

Court Reverses \$33 Million Damages Award in Favor of Suspended Cardiologist on the Grounds of Peer Review Immunity

By John J. D'Attomo

A federal appeals court has reversed a damages award of \$33 million against a hospital and certain physicians arising from a temporary restriction of a cardiologist's cath lab privileges.¹ The decision of the U.S. Court of Appeals for the Fifth Circuit in *Poliner v. Texas Health Systems* reaffirms the principle that participants involved in peer review proceedings are immune from damages under the federal Health Care Quality Improvement Act (HCQIA) when certain requirements are satisfied. The decision also makes clear that an objective standard applies when assessing the reasonableness of the peer reviewer's actions and that the subjective motivations of the peer review participants are irrelevant to the immunity question.

The Abeyance of Plaintiff's Cath Lab Privileges

In May 1998, a patient presented at the emergency room of Presbyterian Hospital in Dallas, Texas with a heart attack. The patient was referred to plaintiff, an interventional cardiologist, with a solo practice at Presbyterian Hospital. Plaintiff performed diagnostic tests on the patient but failed to detect a completely blocked artery.

Following this incident, the chairman of the internal medicine department at Presbyterian Hospital, Dr. Knochel, sought an "abeyance," *i.e.*, a temporary restriction, of plaintiff's cath lab privileges pending an investigation. Dr. Knochel advised plaintiff that, pursuant to the hospital's medical staff bylaws, his privileges would be suspended if he did not agree to the abeyance. Plaintiff consequently signed the abeyance request on May 14, 1998.

Thereafter, an ad hoc committee reviewed a sample of the cardiologist's cases and concluded that he had rendered substandard care in more than half of the cases reviewed. Based on the ad hoc committee's report, Dr. Knochel requested that plaintiff consent to an extension of the abeyance to permit further investigation, again advising

¹ *Poliner v. Texas Health Systems*, 537 F.3d 368 (5th Cir. 2008).

that the cardiologist's privileges would be suspended if he did not agree to the abeyance. Plaintiff signed the extension request. Following further investigation, and based on the recommendation of the Internal Medicine Advisory Committee, Dr. Knochel suspended plaintiff's cath lab and echocardiography privileges on June 12, 1998. Approximately five months later, a hearing committee upheld the suspension but directed that the cardiologist's privileges be reinstated with certain conditions.

Plaintiff Sues for Defamation and Other Claims

Plaintiff brought suit against Dr. Knochel, the hospital and other physicians involved in the peer review process, asserting claims under federal and state law, including claims for defamation. According to plaintiff, the defendants defamed him and destroyed his practice by labeling him a "dangerous doctor." He also argued that he was forced to agree to the abeyance, which was in effect a summary suspension of his privileges, and that defendants failed to satisfy the requirements for a summary suspension under the medical staff bylaws. Finally, the cardiologist argued that the defendants were motivated by an intent to eliminate him as a competitive threat to the other cardiology groups at the hospital.

The defendants moved for summary judgment asserting, among other things, immunity under the HCQIA. The trial court concluded that the defendants were entitled to immunity for any damages resulting from the June 12 suspension order, but that an issue existed as to whether Dr. Knochel's threat to summarily suspend the cardiologist's privileges vitiated his consent to the abeyance. The court reasoned that, if he had not consented to the abeyance, the abeyance was in effect a summary suspension and called into question whether defendants satisfied the notice and hearing requirements of the HCQIA.

The case proceeded to trial and the jury found in favor of the cardiologist. Although he could demonstrate only some \$10,000 in actual lost income, the jury awarded him more than \$90 million in damages for defamation and \$110 million in punitive damages. The trial judge later ordered a remittitur and reduced the award of damages to \$33 million.

The HCQIA Confers Immunity for Each Peer Review Action

On appeal, the Fifth Circuit reversed the trial court judgment, finding that defendants were entitled to immunity from damages for both the abeyance and the suspension of plaintiff's privileges. In reaching its decision, the *Poliner* court addressed the policy underlying the HCQIA and the statutory requirements for immunity.

In enacting the HCQIA, Congress sought to reduce the occurrence of medical malpractice and improve the quality of medical care. While concluding that peer review was an important component in achieving these goals, Congress "recognized that lawsuits for money damages dampened the willingness of people to participate in peer review." Accordingly, Congress "granted limited immunity from suits for money damages to participants in professional peer review actions." When the peer review action meets certain statutory requirements, the HCQIA provides that participants "shall not be liable in damages under any law of the United States or of any State (or political subdivision thereof) with respect

to the action." Immunity under the HCQIA is limited to money damages; a plaintiff may seek injunctive and declaratory relief in appropriate cases.

The Four Requirements for HCQIA Immunity

The circuit court found that defendants satisfied the four requirements for immunity under the HCQIA. First, the peer review action was taken in the reasonable belief the action was in furtherance of quality health care. This standard is satisfied where the reviewers, with information available to them at the time, would have concluded that their action would restrict incompetent behavior or would protect patients. The court noted that the failure to diagnose the blocked artery was a critical error and that restricting plaintiff's cath lab privileges during the investigation, and later extending the abeyance after receipt of the ad hoc committee report, was objectively reasonable.

In rejecting plaintiff's claim that the defendants were seeking to eliminate him as a competitor of other cardiology groups, the court noted that the reasonableness of the peer reviewer's actions is judged under an objective standard for purposes of the HCQIA. Stated differently, the subjective motivation of the peer review participants is irrelevant to the immunity question.

Second, the peer review action was taken after a reasonable effort to obtain the facts. The court noted that the peer review participants discussed the diagnostic error with the plaintiff, another physician involved in the care of the patient, the physician who discovered the diagnostic error, the director of the cath lab and the chief of cardiology. The diagnostic films were reviewed, as were certain of plaintiff's other cases. With respect to the extension of the abeyance, Dr. Knochel relied on the ad hoc committee's review of those other cases.

In concluding that the peer review action was taken after a reasonable effort to obtain the facts, the court noted that HCQIA immunity requires only a reasonable effort to obtain the facts, "not a perfect effort." The court rejected plaintiff's argument that a reasonable effort was lacking because defendants admitted that further investigation was required before his privileges could be summarily suspended under the medical staff bylaws. The court held that "HCQIA immunity is not coextensive with compliance with an individual hospital's bylaws" and that failure to comply with hospital bylaws does not defeat HCQIA immunity.

Third, the peer review action complied with the HCQIA's notice and hearing procedures. At the outset, the court noted that the HCQIA contains an exception to the standard notice and hearing procedures where the restriction on privileges is for not longer than 14 days during which time an investigation is being conducted to determine whether further action is necessary. The court found that the May 14 abeyance fell within this exception to the notice and hearing procedures.

With respect to the extension of the abeyance, the court concluded that it fell within the "emergency" provision of the HCQIA. The emergency provision allows for an immediate suspension or restriction of clinical privileges where the failure to take such action may result in an imminent danger to the health of any individual. Based on the ad hoc committee's report that plaintiff rendered substandard care in more than half the cases

reviewed and on the seriousness of the diagnostic error giving rise to the abeyance, the court found that the extension of the abeyance fell within the emergency provision in the HCQIA. Finally, with respect to the June 12 suspension, the court concluded that plaintiff received notice and a hearing adequate to satisfy the HCQIA.

In reaching its decision, the *Poliner* court noted that the HCQIA includes a presumption that a peer review action meets the standards for immunity unless the presumption is rebutted by a preponderance of the evidence. The court concluded that plaintiff not only failed to rebut the presumption that the peer review actions were taken in compliance with statutory standards, but that the evidence independently demonstrated that the peer review actions met the statutory standards.

Conclusion

The HCQIA confers peer review participants with immunity from damages when the statutory requirements are satisfied. Compliance with an individual hospital's bylaws is not a prerequisite to immunity under the HCQIA. Rather, the relevant question is whether the peer review action complies with the statutory requirements under the HCQIA. As in *Poliner*, the allegation that defendants did not satisfy the requirements for a summary suspension of plaintiff's privileges under the medical staff bylaws was immaterial. Similarly, the cardiologist's allegation that defendants had anticompetitive motives was irrelevant to the question of immunity under the HCQIA. *Poliner* reaffirms that an objective standard applies when assessing the reasonableness of the peer reviewer's actions.

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