light," Grossman said.

Still, considering the conflict for doctors between medical ethics and personal risk, some stakeholders said patients may be reluctant to sue doctors and juries may balk at finding them liable.

"It's a terrible position that providers are being put into, and I don't think juries will blame the doctor unless it's a super clear case," said Morgan Murphy, a malpractice plaintiff's attorney in Missouri.

She said her firm will not pursue malpractice cases based on abortion denials except in "pretty extreme" situations, such as when a patient dies. "Unless a mother is on her deathbed, it's pretty hard to fault a provider who thinks if they provide treatment they're going to be criminally liable or will lose their medical license."

Another hurdle for malpractice cases is that state abortion bans could

undermine the argument that abortion is the legal "standard of care," meaning that it is a widely accepted and prescribed treatment for pregnancy complications such as miscarriage and for fatal fetal abnormalities.

"I absolutely see a breach of the standard of care in these cases," said Maria A. Phillis, an OB-GYN and former lawyer in Cleveland. "But if someone goes to trial in a malpractice case, it will come down to a battle of medical experts about whether it's no longer the standard of care, and the jury would have to decide."

An additional justification for physicians not to provide abortions is that medical liability insurers generally do not cover damages from criminal acts, which "puts the finger on the scales even more to not do anything," Phillis said.

Stuart Grossman, a prominent malpractice plaintiff's attorney in Florida, said he would be eager to take an abortion-denial case in which the woman suffered serious health or emotional injuries.

Unlike other states with abortion bans, Florida does not cap damage amounts for pain and suffering in malpractice cases, making it more financially viable to sue there.

Grossman cited the case of Deborah Dorbert, a Florida woman who reportedly was denied an abortion despite being told by her physicians at 24 weeks of pregnancy that her fetus, with no kidneys and underdeveloped lungs, had a fatal condition called Potter syndrome.

Her doctors and the hospital refused to end the pregnancy even though the state's abortion ban has an exception for fatal fetal abnormalities. Months later, her baby died in his parents' arms shortly after birth.

"You can see how she's been devastated mentally," Grossman said. "She has a wrongful death case that I'd take in a minute." He said the couple could file a malpractice suit for Dorbert's physical and emotional damages and a separate malpractice and wrongful death suit for the couple's suffering over the infant's death.

Failing to counsel patients about their options and connect them with providers willing to terminate a pregnancy is also possible grounds for a malpractice suit, attorneys said. Katie Watson, an associate professor at Northwestern University's Feinberg School of Medicine who has studied state abortion bans, said counseling and referral are not prohibited under these laws and that physicians have an ethical obligation to offer those services.

"I think breaching the obligation for counseling would make a strong malpractice lawsuit," she said.

Nancy Davis said she received no counseling or referral assistance last July after her doctors at Woman's Hospital in Baton Rouge, Louisiana, told her 10 weeks into her pregnancy that her fetus would not survive because it was missing the top of its skull, a fatal condition called acrania. She said they recommended that she terminate the pregnancy and she agreed.

Davis said her doctors then told her a hospital executive had denied permission for the procedure because of Louisiana's abortion ban, even though the law has an exception for fatal fetal abnormalities. A hospital spokesperson declined to comment.

Davis, who has three children, contacted Planned Parenthood of Greater New York, which arranged for child care and a flight to New York City. She had an abortion performed there in September.

"The whole situation has been mentally and physically draining, and my family and I are receiving counseling," Davis said. "I'm still very angry at the hospital and the doctors. I feel like I'm owed compensation for the trauma and the heartbreak."

She sought the counsel of Benjamin Crump, a prominent attorney known for pursuing high-profile cases like wrongful death lawsuits on behalf of the families of Trayvon Martin and George Floyd.

But Crump said that after studying Davis' legal options, he decided a judge would likely dismiss a malpractice suit and that Davis could end up paying the defendants' legal fees and costs.

"The doctor's lawyers will say, "You can't expect my client to break the law and go to prison for up to 25 years,'" Crump said. "Unless you change the law, there is no option for her to receive compensation."

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