PEER REVIEW IMMUNITY CONSIDERATIONS

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HCQIA IMMUNITY STANDARDS

The Health Care Quality Improvement Act ("HCQIA") provides immunity from damages under federal and state law for ***professional review actions*** if certain conditions are satisfied.

42 U.S.C. § 11112(a).

PROFESSIONAL REVIEW ACTION

A professional review action is defined as:

an action or recommendation:

which is ***based on the competence or professional conduct*** of an individual physician;

which conduct affects or could adversely affect ***the health or welfare of a patient or patients***; and

which adversely affects (or may adversely affect) ***the clinical privileges of the physician***.

42 U.S.C. § 11151(9)(emphasis added). This Code Section also provides a list of decisions which do not constitute professional review actions. *Id.*

REQUIREMENTS FOR HCQIA IMMUNITY

To qualify for immunity under HCQIA, all professional review actions must be taken:

(1) in the reasonable belief that the professional review action was in furtherance of quality health care;

(2) after reasonable efforts 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 suspension was warranted by the facts known after such reasonable efforts to obtain the facts.

42 U.S.C. § 11112(a)(1)-(4).

QUESTION OF LAW

HCQIA immunity is a **question of law** for the court.

"HCQIA immunity from damages [should be considered] at the summary judgment stage. If [the court] determines that the defendant is not entitled to such protection, then the merits of the case should be submitted to the jury without reference to the immunity issue. . . . Under no circumstances should the ultimate question of whether the defendant is immune from monetary liability under HCQIA be submitted to the jury."

Bryan v. James E. Holmes Regional Med. Ctr., 33 F. 3d 1318, 1333 (11th Cir. 1994); *see also Kolb v. Northside Hospital*, 342 Ga. App. 192, 194-95 (2017); *Taylor v. Kennestone Hospital, Inc.*, 266 Ga. App. 14 (2004); *Davenport v. Northeast Ga. Med. Ctr.*, 247 Ga. App. 179, 180 (2000).

OBJECTIVE STANDARD

"The reasonableness requirements were intended to create ***an objective standard***, rather than a subjective good faith standard. The plaintiff bears the burden of proving the peer review process was ***not reasonable*** as a matter of law." *Patton v. St. Francis Hosp.*, 260 Ga. App. 202, 206 (2003)(emphasis added).

Bias is irrelevant under HCQIA. *Id.* at 208.

REBUTTABLE PRESUMPTION

A professional review action is presumed to have met the preceding standards unless the presumption is rebutted by a preponderance of the evidence. 42 U.S.C. § 11112(a); *Davenport* 247 Ga. App. at 184-185.

The presumption of reasonableness does not focus on whether the professional review action ultimately proved to further or improve quality healthcare.

Rather, the focus is on the reasonableness of the committee's belief that the action would restrict incompetent behavior or protect patients based upon information available to them at the time. *See Wood v. Archbold Medical Center, Inc.*, 738 F. Supp. 2d 1298, 1349-50 (M.D. Ga. 2010); *Poliner v. Texas Health Systems*, 537 F.3d 368, 379 (5th. Cir. 2008); *Davenport*, 247 Ga. App. at 185.

42 U.S.C. § 11112(a)(1)
Reasonable Belief that the Action was in Furtherance of Health Care

A professional review action is taken ***in the reasonable belief that it is in furtherance of quality health care*** if based on the evidence then before them, the reviewers reasonably believed that their action ***would restrict incompetent behavior or would protect patients***. *Patton*, 260 Ga. App. at 206 (emphasis added), *citing Patrick v. Floyd Med. Ctr.*, 255 Ga. App. 435, 440 (2002).

The "totality of the circumstances" must be considered to determine if the action was "objectively reasonable." *Patton*, 260 Ga. App. at 206; *Poliner*, 537 F.3d at 377-79.

Reasonable belief action was necessary to protect patients:

(1) evidence of a physician's poor surgical technique, poor judgment, poor post-surgical management and high complication rates (*Burrowes v. Northside Hosp.*, 294 Ga. App. 472, 475 (2008));

(2) complaints about a physician's call coverage, compliance with hospital rules/policies and interaction with nursing personnel (*Davenport*, 247 Ga. App. at 185);

(3) a physician's "pattern of substandard professional performance" (*Pfenninger v. Exempla*, Inc., 116 F. Supp. 2d 1184, 1202 (2000); and

(4) lack of anatomical knowledge, insufficient surgical skill and inappropriate surgical judgment (*Isaiah v. WHMS Braddock Hosp. Corp.*, 2008 U.S. Dist. Lexis 57850 at *31 (D. Md. 2008).

42 U.S.C. § 11112(A)(2)
REASONABLE EFFORT TO OBTAIN THE FACTS

"The determinative inquiry on this issue is whether or not the ***totality of the process*** leading up to the . . . decision evidenced a reasonable effort to obtain the facts of the matter." *Davenport,* 247 Ga. App. at 185 (emphasis added); *Kolb,* 342 Ga. App. at 201.

Reasonable efforts to obtain the facts:

(i) conducting an investigation and meeting with the physician in question regarding complaints (*Davenport*, 247 Ga. App. at 185);

(ii) interviewing other physicians regarding the facts and reviewing case review reports prepared by other physicians (*Poliner*, 537 F.3d at 380);

(iii) reviewing the physician's case history, interviewing physicians and nursing staff and considering a practitioner's explanation of the underlying cases (*Pfenninger*, 116 F. Supp. at 1202); and

(iv) considering reports and materials prepared by medical staff committees during internal investigations (*Gabaldoni v. Wash. County Hosp. Ass'n*, 250 F.3d 255, 261-62 (4th Cir. 2001); *Bryan*, 33 F.3d at 1335).

42 U.S.C. § 11112(A)(3)
ADEQUATE NOTICE AND HEARING OR SUCH OTHER PROCEDURES AS ARE FAIR UNDER THE CIRCUMSTANCES

Under the third standard, the peer reviewers must only take a professional review action after providing the practitioner with adequate notice and a hearing ***or*** after such other procedures as are fair to the practitioner under the circumstances.

42 U.S.C. § 11112(a)(3); *Northeast Ga. Med. Ctr. v. Davenport*, 272 Ga. 173, 174 (2000).

42 U.S.C. § 11112(A)(3)
ADEQUATE NOTICE AND HEARING

Notice of Action. The physician must be given notice of the action, which contains the information set forth in 42 U.S.C. § 11112(b)(1).

Notice of Hearing. If a physician timely requests a hearing, the physician must be provided with a notice of hearing, which contains the information set forth in 42 U.S.C.A. § 11112(b)(2).

The Hearing. The hearing must be held before an arbitrator, hearing officer or hearing panel, who are ***not in direct economic competition with the physician involved***, as set forth in 42 U.S.C. § 11112(b)(3)(A)-(B).

Physician Rights During and After the Hearing. The physician must be provided with certain rights during and after the hearing. 42 U.S.C. § 11112(b)(3)(C); 42 U.S.C. § 11112(b)(3)(D).

42 U.S.C. § 11112(A)(3) SUCH OTHER PROCEDURES AS ARE FAIR UNDER THE CIRCUMSTANCES

Alternatively, Section 11112(a)(3) also provides immunity if the action is taken "after such procedures as are fair to the physician under the circumstances."

Thus, the entity must either satisfy the notice and hearing requirements or provide other fair procedures to the physician.

HCQIA also provides for immunity for certain immediate suspensions or restrictions on clinical privileges. 42 U.S.C. § 11112(c).

42 U.S.C. § 11112(c)
Adequate Procedures in Investigations and Health Emergencies

The Notice and Hearing Requirements set forth above do not apply:

- in the case of a suspension or restriction 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 (42 U.S.C. § 11112(c)(1)(B)); or

- to an immediate suspension or restriction of clinical privileges, subject to subsequent notice and hearing or other adequate procedures, where the failure to take such an action may result in an imminent danger to the health of any individual (42 U.S.C. § 11112(c)(2)).

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

Poliner involved 2 "professional review actions:" (i) a 14-day investigative suspension; and (ii) a 15-day extension of the suspension. 360 million jury verdict, which was reversed on appeal.

The 14-day suspension fell within the safe harbor and otherwise qualified for immunity as it was objectively reasonable based upon the facts in existence at the time. *Poliner* 537 F.3d at 377-78, 382.

An ad hoc committee of 6 cardiologists reviewed 44 of Dr. Poliner's other cases and found substandard care in half of them. The ad hoc committee's conclusions justified the committee's decision to impose a 15-day extension of the suspension "without immediately giving a hearing." *Id.* at 383.

The committee's belief that Dr. Poliner activities may pose an imminent danger to patients was "objectively reasonable under the facts they had at the time." *Id. at 378-82.*

- HCQIA does not require the imminent danger to exist ***before*** a summary restriction or suspension is imposed. Rather, HCQIA requires that imminent danger ***may result*** if the summary restriction or restraint is not imposed. *Poliner*, 537 F. 3d at 382.

- *Sugarbaker v. SSM Health Care, 190 F. 3d. 905, 917 (8th Cir. 1999)* (court rejected argument that there was no imminent danger because physician did not have any patients in the hospital at the time of the suspension).

- *Isaiah*, 2008 U.S. Dist. Lexis 57850 (the imminent danger standard does not require a showing of "a currently identifiable patient whose health may be jeopardized").

Such Other Procedures as are Fair Under the Circumstances

The extension of the suspension was imposed after "procedures that were fair to Poliner under the circumstances." *Poliner*, 537 F.3d at 383. Dr. Poliner was provided:

(1) a listing of the patient records that were reviewed by the ad hoc committee and the findings of the committee (substandard care in half of them);

(2) notice that additional case reviews would be reviewed and an explanation of how they would be reviewed;

(3) notice to Dr. Poliner that he would be able to meet with the committee, review the underlying medical records and explain his role in those cases; and

(4) notice and an opportunity for hearing if adverse action was imposed.

In other words, "Poliner and his lawyer knew what was happening and why before the extension." *Id.* at 383.

42 U.S.C. § 11112(A)(4) REASONABLE BELIEF THE ACTION WAS WARRANTED BY THE FACTS

Under the final standard, there must be an *objectively reasonable basis* for imposing the professional review action based upon the facts then known. 42 U.S.C.A. § 11112(a)(4); *Poliner* 537 F.3d at 384; *Davenport,* 247 Ga. App. at 186 ("the real issue is the sufficiency of the basis for the . . . actions").

42 U.S.C. § 11133
National Practitioner Data Bank

Healthcare entities must report the imposition of a professional review action which relates to a physician's professional competency or conduct and which adversely affects the clinical privileges of the physician for longer than 30 days. *See* 42 U.S.C. 111133; National Practitioner Data Bank Guidebook (2018) at E-32.

A summary suspension of a physician's clinical privileges which relates to the physician's professional competency or conduct and which lasts for longer than 30 days pending a hearing must be reported. National Practitioner Data Bank Guidebook (2018) at E-38.

Healthcare entities that substantially fail to meet the reporting requirements lose the immunity protections contained in Section 11111(a).

IMMUNITY STANDARDS UNDER GEORGIA LAW

Georgia's peer review statute provides that:

no professional health care provider "shall be held, by reason of the performance of peer review activities, . . . to be civilly liable under any law ***unless [the provider] was motivated by malice toward any person affected by such activity***." O.C.G.A. § 31-7-132(a)(emphasis added).

Georgia's medical review statute provides that:

members of a medical review committee are immune from civil liability in actions by providers for actions taken ***without malice or fraud***. O.C.G.A. § 31-7-141(emphasis added).

State law immunity extends to clams for equitable relief.

To the extent that Georgia's peer review and medical review statutes are conditioned upon absence of malice and deception, the statutes are ***preempted by HCQIA*** (where bias is not relevant). *Patton*, 260 Ga. App. at 208; *Patrick,* 255 Ga. App. 444.

However, unlike HCQIA, Georgia's statutes provide immunity from all civil liability and cover claims for ***equitable relief.*** *See DeKalb Medical Center, Inc. v. Obekpa*, 315 Ga. App. 739, 740 (2012).

Where there is no evidence of malice, there is no basis upon which to enjoin a hospital from reporting an adverse decision to the National Practitioner Data Bank. *Obekpa,* 315 Ga. App. at 744.