

# Sham Peer Review: Outrageous and Unjustified Immunity

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The history of outrageous and unjustified immunity in sham peer review began in the mid-1980s with a perception, probably false, that instances of malpractice by physicians were increasing. In addition, there were purported good intentions of Congress to encourage vigorous peer review and to stop incompetent physicians from moving their practice from one state to another. Bowing to pressure from the media-created perception of a crisis in malpractice by physicians, and from the American Medical Association's allegation about the chilling effect antitrust lawsuits could have on the willingness of physicians to perform peer review, Congress passed the Health Care Quality Improvement Act (HCQIA) in 1986.

Nearly 30 years later, the immunity provided by HCQIA has resulted in rampant and widespread abuse of the peer review process for purposes having nothing to do with professional competence or conduct.

## ***Patrick v. Burget***

Ironically, the case that led to the passage of HCQIA was a court-proven case of sham peer review and violation of antitrust law—*Patrick v. Burget*.<sup>1</sup> As reviewed by law professor Katharine A. Van Tassel, the media mischaracterized and spun the case, inflaming public passions and creating alarm within the medical profession:

Rather than focus on the sham peer review aspects of the case, the press spin on the case that caught national attention was that an incompetent physician terminated a peer review proceeding in order to avoid a verdict on his competence. Then, that same incompetent physician turned around and sued the members of the peer review committee and won millions. This mischaracterization of the case allegedly caused alarm among those in the medical profession as it raised the specter of possible retaliatory litigation for good faith participation in peer review.<sup>2</sup>

The jury awarded \$650,000, and under the provisions of antitrust laws, the court trebled the damages to \$2.2 million and in addition awarded Dr. Patrick \$228,600 in attorney's fees.<sup>2</sup> The case went all the way to the U.S. Supreme Court. The Association of American Physicians and Surgeons (AAPS) filed an amicus brief in support of Dr. Patrick, and the American Medical Association and the American Hospital Association filed an amicus brief in support of the perpetrators of sham peer review.<sup>3</sup> Dr. Patrick prevailed.<sup>4</sup> The award shocked the AMA and AHA, which then sought legislation to protect hospitals and peer reviewers.

## **HCQIA Immunity—"Guilty" Until Proven Innocent**

The history of how HCQIA became law has been reviewed

in a number of articles and is well worth reading.<sup>2,5,6</sup> While Congress set out to improve quality of care, the end result is that HCQIA has emboldened bad faith peer reviewers and bad actor hospitals, protecting and thus encouraging abuse of the peer review process. As noted by Vyas and Hozain: "Unfortunately, HCQIA extends these immunities to sham peer reviews. In the hypercompetitive and highly political United States medical system, this immunity has been abused and has led to the devastating destruction of many physician careers."<sup>6</sup>

HCQIA provides qualified immunity to hospitals and peer reviewers based on the reasonableness standards of HCQIA (Sec. 11112(a)(1-4). Professional review actions, for example, must be taken with the reasonable belief that such actions are warranted by the facts known, after a reasonable effort to obtain the facts of the matter, after adequate notice and hearing procedures have been provided to the physician under review, and with the reasonable belief that the actions are in the furtherance of quality health care.

Unfortunately, in what has been described as a complete "mockery of the pretense of due process," Sec. 11112(b)(ii) of HCQIA provides: "A professional review body's failure to meet the conditions described in this subsection shall not, in itself, constitute failure to meet the standards of subsection (a)(3) of this section."

In testimony before the Civil and Constitutional Rights Subcommittee of the House Judiciary Committee concerning HCQIA legislation, attorney Victor M. Glasberg testified:

Now Mr. Chairman, with due respect to the framers of the bill, that [Sec. 11112(b)(ii)] makes no sense, and it makes a mockery of the pretense of due process suggested by the language of the bill. The immunity is predicated on the due process, being provided and then at the end of the provision they say, oh, by the way, with regard to that due process, if you didn't provide it, it doesn't matter. That is not right. I submit that it isn't reasonable legislation and it certainly is not fair to the practitioner.<sup>7</sup>

The HCQIA law that passed, however, retained the outrageous and unfair provision of Sec. 11112(b)(ii).

HCQIA immunity is also limited in that it only applies to monetary damages and does not apply to alleged civil rights violations or to injunctive relief.

HCQIA was drafted so as to insulate hospitals and peer reviewers from having to pay monetary damages even when physicians, who were victims of sham peer review, prevailed in court.<sup>2</sup> Rep. Henry Waxman (D-Calif.), the floor manager of the bill that became HCQIA, provided reassurance at the time:

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. This is true whether the concern is with anti-competitive activities, with actions based on race, or any other prejudicial or discriminatory factors. We have emphasized this throughout our discussions of this bill within the Energy and Commerce Committee and with the staff of the Judiciary Committee. To reiterate: nothing in H.R. 5540, as currently drafted, would protect the type of abuse that I have referred to [emphasis in original].”<sup>8</sup>

However, due to the manner in which HCQIA was drafted, protection of abuses was entirely predictable and has become rampant nationwide.

The drafting of HCQIA made it highly likely that most cases brought against bad actor hospitals and unethical physicians would be dismissed on summary judgment. HCQIA created a presumption that hospitals and peer reviewers will meet the reasonableness standards of HCQIA and shifted the burden to the physician victim to prove otherwise by a preponderance of the evidence. As explained by Dr. Nicholas Kadar:

After it voted the bill out of committee, the HCEC [House Committee on Energy and Commerce] explained in its report that the presumption of immunity was created to permit disputes to be resolved quickly on summary judgment. Lawmakers believed “that the standard (for immunity) will be met in the overwhelming majority of professional review actions” and having physicians prove that it was not met, rather than have hospitals prove that it was, made practical sense.

The practical effect of this provision is that physicians are considered to be “guilty” of the charges brought against them unless and until they can prove otherwise by a preponderance of the evidence. Kadar goes on to explain how courts are depriving physicians of their Seventh Amendment right to a trial by jury when courts weigh the evidence to determine what conclusions might be drawn, substituting their judgment for that of a jury, as opposed to evaluating evidence for sufficiency for a reasonable jury to find in the physician’s favor based on evidence as viewed most favorable to the physician. The issue of the reasonableness of peer review actions, as codified by the reasonableness standards of HCQIA, is an issue of fact that should be determined by a jury, not an issue of law to be determined by a court.<sup>5</sup>

The 5th Circuit *Poliner* decision went even further in the direction of outrageous and unjustified immunity by determining that hospitals and peer reviewers need not follow the medical staff bylaws for peer review in order to obtain immunity under HCQIA.<sup>9</sup>

### **HCQIA Immunity Transformed to Nearly Absolute Immunity**

In practice, the limited and qualified immunity provided by HCQIA has been transformed into nearly absolute immunity by the “objective test,” established by case law and by the judicial doctrine of non-review. The objective test

essentially requires that an objective standard be applied in evaluating the reasonableness standards of HCQIA. That is, whether there was a “reasonable belief” that a professional review action was taken in the furtherance of quality medical care hinges on objective evidence, not subjective state of mind of the reviewers. In practice, as long as a hospital, for example, can produce some minimal written basis for taking an adverse action against a physician (e.g. documentation in meeting minutes), even if that information is false and fraudulent, hospitals can generally obtain immunity under HCQIA. As provided by the Court in the case of *Meyer v. Sunrise Hospital*:

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.<sup>10</sup>

Thus, irrespective of bad faith motives and malicious intent of peer reviewers, hospitals and peer reviewers often obtain immunity under HCQIA due to this “objective test.” There is also a significant difference between procedural due process and substantive due process, the latter of which is always lacking in cases of sham peer review.

The judicial doctrine of non-review is basically a rule created by courts whereby judges often defer completely to hospitals and their peer reviewers with respect to the facts. Courts may cite their lack of knowledge in medical peer review matters and reluctance to “second-guess” hospitals in their staffing decisions, and will often simply accept as fact and truth whatever the hospital states. In 2006, the Michigan Supreme Court put an end to the judicial doctrine of non-review in peer review matters in Michigan.<sup>11</sup> The Court rejected the proposition that courts are not competent to review hospital staffing decisions:

Additionally, we are not persuaded by the argument that courts are incompetent to review hospital staffing decisions as a basis for adopting the judicial nonintervention doctrine. This claim overlooks the reality that courts routinely review complex claims of all kinds. Forgoing review of valid legal claims, simply because those claims arise from hospital staffing decisions, amounts to a grant of unfettered discretion to private hospitals to disregard the legal rights of those who are the subject of a staffing decision, even when such decisions are precluded by statute.<sup>11</sup>

The judicial doctrine of non-review has been discredited and abandoned in most jurisdictions as courts observe wrongdoing that occurs in peer review, but this doctrine has not yet been overruled in Iowa, Oklahoma, and South Carolina.

## State Peer Review Immunity

Virtually all states have their own peer review immunity statutes. State peer review immunity statutes will often provide immunity absent malice in performing peer review—i.e. malice defined as knowingly providing false information or providing information with reckless disregard of the truth or falsity of the information. Reasoning that the core feature of peer review involves communication of information about the physician under review, the *Feyz* Court in Michigan adopted the defamation definition of “actual malice” as per the standard set in the case of *Veldhuis v. Allan*.<sup>12</sup> The *Feyz* court stated:

The panel in *Veldhuis v. Allan* held that the statutory immunity accorded to peer review activities does not apply “if the person supplying information or data does so with knowledge of its falsity or with reckless disregard of its truth or falsity. Similarly, a review entity is not immune from liability if it acts with knowledge of the falsity, or with reckless disregard of the truth or falsity, of information or data which it communicates or upon which it acts.”... The defamation definition of “malice” promotes the goals of peer review because peer review participants are not protected if they are not performing evaluations with a focus on improving patient care, but rather on the basis of false extraneous factors unrelated to patient care.... Although this definition originated in the context of defamation, this definition is uniquely appropriate to Michigan’s peer review scheme [MCL 331.531], as peer review immunity is based on communication of information about professional activities and standards.<sup>11</sup>

Proving that defendants knowingly provided false information can be difficult.

A statute in Florida, Section 395.0191(4), Fla. Stat. (2009), immunizes hospitals and peer reviewers for monetary damages absent “intentional fraud.” Although sham peer review is, by definition, fraudulent peer review whereby a hospital and peer reviewers attempt to make it look like legitimate peer review, extrinsic evidence of fraud must be pleaded with particularity in order to prevail.

## Absolute Immunity Agreements and Releases Used by Hospitals

Although HCQIA provides nearly absolute immunity to hospitals and peer reviewers, some hospitals have gone even further by requiring all physicians on staff to agree to provide absolute immunity to hospitals and peer reviewers, and to agree not to sue the hospital for any adverse peer review or credentialing decision. One example is as follows:

By applying for appointment and clinical privileges, I accept the following conditions and intend to be legally bound by them, regardless of whether or not I am granted appointment and/or

clinical privileges. These conditions shall remain in effect for the duration of any term of appointment that I may be granted.

To the fullest extent permitted by law, I extend absolute immunity to, release from any and all liability and agree not to sue the hospital, its medical staff, their authorized representatives, and appropriate third parties for any matter relating to appointment, reappointment, clinical privileges, or my qualifications for same. This includes any actions, recommendations, reports, statements, communications, or disclosures involving me, which are made, taken, or received by the hospital, the medical staff, their authorized representatives, or appropriate third parties.

If, notwithstanding the provisions in this Section, I institute legal action against the hospital, its medical staff, or their authorized representatives and do not prevail, I agree to reimburse the hospital and any medical staff members who are named in the action for all costs incurred in defending such legal action, including reasonable attorney’s fees.

HCQIA also has a “loser pays” provision (42 U.S.C. Sec. 11113), but it only applies if the defendant meets the reasonableness standards of HCQIA, if the defendant substantially prevails, and if plaintiff’s conduct during litigation was determined to be frivolous, unreasonable, without foundation, or in bad faith. Under this section of HCQIA, a defendant shall not be considered to have substantially prevailed if the plaintiff obtains an award for damages or permanent injunctive or declaratory relief. In the example of hospital immunity and release above, if the physician simply loses a lawsuit against the hospital, the physician is liable for all of the hospital’s and defendants’ costs and attorney’s fees.

## Illinois Hospital Licensing Act—Immunity Granted Absent Physical Harm to Physician

In Illinois, hospitals can claim absolute immunity as long as the hospital, its physician reviewers, or authorized representatives do not physically assault and cause physical harm to the physician under review. Apparently, wanton and willful conduct, which ruins or ends a physician’s career and devastates the physician financially, does not qualify as “harm” in the Court’s view. The Illinois state law the Court cites in its decision in the case of *Steven I. Valfer, M.D. and Highland Park OB-Gyn Associates, LTD. v. Evanston Northwestern Healthcare n/k/a Northshore University Health System* is the Illinois Hospital Licensing Act (IHLA) 210 ILCS 85/10.2. The decision rendered by the Appellate Court of Illinois, First Judicial District on March 26, 2015, was as follows:

Defendant is immune from civil damages under section 10.2 of the Illinois Hospital Licensing Act (IHLA). 210 ILCS 85/10.2 (West 2012). Defendant is immune from civil damages under IHLA unless its conduct was willful and wanton; under the special

definition of willful and wanton provided by the IHLA, a plaintiff must allege or show physical harm to plaintiff by the defendant. Where plaintiff failed to allege or show any physical harm by defendant, the trial court properly granted summary judgment in favor of defendant.<sup>13</sup>

However, there is no reference to *physical* harm stated in IHLA. Section 10.2 states in part:

For the purposes of this Section, “willful and wanton” means a course of action that shows actual or deliberate intention to harm or that, if not intentional, shows an utter indifference to or conscious disregard for a person’s own safety and the safety of others.<sup>14</sup>

In his petition for leave to appeal to the Supreme Court of Illinois, Dr. Valfer’s attorney points out the absurdity and unjust consequences of the Court’s interpretation of “willful and wanton” conduct under IHLA:

This Opinion held that a hospital is immune from civil damages under section 10.2 of the Illinois Hospital Licensing Act, 210 ILCS 85/1 et seq. (“IHLA”) unless its willful and wanton conduct vis-à-vis a physician who is deprived of due process in the peer review and reappointment process, alleges or shows that he or another suffered physical harm as a result of the hospital’s wrongdoing. This requirement, which is not in the IHLA, actually creates absolute immunity for hospitals in state law cases where doctors are seeking review of hospitals’ termination, suspension, restriction or non-reappointment decisions and actions, unless a fist fight or shoving match erupts as a result of the hospital’s conduct and the offended physician or another individual is injured.... From now on, according to the case law, reviews can be complete shams and the doctors will have absolutely no recourse absent a showing of physical harm.<sup>14</sup>

On Nov 3, 2015, AAPS moved for leave to file an amicus brief with the Supreme Court of Illinois in support of Dr. Valfer to overturn the Appellate Court’s decision.<sup>15</sup> The AAPS motion stated the appellate court’s interpretation of “willful or wanton misconduct” would “open the floodgates to ‘sham’ or bad-faith peer review without any meaningful deterrence and without any legal remedies for its victims...[and] would leave victims of discrimination without a legal remedy merely because no one has been physically injured.”<sup>15</sup>

## Conclusion

Physicians seeking redress and justice in the courts for sham peer review face almost insurmountable immunity provided to hospitals and peer reviewers by HCQIA, state peer review immunity statutes including IHLA in Illinois, mandatory agreements to provide absolute immunity to hospitals, and broad releases insulating hospitals from monetary damages. Progress is being made on a case-by-case basis, gradually chipping away at this outrageous and unjustified immunity. Through tax-deductible financial support provided to the American Health Legal Foundation

by our members, AAPS is able to continue the fight against sham peer review and the outrageous and unjustified immunity provided to bad actor hospitals and bad faith peer reviewers.

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