

**Illinois Association Medical Staff Services
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Legal Update

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Murphy v. Baptist Hospital Economic Credentialing

- Background of Dispute
 - In response to the opening of a competing heart hospital, Board of Directors adopted an Economic Credentialing Policy (“Policy”).
 - “Any physician who, directly or indirectly, acquires or holds an ownership or financial interest in a hospital anywhere in Arkansas is ineligible for initial or renewed professional staff appointments or clinical privileges at any Baptist hospital.”
 - Policy applied to owners, investors, and immediate family members – very broad definition.
 - No hearing rights were provided if a current physician loses privileges.
 - In order to obtain or maintain privileges, physician or family member had to completely divest themselves of this ownership/financial interest.

Murphy v. Baptist Hospital **Economic Credentialing (cont'd)**

- Several physician affected by this Policy sued to enjoin implementation under a number of theories.
 - Tortiously interferes with patient-physician relationship.
 - Is contrary to public policy.
 - Is an unconscionable business and trade practice in violation of Arkansas Deceptive Trade Practices Act.
- Trial court agreed and enjoined enforcement of the Policy in 2004.
- Decision was upheld by the Arkansas Supreme Court and was remanded for trial which took place between March 10-20, 2008.

Murphy v. Baptist Hospital **Economic Credentialing (cont'd)**

- On February 27, 2009, trial court entered an Order for Permanent Injunction and made the following findings and rulings:
 - Patient-physician relationship carries with it a reasonable business and patient expectations.
 - A contract with the patient exists.
 - Referrals are the lifeblood of a physician's practice.
 - Hospital acknowledged that Policy would disrupt a patient's relationship with their physician of choice.

Murphy v. Baptist Hospital Economic Credentialing (cont'd)

- Court determined that Baptist Health potentially interfered with patient-physician relationship because:
 - The Hospital specifically identified the plaintiff physicians who would be affected;
 - The Policy would make it difficult for any physician associated with competing heart hospital to admit patients to Baptist Health;
 - Because the Hospital was an exclusive, in-network provider with one or more managed care plans, it knew and warned the plaintiffs that retention of their financial interest in any specialty hospital would result in their exclusion from the insurance networks;

Murphy v. Baptist Hospital Economic Credentialing (cont'd)

- Hospital confirmed with Blue Cross/Blue Shield that plaintiffs would be excluded if they no longer had staff privileges at Baptist;
- Although plaintiffs never lost privileges at the Hospital, the court determined that imposition of the Policy would in fact cause compensatory damages, would interfere with patient relationships and would result in loss of referrals;
- Policy was contrary to public policy because:
 - Arkansas protects the patient's right to the physician of their choice as reflected in a number of court decisions. The Policy interferes with this relationship.

Murphy v. Baptist Hospital Economic Credentialing (cont'd)

- Restrictive covenants in employment agreements are not generally enforceable in Arkansas.
- The Patient Protection Act of 2005 was passed so as to allow patients to be given the opportunity to see the health care provider of their choice and the opportunity of providers to participate in health benefit plans.
- The Medicare Act guarantees patients basic freedom of choice.
- The AMA Code of Ethics provides that “free choice of physicians is the right of every individual.”

Murphy v. Baptist Hospital **Economic Credentialing (cont'd)**

- Public policy favors the establishment and acquisitions of specialty hospitals and disfavors economic credentialing.
- The court cited to expert testimony and federal studies which concluded that economic credentialing does not benefit the community.
- Economic credentialing punishes physician investment in specialty hospitals and punishes physicians for engaging in conduct that is “illegal, negatively affects patient care, impedes advancements in medical technology and the construction of a modern health care delivery system and interferes with patient-physician relationships. The court also cited to an AMA policy.

Murphy v. Baptist Hospital Economic Credentialing (cont'd)

- The Hospital acted contrary to its obligations as a 501(c)(3) not-for-profit, tax-exempt charitable organization because as one of the listed factors of requiring that a hospital operate for the benefit of the community and to demonstrate that it qualifies for exempt status that the Hospital is willing to hire any qualified physician. The Hospital did not carry out its fiduciary duty to make inquiry as to whether the effect of the policy would be to close the Hospital's medical staff and jeopardize its tax-exempt status.
- Public policy does not support suppression of competition which was the specific intent of Baptist Hospital by prohibiting physicians from investing in a competing hospital or otherwise lose their medical staff membership and clinical privileges.

Murphy v. Baptist Hospital Economic Credentialing (cont'd)

- The court determined that competition is good because it results in lower prices and better quality and obligates facilities to remain innovative and cost efficient.
- Public policy protects the institution of marriage.
 - The court heard testimony that a physician at Baptist was going to lose privileges because her husband, who was not on staff at Baptist, had an ownership in a surgical hospital that would compete with Baptist.
 - This physician testified that losing privileges would destroy her hospital practice and that she would be forced to coerce her husband to give up his association or divorce him, and thus the Policy had the effect of contravening the state's interest in protecting the institution of marriage and could affect many physicians given the broad definition of "immediate family member".

Murphy v. Baptist Hospital **Economic Credentialing (cont'd)**

- The court rejected Hospital's four separate purposes for supporting the Policy which were:
 - To prevent physicians from selectively referring profitable patients to their own facilities while dumping less profitable patients at Baptist Health;
 - To protect Baptist Health's financial health so that it may carry out its charitable mission;
 - To prevent staff members from working at physician-owned facilities;
 - Foster hospitable physician-hospital relations.

Murphy v. Baptist Hospital Economic Credentialing (cont'd)

- None of the evidence introduced by Baptist supported any of these proposals.
- Court determined that many supposed purposes were never truly investigated or analyzed and appeared to be an after the fact argument in an attempt to justify the Policy.
- The policy was overly broad and not tailored to meet any specific, justifiable purpose.
- The definition of immediate family was broad.
- The restriction applied to every hospital licensed in the entire State of Arkansas and could affect physicians who did not even have a family connection, because it also applied to “any interest, directly or indirectly, in real or personal property used by competing hospital.”

Murphy v. Baptist Hospital **Economic Credentialing (cont'd)**

- Although the court found that Baptist had a legitimate and strong interest in protecting its economic viability, no such analysis was conducted prior to the implementation of the Policy and no such rationale was ever presented before the Board.
- In addition, the Arkansas Heart Hospital had been in existence for six years prior to any action taken by Baptist Health and in fact the Policy was developed by the prospect of another specialty hospital in the market.

Murphy v. Baptist Hospital **Economic Credentialing (cont'd)**

- The court determined that the hospital's decision to adopt the Policy was done so with the intent to stifle competition even though there is a shortage of cardiac beds in this area. Although the community has a great need for non-profit hospitals and to make sure that it remained an "economically viable institution", there was no credible evidence to support that the Arkansas Heart Hospital would adversely affect Baptist which consistently has made money and where other evidence showed that a community hospital increases profitability when specialty hospitals enter the market.

Murphy v. Baptist Hospital Economic Credentialing (cont'd)

- Although the court found that “society has a strong interest in ensuring that the most financially lucrative patients are not selected by specialty hospital physicians leaving uninsured or under-insured patients to be treated at community hospitals, the Hospital had failed to prove that any plaintiff had actually engaged in such activity”.
- The court rejected the Hospital’s argument that it cannot be compelled to grant staff privileges to the plaintiffs because it had the right to refuse to deal and that one party cannot compel another to contract. The court determined that this right is not absolute and a party “may not refuse to deal where the refusal is illegal, unconscionable, or contrary to public policy”.

Murphy v. Baptist Hospital **Economic Credentialing (cont'd)**

- The court also determined that the policy was in violation of the Arkansas Deceptive Trade Practices Act because it was adopted in connection with its “business, trade, or commerce”, that the Policy caused actual injury through disruption of relationships with patients and referral sources, and that the Policy “affronts the sense of justice, decency, and reasonableness because it impinges on fundamentally important public policies without adequate countervailing justification”.

Doe v. Leavitt: What Constitutes “Under an Investigation” for Purposes of HCQIA

- Background of case.
 - On July 26, 2005, an operating room nurse at the Hospital filed a written complaint against a physician alleging that he had threatened her.
 - The MEC temporarily suspended the physician the following day and appointed an ad hoc investigating committee to inquire into these allegations.
 - On August 2, 2005, the committee determined that the nurse reasonably perceived the physician’s actions to be threatening, thereby justifying the complaint.
 - The MEC met a few days later and proposed that the physician be allowed to return to work as long as he agreed to certain proctoring and psychological evaluations.

Doe v. Leavitt: What Constitutes “Under an Investigation” for Purposes of HCQIA

- On August 11, the physician rejected the proposal and voluntarily relinquished clinical privileges which resignation was accepted on August 19.
- Because the Hospital determined that the physician had resigned while “under an investigation”, the Hospital reported the resignation to the Data Bank.
- The physician contested this decision and argued that the investigation had ended when the committee presented its report to the MEC and therefore, he had not resigned while under an investigation.

Doe v. Leavitt: What Constitutes “Under an Investigation” for Purposes of HCQIA

- The Secretary of Health and Human Services issued an opinion on May 25, 2007, that the resignation was properly reported because “an investigation is . . . considered ongoing until the health care entity’s decision making authority takes a final action or formally closes the investigation.” Because no final action had been taken, physician will still under investigation at the time of his resignation.

Doe v. Leavitt: What Constitutes “Under an Investigation” for Purposes of HCQIA

- The court’s decision:
 - The NPDB Guide Book, which was issued in September, 2001, although instructive, is simply an agency manual and not the product of notice-and-comment rule making, nor was it ever published in the Federal Register. Therefore, it is not entitled to deference as an agency interpretation of statute.
 - Congress, however, did empower the Secretary to establish dispute resolution procedures relative to HCQIA filing requirements who, in turn, passed a regulation that establishes an adjudicative process for reviewing written information submitted by both a reporting entity and the reported physician in the issuance of a final administrative determination regarding the accuracy of reported information.

Doe v. Leavitt: What Constitutes “Under an Investigation” for Purposes of HCQIA

- The court relied on the following factors to give a degree of deference to the Secretary’s decision:
 - A decision was issued by the Secretary himself who clearly understood the need for an in depth consideration of the disputed issue.
 - Provided a construction of the word “investigation” in the Guide Book applicable to all cases.
 - The procedures employed reflects the operation of a deliberative process because it involved the exchange of letters and the consideration of both the Hospital’s position and that of the affected physician.

Doe v. Leavitt: What Constitutes “Under an Investigation” for Purposes of HCQIA

- The physician’s position was thoroughly assessed and rejected through citation to various portions of the statute and its legislative history.
- The secretary had a powerful incentive to develop a body of knowledge about problems affecting physician performance and therefore the area in which the disputed interpretation operates within the “heartland” of the Secretary’s expertise.
- The decision was based on long established policy which the physician did not contest.

Doe v. Leavitt: What Constitutes “Under an Investigation” for Purposes of HCQIA

- The interpretation was also based on the stated goal of the legislation to restrict “the ability of the competent practitioners from moving state to state without disclosure or discovery of (a) previous adverse action . . . history.”
- The Secretary further concluded that Congress did not intend to construct an easily accessible escape hatch that would permit beleaguered physicians to allude the reach of the HCQIA’s reporting requirement.

Doe v. Leavitt: What Constitutes “Under an Investigation” for Purposes of HCQIA

- The Secretary appropriately discerned a broad Congressional purpose to improve the quality of health care by mandating the reporting of significant disciplinary measures taken against physicians and curtailing the ability of physicians to avoid inquiries into potential misconduct. The legislative history is clear that Congress was concerned with putting an end to private deals that avoid required reports.
- The court further observed that a hospital’s medical staff bylaws cannot change the meaning of what constitutes the word “investigation” if contrary to the intent of the statute. The fact that the committee in this case had submitted its report to the MEC for review did not mean that the investigation was formally concluded. In fact, the MEC had an additional 10 days to take action on the report.

Eliminating Negligence in Physician Credentialing

- Doctrine of Corporate Negligence
 - Hospital has a duty to take reasonable steps to ensure that physicians have the appropriate education, background, training and experience to demonstrate current competency to exercise each and every one of the clinical privileges they are requesting and which are granted to them. Failure to satisfy this duty will result in a hospital's independent liability to a patient if injured as a result of the negligence of an unqualified physician.

Eliminating Negligence in Physician Credentialing (cont'd)

- Frigo v. Silver Cross
 - Hospital found negligent after patient's foot was amputated as a result of physician's negligence because it granted surgical privileges to a podiatrist even though he did not meet the hospital's stated criteria for receiving these privileges.

Eliminating Negligence in Physician Credentialing (cont'd)

- Anderson v. Loyola Medical Center
 - Hospital found liable because it had not adequately trained the procuring surgeon, who was a member of the Loyola “transplant team”, when the surgeon harvested a donor’s heart without assessing whether the organ was appropriate for transplantation. Heart, in fact, was not suitable but transplant surgeon was forced to use it because recipient’s heart had already been removed. Patient died soon thereafter. Case on appeal to Illinois Supreme Court.

Eliminating Negligence in Physician Credentialing (cont'd)

- IHA White Paper
 - Likely bases for a negligent credentialing claim.
 - Negligent information gathering and verification.
 - Negligent failure to follow reasonable internal credentialing procedures such as medical staff bylaws and policies relating to appointment, reappointment and credentialing/privileging procedures.
 - Negligent failure to follow standards of accreditation, licensing, Medicare Conditions of Participation and other applicable credentialing requirements.

Eliminating Negligence in Physician Credentialing (cont'd)

- Negligent failure to assess the credentialing information reasonable.
- Negligent granting or failure to limit privileges to an unqualified physicians.
- Negligent failure to take appropriate, remedial or corrective action based on the credentialing information.

Eliminating Negligence in Physician Credentialing (cont'd)

- Four Possible Hospital Responses to Frigo
 - Maintaining the Status Quo
 - Under this approach, the hospital would review the Frigo decision and conclude that the risk of a negligent credentialing claim is too low to warrant revising the hospital's practices and take steps to ensure that current procedures are being followed.

Eliminating Negligence in Physician Credentialing (cont'd)

- Audit and Improve Credentialing
 - Under an audit approach, the hospital would use the Frigo decision as an opportunity to revisit, reassess and reengineer the hospital's credentialing process to determine if the hospital is in compliance with its bylaws, policies and all legal requirements and to improve the hospital's decisions and actions, but do nothing to otherwise generate information or documents that are discoverable under the Medical Studies Act.

Eliminating Negligence in Physician Credentialing (cont'd)

- Improve Credentialing and Adopt Discoverable Processes for Special Cases
 - Under this approach, the hospital would do every step described above, to assess and improve existing credentialing practices. But it would also adopt a discoverable approach to credentialing for select “red flag” cases that may pose a heightened risk of a negligent credentialing claim against the hospital.
 - Hospitals that wish to grant privileges to such “red flag” physicians would need to consult legal counsel to explore the possibility of developing a second credentialing track or documentation that is not protected by the Medical Studies Act.

Eliminating Negligence in Physician Credentialing (cont'd)

- One set of defense information that can be generated for a “red flag” application is to describe the pre-committee information the hospital gathered to provide to its credentialing committee. It would be particularly helpful to show that the hospital engaged in heightened information gathering in light of a particular red flag.
- There is nothing in the Medical Studies Act that prohibits a peer review committee from generating another report for the express purpose of explaining the reasonableness of its credentialing recommendations for the purpose of limiting the hospital’s legal liability.

Eliminating Negligence in Physician Credentialing (cont'd)

- Thus, it may be possible for the credentials committee to conclude its confidential, Medical Studies Act protected work and reconvene to produce its discoverable defense of the reasonableness of its credentialing recommendation for the express purpose of creating a discoverable record on the “red flag” application or other peer review decision in the event that the decision is challenged as being negligent.
- Improve Credentialing and Adopt a Universally Discoverable Process.

Eliminating Negligence in Physician Credentialing (cont'd)

- The Challenge of Gathering Credentialing Information
 - Credentialing Immunity: Hospital Licensing Act and HCQIA
 - Credentialing Confidentiality: Medical Studies Act and PSOS
 - Uniform Application: Data Collection Act
 - Credentialing Burden of Proof: Always on Physician
 - Additional Immunities, Waivers & Protections

Eliminating Negligence in Physician Credentialing (cont'd)

- Considerations for Improving the Credentialing Process
 - Interpersonal Relationships
 - Imperfect Knowledge
 - Career Consequences
 - Evolving Patient Safety Standards
- Assessing Your Credentialing and Privileging Practices
 - Quality First
 - Follow Hospital and Medical Staff Bylaws, Rules & Procedures
 - Develop a “Red Flag” System

Eliminating Negligence in Physician Credentialing (cont'd)

- Applicant's Burden
- Gap Analysis
- Verify Objective Facts
- Privileges Match Credentials
- Consider the Adoption of Utilization Requirements
- Engage Experts
- Board Involvement
- Ongoing Quality Improvement
- Change the tone of Your Peer Review Process
- The Role of Legal Counsel