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OPERATIONAL IMPACT OF SIGNIFICANT CASES

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I. ISSUES AFFECTING HOSPITALS AND HEALTHCARE PROVIDERS

A. Physician Credentialing & HCQIA Immunity

1. Walker v. Memorial Health System of East Texas

In *Walker*, the U.S. District Court for the Eastern District of Texas considered a physician's motion for preliminary injunctive relief in connection with a hospital's filing of an adverse report to the National Practitioner Data Bank ("NPDB" or "Data Bank").[1] Frank Walker, M.D. is a surgeon who holds clinical privileges at CHI St. Luke's Health Memorial hospital in Lufkin.[2] Various issues arose related to Dr. Walker's treatment of two patients at the hospital, culminating in peer review proceedings against Dr. Walker.[3] Upon conclusion of the peer review, the hospital's medical executive committee ("MEC") recommended that Dr. Walker's next five bowel surgery cases be proctored under the supervision of a surgical proctor approved by the MEC and at Dr. Walker's own expense.[4] The MEC's recommendation was upheld through an internal appellate process and by the hospital's board of directors.[5] Significantly, the board did not specify a timetable for completion of the proctored cases.[6]

A month later, the hospital filed an adverse report with the NPDB disclosing the proctoring requirement imposed against Dr. Walker and publishing to the Data Bank that the basis for the action was Dr. Walker's "substandard or inadequate skill level."[7] Dr. Walker subsequently lodged an administrative dispute of the report and filed an action seeking immediate injunctive relief.[8]

The NPDB is a federal program that contains various negative information on health care practitioners, including medical malpractice payments and negative reports made against practitioners by hospitals.[9] Though not accessible by the public, the NPDB is accessible by federal and state licensing authorities (including the Texas Medical Board), hospitals and other healthcare entities, and health insurance providers.[10] The NPDB was established in conjunction with the Health Care Quality Improvement Act ("HCQIA") in an effort to advance the quality of medical care by encouraging physicians to participate in peer review and by restricting the ability of incompetent physicians to move from state to state without disclosing their previous incompetent performance.[11] In connection with the court's review of Dr. Walker's request for preliminary injunctive relief, the court noted that practitioners with one or more adverse reports in the Databank "may find it difficult to build or maintain their practices, as healthcare entities, including hospitals and health insurance companies, are likely reluctant to associate with practitioners who have been deemed incompetent through peer review."[12]

Since an adverse report almost certainly proves detrimental to a practitioner's livelihood, the court found, healthcare entities must comply with several procedural and substantive requirements before filing an adverse report.[13] The court noted that not every adverse peer review or sanction is reportable, however.[14] For example, proctoring sanctions are only reportable if a proctor is assigned to the practitioner for a period longer than 30 days.[15] Conversely, proctoring sanctions that do not last longer than 30 days are not considered a restriction of clinical privileges and should not be reported to the NPDB.[16]

As a threshold matter, the hospital argued the court lacked authority to issue a preliminary injunction because HCQIA does not provide a private right of action.[17] The court rejected the hospital's argument, finding the hospital misread Dr. Walker's complaint and disregarded binding Fifth Circuit precedent.[18] The court noted that Dr. Walker's claims were not brought as a private right of action under HCQIA, but instead stated causes of action for business disparagement, tortious interference with contract and business relations, racial discrimination under 42 U.S.C. § 1981, breach of contract, and declaratory judgment.[19] While it was true that resolution of the case necessarily involved interpreting provisions of HCQIA, the court found premise that Dr. Walker was asserting a private right of action under HCQIA was not supported by the complaint.[20] Second, the court noted the Fifth Circuit made clear in *Poliner v. Texas Health Systems* that '"the doors of the courts remain open to doctors who are subjected to unjustified or malicious peer review, and they may seek appropriate injunctive and declaratory relief in response to such treatment.'"[21] The court found that while HCQIA immunity may ultimately bar Dr. Walker from recovering monetary damages, the motion before the court concerned only injunctive relief, which is not subject to HCQIA immunity.[22]

Having concluded that the court had authority to issue a preliminary injunction, the court proceeded to evaluate whether Dr. Walker could show the following factors: (1) a substantial likelihood of success on the merits of the claim; (2) a substantial threat of irreparable injury or harm for which there is no adequate remedy at law; (3) that the threatened injury to the applicant outweighs any harm that the injunction might cause to the defendant; and (4) that the injunction will not disserve the public interest.[23]

To demonstrate a likelihood of success on the merits, the court found that Dr. Walker was required to demonstrate the hospital's adverse report to the NPDB was likely improper under the governing statutes and guidelines.[24] The court first noted the underlying issue turned on whether the sanction handed down from the hospital's board of directors qualified as a proctoring assignment "for a period of longer than 30 days."[25] If the proctoring assignment did not satisfy this requirement, the court found, then the sanction is considered a non-reportable sanction.[26] The hospital argued that since 30 days passed without Dr. Walker having completed five proctored bowel surgery cases, the 30–day requirement had been satisfied and the hospital was required to file an adverse report with the NPDB.[27] Dr. Walker argued in response that the terms of the proctoring sanction contained no temporal limitations, such that the five qualifying cases could be "completed within a week, a year, or longer."[28]

The court agreed with Dr. Walker, finding the terms of the proctoring sanction did not specify the duration of the proctoring assignment, and therefore were not reportable.[29] The court found that when Congress authored HCQIA, "it decided to set a bright-line temporal threshold of 30 days for reportable proctoring sanctions."[30] This requirement, the court added, gives hospitals and practitioners certainty regarding which proctoring sanctions are reportable.[31] The court found that "[w]hether a proctoring sanction is reportable should be established by the terms of the sanction at the time it is delivered, not by whether, in fact, it takes more than 30 days to satisfy the requirement."[32] To find otherwise, the court found, would lead to absurd results.[33] As an example, the court noted a sanctioned surgeon in a busy Dallas hospital may be able to quickly find a proctor and complete the set number of cases within 30 days, but, in contrast, a surgeon in a Lufkin hospital given an identical sanction may be unable to promptly secure a proctor and complete the set number of cases within 30 days.[34] In this scenario, even though given precisely the same

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