Peer Review after *Poliner* – Absolute Immunity?

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Introduction.

Effective medical peer review is essential to the provision of quality medical care. Honest, legitimate peer review should be protected. But "sham" or bad faith peer review simply cannot be protected or tolerated. The consequences of bad faith peer review are devastating to both physicians and to the public. A physician's reputation and career can be ruined by sham peer review. Likewise, the public suffers when competent, skilled doctors are removed from practice because of peer review based on political, personal or anti-competitive reasons. The only goal of honest peer review should be to protect patients and ensure quality patient care.

By enacting the Health Care Quality Improvement Act ("HCQIA"),[2] Congress provided a road map for hospitals and doctors to conduct proper, effective peer review and avoid legal liability for such peer review. The HCQIA provides qualified immunity to peer review participants who act in the reasonable belief that a peer review action furthers quality health care, after reasonable efforts to obtain the facts, and in the reasonable belief that such action is warranted after a reasonable investigation of the facts.[3]

Congress intended that immunity under the HCQIA be qualified, not absolute, and that the presumption of immunity be rebuttable. But the courts have interpreted the HCQIA's reasonable belief standards in such a way that effectively makes the HCQIA's limited, qualified immunity absolute so long as peer review participants cite a health care or professional competence issue as the purported basis for their action. This is the case even if such alleged medical concern is merely a pretext to oust an unpopular competitor or someone whose politics do not align with the hospital's views.

On July 23, 2008, the Fifth Circuit reversed the ***Poliner*** verdict,[4] holding as a matter of law that Dr. Poliner's peer reviewers were immune from liability for the enormous damages the jury found he suffered as a result of a wrongful peer review. The Fifth Circuit's complete disregard for the jury's evidentiary findings that required the trial court to conclude that the HCQIA immunity standards were not met, illustrates how the current judicial interpretation of the HCQIA's "reasonable belief" test practically eliminates any judicial recourse for physicians who are subjected to bad faith or sham peer review. In short, HCQIA's limited immunity has in effect become absolute.

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[2] 42 U.S.C. §§ 11101 et seq. (2000).

[3] *See* 42 U.S.C. §§ 11112(a).

[4] *See* 537 F.3d 368 (5th Cir. 2008).

Poliner Facts.

Dr. Lawrence Poliner, a board-certified interventional cardiologist with over twenty five years of experience, was the subject of a peer review action that began with a 14-day abeyance of medical staff privileges that was imposed under the threat of summary suspension. When the initial 14-day abeyance ended, it was extended another 14 days. Dr. Poliner's privileges were then summarily suspended. The peer reviewers cited instances of allegedly substandard medical care as the purported reason for the peer review actions. But the evidence at trial offered by Dr. Poliner, including testimony from nationally renowned physicians, demonstrated the actions against Dr. Poliner's privileges were based on personal animosity, economics and hospital politics – not quality of care issues.

Dr. Poliner sued the hospital and the doctors involved in these peer review actions. He alleged that the abeyance and suspension of his privileges was malicious, not done for reasons related to health care, and was a sham to force him out of practice at the hospital. Defendants claimed immunity under the HCQIA and similar Texas statutes. Dr. Poliner provided extensive evidence of false and malicious criticism of his practice, bias, political motivations and false pretext for the peer review actions. The trial court determined, as a matter of law that the summary suspension qualified for statutory immunity. However, the court found that fact issues existed as to whether the two abeyance actions met immunity standards. Accordingly, those issues went to the jury.

The Poliner jury unanimously concluded, and the trial court affirmed, that defendants were not immune from liability. Further, based on explicit findings that the defendants acted with malice, the jury rendered a $366 million verdict for Poliner.[5] Following the entry of Judgment for Dr. Poliner, the Defendants then appealed to the United States Court of Appeals for the Fifth Circuit.

The Fifth Circuit reversed the jury verdict and rendered judgment in favor of the defendants. In so doing, the Court completely ignored the jury's finding of malice in connection with the peer review. The Court disregarded the evidence that Dr. Poliner presented that convinced a unanimous jury that the motive for the peer review was not health care but personal animosity and economics. The Court failed or refused to consider the evidence that the peer review was conducted for reasons other than health care. The Court failed or refused to consider the evidence Dr. Poliner presented that demonstrated that the participants in the peer review process acted maliciously in their findings. The Court also failed or refused to consider the testimony of noted physicians who said that the reviewers were wrong in their assessment of Dr. Poliner's medical care and skill to such an extent their motivation had to be entirely subjective. Instead, the court considered only whether, at the time of the abeyances, Dr. Knochel, the hospital administrator who made the decision to suspend Dr. Poliner, had an objectively reasonable belief that abeyance of Poliner's privileges furthered quality health care. Because Dr. Knochel alleged substandard patient care as a "basis" to abate Poliner's privileges, the Fifth Circuit found that as a matter of law HCQIA immunity standards were met. In fact, the Court seemed to adopt the Hospital's brief on the medical care issues that were highly contested at trial, and for which there was substantially conflicting testimony that the jury considered.

[5] The verdict was subsequently remitted, and a judgment entered in the amount of approximately $22 million.

Poliner petitioned the United States Supreme Court to review the Fifth Circuit's decision. In support of his petition, Poliner claimed that the circuit courts have incorrectly interpreted the HCQIA, by excluding evidence of the subjective motives of peer reviewers. The Supreme Court denied Poliner's petition, effectively creating absolute immunity so long as a "colorable" pretext is advanced to support the peer review action. Given existing judicial interpretation, there appears to no longer be a reasonableness test for HCQIA immunity.

An overview of HCQIA immunity.

In 1986, Congress acknowledged nationwide problems of medical malpractice and a need to improve medical care by preventing incompetent physicians from moving between the states without disclosing their previous damaging or incompetent practice.[6] Congress reasoned these issues were best remedied with effective professional peer review.[7]

To ensure that physicians would cooperate in peer review intended to identify incompetent and unprofessional peers, Congress found it necessary to provide limited immunity to peer reviewers.[8] Indeed, it found that doctors afraid of being sued for an honest assessment of their peers were not likely to participate or engage in effective peer review.[9]

However, Congress crafted the HCQIA so that immunity would be limited and not absolute. It mandated that peer reviewers who act in accordance with the reasonable belief, due process, and other requirements of the HCQIA would be protected from liability for damages sought by a disciplined doctor. However, it did not foreclose liability for damages for those peer reviewers who fail to meet the HCQIA standards by engaging in malicious or sham peer review or peer review based on anticompetitive motive. Plainly, the HCQIA was never intended to insulate improper peer review from redress. Likewise, it was not intended to provide blanket immunity to peer reviewers who falsely allege substandard care or professional incompetence, so that they can then act against another physician entirely on the basis of personal animosity, economics, or hospital politics and avoid liability for such illegitimate actions. Nonetheless, the courts have consistently ruled in favor of peer reviewers in peer review cases, and virtually never allow any case to survive summary judgment.

HCQIA immunity and the reasonable belief standard.

Under the HCQIA, peer reviewers must meet four standards to qualify for immunity. Congress specifically wrote these standards to provide limited immunity that would strike a balance between encouraging proper peer review and requiring accountability for damages in the event of improper peer review. On its face, the HCQIA's "reasonable belief" standard contemplates both objective and subjective elements.

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[6] 42 U.S.C. § 11101(1)-(3) (1995).
[7] *Id*.
[8] H.R. REP. NO. 99-903, at 10 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6384, 6385.
[9] *Id*.

Under the 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 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 (3).

Notably, Congress first considered a "good faith" standard for peer review.[10] But concerned that good faith might be interpreted "as requiring only a test of the subjective state of mind of the physicians conducting the professional review action,"[11] Congress set forth what it termed "a more objective" reasonable belief standard.[12] Importantly, Congress did not say or suggest that all subjective intent or motive be disregarded as irrelevant. Indeed, nothing in the "reasonable belief" test precludes consideration of evidence of a subjective bias or improper motive against evidence of professional incompetence or substandard patient care. Simply because Congress favored a "more objective" standard it does not follow that all subjective motives unrelated to health care are irrelevant in the "reasonable belief" analysis. After all, the HCQIA is titled "Title IV – Encouraging Good Faith Professional Review Activities."[13]

Congress intended the "reasonable belief" test be satisfied if peer reviewers, with information available to them at the time of the professional review action, after reasonable effort to obtain the facts, reasonably concluded that their action would restrict incompetent behavior or protect patients.[14] Clearly, Congress focused the reasonable belief inquiry on all information available to the peer reviewer at the time of the action, which necessarily includes information about subjective reasons or motives for the action. Thus, for immunity to attach, consideration of both subjective and objective reasons for the peer review action must yield a reasonable conclusion the action was required.

Further, Congress acknowledged that limited immunity could be "abused and serve as a shield for anti-competitive economic actions under the guise of quality controls."[15] HCQIA's legislative history shows Congress intended "that physicians receive fair and unbiased review to protect their reputations and medical practices."[16] The reasonable belief test was intended to identify those peer review actions that were based on something other than a reasonable belief.

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[10] H.R. REP. NO. 99-903, at 10 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6384, 6392.
[11] *Id*. at 6392-93.
[12] *Id*. at 6393. Thus, a defendant could not receive immunity for unreasonable behavior just because he claimed that he acted in "good faith." The belief would also have to be reasonable for immunity to be conferred.
[13] Pub. L. No. 99-660, 100 Stat. 3743 (1986) (emphasis added).
[14] *Id*.
[15] 42 U.S.C. §§ 11111(a)(1) and 11112(a). *See also* H.R. REP. NO. 99-903, at 9 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6384, 6391.
[16] H.R. REP. NO. 99-903, at 11 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6384, 6393.

However, current judicial misinterpretation of the test has resulted in immunity for bad faith or malicious peer review undertaken for reasons not related to health care.

Judicial interpretation of the HCQIA's reasonable belief standard.

Austin v. McNamara was the first case to conclude that subjective intent must be wholly eliminated from the reasonable belief analysis. In *Austin*, after citing the HCQIA's legislative history that points away from a purely good faith analysis, the Ninth Circuit concluded that a physician's allegations of "animosity" and "hostility" were "irrelevant to the reasonableness standards of §11112(a). The test is an objective one, so bad faith is immaterial."[17] In direct contrast to the balanced but "more objective" test that Congress conceived, the *Austin* court constructed a highly simplistic test that turns a blind eye to any bad faith, malice, or other subjective motive underlying peer review that is not related to health care.[18] In short, *Austin* set forth a purely objective test – not the balanced, more objective test envisioned by Congress.

Subsequently, other courts, without any substantive analysis or review of the HCQIA, have merely followed this erroneous interpretation with the inevitable result that the courts will not consider any evidence of subjective motives or malicious behavior to rebut the presumption that a defendant peer reviewer had a "reasonable belief" that the action was warranted. Thus, immunity has been found, as a matter of law, in each case analyzing the "reasonable belief" of peer reviewers. *Poliner* was the lone exception, when federal court Judge Solis allowed facts issues underlying the question of immunity to go to the jury. Although the jury found the peer review action to have been conducted maliciously, the Fifth Circuit reversed.

The existing judicial interpretation of the HCQIA's "reasonable belief" standard excludes all evidence of subjective motivation underlying a peer review, finding such evidence to be irrelevant. As a result, there is apparently no set of facts or circumstances that the federal courts will accept to rebut the "reasonable belief" that a peer review was needed to further quality health care. In short, so long as a peer reviewer can point to a health care related or professional competence reason, the courts will conclude he had a reasonable belief at the time that his peer review action furthered quality health care – even if the peer review itself was motivated by personal animosity, economics or politics. This flawed interpretation of the reasonable belief test confers absolute immunity for peer review and is simply not what Congress intended.

Effects of the existing judicial misinterpretation.

The procedure for challenging qualified immunity under the HCQIA is not operating as Congress intended. Without a civil rights or antitrust violation, which are expressly carved out of the HCQIA's immunity, it is virtually impossible to define circumstances where "reasonable belief" would not be found as a matter of law. The courts have resoundingly concluded that a

[17] *Austin v. McNamara*, 979 F.2d 728, 734 (9th Cir. 1992) (emphasis added).

[18] The dissent in *Austin* points out the serious flaw in this holding, stating that "[e]vidence of motive and intent is relevant to show whether the defendants possessed a reasonable belief that the final revocation was warranted by the facts known. Moreover, the legislative history discussing the due process requirements of section 11112 makes clear that it is essential that 'physicians receive fair and unbiased review to protect their reputation and medical practices' (internal citations omitted). Any inquiry into the reasonableness of the reviewers' beliefs should at least consider any evidence of bias or ulterior motive even though an objective standard ultimately applies." *Id.* at 741, n. 3.

violation of or departure from the hospital's own bylaws by the peer review participants does not itself rebut the presumption.[19] Further, the courts routinely disregard expert evidence that a peer reviewed physician's care was in fact appropriate and no reason for a peer review. The peer review action will be deemed grounded in the reasonable belief it furthers quality health care simply because a health care issue is claimed to be the reason for the action, regardless of the veracity or propriety of the claim. Thus, there will be no opportunity for a jury to consider facts underlying the automatic conclusion that a peer review action was based on a reasonable belief.

Finally, the HCQIA expressly allows individual states to provide additional or greater protection to peer review activities.[20] State peer review laws generally provide immunity except in situations of malice, fraud, or willful and wanton misconduct. But the HCQIA immunity, as currently interpreted by the courts, completely overrides state laws that mandate accountability for peer review based on bad faith, malice, or intentional fraud. A plaintiff's ability to rebut the presumption of immunity under state law is stymied by the current purely objective reasonableness test for immunity under the HCQIA. A peer review action can be taken maliciously and in bad faith as long as it is claimed that a quality of care issue or professional competence issue exists. As observed by an Ohio state court of appeals.—"[i]f a hospital rids itself of a doctor both because of health care concerns and because of financial/political concerns, HCQIA will give the hospital immunity from suit."[21] Thus, state laws enacted to protect physicians from malicious peer review are effectively meaningless.

Conclusion.

After Poliner's reversal, a peer review action predicated on a health care issue or allegation of professional incompetence will always be found to satisfy the reasonable belief test, as a matter of law. This is true even if the alleged health care or professional competence reason for the review action is pretextual. Thus, peer reviewers now have absolute immunity from liability.

This result is not what Congress envisioned or intended when it crafted the limited, qualified immunity set out in the HCQIA. Until the United States Supreme Court acts to correct the erroneous judicial interpretation of the reasonable belief standard or Congress acts to amend the HCQIA to clarify that reasonable belief must be determined by considering all reasons for the peer review action (both objective and subjective), abusive peer review will continue to be insulated from liability. Skilled, competent physicians who have their reputations and careers destroyed or damaged by bad faith peer review will continue to have little recourse through the courts for loss of their medical privileges and related damage done to their reputations. Honest

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[19] *See, e.g., Wieters v. Roper Hosp., Inc.*, 58 Fed.Appx. 40, 46 (4th Cir. 2003) (even if procedure strayed from the letter of the bylaws, it still meets immunity requirements if it was "fair to the physician under the circumstances"); *Meyers v. Columbia/HCA Healthcare Corp.*, 341 F.3d 461, 469-70 (6th Cir. 2003) (even assuming the bylaws were violated, notice and procedures complied with HCQIA's statutory "safe harbor"); *Bakare v. Pinnacle Health Hosp., Inc.*, 469 F.Supp.2d 272, 290 at n. 33 (M.D. Pa. 2006) ("court need not determine whether MEC followed the Bylaws"); *Wahi v. Charleston Area Med. Ctr.*, 453 F.Supp.2d 942, (S.D.W.Va. 2006) (failure to follow bylaws procedures did not render process inadequate under HCQIA).

[20] *See* 42 U.S.C. § 11115(a).

[21] *Cowett v. TCH Pediatrics, Inc.*, 7th Dist. No. 05 MA 138, 2006 Ohio-5269, at ¶23 (Ohio App. 2006) (emphasis in the original).

peer review is effective and should be protected as HCQIA intended – by limited, qualified immunity. Sham or bad faith peer review should not.