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NEWSLETTER OF THE **HEALTHCARE INDUSTRY** PRACTICE GROUP OF MANATT, PHELPS & PHILLIPS, LLP

Fifth Circuit Reverses Lower Court *Poliner* Decision and Reaffirms Broad Immunity for Hospitals and Physicians in Peer Review Cases

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In a case that has been closely watched around the nation for several years, the Fifth Circuit Court of Appeals has reaffirmed hospitals' and physician peer reviewers' broad immunities from damages claims under the 1986 Health Care Quality Improvement Act ("HCQIA"). In *Poliner v. Texas Health Systems*, 2008 WL 2815533 (5th Cir. Jul. 23, 2008), the court overturned a $33 million judgment awarded to the plaintiff, a cardiologist whose cardiac catheterization and echocardiography privileges were summarily suspended following a patient incident at the defendant hospital and a subsequent review of multiple cases. Earlier, a jury had awarded plaintiff a record-breaking sum of $360+ million against both the hospital and individual physician peer reviewers, on plaintiff's claims of defamation, breach of contract and tortious interference with contract.

Poliner was a headliner case, based upon the enormous jury award and the lower court's rejection of the defendants' HCQIA immunity defense with respect to the peer review actions leading up to the summary suspension. The district court had concluded that the jury needed to decide whether the defendants had acted in the reasonable belief the action taken would further quality of care, had made a reasonable effort to obtain the facts, and had afforded the plaintiff a fair procedure.

Not so, said the Fifth Circuit. These were questions of law, based upon undisputed facts showing the defendants had

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carefully investigated the facts and imposed a measured restriction upon the plaintiff's privileges to protect patients. The Fifth Circuit held that HCQIA plainly applied: the "Defendants satisfied the notice and hearing requirements, and no reasonable jury could conclude otherwise." 2008 WL 2815533 at 9.

Dr. Poliner had made a potentially life-threatening diagnostic mistake on a patient, which led to the investigation and then his summary suspension. But, this was not Dr. Poliner's only instance of suspected substandard care. Various hospital medical staff committees reviewed the matter and decided to seek Dr. Poliner's voluntary agreement to temporarily relinquish his privileges to perform cardiac catheterization, pending a fuller investigation of Dr. Poliner's cases. Dr. Poliner agreed. He later agreed to an extension of the initial voluntary restriction, to allow for the in-depth peer review.

An ad hoc investigation committee then reviewed 44 of Dr. Poliner's cases and found "substandard care in more than half." 2008 WL 2815533 at 3. Accordingly, Dr. Poliner's cardiac catheterization and echocardiography privileges were suspended.

Dr. Poliner requested and received a hearing under the hospital's medical staff bylaws. The hearing committee upheld the summary suspension as justified by the information available at the time, but recommended that Dr. Poliner's privileges be reinstated subject to comprehensive mandatory preprocedure consultation on the next 30 of Dr. Poliner's interventional cases. The recommendation was affirmed at all internal levels of review, although the scheme later was changed from preprocedure review to postprocedure outside review

Dr. Poliner sued for damages, challenging the summary suspension on various theories. He also challenged the presuspension temporary restriction of his privileges, which he asserted – and the district court agreed – was improper and coercive rather than voluntary.

The district court extended HCQIA immunity to all defendants on the summary suspension itself, and granted all defendants' summary judgment motion on that basis. But, the district court also held that a jury needed to decide whether the initial temporary restriction and the subsequent extension of it (which both the district court and the court of appeals considered two separate actions) were proper.

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On the appeal of Dr. Poliner's jury award and judgment, the Fifth Circuit held that that HCQIA immunized all of defendants' actions, including the agreed-upon temporary restriction of privileges during the investigation. The court concluded that the proper focus for determining HCQIA immunity is not "whether Defendants' beliefs proved to be *right*." 2008 WL 2815533 at 8 (emphasis in original). Instead, HCQIA "asks if the beliefs of Poliner's peers were objectively reasonable under the facts that they had at the time." *Id*. The court explained that "[i]f 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, or that his treatment decisions proved to be 'right' in their view, HCQIA immunity would be a hollow shield." Id. at 8. The Fifth Circuit plainly found intolerable "the public health ramifications of allowing incompetent physicians to practice while the slow wheels of justice grind." *Id*. at 9.

The Fifth Circuit's decision in *Poliner* has restored order and common sense to the peer review process. That process is imperiled when expert and willing peer review bodies and leaders feel unprotected from liability and discouraged from participating in the already formidable task of reviewing peer physicians. The *Poliner* court also well understood the policy problem posed by runaway claims against peer reviewers: "To allow an attack years later upon the ultimate 'truth' of judgments made by peer reviewers supported by objective evidence would drain all meaning from the statute. The congressional grant of immunity accepts that few physicians would be willing to serve on peer review committees under such a threat; . . . 'the 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.'" *Id*. at 12 (citations omitted).

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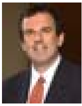
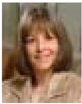
involving physician peer review, Medicare preemption, ERISA preemption, and California's Unfair Competition Law.



Barry S. Landsberg Mr. Landsberg is a member of the Firm's Board of Directors and is the Firm's National Director of Appellate Litigation. He is an experienced trial and appellate lawyer, who has made landmark law in California for hospitals, nursing homes and other healthcare providers and insurers. Mr. Landsberg also has argued and won several first-impression cases before the California Supreme Court and the California Court of Appeal.



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