Unanswered Questions after *Dobbs* Part II: Health Care Providers

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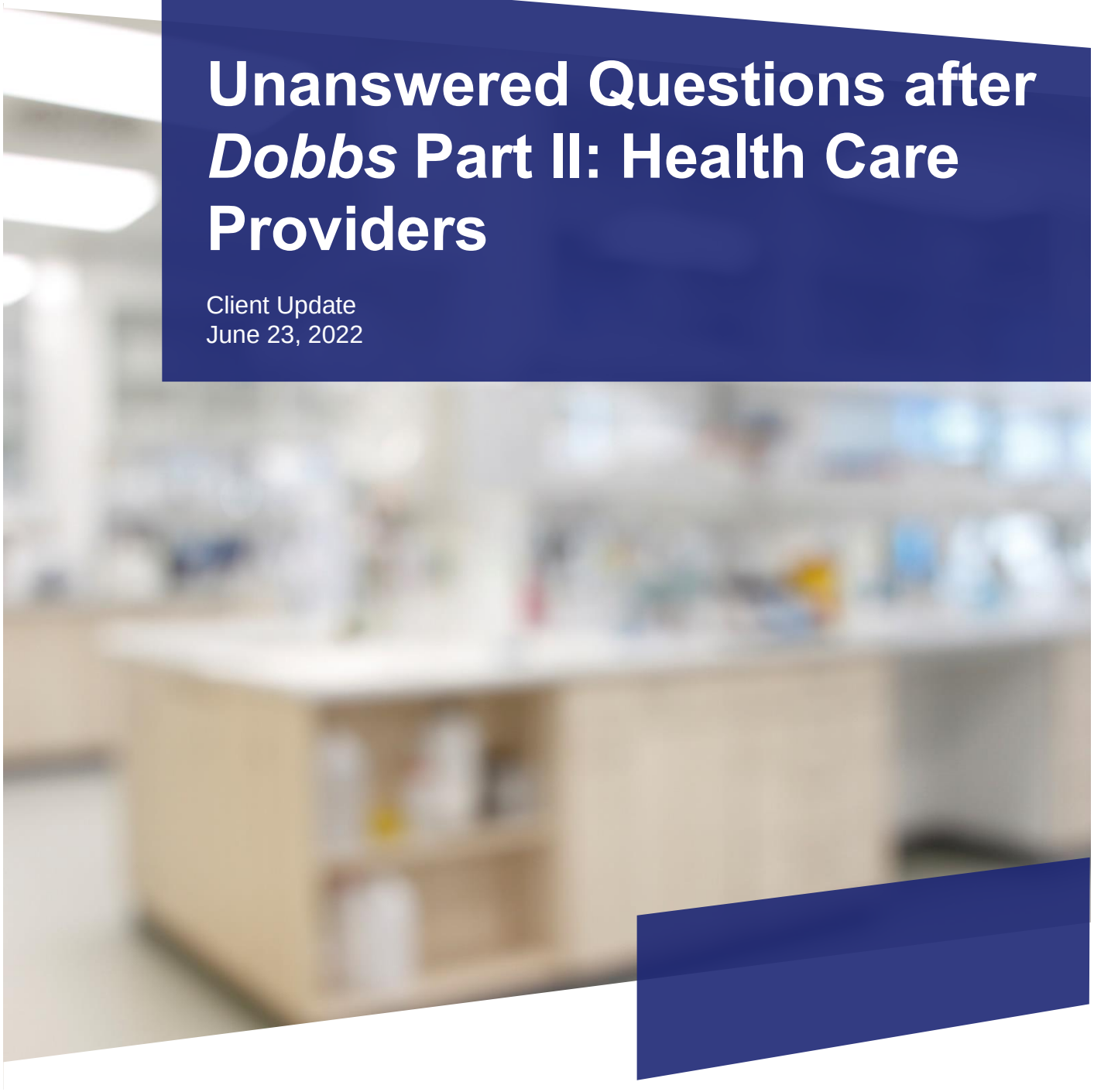

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Unanswered Questions Part II: Health Care Providers

In our second installment of "Unanswered Questions," Reed Smith's Reproductive Health Working Group explores the potential implications of the *Dobbs* opinion for health care providers (both hospitals and physicians). The following are specific examples of the challenging and complicated scenarios that may arise as a result of this decision.

Provider Licensure Implications

- How should physicians that are operating in more than one jurisdiction navigate state licensing issues when they are licensed in multiple states that have conflicting regulatory schemes governing abortions? For example, a physician practices medicine in States A and B on a state line border. State A has a trigger law that immediately prohibits abortions if the *Roe v. Wade* precedent is overturned. State B has statutory protections for providing abortion procedures.
    - In this scenario, will State A's state medical board consider the act of providing legal abortion services in State B to be unprofessional conduct that warrants formal administrative action against the physician's license?
    - Even if this is an extraterritorial reach, what reporting obligations does the physician have once they are aware of the administrative action, even while the physician is contesting it? What reporting obligations does a hospital have once it becomes aware of this action?
    - What are the implications of this type of administrative action on potential malpractice claims?
        - Can hospitals treat professional licensing complaints or malpractice actions arising out of abortion procedures differently across states where the right to an abortion differs? Should they?
        - And how will these issues affect malpractice insurance premiums and coverage?
    - How will this type of licensing administrative action impact the ability to become re-credentialed as part of state, federal or third party accreditation/license/permit renewal processes?
        - Additionally, how will hospital systems evaluate this type of information during a credentialing process?

Practice of Medicine Boundaries

- How far can a regulator's authority creep into and supersede the medical judgment of a provider? For example, many state trigger laws (discussed in our prior update), include exceptions to abortion prohibitions where a medical practitioner determines a mother's life is in danger. In this scenario:
    - Where is the line for determining a mother's life is in danger and how much discretion will a provider have in such a situation?
    - What level of proof/documentation will be required to establish the existence of circumstances justifying this exception?
    - How will hospital departments abide by the law without prescribing or interfering with the practice of medicine and the patient/physician relationship?
    - What obligations will hospitals have to monitor dual-use medications being prescribed by providers?
    - Will there be liability for the actions of midlevel practitioners under physician supervision (depending on whether the scope of practice of those practitioners permits abortion procedures)?

- Will there be criminal liability for procedures that unintentionally cause a miscarriage?

Oversight and Compliance

- What obligations do hospital systems and physician groups have to ensure that their facilities, and the medical professionals practicing within their organizations, comply with any changes that occur as a result of the rules changes stemming from the *Dobbs* decision?
  - Will all patients be evaluated for pregnancy?
- Extending the earlier discussion of physician judgment, do hospitals have to be aware of whether physicians are utilizing varying applications of what a "serious risk of injury" is to a mother in their hospital, when a state law criminalizes abortion with an aiding and abetting provision? Similarly, do hospital systems and physician groups need to monitor and evaluate policies and procedures around the transfer across state lines of patients who may be seeking an abortion?
- Moving forward, do hospital systems and physician groups in states where abortion is no longer legal have to incorporate state-specific training into their compliance programs to ensure that employees are aware of potential liabilities that could come from prescribing a medication or procedure that could cause a spontaneous abortion?
- On the other hand, where states act to protect abortions, will hospital systems and physician groups have to train on compliance around a patient's right to privacy related to an abortion?
- Lastly, will hospital systems and physician groups have to evaluate subpoenas differently for medical records that could contain information about abortions going forward?

Long-Term Care and Other Institutional Settings

- Given "life begins at conception" and other "personhood" laws (laws which may classify fertilized eggs, zygotes, embryos, and/or fetuses as "persons," thereby granting them, among other things, the right to life from the moment of conception), do institutional providers need to revisit pharmacy practices to address unknown or undiscovered pregnancies?
  - For example, some drugs can cause miscarriage when prescribed on-label for unrelated purposes (e.g., ulcer therapies). What are the implications for dispensing such drugs?
- Will long-term care facilities need to commonly test patients for pregnancy or confirm that they are post-menopausal?

Stay tuned for more installments of Unanswered Questions after *Dobbs,* coming soon. Please reach out to a member of the Reed Smith Reproductive Health Working Group or the Reed Smith attorneys with whom you continually work for more information or guidance on these or related issues. Reed Smith will continue to monitor developments as we anticipate the release of the *Dobbs* opinion soon.

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