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FIFTH CIRCUIT REVERSES \$33 MILLION JUDGMENT AGAINST PHYSICIANS AND HOSPITAL ARISING FROM PEER REVIEW ACTIONS

In a recent case, the Fifth Circuit emphasized the legislative purpose in the Health Care Quality Improvement Act (HCQIA) to improve the quality of health care by protecting physicians who participate in peer review actions, finding they were entitled to immunity from monetary damages.

In *Poliner v. Texas Health Systems*, -- F.3d -- (5th Cir. 2008), 2008 WL 2815533, an interventional cardiologist sued Presbyterian Hospital and several physicians for damages related to a restriction of his privileges during a peer review investigation. At trial, the jury found in favor of Dr. Poliner on various claims and awarded nearly \$90 million in defamation damages and \$110 million in punitive damages. The district court reduced the damages to \$33 million, including prejudgment interest.

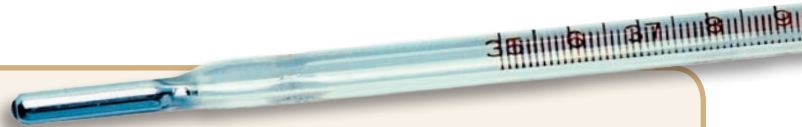
The defendants appealed the judgment, arguing they were entitled to immunity from monetary damages under HCQIA. The Fifth Circuit found Dr. Poliner failed to rebut the presumption that the peer review actions were taken in compliance with statutory requirements. The evidence demonstrated the defendants complied with HCQIA and were entitled to immunity. The appellate court reversed the judgment in favor of Dr. Poliner and rendered judgment in favor of the defendants.

At issue were two peer review actions: a temporary abeyance of privileges and a five month suspension of privileges. Dr. Poliner's privileges were temporarily restricted for fewer than 29 days to investigate concerns about his handling of several cases. Because several cases raised concerns and criticisms, Dr. Poliner agreed to an abeyance or temporary restriction of his cardiac catheterization lab privileges to allow for an investigation as provided by the Medical Staff Bylaws. He was told that his privileges would be suspended if he did not agree to the abeyance. He later agreed to an extension of the abeyance. An ad hoc committee of cardiologists reviewed 44 of Dr. Poliner's cases and concluded that, in over half of the cases, Dr. Poliner rendered substandard care. The investigation led to a five month suspension of Dr. Poliner's cardiac catheterization lab privileges and echocardiography privileges.

The Fifth Circuit reviewed the requirements for immunity under HCQIA. A professional review action must be taken: 1) in the reasonable belief that the action was in furtherance of quality health care; 2) after a reasonable effort to obtain the facts of the matter; 3) after adequate notice and hearing procedures are afforded to the



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physician involved, or after other procedures as are fair under the circumstances; and 4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain the facts and after meeting the adequate notice and hearing or other fair procedural requirements.

The Fifth Circuit found both peer review actions met the first requirement—the defendants reasonably believed the action was in furtherance of quality health care. The court noted that HCQIA did not require actual improvement of the quality of health care and did not require that the conclusions reached by the reviewers actually be correct. Nor was the good faith or bad faith of the reviewers relevant. The requirement was met if the reviewers could reasonably conclude, based on the information available to them at the time, that the peer review action would restrict incompetent behavior or would protect patients. Because the ad hoc committee of cardiologists reviewed 44 of Dr. Poliner’s cases and concluded he gave substandard care in more than half the cases, the peer review committee had an objectively reasonable belief that restricting Dr. Poliner’s cath lab privileges during an investigation would further quality health.

As to the second requirement for immunity under HCQIA, the appellate court found the defendants made a reasonable effort to obtain the facts. The cases at issue were reviewed by cardiologists, and several physicians also involved in some of the cases were interviewed, as was Dr. Poliner. The court found nothing to suggest the information obtained was so flawed or deficient as to render the defendants’ reliance on the information unreasonable. Although Dr. Poliner contended there was

insufficient information to suggest he posed a present danger to patients, as required by the Medical Staff bylaws, the court noted HCQIA required a reasonable effort to obtain the facts—not a perfect effort. The court also stated that HCQIA immunity was not contingent upon or coextensive with compliance with the bylaws. Physicians could still seek injunctive or declaratory relief where the bylaws were violated, but they would not be entitled to monetary damages under HCQIA on that basis.

The appellate court also found the defendants satisfied the third requirement for immunity under HCQIA—the adequate notice and hearing requirements. The court found the defendants imposed the restrictions on Dr. Poliner’s privileges after procedures that were fair to him under the circumstances presented, considering the potential danger to patients. Finally, the appellate court concluded the peer review actions were taken in the reasonable belief that the actions were warranted, based on the facts known after a reasonable effort to obtain those facts.

The protection of immunity from monetary damages afforded when HCQIA requirements are met should serve to reassure physicians involved in peer review actions of adequate protection when they participate in this important process.



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