

## Medical Peer Review and Immunity Under HCQIA After *Poliner*

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The decline in the quality of health care that stemmed from increasing medical malpractice and incompetent physicians moving from state to state without disclosure or discovery of the physician's prior incompetent performance became a nationwide issue. To address this problem, Congress enacted the Health Care Quality and Improvement Act of 1986 (HCQIA). HCQIA was believed to provide a remedy through professional peer review. To encourage effective peer review within the medical profession, the Act provided protection against monetary damages for physicians involved in professional peer review.<sup>1</sup>

In *Poliner v. Texas Health Systems*,<sup>2</sup> (hereinafter *Poliner 1*) complaints were made against Dr. Poliner regarding his technique and clinical judgments during cardiac catheterizations and echocardiography procedures. These complaints were made through the hospital process and were subsequently reviewed by the internal medicine advisory committee. The chairman appointed an ad hoc committee to review the allegations against Dr. Poliner. While the review was pending, another incident regarding Dr. Poliner's care occurred. Dr. Poliner was asked to sign a letter agreeing to an abeyance of his privileges for cardiac catheterization and echocardiography. Dr. Poliner was informed that if he refused to agree, his privileges would be summarily suspended. This action was taken before the ad hoc committee had completed its review of the other complaints. In a subsequent meeting, the internal medicine advisory committee recommended suspension of Dr. Poliner's catheterization and echocardiography procedures because of his poor judgment, inadequate skills, and unsatisfactory documentation in the medical record resulting in substandard care. He was advised of his right to appeal, and he requested the appeal. The appeal hearing restored his privileges with conditions, but found that the suspension was justified based upon the evidence available at the time the action was taken. After his privileges were restored, Dr. Poliner sought to appeal the suspension because the presence of the suspension would continue to be problematic for him in that he would have to report the action to insurers, to hospitals and other institutions when applying for privileges, as well as reporting it to the National Practitioner Data Bank. The hospital by-laws provided for review that was limited to the procedural process but did not for substantive issues. That process determined that Dr. Poliner was afforded due process and the decision was upheld by the hospital's Board of Trustees.

Dr. Poliner then brought suit against the hospital and the physicians involved in the peer review process. He alleged: 1) a combination/conspiracy against him in violation of antitrust law; 2) violations of State antitrust laws; 3) breach of contract (hospital only regarding by-laws); 4) slander/libel; 5) tortious interference; 6) intentional infliction of emotional distress; and 7) deceptive trade practices violation. He also sought a declaratory judgment that the defendants were not immune from liability under HCQIA or the Texas Medical Practice Act. The defendants sought summary judgment claiming:

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<sup>1</sup> 42 U.S.C. § 11101.

<sup>2</sup> *Poliner vs. Texas Health Systems*, 2003 WL 2225677 (N.D. Tex.).

immunity under HCQIA; that neither the Texas Medical Practice Act nor HCQIA created a private cause of action for temporary suspension of privileges; and Texas law did not recognize a cause of action for suspension of hospital privileges. The court considered each of the allegations in determining whether Poliner had raised a fact issue sufficient to survive the summary judgment motion.

The defendants sought summary judgment premised upon immunity under HCQIA. In order for immunity to apply, four elements must be met. First, the action must be taken in a reasonable belief that the action is in furtherance of the quality of care. Second, the action can only be taken after reasonable effort to obtain the facts of the matter. Third, the action can only be taken after adequate notice and hearing. Lastly, there must be a reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain the facts and after meeting the third requirement.<sup>3</sup>

Poliner sought declaratory judgment that the defendants were not entitled to immunity under HCQIA. Poliner alleged that the defendants were motivated by something other than a reasonable belief that their actions would further the care of the hospital's patients. He claimed that the animosity toward him and the desire to eliminate him as an economic competitor resulted in a conspiracy to eliminate him from practicing at the hospital. He further claimed that the reviews were less than thorough, that they were biased, incomplete, filled with errors, and that the defendants did not make reasonable efforts to obtain the facts.<sup>4</sup> Lastly, Poliner claimed that he was not afforded adequate notice and hearing procedures.

In addressing the determination of whether fact issues existed as to Dr. Poliner's claims regarding the elements of HCQIA, the court focused upon the peer review actions taken, noting that the abeyance and the subsequent suspension represented independent peer review actions. Regarding the abeyance, Poliner claimed that he was forced to agree to the abeyance and that this was a summary suspension without the procedural protections required by the hospital by-laws and HCQIA. HCQIA provides an exception to the notice and hearing requirement: "the notice and hearing requirements do not preclude immediate suspension where the failure to take such action may result in an imminent danger to the health of any individual"<sup>5</sup> The abeyance action was taken after the occurrence of a subsequent event involving Dr. Poliner and during the pendency of review of prior complaints against him; therefore the results of these reviews were not available to the decision makers in determining whether the imminent danger exception would apply. Accordingly, the court concluded that the defendants could not show that imminent danger existed to any patient at the time of the abeyance and therefore a fact issue existed as to whether Dr. Poliner was properly summarily suspended without notice and hearing. The court denied summary judgment to the hospital and the physician defendants involved in the abeyance action. The court further concluded that the subsequent suspension by the internal medicine advisory committee after the review by the ad hoc committee did comply with HCQIA and thus held that the internal medicine

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<sup>3</sup> 42 U.S.C. § 11112 (a).

<sup>4</sup> Poliner 1, *supra* note 2 at 12.

<sup>5</sup> 42 U.S.C. § 11112 (c)(2).

advisory committee and ad hoc committee members were immune under HCQIA, granting summary judgment as to those individuals.

HCQIA allows states to provide for greater protections for medical peer review activities. Texas has allowed for peer review immunity absent “malice” (reckless disregard or a high degree of awareness of probable falsity) or actual knowledge of falsity. Negligence, lack of investigation, or failure to act as a reasonably prudent person is insufficient to show actual malice. However, an inadequate investigation coupled with ulterior motives may be sufficient to raise a fact issue of actual malice.<sup>6</sup> In this case, the court determined that there was not just a claim of inadequate investigation, but complete failure to investigate before the summary suspension (forced abeyance) and some evidence of animosity against Dr. Poliner. The district court held that a fact issue existed as to whether there was actual malice and denied the defendant’s summary judgment motions on the basis of immunity under the Texas peer review statutes.

The case proceeded to trial and the jury found for Dr. Poliner awarding an aggregate of \$360 million. The majority of the damages were for mental anguish, injury to career, and punitive damages. The district court remitted the defamation damages to \$10.5 million for injury to career, \$10.5 million for mental anguish, and \$1.5 million in punitive damages, and ordered prejudgment interest of over \$11 million.<sup>7</sup>

The Fifth Circuit Court of Appeals, in reviewing the case provided the analytical framework to be utilized in the application of HCQIA’s immunity. The Fifth Circuit intimated two requirements for HCQIA immunity for participants in the peer review process. First, the action must be a “professional review action” as defined by the statute and second, the action must meet certain standards.<sup>8</sup> HCQIA defines a professional review action as an action or recommendation of a professional review body made in the course of a professional review activity, based on the competence or professional conduct of a physician that affects or could adversely affect the health of patients, or affects or could adversely affect the clinical privileges or membership in a professional society of the physician.<sup>9</sup> The jury in Poliner 1 was charged that the abeyance of Poliner’s privileges and the subsequent suspension were professional review actions, and the Fifth Circuit Court affirmed this finding. The Court of Appeals focused on the second requirement for immunity; the compliance with HCQIA’s standards.

In considering the first requirement of reasonable belief that the action was in furtherance of quality health care, the Fifth Circuit, following other circuits, explained that the reasonable belief standard of HCQIA was satisfied if the reviewers could reasonably conclude that their action would restrict incompetent behavior or would protect patients.<sup>10</sup> The Court of Appeals further stated that the reasonable belief requirement does not require that the action result in actual improvement in the quality of care,<sup>11</sup> or that the

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<sup>6</sup> Poliner 1, *supra* note 2 at 14-16.

<sup>7</sup> *Poliner v. Texas Healthcare Systems*, 537 F.3d 368, 375 (5<sup>th</sup> Cir. 2008).

<sup>8</sup> Poliner 2, *supra* note 7 at 376.

<sup>9</sup> 42 U.S.C. § 11151 (9).

<sup>10</sup> Poliner 2, *supra* note 7 at 378 (citing *Meyers v. Columbia/HCA Healthcare Corp.*, 341 F.3d 461 at 468 (6<sup>th</sup> Cir. 2003)).

reviewers were correct.<sup>12</sup> Furthermore, the Fifth Circuit also stated that the determination is an objective one, rejecting Poliner's urging of bad motives and evil intent and that such subjective motivations were sufficient to overcome HCQIA immunity.<sup>13</sup> The ad hoc committee's recommendations were based upon a group of six cardiologists review of 44 of Poliner's cases. The ad hoc committee concluded that Poliner had given substandard care in more than half of the cases reviewed. The Court of Appeals held, based upon the committee's findings, that the temporary abeyance/suspension of Poliner's privileges would further the quality of health care was reasonable.

Regarding the second requirement that action be taken only "after a reasonable effort to obtain the facts", the court considered the "totality of the process leading up to" the professional review action.<sup>14</sup> The complaints regarding patient care were reviewed by the hospital's risk review committee and forwarded to the department's advisory committee for further review. There was nothing in the review process that was so deficient as to make the reviewer's reliance unreasonable. Accordingly, the Court of Appeals concluded that the reviewers had made reasonable effort to obtain the facts. It is important to note that the Court indicated that an action that complies with the statute but does not comply with the entity's by-laws does not defeat a peer reviewer's right to immunity under HCQIA.<sup>15</sup>

To meet HCQIA requirements for immunity, an action must either be taken in compliance with the Act's requirements for notice of the proposed action, notice of the hearing, and conduct of the hearing, or it must meet one of the exceptions to those requirements. The Fifth Circuit found that the abeyance met the exception relating to the emergency suspension. The abeyance was a restriction of privileges imposed to allow for an investigation. The reviewing body had decided that an additional restriction was required after the investigation, however did not request his consent to the extension until the 15<sup>th</sup> day. Poliner argued that the provision did not apply because the restriction was longer than 14 days. The Court indicated that, for immunity purposes, the fact that he was notified on the 15<sup>th</sup> day was not relevant because the committee had made the decision to further restrict his privileges within the required 14 days. With regard to the extension of the abeyance the Court held that the subsequent suspension fell within HCQIA's "emergency provision" which requires only that a failure to act may result in

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<sup>11</sup> Poliner 2, *supra* note 7 at 378 (citing *Imperial v. Suburban Hosp. Ass'n, Inc.* 37 F.3d 1026, 1030 (4<sup>th</sup> Cir. 1994)).

<sup>12</sup> See *Imperial*, 37 F.3d at 1030 ("But more importantly than the issue at hand, even if Imperial could show that these doctors reached an incorrect conclusion on a particular medical issue because of the a lack understanding, that does not meet the burden of contradicting the existence of a *reasonable belief* that they were furthering health care quality in participating in the peer review process.").

<sup>13</sup> See *Mathews v. Lancaster General Hospital*, 87 F.3d 624, at 635 (explaining that other circuits "have held that a defendant's subjective bad faith is irrelevant under § 11112 (a) and have upheld a finding of immunity if, on the basis of the record, the court could conclude that the professional review action would further the quality of health care"); *Bryan v. James E. Holmes Reg'l Med. Ctr.*, 33 F.3d 1318, at 1335 ("Moreover, Bryan's assertions of hostility do not support his position because they are irrelevant to the reasonableness standards of § 11112 (a)").

<sup>14</sup> Poliner 2, *supra* note 7 at 380 (citing *Mathews v. Lancaster General Hospital*, 87 F.3d 624 at 637 (3<sup>rd</sup> Cir. 1996)).

<sup>15</sup> *Id.* at 381 (citing *Meyers*, 341 F.3d at 469-470).

an imminent danger to the health of any individual. The court stated that the ad hoc committee's conclusions were fully warranted.<sup>16</sup>

Lastly, HCQIA requires that the peer review action must be taken in reasonable belief that the action is warranted by the facts known after such reasonable effort to obtain them. The court determined that in both the initial abeyance and subsequent suspension that the restrictions were specific to the issues raised by the review, concluding that there was a reasonable basis for the restrictions warranted by the facts then known.

The enormity of the jury award is suggestive that more was involved than a straight forward application of HCQIA immunity requirements. It may be representative of a jury belief that this case involved a malignant abuse of the peer review process for reasons not entirely related to improving health care. Nevertheless, the Fifth Circuit has established the framework for applying HCQIA immunity. Despite the immunities provided under HCQIA, the medical profession remains apathetic to the performance of professional peer review. The potential for litigation against those performing peer review leads to what physicians feel are unnecessary entanglement in the legal process. This creates a "chilling effect" on any meaningful peer review and will result in a less vigorous peer review process than that envisioned by Congress. Unfortunately, this stance will be counterproductive to physicians' desires for any degree of tort reform. Physicians are uniquely qualified to evaluate the performance of their peers and unless they are willing to participate in improving the quality of care by engaging in meaningful peer review, individuals will have no alternative but to seek redress via the courts.

*Health Law Perspectives*, (November 2008), available at:  
<http://www.law.uh.edu/healthlaw/perspectives/homepage.asp>

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<sup>16</sup> *Id.* at 383.