Federal Appeals Court reverses lower Court ruling; reaffirms immunity for hospitals and physicians in peer review cases

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On July 23, 2008, the US Court of Appeals for the Fifth Circuit Court (Appeals Court) overturned a $33 million judgment awarded to Lawrence Poliner, MD, and found in favor of Texas Health Systems (Hospital), concluding that the peer review activities of the Hospital and its physicians were entitled to immunity under the Health Care Quality Improvement Act (HCQIA).[1] The ruling resulted in a sigh of relief from hospitals and physicians involved in peer review activities.

The medical and legal communities have watched the *Poliner* case closely since 2004 when a jury awarded a physician, Dr Poliner, $366 million in damages against a hospital and members of its medical staff. The medical and legal communities were shocked by the amount of the jury award and amazed by the physician's ability to defeat the claims of immunity by the hospital and the physicians involved in the peer review process. The huge jury award also had a chilling effect, as physicians became more reluctant to serve on peer review committees or as leaders of hospital departments.

Brief Case History

The case involved Dr Poliner, a cardiologist, who was asked by the internal medicine department chair to hold his cardiac catheterization lab (cath lab) privileges in abeyance for a short time while an investigation occurred. The event that triggered the abeyance request was Dr Poliner's failure to diagnose and treat a blocked artery during a catheterization. When Dr Poliner asked what his options were, he was told that the alternative was suspension of his privileges.

The abeyance was extended once, as allowed by the medical staff bylaws, and on the 23rd day of the abeyance, the peer review committee met with Dr Poliner to discuss its investigation and concerns. The peer review committee recommended a temporary suspension of Dr Poliner's cath lab and echocardiogram privileges pending a full investigation. Approximately 5 months later, the full investigation resulted in a full reinstatement of Dr Poliner's privileges with a temporary mandatory consultation requirement. Doctor Poliner appealed, and the Hospital's Board of Trustees upheld the decision.

In May 2000, almost 2 years later, Dr Poliner filed suit against the Hospital, the physicians involved in the initial decision to hold his cath lab privileges in abeyance, and 7 other physicians involved in his medical peer review for antitrust claims, violation of the Texas Deceptive Trade Practices Act, breach of contract, business disparagement, libel, slander, tortuous interference, intentional infliction of mental anguish, and emotional distress. Doctor Poliner claimed damages from the initial limited restriction on his privileges, the extension of those restrictions, and the suspension of his privileges. He alleged that competitors acting in bad faith motivated the suspension. The defendants moved for summary judgment based on immunity under HCQIA and other grounds.

On September 30, 2003, the District Court issued its decision. It extended HCQIA immunity to all defendants on the summary suspension itself and granted all defendants' summary judgment motion on that basis. However, the district court also held that a jury needed to decide whether the abeyance and its subsequent extension were proper. Consequently, the District Court allowed the case to proceed to a jury trial on only the alleged damages from the limited restrictions on Dr Poliner's privileges during the initial abeyance and the subsequent extension.

The jury found that the professional review related to the abeyance did not meet the standards for immunity under HCQIA or Texas law, and in favor of Dr Poliner on all of his claims. It awarded Dr Poliner $366 million in damages, largely based on the fact that it believed that the defendants had acted mali-

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ciously and without privilege or justification. The defendants moved for a new trial or a reduction in the amount of damages.

In 2006, approximately 2 years later, the District Court denied the defendants' request for a new trial and reduced the overall damage award against the defendants to $33 million. The defendants appealed the ruling, and in July 2008, the Appeals Court reversed the District Court's decision and ruled that the defendants should have been entitled to immunity under HCQIA. The Appeals Court held that Dr Poliner failed to rebut the presumption that the peer review action complied with HCQIA and further that the evidence independently established in the action complied with the statute.

This recent ruling should relieve many of the concerns felt by physicians and hospitals after the initial verdict. At the same time, it serves as a reminder that HCQIA immunity is not automatic and requires strict adherence to the terms of the Act.

What is HCQIA?

HCQIA, passed in 1986, grants peer review participants qualified immunity from damage liability, provided they demonstrate compliance with certain standards. HCQIA establishes a presumption that peer review actions are reasonable in a suit brought by a physician.[2] HCQIA allows states to enact even greater protections for medical peer review activities.

To protect and encourage peer review, Congress immunized from damages any peer review actions that meet certain objective standards of reasonableness. When it passed HCQIA, Congress created a National Practitioner Data Bank (NPDB), to which hospitals are required to report certain information, such as a hospital's revocation of privileges for more than 30 days. Congress wanted to address the issue of physicians moving from state to state to escape knowledge of their prior practice. Congress understood that the lawsuits by those subject to peer review actions threatened the feasibility of the hospital peer review and that the NPDB would only encourage more lawsuits against peer reviewers.

To balance the interests of the physicians subject to peer review with the interests of those engaged in peer review, Congress immunized peer reviewers and their hospitals from individual damage suits if their actions satisfied certain standards of objective reasonableness. Congress did not restrict the physician's right to seek declaratory or injunctive relief to enforce the physician's procedural or other state law rights that might protect a physician during the peer review process. The immunity from damages provides those who grant and monitor physician privileges the ability to err on the side of patient safety and makes patient safety the top priority.

The 4 requirements for immunity under HCQIA are

1. The action must have been taken with the reasonable belief that it furthered quality health care.
2. There was a reasonable effort to obtain the facts.
3. There was adequate notice and hearing procedures afforded to the affected physician.
4. There was a reasonable belief that the adverse action was warranted by the facts known.

The Court of Appeals ruling in the Poliner case provided the following additional insight regarding the application of immunity under HCQIA.

- HCQIA's reasonableness standard was intended to create an objective standard of performance rather than a subjective good faith standard.
- The review of reasonableness must be based on the information known at the time, not what might be later shown to be true by experts or otherwise.
- HCQIA requires that the findings of the peer review body are objectively reasonable, not that they are correct.
- Allegations of anti competitive motives or evil intent do not affect the immunity offered by HCQIA if the actions are objectively reasonable.
- Immunity from money damages under HCQIA does not require compliance with the hospital's medical staff bylaws, as long as the requirements for immunity have been met.

Wisconsin Peer Review Immunity Statute

The Wisconsin peer review immunity statute, Wis. Stat. § 146.37, protects those engaged in peer review of health care services from liability by providing immunity, conditioned on good faith, from lawsuits based on their participation in peer review activities. Good faith is presumed under the statute. Wisconsin case law recognizes that the language in the statute is purposefully broad and that the statute provides protection for a wide scope of peer review activities performed by various actors (eg, external peer review groups).

Summary

Peer review committees in Wisconsin should keep in mind both the Wisconsin peer review immunity statute and HCQIA when structuring their peer review processes. Documenting that actions were taken in good faith is critical. While this is not a consideration under HCQIA, it is under Wisconsin law. Temporary restrictions on a physician's privileges can

be appropriate when patient safety requires it; in these circumstances, hospitals should make sure to keep the issue raised by HCQIA's emergency exception.

By and large, courts have sided with hospitals in peer review disputes. The physician challenging the peer review action bears the burden of showing by a preponderance of the evidence that no reasonable belief supported the action. While the initial rulings in the Poliner case raised concerns, these rulings were not typical and were ultimately reversed.

The recent ruling by the Appeals Court affirms that HCQIA stands on solid ground, provides reassurance to hospitals and physicians engaged in peer review, and advances the goals of Congress by allowing peer review committees to take actions that are in the best interest of patients. At the same time, physicians subject to review retain the right to seek remedies other than money damages and to hold a hospital and its medical staff to a reasonable standard conduct that they can reasonably implement.

References

1. *Poliner v Texas Health Systems*, 537 F3d 368 (5th Cir 2008). Available at http://www.ca5.uscourts.gov/opinions/pub/06/06-11235-CV0.wpd.pdf. Accessed on October 8, 2008.
2. 42 USC § 11112(a), App. 1

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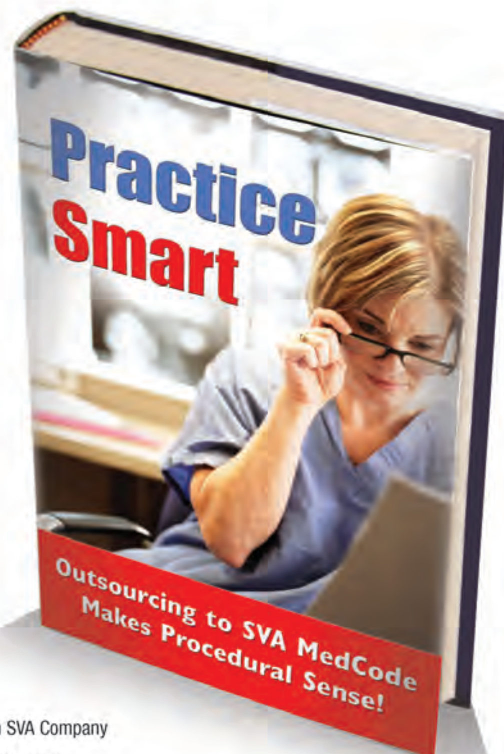

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