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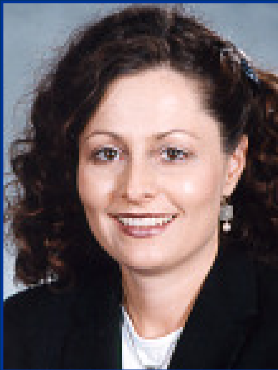

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# POLINER AND PEER REVIEW - THE PENDULUM SWINGS BACK

Nearly four years after a $366 million verdict[1] against Presbyterian Hospital of Dallas and three individual physicians for defamation, and other claims arising out of a peer review action shocked peer review committee members and hospitals nationwide, the Fifth Circuit reversed and rendered judgment in favor of Defendants Presbyterian Hospital and James Knochel, M.D., chairman of the Internal Medicine Department.

In *Poliner vs. Texas Health Systems*, No. 06-11235 (5th Cir. July 23, 2008) the Fifth Circuit held that these Defendants were immune from money damages based on application of the federal Health Care Quality Improvement Act (HCQIA) immunity.

The HCQIA provides immunity from money damages to participants in "professional review actions," defined in pertinent part as:

> an action or recommendation of a professional review body which is taken or made in the conduct of professional review activity, which is based on the competence or professional conduct of an individual physician (which conduct affects or could affect adversely the health or welfare of a patient or patients), and which affects (or may affect) adversely the clinical privileges, or membership in a professional society, of the physician. 42 U.S.C. § 11151(9).

However, for the HCQIA to apply the professional peer review action must be taken:

1. in the reasonable belief that the action was in the furtherance of quality healthcare;
2. after a reasonable effort to obtain the facts of the matter;

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3. after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances; and
4. in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph. Id. at 11112(a)

**BACKGROUND**

The issue in the trial court concerned the temporary suspension of cardiac catheterization lab privileges of Lawrence Poliner, M.D., a Dallas cardiologist. The catalyst for the original abeyance of Dr. Poliner's privileges was his care of an emergency room patient on May 12, 1998. Testing revealed the patient was suffering a heart attack and had a partially blocked right coronary artery. Dr. Poliner performed an interventional procedure to open the partially blocked artery but missed the fact that the left anterior descending artery was completely blocked. The patient also suffered serious complications following the procedure due to bleeding. The Chief of Cardiology was notified the day the incident happened. Dr. Knochel (Chairman of the Internal Medicine Department) learned of it the following day from another cardiologist and a consulting critical care specialist. At the time of the incident, Dr. Knochel was already aware of four earlier Dr. Poliner patients referred for Internal Medicine committee review by the hospital's Clinical Risk Review Committee.

On May 13, 1998, Dr. Poliner was asked to agree to a voluntary abeyance of his cath lab privileges. He was told if he did not agree, his privileges would be suspended. An abeyance letter was delivered to Dr. Poliner the next day, and he was requested to sign and return it by 5:00 that afternoon. Dr. Poliner asked for additional time to consult a lawyer, but this request was denied. He signed the letter and retained a lawyer afterward.

An ad hoc committee of six cardiologists was then appointed and reviewed 44 of Dr. Poliner's cases. Of the cases reviewed, the committee found the care to be substandard in over half. On the last day of the abeyance period, the Internal Medicine Committee met to review the ad hoc report and recommended an extension of the abeyance to allow time for an outside review and additional evaluation. Another letter was delivered to Dr. Poliner seeking his consent to extend the voluntary abeyance, and he was again told the alternative was suspension. He signed the

letter.

On June 8th Dr. Poliner was asked to attend a meeting of the Internal Medicine Committee set for June 11th concerning the reviewed cases. He asked for, but was not granted, an extension to review the patient charts at issue. The next day the Internal Medicine Committee voted to suspend Dr. Poliner's cath lab and echocardiography privileges. (The trial court granted summary judgment to defendants on the claims relating to this June 12th suspension.)

Dr. Poliner sought a hearing pursuant to the hospital bylaws, which was ultimately held on November 9, 1998. The Hearing Committee upheld the June 12th suspension but recommended reinstatement of Dr. Poliner's privileges under the condition he consult with another Presbyterian cardiologist prior to performance of interventional cardiac procedures. Dr. Poliner appealed the decision to uphold the June 12th suspension based on lack of due process, but it was confirmed by the hospital's Board of Trustees.

## LITIGATION

Almost two years later, Dr. Poliner sued Presbyterian, Dr. Knochel and several other physicians for antitrust claims (summary judgment granted by trial court), DTPA (summary judgment granted by trial court), breach of contract, business disparagement, libel, slander, tortious interference, intentional infliction of mental anguish and emotional distress. The case was tried in August of 2004 to a Dallas federal court jury.

The Fifth Circuit made a thorough analysis of each aspect of the Poliner peer review under the four prongs of the HCQIA. On the first, whether the peer review action was taken "in the reasonable belief that the action was in the furtherance of quality healthcare," the court found it "indisputable" that Dr. Poliner's treatment of the emergency room patient "raised serious questions…", and that those concerns were "amplified by the problems with Poliner's other patients" brought to the attention of the Internal Medicine Committee chair. The Fifth Circuit concluded it was objectively reasonable to believe both the initial temporary abeyance and the extension would further quality healthcare. It also noted that the HCQIA does not require an improvement in the quality of healthcare, nor that the conclusions were actually correct.

The court was not persuaded by Poliner's argument that the

care recommended by the reviewers would have put his patients in danger – "our inquiry focuses on the information available to defendants when they made the critical decisions," and whether "the beliefs were objectively reasonable under the facts they had at the time."

On the second prong, after carefully outlining everything that transpired, the Fifth Circuit determined "no reasonable jury could conclude that Defendants failed to make a reasonable effort to obtain the facts." In support of this, the Court noted the review of the initial four cases by a cardiologist and the IMAC, discussions with four physicians regarding the care of the emergency room patient, and the review of the 44 cases conducted by the ad hoc committee. As for Dr. Poliner's argument that there was insufficient evidence to deem him a "present danger" as outlined in the hospital bylaws, he was "entitled to a reasonable effort, not a perfect effort," and failure to comply with hospital bylaws "does not defeat a peer reviewer's right to HCQIA immunity from damages."

That said, the Fifth Circuit also emphasized that complying with HCQIA compliance does not give hospitals and committees a free pass to violate bylaws or other applicable authority, and that "the doors to the courts remain open to doctors who are subjected to unjustified or malicious peer review, and they may seek appropriate injunctive and declaratory relief in response to such treatment."

On the third HCQIA prong the Fifth Circuit found the initial May 14 abeyance fell under the "safe harbor" of section 11112(b) which eliminates the requirements of 11112(a)(3) "in the case of a suspension or restrictions of clinical privileges, for a period of not longer than 14 days, during which an investigation is being conducted to determine the need for a professional review action." As for the extension, the Fifth Circuit found that the May 14th extension letter and the opportunity to participate in the Internal Medicine Advisory Committee meeting constituted "such other procedures which are fair to the physician under the circumstances" and was justified given the ad hoc committee's conclusions. "The committee review raised serious problems…and rather than acting precipitously, Defendants sought out further information. It is difficult to conceive of a meaningfully different response from Defendants." The court was further swayed by the fact that Dr. Poliner had retained an attorney prior to the extension, and that the privilege restriction was "temporary in nature and limited in scope."

Finally, the Fifth Circuit found the action was taken "in the reasonable belief the action was warranted by the facts known after such reasonable effort to obtain facts" given that the restrictions were limited to Dr. Poliner's cath lab procedures, the information provided to Dr. Knochel did not appear "obviously mistaken or inadequate," and there was an objectively reasonable basis for imposing the temporary restriction given the facts.

## CONCLUSION

In summary, the Fifth Circuit held Dr. Poliner failed to rebut the presumption that the peer review action complied with HCQIA, and further held that the evidence "independently established" the actions complied with the statute.

Now that the 10 year saga is over, what can be drawn from it? In any litigation much goes on which cannot be gleaned from a reading of court opinions. In addition to the enormous toll the case undoubtedly took on the parties involved, it is impossible to calculate the indirect costs associated with such a shocking verdict. Most notably, there was considerable and justifiable concern among physicians and hospitals following publication of the initial verdict that participation in the peer review process could be second guessed by a jury years after the fact and characterized as "malicious." This concern led some doctors to refuse to participate in a process fundamental to the provision of quality healthcare because of the personal risk. The Court's opinion should allay some of those concerns, although it goes without saying that HCQIA immunity is not automatic, requires strict adherence with the terms of the Act, and reminds us that what is considered "reasonable" may be in the eye of the beholder.

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[1]Remitted by trial court to $33 million).

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