How Courts Are Protecting Unjustified Peer Review Actions Against Physicians by Hospitals

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"… The goal of uniform justice is unattainable in the United States … It seems inescapable that the American people will continue to be guinea pigs in a national experiment run by courts."

Judge Richard Posner, U.S. Court of Appeals for the Seventh Circuit: *Law, Pragmatism and Democracy (2003)*

Introduction

Retrospective review of medical records by peers ("peer review") remains the mainstay for evaluating the quality of medical care. In 1986, Congress enacted the Health Care Quality Improvement Act (HCQIA) to protect hospitals and peer reviewers from liability for money damages for actions against a physician's hospital privileges that meet the reasonableness and fairness standards of 42 U.S.C. § 11112(a) shown in Table 1. The statute creates a presumption that peer review actions meet these criteria, and physicians have the burden to rebut the presumption of immunity by a preponderance of the evidence.[1]

Lawmakers were very aware that the legal protection HCQIA created could be misused. They cut back the original scope of the immunity because members of the House Committee on the Judiciary (HCJ) from both sides of the political aisle opposed HCQIA's immunity provisions, and HCQIA's proponents in Congress made it clear that they never intended HCQIA to protect any abuses of the peer review process.

For example, Rep. Waxman (D-Calif.), chairman of the House Committee on Energy and Commerce (HCEC), which considered the original bill, was emphatic that "we cannot tolerate abuses of the peer review system, and that H.R. 5540 [the bill enacted into law as HCQIA] was never intended to protect any such abuses."[2] Nevertheless, the courts have disregarded the legislative history of HCQIA in the HCJ, and have interpreted and applied HCQIA in a way that protects unjustified peer review actions against physicians by hospitals against Congress's expressly stated contrary intent.

Questions about how and why courts are protecting peer review abuses are complex. One reason is that most courts have misunderstood the legal effect of the presumption of immunity HCQIA created. After it voted the bill out of committee, the HCEC explained in its report that the presumption of immunity was created to permit disputes to be resolved quickly on summary judgment.[3] Lawmakers believed "that the standard [for immunity] will be met in the overwhelming majority of professional review actions"[3] and having physicians prove that it was not met, rather than have hospitals prove that it was, made practical sense. Lawmakers did not create the presumption to make it more difficult for physicians to meet their burden of proof.

Nevertheless, courts have consistently misinterpreted the legal effect of HCQIA's presumption of immunity as increasing the physician's burden of proof, and as creating an almost insurmountable obstacle to prove that the hospital's actions did not meet the standards of § 11112(a). For example, a panel of the Third Circuit, which included future Supreme Court Justice Samuel Alito, declared: "The HCQIA places a high burden on physicians to demonstrate that a professional review action should not be afforded immunity."[4]

This is simply not true. A physician's burden to rebut the presumption of immunity is the lowest known to the civil law—the preponderance of the evidence standard—and as Judge Lipez, writing for the First Circuit, explained, the presumption of immunity has *no effect* on the physician's burden on rebuttal:

> For [the plaintiff] Dr. [Kunwar] Singh...*the burden of defeating summary judgment remains similar to the burden faced by any plaintiff confronted with a properly supported motion for summary judgment.* Summary judgment would not be proper if Dr. Singh raised a genuine issue of fact material to the determination of whether Blue Cross met one of the HCQIA standards during its peer review [emphasis added].[5]

Courts have misunderstood the legal effect of HCQIA's presumption in other respects, with the upshot that they do not review motions for summary judgment based on HCQIA immunity appropriately, and are improperly dismissing cases on summary judgment before the physician ever gets a chance to present the merits of his or her case to a jury.

Another reason courts are protecting improper peer review actions and abuses of the peer review process is that they have ignored the amendments made to H.R. 5540 following hearings before the HCJ, and have consequently misconstrued the balance Congress struck between protecting *effective* peer review and protecting physicians against *improper* peer review, as discussed below. For example, in the version of H.R. 5540 voted out of the HCEC, a physician had to rebut the presumption of immunity by clear and convincing evidence, but following hearings in the HCJ, the physician's burden was reduced to the preponderance of the evidence.[6] The clear and convincing evidence standard is "reser-

Table 1. Requirements for Immunity under HCQIA [1]

A professional review action must be taken:

(1) in the reasonable belief that the action was in the 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). 42 U.S.C. § 11112(a).

ved to protect particularly important interests,"[7] whereas the preponderance of the evidence standard "is employed ... when an incorrect finding of fault would produce consequences as undesirable as ... an incorrect finding of no fault."[8]

Therefore, by reducing the physician's burden of proof, Congress sent a clear signal that it was as important to avoid falsely accusing physicians of incompetence as to identify incompetent physicians. Reinforcing this clear signal were the repeated reassurances of Rep. Henry Waxman, floor manager of the bill, that "Bad faith peer review activities permitted by the Patrick case could never obtain immunity under H.R. 5540."[2,6]

The federal courts have destroyed the careful balance Congress struck—and had to strike to get the immunity provisions of the statute passed by the House—by replacing the objective reasonableness standards of § 11112(a) with a deferential standard of review that accepts as reasonable any facially plausible belief the peer reviewers could have subjectively entertained, however objectively unreasonable. The courts have justified replacing the standard Congress enacted by invoking a judicially created—i.e. common law—doctrine referred to as the "non-review doctrine" that antedated HCQIA, notwithstanding that a common law doctrine cannot modify a federal statute.

Courts Protect Unjustified Peer Review Actions: Overview

Courts have profoundly misconstrued HCQIA's immunity provisions and the balance Congress struck between protecting peer reviewers and protecting physicians from improper peer review, as shown most clearly in a concurring opinion in a case that held a hospital immune for summarily suspending the privileges of an emergency room physician, Dr. Susan Meyer, based on a single dubious case. Justice Shearing of the Nevada Supreme Court, joined by Justice Rose, explained:

> I must concur in the result reached in the majority opinion because HCQIA sets such a low threshold for granting immunity to a hospital's so-called peer review. Basically, as long as the hospitals provide procedural due process and state some minimal basis related to quality health care, *whether legitimate or not, they are immune from liability.* Unfortunately, this may leave the *hospitals and review board members free to abuse the process for their own purposes without regard to quality medical care. This is particularly probable* since most courts have indicated that the legislative history of HCQIA bars consideration of the subjective motives or biases of peer review boards. Here, hospital administrators, immediately upon recognizing a public relations problem, decided that Dr. Meyer was to be the hospital's scapegoat for the unfortunate death of a patient.… Unfortunately, the immunity provisions of HCQIA sometimes can be used, not to improve the quality of medical care, but to *leave a doctor who is unfairly treated without any viable remedy* [emphasis added].[9]

Although few courts have been as forthright, this concurrence accurately describes how most courts have interpreted and applied HCQIA. For example, the Maryland Special Court of Appeals held a hospital immune for revoking the privileges of a physician who, the court admitted, had an "excellent professional reputation" and a "legitimate gripe," and who "put patient welfare above all else." The Court reasoned that "to her misfortune" the physician's claims against the hospital brought "the HCQIA into play," and, "as reprehensible as some of [the peer reviewer's] actions may have been, they succeed as a matter of law."[10] This interpretation is flatly contradicted by the legislative history of HCQIA and the balance Congress struck between protecting peer reviewers and protecting physicians from peer review abuses.

The law is not static. By protecting peer review abuses, courts have encouraged them, and as the abuses have become more brazen, so have the interpretations of HCQIA to protect them. For example, in *Jenkins v. Methodist Hospital of Dallas*,[11] the U.S. District Court for the Northern District of Texas held a defendant physician immune for knowingly providing false information to peer review committees about the plaintiff physician whose hospital privileges had been adversely affected. Although the court was "troubled" that a statute should protect a person who knowingly provided false information, it never questioned its own interpretation of the statute. Relying on *Jenkins*, two Virginia courts reversed their earlier rulings denying defendants' motions to dismiss, and held the defendant hospital and peer reviewers immune under HCQIA.[12,13] For example, in *Meyers v. Riverside Regional Medical Center*,[12] retired Judge John Clarkson stated in a letter opinion dated June 12, 2006, that the evidence in the record showed that the false statements about Dr. Paul Meyers[14] were made only with reckless disregard, not with knowledge of falsity, and that no one had said anything "untruthfully." Even if one accepts these factual findings that should have been made by a jury, Judge Clarkson did not explain why peer review actions based on false statements made with "reckless disregard" were objectively reasonable; he merely asserted it.

But Judge Clarkson did not stop there. Notwithstanding that he had initially denied a motion to dismiss Dr. Meyers' claim—and therefore, could not have found the claim to be frivolous or without foundation—and later determined that false statements were made about Dr. Meyers with "reckless disregard" of falsity, he held that the "cause was unreasonable and without foundation brought," and awarded most of the hospital's attorney's fees. Judge Clarkson's decision illustrates a disturbing recent trend: courts are awarding attorney's fees in cases that are obviously not "frivolous, unreasonable, without foundation, or [brought] in bad faith," and, therefore, that do not meet the criteria for awarding attorneys' fees under HCQIA.[15]

Dr. Meyers proved that the actions of each of two hospitals on his privileges were unreasonable, arbitrary, and capricious, and he prevailed at each hospital's "fair" hearing. I am unaware of any other case in which a court awarded attorneys fees against a physician who prevailed at any, much less two, hospital hearings. There is no right of appeal from tort cases in Virginia, and both the Virginia Supreme Court and the U.S. Supreme Court denied Dr. Meyers's petitions.

In *Cowell v. Good Samaritan Hospital*,[16] the legal protection being accorded unjustified peer review actions by the courts reached its apogee, for the Washington Court of Appeals literally made facts up out of whole cloth to justify holding the hospital immune. In *Cowell*, the hospital's own hearing committee determined that the allegations about Dr. Pamela Cowell's cases that had prompted a Request for Corrective Action (RFCA), and about other cases that were used to bolster these allegations, "lacked a substantial factual

basis." Nevertheless, the hospital revoked all of Dr. Cowell's privileges for completely different reasons—that she had ostensibly exceeded the scope of her privileges by performing four laparoscopically assisted vaginal hysterectomy (LAVH) procedures with a Dr. Michaelson, who had privileges to perform these procedures, and failed to cooperate with the peer review process. These allegations, which no one had ever made before, were not the basis for the RFCA, but were simply fabricated during the investigation. The Washington Court of Appeals rejected Dr. Cowell's argument that this shifting justification for the hospital's action reflected pretext, not a genuine belief about the quality of patient care, claiming that "the…record contains abundant evidence of concerns about Cowell's performance of procedures beyond the scope of her privileges and her inability to have her procedures properly videotaped and monitored. In the light of this record, Cowell's claim that such concerns were 'shifting justifications for disciplinary action' lacks merit." The court concluded: "In sum, the MEC's [medical executive committee's] recommendation and the Board's decision were based on long-standing concerns that Cowell's conduct—namely, her performance of LAVHs without privileges and her failure to comply with videotaping and monitoring requirements—negatively impacted patient care."

The court simply made all this up. Among the evidence in the record that flatly contradicted the court's claims about long-standing evidence of Dr. Cowell exceeded the scope of her privileges were the following testimonies by the chairman of the investigating committee and the director of quality management, respectively:

Q: And you did not come across, did you, any document, peer review, letters, or anything from anybody suggesting that Dr. Cowell had—telling her that she had exceeded the scope of her privileges, correct?
A: Correct.[17]
Q: Did you hear anybody in any committee, or, indeed, outside of a committee, somebody like Dr. Mott or Dr. Morris, ever raise any questions about Dr. Cowell's cooperation with the peer-review process?
A: No.
Q: Did you hear anyone ever say, in any committee, that Dr. Cowell had exceeded the scope of her privileges?
A: No.
Q: Was ever any determination made, while you were there, in connection with her reapplication for privileges, that Dr. Cowell had practiced outside the scope of her privileges?
A: No.[18]

How Courts Protect Peer Review Abuses: Summary Judgment

Courts protect peer review abuses because they almost always hold that the physician failed to rebut the presumption of immunity, and dismiss lawsuits against hospitals on summary judgment without a trial. Summary judgment is a civil procedure unique to American law that allows courts to dismiss a case without a trial if the judge determines that the evidence in the record is insufficient to allow a jury to find for the plaintiff. To make this determination, courts must follow strict rules for evaluating evidence in the record to preserve the right to trial by jury in civil cases, which is protected by the Seventh Amendment to the U.S. Constitution, and by all state constitutions. Courts protect peer review abuses by failing to follow these rules.

The right to a jury trial in civil cases is the right "that questions of fact in common law actions shall be settled by a jury, and that the court shall not assume directly or indirectly to take from the jury or to itself such prerogative."[19]

On motions for summary judgment, courts are prohibited from "weighing" evidence to decide which evidence to believe or what inferences to draw from the evidence, or from making credibility determinations, in order to preserve this right to a jury trial. Courts must accept as true all the plaintiff's evidence that has support in the record, and draw all reasonable inferences supported by the evidence in the plaintiff's favor. Evidence presented by the defendant (the moving party) may be accepted as true only if a jury would be *required* to believe it.[20,21] If a piece of evidence could reasonably support two inferences, one favoring the plaintiff the other the defendant, the court must draw the inference favoring the plaintiff, and may not "either credit [the defendant's] asserted inferences over those advanced and supported by [the plaintiff] or [fail to] give [the plaintiff] the inference [he/she was] due."[22]

In other words, the judge must construct a best-case scenario from the evidence in favor of the plaintiff that represents the most favorable view a reasonable jury could take of the evidence from the plaintiff's vantage point. The court then asks, not what conclusion *it* would draw from this best-case scenario if *it* were sitting as a juror, but whether a reasonable jury *could* find for the plaintiff on his or her claim(s) based on this best-case scenario. Not all judges possess the capacity for detachment this inquiry requires.

The rationale underlying these rules is that if no one could find for the plaintiff on this best-case scenario, then there is no point in having a jury trial because an actual jury could not reasonably reach a verdict more favorable to the plaintiff than the verdict this judicially constructed best-case scenario can reasonably support. If, however, in a HCQIA case, a reasonable jury *could* find for the physician, summary judgment would be improper, even if the jury could also find for the hospital, because the very purpose of the right to a jury trial is to have juries, not judges, decide who prevails when reasonable minds could come to different conclusions on that question. Many courts ignore this point when it comes to deciding motions for summary judgment based on HCQIA immunity.

Congress cannot "strip parties contesting matters of private right of their constitutional right to a jury trial"[23] or authorize states to do so.[24] Therefore, when it enacted HCQIA, Congress had neither the intent nor the authority to require courts to evaluate evidence offered to oppose a motion for summary judgment based on HCQIA differently from how they are required to evaluate evidence on any other summary judgment motion. Professor Charity Scott noted in a prescient 1991 article that antedated the current case law on HCQIA:

> The judge's function to evaluate the evidence for its sufficiency must be carefully distinguished from the jury's function to weigh the evidence for its persuasiveness.... [S]ummary judgment should be handled similarly with or without HCQIA. At the summary judgment stage..., *independently of the defendants' denials and explanations*, the court should evaluate whether *the plaintiff's evidence is sufficient* for a rational factfinder to find in her favor. Finally, it should be stressed that both HCQIA and the trilogy [of cases decided by the U.S. Supreme Court in 1986] have

> only allocated burdens of proof; neither authorizes judicial deference to the actions of peer reviewers…. [T]he presumption does not serve to increase the weight of plaintiff's burden of proof [emphasis added].[25]

Courts simply do not evaluate evidence on a motion for summary judgment based on HCQIA immunity in this way, because they ask only whether a jury could find for the hospital, and not whether the jury could find for the physician. This is what the *Cowell* court did when it asked at oral argument whether Dr. Cowell had shown that a jury "could conclude that no reasonable person could believe that [Dr. Cowell] had acted outside the scope of her privileges," when the question the court should have asked was whether a jury could conclude that Dr. Cowell had *not* "acted outside the scope of her privileges." Since exceeding the scope of her privileges was the hospital's justification for its action against Dr. Cowell, the court's question was tantamount to asking whether a jury could find for the hospital. However, the law required the court to ask *solely* whether a jury could have found for Dr. Cowell because summary judgment is only proper "if the evidence of reasonableness...is so one-sided that no reasonable jury could find that [the hospital's action was not reasonable]."[5] Manifestly, summary judgment in this case was improperly granted, and Dr. Cowell was deprived of her constitutional right to a jury trial.

Asking the wrong question about the evidence is not the only way in which courts are incorrectly deciding motions for summary judgment based on HCQIA immunity. Courts are also not allowing juries to decide whether peer review actions were reasonable and fair, but are deciding these questions themselves because they treat them as questions of law rather than as questions of fact for a jury to decide. Moreover, as already noted, they are deciding these questions by deferring to the peer reviewers—that is, they deem whatever the peer reviewers did or did not do to be objectively reasonable.

Courts Have Disregarded HCQIA's Legislative History

It is impossible to appreciate the extent to which the federal courts have rewritten HCQIA to protect peer review abuses without understanding why Congress enacted HCQIA in the first place, and what happened to the original bill in its passage through the House—i.e. its legislative history.

The bill that became HCQIA was first introduced in the HCEC by Rep. Ron Wyden (D-Ore.), who is now in the Senate. Congress was debating what many at that time perceived to be a medical malpractice crisis "that threatene[d] to drive physicians out of practice, leaving their patients stranded without care."[26] Lawmakers concluded that this crisis was largely attributable to "a small—but deadly—group of incompetent and unprofessional physicians who cause[d] serious injury and needless death," because they accounted for a disproportionate number of malpractice claims that drove up insurance premiums. HCQIA was enacted specifically to target this "small but deadly" group of physicians.

For example, Rep. Wyden stated, "The bill before us today will create an important first line of defense against malpractice: ridding the profession of bad doctors is the first line of defense against malpractice. As such, it is the first step toward a national malpractice strategy."[27]

Lawmakers recognized that the problem was not that no one knew who these "deadly" doctors were, but that "[t]ypically they cut a deal with the hospital to leave town…carrying good references in return for not suing the hospital."[27] Instead of sanctioning hospitals that engaged in such conduct, HCQIA's proponents established a "reporting system" that we know today as the National Practitioner Data Bank (NPDB), calling it "the essential feature of H.R. 5540."[27]

As Rep. Waxman explained, "This bill focuses on those instances in which physicians injure patients through incompetent or unprofessional service, are identified as incompetent or unprofessional by their peers but are dealt with in a way that allows them to continue to injure patients. The reporting system in this legislation would virtually end the ability of incompetent doctors to skip from one jurisdiction to another without detection."[28]

The justification for the immunity provisions (Title I) of HCQIA was that fear of liability under federal antitrust laws—which require damage awards to be trebled, and against which state immunity statutes could not immunize physicians—would deter physicians from criticizing their colleagues, and render peer review ineffective. Rep. Waxman argued that once the reporting system was implemented, a surge in antitrust suits would result, and peer reviewers needed protection against them.

These arguments were temporarily bolstered by the verdict of an Oregon jury that awarded Dr. Timothy Patrick $1.8 million on his antitrust claims against a hospital and peer reviewers.[2] Lawyers representing hospital groups seized on the *Patrick* verdict to convince lawmakers that "doctors participating in peer review face the tremendous risk…that they will be sued for their actions against a colleague."[28] These claims were bogus, and even members of the hospital lobby were forced to concede in testimonies before the HCEC that "plaintiff-physicians rarely have prevailed in these cases,"[26, p 276] and that "hospitals are, with only rare exceptions, successful in defending such cases."[26, p 297] The HCJ opposed HCQIA's immunity provisions as directed at a "phantom problem."

For example, Mr. Victor Glasberg told the committee: "I submit to the committee that somebody is running scared from a phantom problem…. [A]ntitrust theory is pretty much a bust for doctors seeking retribution for wrongfully deprived privileges."[29]

Physicians asserted federal antitrust claims in the first place because they had been unsuccessful in recovering on other legal theories. Mere denial, or revocation of a physician's hospital privileges does not in itself give rise to a cause of legal action. Physicians had to assert claims sounding in tort or contract in order to recover damages, and these claims were usually unsuccessful. Most states had their own immunity statutes that protected peer reviewers from such claims when they had acted in good faith, and often physicians asserting state law claims against peer reviewers had to prove bad faith by clear and convincing evidence, which is a very high standard to meet.

As Rep. Edwards, who opposed Title I, explained: "It is very difficult, under existing state and federal law, to challenge fairly administered review actions…. Therefore, peer review participants' fear of damage claims is unfounded."[30]

Before the bill—now called H.R. 5540—was voted out of the HCEC on Sept 26, 1986, the scope of immunity for anticompetitive conduct was narrowed, but peer review actions improper in other respects could still satisfy the standards of § 11112(a), and receive protection.[3] Therefore, the scope of immunity was narrowed further following hearings in the HCJ on Oct 8-9, 1986.[31] Although discriminatory actions against racial minorities most concerned lawmakers, they were equally emphatic that actions based on "turf battles," the type of patients treated, or the style of a physician's practice were just as unacceptable, and would not obtain immunity under HCQIA. The immunity that remained was intended to "provide very limited immunity from liability for allegations of antitrust violations by disciplined physicians."[32]

The HCJ recommended deleting the immunity provisions of H.R. 5540 because it was unnecessary, provided no incentive actually to engage in effective peer review, and could be misused to shield illegitimate actions as well as protect appropriate ones.[33] Their concerns were vindicated when two days after H.R. 5540 was reported out of the HCEC, the Ninth Circuit Court published its opinion on defendants' appeal in the *Patrick* case, and described the peer review in that case as "shabby, unprincipled and unprofessional," and found "substantial evidence that the defendants acted in bad faith in the hospital's peer review process."[34] To assuage the concerns engendered by this decision, Rep. Waxman repeatedly reassured members of the HCJ that the extensive revisions to H.R. 5540 had cut back the scope of the immunity to the point at which bad faith peer review activities could never obtain immunity:

> These provisions have undergone a number of revisions in the legislative process. I stress this because most of the objections raised about earlier versions of H.R. 5540 (and its predecessor, H.R. 5110) have been addressed in recent drafts, and particularly in the provisions that are now before the House.[6]

Nevertheless, courts have repeatedly held that the good or bad faith of the peer reviewers, or the motives underlying their actions, are irrelevant to whether or not they are immune under HCQIA.[5,9]

Rep. Waxman was referring to the revisions made to H.R. 5540 in the HJC after it was voted out of the HCEC, but courts have disregarded these revisions, and have relied solely on the HCEC report of Sept 26, 1986, to interpret HCQIA's immunity provisions. In an early and very influential decision, the Eleventh Circuit Court, relying on this report, concluded that, "The statute attempts to balance the chilling effect of litigation on peer review with concerns for protecting physicians improperly subjected to disciplinary action."[35] However, at this stage of the bill's legislative history, the main concern was anticompetitive conduct, and the balance to which the Eleventh Circuit referred protected physicians principally from improper anticompetitive conduct, not from other abuses.

By disregarding the amendments to H.R. 5540 made after it was voted out of the HCEC, which narrowed the scope of immunity further, courts have transformed the "very limited," qualified immunity Congress enacted into a virtually absolute immunity. Three important constructions or "interpretations" of HCQIA that effected this transformation and destroyed the balance Congress struck are described below.

Deference to Peer Reviewers

Nothing in the language or legislative history of HCQIA authorizes courts to defer to the peer reviewers whose actions are at issue as to what is reasonable.[16] In fact, HCEC rejected a subjective, good-faith standard of what was reasonable under § 11112(a) before the bill was transferred to the HCJ: "In response to concerns that 'good faith' might be misinterpreted as requiring only a test of the subjective state of mind of the physicians conducting the professional review action, the committee changed to a more objective 'reasonable belief' standard."[26]

A more subtle, but no less clear indication that lawmakers intended courts to apply an objective standard *without* deference to peer reviewers is provided by the amendments made to 42 U.S.C. § 11151(9) by the HCJ.

HCQIA applies only to professional review actions, and 42 U.S.C. § 11151(9) defines what constitutes a professional review action. The version of H.R. 5540 voted out by the HCEC, § 11151(9) listed four kinds of activities that were specifically *excluded* from the definition of professional review action to make it clear that HCQIA did not apply to these activities.[36]

However, members of the HCJ were not satisfied with these safeguards because the real reasons motivating a peer review action may not be apparent from the face of the action. Therefore, a catchall provision was added to § 11151(9) to ensure that the four activities listed were not the only ones to which HCQIA would *not* apply. Rep. Waxman actually tried to convince members of the HCJ that this (and other) amendments were not necessary, because he claimed that H.R. 5540, as voted out by the HCEC, already protected against abuses:

> I want to make it clear, however, that we fully agree that we cannot tolerate abuses of the peer review system, and that H.R. 5540 was never intended to protect such abuses. To reiterate: nothing in H.R. 5540, *as currently drafted,* would protect the type of abuses that I have referred to [emphasis added].[26]

This was not true, because the protection applied only to anticompetitive conduct, and immunity *could* attach to other types of unspecified "improper" peer review. This was apparent from the following language in the HCEC report:

> Initially, the [HCEC] considered establishing a very broad protection from suit for professional review actions. In response to concerns that such protection might be abused and serve as a shield for anti-competitive economic actions under the guise of quality controls, however, the committee restricted the broad protection.
>
> The provisions would allow a court to make a determination that the defendant has or has not met the standards specified in section [11112(a)]. The [HCEC] Committee intends that the court should so rule even though other issues in the case need to be resolved. For example, a court might determine at an early stage of litigation that the defendant has met the [§ 11112(a)] standards, even though the plaintiff might be able to demonstrate that *the professional review action was otherwise improper*" [emphasis added].[26]

Therefore, the HCJ rejected Rep. Waxman's reassurances, and insisted on the catchall provisions "to clarify that the list of exclusions [in § 11151(9) was] not exhaustive [and] to avoid the inference that any matters not listed in this subsection [42 U.S.C. § 11151(9)] are necessarily ones related to competence or professional conduct"—i.e. were professional review actions to which HCQIA applied.[37] Rep. Waxman himself explained the purpose of including § 11151(9)(E) (the catchall provision) as follows:

> This subsection reflects the concern that professional review actions brought for illegitimate reasons may not appear as such on their face…. [S]erious issues arise when actions are stated to be for legitimate reasons, but are challenged as not being genuinely based on the competence or professional conduct of an individual physician…. For example, an action taken against a physician because of a style of practice or a pattern of patients that do not generate sufficient revenue for the hospital would not be covered by this bill.[37]

Waxman also stated: "The immunity provisions have been restricted so as not to protect illegitimate actions taken under the guise of furthering the quality of health care."[28]

Statements by other lawmakers who *supported* HCQIA's immunity provisions further make it clear that they never intended HCQIA to protect pretextual peer review actions motivated by factors other than a genuine belief that the action would further the quality of care, prevent an incompetent or unprofessional physician from practicing, and protect patients**.** For example, Rep. Tauke stated:

> The Health Care Quality Improvement Act provides carefully defined immunity…for peer review actions undertaken with the *clear motive* of improving the quality of care and carried out in a manner giving the physician under review every opportunity to defend his or her record…. We drafted, redrafted, and then drafted again to provide that (1) the protection is afforded only to quality of care *motivated* reviews of physicians [emphasis added].[27]

It cannot be reasonably inferred that lawmakers, who expressly rejected a subjective good-faith standard as sufficient for immunity to attach under HCQIA, and who then amended § 11151(9) out of concern that the peer reviewers' stated reasons for a peer review action may not have been their actual reasons for taking the action, nevertheless intended courts to defer to peer reviewers, and accept as reasonable whatever they professed to believe to be reasonable. Lawmakers amended H.R. 5540 because they were concerned that HCQIA's immunity could be used to protect pretextual actions. The only rational conclusion that can be drawn from the amendment they made to the definition of professional review action, and their stated reasons for amending the definition, is that Congress did not intend HCQIA to apply to pretextual actions, and the statutory scheme it created read pretextual actions out of the definition of "professional review action" altogether.

The presumption of immunity is a presumption that the criteria for immunity in § 11112(a) were met *by a professional review action*. It is not a presumption that any action by a hospital on a physician's privileges *is* a professional review action— i.e. that it was undertaken for legitimate reasons. Lawmakers recognized that the stated reasons for a professional review action may not be the actual reasons for the action. Therefore, they could not have intended the say-so of peer reviewers, or the fact that facially an action appeared to be based on a physician's competence or conduct, to be sufficient to prove that an action satisfied the requirements of § 11151(9), and, therefore, that HCQIA applied at all. Much less did lawmakers intend courts to accept as reasonable whatever the peer ostensibly believed to be reasonable.

The Non-review Doctrine

In deciding motions for summary judgment based on HCQIA immunity, courts are improperly deferring to peer reviewers to find hospitals immune, and have justified their deference on the basis of the so called "non-review doctrine." This is a judge-made, prudential rule, not a doctrine "grounded in statutory or constitutional provisions."[38]

To understand this doctrine, it is crucial to understand that, under the common law, unjustified, unfair, or otherwise improper denial or revocation of a physician's hospital privileges does not give rise to a legal cause of action. For a physician to have a *legal* claim, the hospital or peer reviewers had to commit some tort or breach some contract in the peer review process independent of the peer review action itself. Therefore, aggrieved physicians sought to have unjustified peer review actions against them reversed through "equity"—the court's inherent power to order what justice requires, which does not include awarding money damages. That is, physicians sought *injunctions*, which means they asked the courts to enjoin hospitals from revoking their privileges. HCQIA does not apply to equitable remedies, and, therefore, does not affect the ability of physicians to obtain injunctions in appropriate cases.[39]

However, courts have historically been very unwilling to intervene in equity to reverse staffing decisions of *private* hospitals for a variety of reasons,[40] one of which was that they felt less qualified than medical professionals to make judgments about the operation of hospitals.[41,42] This unwillingness to reverse hospital decisions on equitable grounds is what is referred to as the "*non-review doctrine.*" Although some jurisdictions still adhere strictly to this doctrine,[43] most have modified it,[44] and the Michigan Supreme Court recently rejected the doctrine altogether.[38]

Today, most courts will review adverse decisions on physicians' privileges, albeit on differing legal theories,[45] to ensure fairness and sufficiency of the evidence,[42,46,47] because hospitals serve the public, and are private only in the sense that they are non-governmental.[48] The important point, however, is that because HCQIA applies only to legal claims, and does not apply to injunctions, physicians are no more or less likely to obtain an injunction to enjoin a hospital from taking actions on their privileges today than they were before HCQIA was enacted.

The crucial point to understand about the non-review doctrine is that it applied *only to injunctions*, not legal claims—i.e. the obverse

of HCIQA. The non-review doctrine never had any application to legal claims for money damages—say, a tort claim. Therefore, it has nothing whatsoever to do with HCQIA, meaning, it is not affected by HCQIA's enactment, and it has no effect on how HCQIA applies to *legal* claims. The non-review doctrine applies only when a court is considering whether or not to grant an injunction to reverse a hospital's action on a physician's privileges.

For example, in an early leading case, the Iowa Supreme Court declined to enjoin a Catholic hospital from revoking a physician's privileges because he was involved in a highly publicized divorce, but emphasized that had the "acts or omissions" of the hospital's board of trustees been "fraudulent...or otherwise wrongfully injurious to another...[they] would be liable as any other private corporation, so offending."[41] This remains the law today. Courts distinguish between injunctions to reverse hospital staffing decisions and tort and contract claims for money damages,[34] and "the tangential involvement of the peer review process does not foreclose judicial intervention in the types of disputes normally dealt with in the courts."[49]

Obviously, a doctrine that does not apply to a tort claim cannot properly be invoked to justify holding a hospital immune from a tort claim under HCQIA or any other doctrine. But this is exactly what courts have done by incorporating the non-review doctrine into the standards of review under HCQIA. The Eleventh Circuit Court's decision in *Bryan v. James E. Holmes Regional Medical Center* began this process by overturning a $4.2 million jury verdict for the plaintiff-physician, and holding the hospital immune from damages under HCQIA.[35] Writing for the Eleventh Circuit, Judge Tjoflat stated:

> [T]he intent of [the HCQIA] was not to disturb, but to reinforce, the preexisting reluctance of courts to substitute their judgment on the merits for that of health care professionals and of the governing bodies of hospitals in an area within their expertise.[35]

Judge Tjoflat was quoting from the Supreme Court of West Virginia's decision in *Mahmoodian v. United Hospital Center*.[47] The issue in *Mahmoodian* was whether the court should grant the plaintiff-physician an *injunction* to enjoin the hospital from terminating his privileges. *Mahmoodian* invoked the "pre-existing reluctance of courts"—i.e. the non-review doctrine—to explain why it was denying the injunction. With its passing reference to HCQIA, which had just been enacted and did not apply to the case, the court was simply stating that Congress did not intend to change this pre-existing reluctance, but intended to reinforce it by making HCQIA apply only to legal claims, not injunctions.

Mahmoodian's interpretation of the law was correct because HCQIA does *not* apply to injunctions, only legal claims, but Judge Tjoflat's invocation of the non-review doctrine was inapposite because the plaintiff-physician, Dr. Bryan, was not seeking an *injunction*. He was seeking money damages under state and federal law. In *Poliner v. Texas Health System*, the Fifth Circuit took the misapplication of the non-review doctrine one step further, and said that Congress intended physicians subjected to "abusive peer review" to "access the courts" by filing an *injunction*, not to recover money damages.[50] This conclusion is flatly contradicted by the reassurances of HCQIA's proponents that the statute would not protect illegitimate peer review actions,[2,6] and, therefore, could not bar recovery of money damages for such actions if an applicable legal theory of recovery could be found.

The upshot of all this statutory rewriting by the federal courts is that the sufficiency of a physician's rebuttal evidence never gets evaluated at all. In *Cowell*, for example, trial Judge Katherine Stolz declared from the bench without a written opinion, "They are immune from suit because they were doing this to further peer quality review, and the statute clearly allows that *that is the final remedy*, and *I don't have any authority to second-guess that*, nor am I going to penalize the people who are voluntarily participating in that because that flies in the face of the Congressional Act to encourage the peer review" [emphasis added].[51]

HCQIA Immunity Is a Question of Fact

The final way in which most federal courts have rewritten HCQIA to protect peer review abuses is by declaring that whether the physician has rebutted the presumption of immunity is a question of law for the court to decide, not a question of fact for the jury to decide.[35] However, it is elementary that questions of law do not depend on evidence.[52] Since a hospital's immunity depends on the sufficiency of the physician's rebuttal evidence, immunity cannot be a question of law. As Chief Judge Rice of the U.S. District Court for the Southern District of Ohio explained, "Because questions of law do not turn upon the satisfaction of evidentiary burdens, *it is clear* that the reasonableness or adequacy of a particular review action is a *question of fact, to be resolved by the trier of fact* [emphasis added]."[53]

Courts ostensibly evaluate the sufficiency of a physician's rebuttal evidence by applying a test first annunciated by the Ninth Circuit in *Austin v. McNamara* that all courts have subsequently adopted: "Might a reasonable jury, viewing the facts in the best light for the plaintiff, conclude that he has shown, by a preponderance of the evidence, that the defendants' actions are outside the scope of § 11112(a)?"[54]

Although the Eleventh Circuit adopted this test in *Bryan*, it nevertheless held that immunity under HCQIA was not a question of fact for the jury to decide, but a question of law for the court to decide. [35] Almost all courts have adopted this construction of HCQIA, but as Chief Judge Rice observed, "In permitting the issue of HCQIA immunity to be resolved on summary judgment, these courts have not always been careful in their explanation of the analysis involved."[53]

This was, to say the least, an understatement, because no court has ever explained how the two legal standards of review adopted by the *Bryan* court can be reconciled. That is, how can a court ask whether a jury *could* conclude that the peer review action at issue was unreasonable, and simultaneously decide itself whether the

action was reasonable or unreasonable? The Eleventh Circuit simply declared this to be the law, and justified it by drawing a false analogy between HCQIA immunity and the qualified immunity government officials have under § 1983, which the First Circuit subsequently rejected.[5]

Immunity under § 1983 depends on the reasonableness of a government official's action in the light of *legal rules* that were *clearly established* when the action was taken, whereas immunity under HCQIA depends on the reasonableness of a professional review action based on *facts* known when the action was taken, not legal rules. Whether a legal rule was clearly established at a given point in time is a quintessentially legal question that does not depend on any case-specific facts, and is properly a question of law for the court to decide. But, as Judge Lipez pointed out for the First Circuit, "[t]here is no comparable legal question involved in the immunity analysis under HCQIA."[5] Therefore, Judge Lipez rejected Judge Tjoflat's analogy, and explained that juries can decide the question of immunity because:

> Although peer review actions are not within the common experience of jurors, they are not so esoteric that they cannot be fairly evaluated by jurors, perhaps with the assistance of expert witnesses. Also, we routinely ask jurors to evaluate the quality of medical care in medical malpractice cases. As this case illustrates, the quality of medical care is often at the core of a peer review dispute under the HCQIA. Therefore, we see no reason why juries should be excluded entirely from immunity determinations under the HCQIA.[5]

The Tenth Circuit has also rejected the Eleventh Circuit's construction of HCQIA, and allows juries to decide the reasonableness of peer review actions.[54] The U.S. Supreme Court ordinarily resolves such conflicts between the circuits over the interpretation of a statute, but has repeatedly denied certiorari to resolve the split among the circuits over this important question.[55,56]

Conclusions

This brief review of the case law and legislative history of HCQIA has attempted to show that courts have interpreted and applied HCQIA incorrectly, and in a way that protects peer review abuses and encourages them. This review has by no means covered all the misinterpretations of HCQIA that have resulted in legal protection being afforded peer review abuses by the courts. The consequences of this legal protection have, of course, been devastating to physicians, but what is less well appreciated is that the peer review process, quality of care, and ultimately the public, have been adversely affected as well.[56] Neither Congress nor the U.S. Supreme Court have shown any interest in rectifying this growing problem. States, however, could legislate to protect physicians against peer review abuses, as such legislation would not be prempted by HCQIA.

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