

Poliner v. Texas Health Systems:

Fifth Circuit Court of Appeals Restores Peer Review Immunity

By Tom Leatherbury, Brenda Strama, and Daniel Tobey¹

In the Fifth Circuit’s most expansive opinion on peer review immunity, a unanimous panel reversed a \$33,000,000 defamation judgment against a major hospital and its former chairman of Internal Medicine and rendered judgment in their favor. The original \$366,000,000 jury verdict and the judgment created a chilling effect on peer review committees and inspired an amicus brief from a group that was led by the Health Care Indemnity Company and that included the American Hospital Association and numerous other hospitals and health care entities.² The Fifth Circuit’s opinion has clarified peer review immunity and restored, in the words of the Court, “Congress’ balancing of the significant interests of the physician and the public health ramifications of allowing incompetent physicians to practice while the slow wheels of justice grind.”³ The Supreme Court denied Dr. Poliner’s petition for writ of certiorari on January 21, 2009. His petition for rehearing is pending.

Summary of Facts

On May 12, 1998, cardiologist Lawrence Poliner performed an angioplasty on a patient experiencing a heart attack. Dr. Poliner opened one partially blocked artery but failed to notice that another major artery was completely blocked.⁴ The patient also experienced post-procedure bleeding, went into shock, and was transferred to the Intensive Care Unit, where the patient was near respiratory failure.

This and several other prior patient events involving Dr. Poliner were considered by the Internal Medicine Advisory Committee (IMAC) of Presbyterian Hospital of Dallas, chaired by Dr. James Knochel. On May 13, Dr. Knochel consulted with hospital administrators, members of the IMAC, the director of the cath lab, and the Chief of Cardiology, and then offered Dr. Poliner a voluntary, temporary restriction of his cath lab privileges during a further investigation (this temporary restriction of privileges was termed an “abeyance” under the hospital’s medical

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² The Amicus Brief was signed by Methodist Hospital, North Mississippi Health Services, Inc., Children's Medical Center of Dallas, Texas Children’s Hospital, Tenet Health Care Corp., Summa Health System, Franciscan Ministries of the Lake, the American Hospital Association, Health Care Indemnity Co., Rush Health Systems, Inc., Partners HealthCare System, Inc., and the Mississippi Hospital Association.

³ *Poliner v. Texas Health Systems*, 2008 WL 2815533, *11 (5th Cir. 2008), in part quoting *Rogers v. Columbia / HCA of Cent. La., Inc.*, 971 F. Supp. 229, 236 (W.D. La. 1997) (internal quotations omitted).

⁴ He later wrote that the missed artery was “obvious from reviewing the films.” *Poliner* at *1.

staff bylaws). Dr. Poliner's alternative, according to Dr. Knochel, was suspension.⁵ The next day, Dr. Poliner requested time to consult with an attorney but was denied. He agreed to the abeyance in writing and retained counsel.

Dr. Knochel then appointed a committee of six cardiologists to review forty-four of Dr. Poliner's cases. The committee found substandard care in over half of those cases. Dr. Knochel and the IMAC then requested an extension of the abeyance in order to continue the investigation. Dr. Poliner again consented in writing, again after learning his alternative was suspension. In total, Dr. Poliner's abeyance lasted less than thirty days.

On June 12, the IMAC unanimously recommended that Dr. Poliner's echocardiography and cath lab privileges should be suspended, citing concerns including "poor clinical judgment," "inadequate skills, including angiocardiology and echocardiography," and "substandard patient care."⁶ Dr. Knochel suspended Dr. Poliner's privileges. Five months later, a hospital hearing panel found that the suspension of Dr. Poliner's privileges was justified based on the information available at the time but reinstated his privileges with conditions.

In May 2000, Dr. Poliner brought suit against Presbyterian Hospital, Dr. Knochel, and other doctors involved in the peer review process. Dr. Poliner asserted that the peer review was conducted in bad faith by business competitors. He alleged defamation and other tort claims, federal and state antitrust claims, violations of the Texas Deceptive Trade Practices Act, and breach of contract. He later added his professional association as an additional plaintiff.

The District Court

On the defendants' motion for summary judgment, the District Court (the Honorable Jorge Solis) divided the peer review process into two parts: the abeyance and the five-month suspension. The District Court held that, as a matter of law, the suspension was protected by HCQIA immunity and dismissed all suspension-related claims against all defendants.⁷

However, the District Court found fact issues as to whether the abeyance qualified for HCQIA immunity. The District Court observed that, under the medical staff bylaws, a physician must agree to an abeyance of his or her privileges. Since Dr. Poliner's only alternative to accepting the abeyance was a formal suspension, the Court reasoned that the abeyance, if coerced or involuntary, would be a *de facto* summary suspension under the medical staff bylaws. The Court held that a jury should decide whether Dr. Poliner in fact agreed to the abeyance or whether the abeyance, if recharacterized as a "summary suspension," satisfied the bylaws and qualified for HCQIA and/or state law immunity.

The jury found for Poliner and his professional association on all abeyance-related claims and awarded more than \$360,000,000 in damages, including \$90,000,000 for defamation and

⁵ According to medical staff bylaws, "The physician must agree to the abeyance prior to the taking of such action. If the physician does not agree to the abeyance, the department will proceed with the corrective action or suspension." *Poliner* at *2, n. 10.

⁶ *Poliner* at *3.

⁷ *Poliner v. Texas Health Systems*, 2003 WL 22255677 (N.D. Tex. 2003).

\$110,000,000 in punitive damages.⁸ The District Court denied the hospital's and Dr. Knochel's renewed motion for judgment as a matter of law and motion for new trial⁹ but remitted the damages to \$22,500,000 (\$10,500,000 for mental anguish, \$10,500,000 for injury to career and reputation, and \$1,500,000 in punitive damages) and then added over \$11,000,000 in pre-judgment interest.¹⁰

Effect of the Verdict and the Judgment

The verdict garnered national attention. *Time* profiled the case from Dr. Poliner's perspective, stating that he recovered from the hospital and "three colleagues who trumped up charges of substandard care against him to eliminate him as a competitor."¹¹ Multiple industry and bar association seminars focused on the case. Health care attorneys reported both an upswing in legal actions against peer reviewers and a chilling effect on the peer review process. Other physician-plaintiffs demanded "Poliner-type money" in settlement discussions. As noted above, the systemic concerns raised by this outlier decision led to crucial amicus support from health care organizations on appeal. *See* note 1, *supra*.

The Court of Appeals

Presbyterian Hospital and Dr. Knochel appealed the judgment. On July 23, 2008, the Court of Appeals reversed and rendered judgment for the hospital and Dr. Knochel.¹² The Court treated the two abeyances as separate peer review actions, finding that both deserved immunity under HCQIA as a matter of law. Judges King, Higginbotham, and Southwick composed the panel. Judge Higginbotham wrote the opinion.

The Court began by noting that Congress passed HCQIA to address the "increasing occurrence of medical malpractice" and "a national need to restrict the ability of incompetent physicians to move from State to State without disclosure or discovery."¹³ Congress "viewed peer review as an important component of remedying these problems, but recognized that lawsuits for money damages dampened the willingness of people to participate in peer review."¹⁴ Accordingly, the passage of HCQIA granted participants in professional peer review actions a limited immunity against money damages and established four requirements for immunity:

For purposes of the protection set forth in section 11111 (a) of this title, a professional review action must be taken—

⁸ The jury found only about \$10,000 in economic damages at trial.

⁹ The two other physician-defendants settled post-verdict.

¹⁰ *Poliner v. Texas Health Systems*, 2006 WL 770425 (N.D. Tex. 2006) ("Memorandum Opinion and Order"); *Poliner v. Texas Health Systems*, 239 F.R.D. 468 (N.D. Tex. 2006) ("Amended Memorandum Opinion and Order").

¹¹ Jeff Chu, *Doctors Who Hurt Doctors*, *TIME*, August 2005, at 52.

¹² The June 3rd, 2008 oral argument may be found at <http://www.ca5.uscourts.gov/OralArgumentRecordings.aspx>.

¹³ *Poliner* at *6, quoting 42 U.S.C. §§ 11101(1), (2) (internal quotations omitted).

¹⁴ *Poliner* at *6.

- (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).¹⁵

The Court noted that, under HCQIA, professional review actions are presumed to have met these standards, and the burden is on the plaintiff to rebut this presumption by a preponderance of the evidence.¹⁶ Additionally, § 11112(c) provides that, in certain circumstances, the prior notice and hearing procedures referred to in § 11112(a)(3) are not required (for instance, if no adverse action is taken; during an investigation lasting fourteen days or less to determine the need for a professional review action; or if an immediate suspension is necessary to prevent imminent danger and if subsequent hearing or process is provided).¹⁷

The Court found that each abeyance satisfied the reasonableness requirements of § 11112(a)(1), (2), and (4). Regarding the procedural requirements of § 11112(a)(3), the Court found that the first abeyance fell within § 11112(c)(1)(B) and that the second fell within § 11112(c)(2) (providing exceptions for investigations and health emergencies, respectively). Accordingly, the Court held that the hospital and Dr. Knochel enjoyed HCQIA immunity as to

¹⁵ 42 U.S.C. § 11112(a)

¹⁶ *Id.*

¹⁷ 42 U.S.C. § 11112(c) states:

(c) Adequate procedures in investigations or health emergencies

For purposes of section 11111 (a) of this title, nothing in this section shall be construed as—

(1) requiring the procedures referred to in subsection (a)(3) of this section—

(A) where there is no adverse professional review action taken, or

(B) 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; or

(2) precluding 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.

both abeyances as a matter of law. The Court reversed the judgment of the District Court and rendered judgment for the defendants.

Significantly, the Court commented in light of its holding: “Because Defendants are immune under the HCQIA, we have no occasion to consider Defendants’ other substantial arguments that we must reverse and render judgment based on state law immunity and because Poliner failed to prove the substantive elements of his claims. . . . Nor need we reach the compelling arguments that, at the very least, we would have to reverse and remand for a new trial because of the jury’s excessive verdict and manifest trial errors.”¹⁸

Impact of the Opinion

The Court of Appeals affirmed at least five important principles concerning HCQIA immunity.

First, the controlling legal question is whether the peer reviewers complied with HCQIA, not with hospital or medical staff bylaws. “[F]ailure to comply with hospital bylaws does not defeat a peer reviewer’s right to HCQIA immunity from damages.”¹⁹ The District Court based its faulty opinion on the distinction between “abeyances” and “suspensions,” terms that arose solely from the Medical Staff bylaws. However, these terms and internal standards are immaterial to HCQIA. Under HCQIA, any act that qualifies as a “professional review action” and meets the statutory requirements of 42 U.S.C. § 11112 qualifies for immunity.²⁰ The Court of Appeals held: “for the purposes of HCQIA immunity from money damages, what matters is that the restriction of privileges falls within the statute’s definition of ‘peer review action,’ and what we consider is whether these ‘peer review actions’ satisfy the HCQIA’s standards, and not whether the ‘abeyances’ satisfy the bylaws.”²¹ The District Court therefore erred in denying immunity based on an alleged failure to follow hospital or medical staff bylaws.

Second, the reasonable belief standards of 42 U.S.C. § 11112(a)(1) and (4) are objective, not subjective. The good or bad faith of the peer reviewers is irrelevant. The Court expressed “serious doubts that Poliner proved that the restrictions resulted from anti-competitive motives” and noted “ample” objective evidence for concern about Dr. Poliner’s performance.²² As such, the statutory requirement for acting “in the reasonable belief that the action was in the furtherance of quality health care” was objectively satisfied.

¹⁸ *Poliner* at *12.

¹⁹ *Poliner* at *9.

²⁰ The statute defines a “professional review action” in part as “an action or recommendation of a professional review body which is taken or made in the conduct of professional review activity, which is based on the competence or professional conduct of an individual physician (which conduct affects or could affect adversely the health or welfare of a patient or patients), and which affects (or may affect) adversely the clinical privileges, or membership in a professional society, of the physician.” 42 U.S.C. § 11151(9).

²¹ *Poliner* at *7 (NB: the terms “professional review action” and “peer review action” are both used in the opinion).

²² *Poliner* at *8.

Third, the peer reviewers should be judged based on whether their conclusions were objectively reasonable based on the facts available at the time, not on whether they are later proved wrong or right. The Court questioned the relevance of “post-hoc expert analyses” to HCQIA standards.²³ As the Court held, “If a doctor unhappy with peer review could defeat HCQIA immunity simply by later presenting the testimony of other doctors of a different view from the peer reviewers ... HCQIA immunity would be a hollow shield.”²⁴

Fourth, peer reviewers must conduct a reasonable investigation, not a perfect investigation. The ultimate decision-maker may rely on information provided or findings made by other doctors and need not personally investigate the matter independently.²⁵ Specific omissions in an investigation do not necessarily defeat immunity; rather, the court should look to the totality of the process.²⁶ Here, despite the many putative procedural failures alleged by Poliner, the Court held, “No reasonable jury could conclude that Defendants failed to make a reasonable effort to obtain the facts.”²⁷

Fifth, the Court highlights that, despite HCQIA, peer review actions are still subject to claims for declaratory or injunctive relief. HCQIA immunity is limited to immunity from monetary damages. The Court acknowledges that in some circumstances, this may result in “harsh outcomes” for individual physicians, but that Congress chose this trade-off as the acceptable balance between encouraging vigorous peer review and discouraging misuse of the peer review process.²⁸

Conclusion

The size of the jury’s eye-popping verdict and the District Court’s unprecedented rationale and judgment garnered a great deal of attention in the health care community. What was truly at stake, however, was the ability of doctors and hospitals to maintain and improve the quality of their patient care through vigorous and honest peer review, unfettered by the fear of claims for inflated money damages. In reversing and rendering the District Court’s judgment and eloquently clarifying the balance of interests protected by Congress, the Fifth Circuit has set a strong precedent revitalizing HCQIA and protecting patient safety.

²³ *Id.*

²⁴ *Id.*

²⁵ *Poliner* at *9, citing *Gabaldoni v. Wash. County Hosp. Ass’n*, 250 F.3d 255, 261 (4th Cir. 2001).

²⁶ *Poliner* at *9.

²⁷ *Id.* (internal quotations omitted).

²⁸ *Poliner* at *9.