

A Tenn. Court Gets Specific On Abortion Ban Exceptions

By **Theresa Schliep**

Law360 (October 22, 2024, 7:56 PM EDT) -- Previabile preterm premature rupture of membranes, or PPRM. Severe preeclampsia. Mirror syndrome associated with fetal hydrops.

Those are some of the conditions that a Tennessee **state court said** last week could fall under the medical exception that would allow a doctor to treat a pregnant person with an abortion, despite the state's ban.

The **decision** is one of the first since the Dobbs decision to list specific medical conditions that satisfy a state law's medical necessity exception.

The court called the statutory language "demonstrably unclear" as "evidenced by the confusion and lack of consensus within the Tennessee medical community on the circumstances requiring necessary health- and life-saving abortion care."

The decision gives some clarity to Tennessee physicians and others who have struggled to interpret what medical conditions are covered by the ban exception.

Experts say it also signals an additional role for courts to play in the post-Roe landscape: Declaring specifically what medical conditions are serious enough for exceptions to apply.

"The lower court's recent decision in *Blackmon v. Tennessee* does represent a departure from approaches taken by other state courts in cases involving the scope of medical exceptions," Rebecca Reingold, a law professor at Georgetown University Law Center, told Law360 in an email.

"Most other state courts that have considered this issue have either ruled that the pregnancy complications involved do not meet the medical exception at issue or have interpreted them to apply to a specific plaintiff's circumstances."

All 20 states with abortion bans have some sort of exception to prevent the death of the mother, even as the scope and applicability of those exceptions has been hotly litigated in the courts.

The Tennessee ruling comes after seven women who sought abortion care because of severe pregnancy complications urged the court to clarify the medical necessity exception and enjoin enforcement. They argue that confusion over the ban's scope forced them to travel out of state to receive abortion care, suffer delays in medical care, or face life-threatening health risks.

The plaintiffs also include two physicians who alleged the exception violated their due process rights under the state's constitution due to its vagueness.

A three-judge panel issued an injunction that blocks the state from taking disciplinary action against the physicians who brought the case for providing abortions to treat the four conditions the court concluded were medical emergencies under the ban.

According to the decision, the exceptions comprise PPRM, which is a premature rupture of the membrane; "inevitable abortion," a type of miscarriage; "fatal fetal diagnoses that lead to maternal health conditions" like preeclampsia; or "fatal fetal diagnoses leading to an infection that will result in uterine rupture or potential loss of fertility."

It's still early days in the litigation over the state's medical exceptions, and the decision isn't the final word on the scope of exceptions or the plaintiffs' case.

Notably, Tennessee Attorney General Jonathan Skrmetti said the ruling aligned with Tennessee's position that state law "allows pregnant women to receive all necessary care to address serious health risks." The decision notes that both sides agreed that the listed medical conditions fell within the exception.

The Tennessee court declined to enjoin the criminal statute itself, finding it lacked jurisdiction.

Some health law experts called the Tennessee decision, though preliminary, a win for providers. Terry McGovern, a professor at the CUNY Graduate School of Public Health & Health Policy, said listing out some conditions provides needed clarity to "terrified" physicians.

"We had Texas refuse to do this and kick it to their medical board, and the medical board left things quite vague," McGovern said, referring to litigation over the state's six-week ban.

Following the U.S. Supreme Court decision in *Dobbs*, disputes over the application — or even the usefulness — of medical exceptions to abortion bans have spawned in courthouses and legislatures across the country.

All states with abortion bans have an exception to prevent the death of the pregnant patient, and 14 states have exceptions to preserve the health of the patient, according to data from KFF. Some states specify in their statutes that abortion care is allowed for ectopic pregnancies — when a fertilized egg develops outside of the uterus — or for miscarriages.

Many state attorneys general maintain that their abortion statutes allow doctors to provide abortions when necessary to save the mother's life or preserve her health.

But providers say those exceptions are challenging to apply, for reasons including that it's sometimes unclear how close to death a person needs to be before they're entitled to a life-saving abortion under a given state law.

ProPublica, a nonprofit news organization, has reported that a Georgia woman died after she failed to receive timely medical care following a medication abortion. Georgia criminalizes abortion after six weeks.

Litigation over state abortion bans and their exceptions are an increasingly complicated web, with many laws subject to repeated litigation and some courts declining to review the merits of the statutes and instead deciding cases on procedural grounds.

There are several iterations of state supreme court opinions on medical exceptions. The Tennessee decision diverges particularly with decisions from the Texas Supreme Court over a pair of high-profile cases concerning that state's exception to its abortion ban, in which the Texas court did not list or certify any specific conditions that might meet the state's exceptions as the lower Tennessee court did.

The Texas Supreme Court in October 2023 **issued a decision saying** that "Texas law permits a life-saving abortion" and that a "physician may perform an abortion if, exercising reasonable medical judgment, the physician determines that a woman has a life-threatening physical condition that places her at risk of death or serious physical impairment unless an abortion is performed."

And in the case of Kate Cox, who eventually left the state to get an abortion, the **state high court said** Cox's physician failed to attest that her "condition poses the risks the exception requires," asserting that "the law leaves to physicians—not judges—both the discretion and the responsibility to exercise their reasonable medical judgment, given the unique facts and circumstances of each patient."

The Texas Medical Board eventually issued guidance saying that ectopic pregnancies are allowed under the state's abortion ban and provided a definition for a "medical emergency," but otherwise

declined to delineate precisely what conditions fall under the scope of the exception.

Medical exceptions to a state abortion ban were also at issue in a decision from the North Dakota Supreme Court **striking down the state's ban**, which said that under the state's exception, "a North Dakota physician may provide an abortion with the subjective intent to prevent death or a serious health risk, yet still be held criminally liable if, after the fact, other physicians deem that the abortion was not necessary or was not a reasonable medical judgment."

Meanwhile, Oklahoma's Supreme Court **found there's a right to access abortion** to preserve the life of the mother.

And Indiana's **high court last year upheld** the state abortion ban and declined to rule on the medical exceptions, saying the case at that juncture did "not present an opportunity to establish the precise contours of a constitutionally required life or health exception and the extent to which that exception may be broader than the current statutory exceptions."

Despite the welcome reaction among abortion rights advocates to the Tennessee decision, some pointed out that a "list" of permissible exceptions comes at the expense of whatever is omitted.

Reingold said that "many experts caution against creating and relying on lists of conditions that meet medical exceptions - whether through the statutes themselves or courts' interpretation of them."

"This is because the practice of medicine is patient-specific and it is impossible to create an exhaustive list that includes all circumstances and scenarios that may qualify as 'medical emergencies,'" she added.

Linda Goldstein, an attorney with the Center for Reproductive Rights who is representing the plaintiffs in the case, called the decision "a win for pregnant patients in Tennessee" and said they hope "the court's clarification of Tennessee's abortion ban will encourage Tennessee physicians to return to performing the essential health care they've been trained to provide."

The plaintiffs are represented by Linda C. Goldstein, Marc Hearn, Nicolas Kabat and Jasmine Yunus of the Center for Reproductive Rights, Scott P. Tift and Nicole Chanin of Barrett Johnston Martin & Garrison PLLC and Jamie A. Levitt and J. Alexander Lawrence of Morrison & Foerster LLP.

The state is represented by Whitney Hermandorfer, Steven J. Griffin and Donna L. Green of the Tennessee Attorney General's Office.

The case is Nicole Blackmon et al. v. Tennessee et al., case number 23-1196-I, in the Chancery Court of Tennessee for the Twentieth Judicial District.

--Additional reporting by Gianna Ferrarin and Hannah Albarazi. Editing by Alex Hubbard.