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Health Law - The Tenth Circuit Lowers the Evidentiary Burden to Overcome Peer Review Immunity under the Health Care Quality Improvement Act - Brown v. Presbyterian Healthcare Services

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HEALTH LAW—The Tenth Circuit Lowers the Evidentiary Burden to Overcome Peer Review Immunity Under the Health Care Quality Improvement Act—*Brown v. Presbyterian Healthcare Services*

I. INTRODUCTION

In *Brown v. Presbyterian Healthcare Services*,[1] the Tenth Circuit Court of Appeals lowered the evidentiary burden on plaintiffs seeking to overcome the peer review immunity conferred by the Health Care Quality Improvement Act[2] (HCQIA or Act). The HCQIA grants qualified immunity from money damages to peer review participants, provided that the peer review actions are conducted in accordance with the requirements of the Act.[3] The *Brown* court found that physician plaintiffs need show only that a difference of opinion exists among medical experts on whether the scope of the review was reasonable to create an issue of fact for the jury. The court's decision reduces the protection that the Act affords physician peer reviewers by increasing the likelihood that disciplined physicians with minimal evidence that a peer review was conducted unreasonably will file suit. The decision also increases the burden on peer review participants seeking to avoid a jury trial to show that the scope of their review was broad enough to preclude a difference of expert opinion.

This Note examines the Tenth Circuit's rationale in *Brown*, analyzes the ruling's relationship to current case law, and discusses several judicial options for considering HCQIA immunity issues in the future. It addresses the potential effect and implications of the court's holdings on medical peer review and related litigation in the Tenth Circuit. Finally, this Note includes recommendations for practitioners within the Tenth Circuit regarding HCQIA immunity issues.

II. FACTS[4]

Dr. Arlene Brown is a family practitioner who held staff and clinical privileges, including obstetrical privileges, at Lincoln County Medical Center in Ruidoso, New Mexico. During an informal peer review in early 1992, Dr. Vickie Williams, an obstetrician-gynecologist,[5] raised concerns regarding Dr. Brown's care of three patients. The hospital administrator, Ms. Valerie Miller, referred the charts of these three patients to outside specialists for review.[6] Dr. Brown subsequently agreed to

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1. 101 F.3d 1324 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 1461 (1997).
2. 42 U.S.C. §§ 11101-11152 (1994).
3. Four elements must be satisfied to obtain immunity under the Act. *See id.* § 11112(a).
4. Facts adapted from *Brown*, 101 F.3d at 1327-28.
5. Dr. Williams was the only obstetrician-gynecologist in Ruidoso at the time. *See* Anne L. Finger, *An FP Wins a Harrowing Battle in the Obstetrics Turf War*, MED. ECON., Aug. 25, 1997, at 116, 118. In that article, competition for non-indigent patients, hard feelings over Brown's 1991 bankruptcy filing, and anti-Semitism were raised as possible motives for the defendants' actions. *See id.* at 117-18.
6. Ms. Miller forwarded the charts, together with a "summary of concerns" prepared by Dr. Williams, to two Albuquerque obstetrical specialists, Drs. Gary Aisenbrey and James Hutchison. *See id.* at 121 (quoting Valerie Miller). The outside specialists' comments were submitted to the hospital's Executive Committee. *See Brown*, 101 F.3d at 1327. The three incidents involved questions of whether a patient's labor should have been induced, whether Dr. Brown should have called Dr. Williams earlier in a patient's problematic labor, and whether Dr. Brown appropriately intervened in a placental delivery. *See* Finger, *supra* note 5, at 121. According to the defendants-appellants' brief, both physicians criticized certain aspects of care in two of the cases and disagreed as to the third. *See* Brief for Appellants at 10, Brown v. Presbyterian Healthcare Servs., 101 F.3d 1324 (10th Cir. 1996) (Nos. 95-

consult with an obstetrical specialist when caring for high-risk obstetrical patients.

In February 1993, Ms. Miller instituted formal peer review proceedings against Dr. Brown, claiming that she failed to honor the prior consultation agreement.[7] A peer review panel of three physicians reviewed charts of two of Dr. Brown's patients and heard testimony from Drs. Brown and Williams. After concluding that Dr. Brown breached her agreement to consult, the panel recommended removing her obstetrical privileges. Following Medical Executive Committee approval, the Board of Trustees adopted the panel's recommendations and the hospital submitted a report of the adverse action to the National Practitioner Data Bank (NPDB). In preparing the NPDB report, Ms. Miller and the medical staff coordinator (Ms. Perry) selected "Incompetence/Malpractice/Negligence" as the "Adverse Action Classification Code."

Dr. Brown filed suit seeking injunctive relief and damages for various claims arising from the revocation of her privileges and the filing of the NPDB report.[8] After determining that the defendants were not entitled to the HCQIA's immunity for peer review activities, the district court jury found for Dr. Brown on the defamation, intentional interference with contract, and some of the antitrust claims.[9] The court entered an amended judgment, setting aside damages related to the contract claim and the antitrust punitive damages.[10] Both parties appealed to the Tenth Circuit.[11]

III. HISTORICAL BACKGROUND

In 1986, Congress found that the rising rates of medical malpractice and the need to improve the quality of medical care constituted a nationwide problem.[12] Although Congress determined that "effective professional peer review" could remedy this problem,[13] it found that physicians were discouraged from acting as peer reviewers

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2293 & 96-2013) (citing Appellants' Appendix at 657-60 & Transcript at 399-402, 406-09, 480, 487, 496). One of the specialists suggested that "this physician [Dr. Brown] obtain obstetrical consultation for any high risk antenatal patient." *Id.* (quoting Appellants' Appendix at 656). The plaintiff-appellee's brief indicated that one of the outside reviewers was a PHS employee, and the other reviewer did not believe that the three charts demonstrated "significant breaches of the standard of care." Brief of Appellees at 6-7, Brown v. Presbyterian Healthcare Servs., 101 F.3d 1324 (10th Cir. 1996) (Nos. 95-2293 & 96-2013) (citing Transcript at 379-81, 429-30).

7. Dr. Williams and Nurse McCallum brought two cases for review. *See* Finger, *supra* note 5, at 121. These two cases involved women in possible preterm labor for whom Dr. Brown prescribed medication. *See id.* at 121-22. In the first case, there were no complications after Dr. Brown treated the woman with terbutaline, other than a brief period of hospitalization. *See id.* at 121. The second case involved a patient "clearly in preterm labor" for whom Brown prescribed a repeat dose of medications that Williams had previously recommended. *See id.* at 122. When the drugs failed to work, Brown contacted Williams and an Albuquerque perinatologist. *See id.* The perinatologist arranged for air transport of the patient to Albuquerque where the patient delivered a healthy baby. *See id.*

8. *See Brown*, 101 F.3d at 1327.

9. *See id.*

10. *See id.*

11. *See id.* Plaintiff appealed the order to vacate the awards for both tortious interference with contract and the antitrust punitive damages. *See id.* at 1329. Defendants appealed the court's refusal to find HCQIA immunity as a matter of law, in addition to its refusal to enter judgment as a matter of law on the merits of the antitrust and defamation claims. *See id.* at 1332-33. The circuit court reversed the district court's order vacating Plaintiff's compensatory and punitive damages for tortious interference with contract, and affirmed on all other issues. *See id.* at 1336.

12. *See* 42 U.S.C. § 11101(1) (1994).

13. *Id.* § 11101(3).

by the threat of private money damages.[14] Congress concluded that there was an "overriding national need" to encourage and protect those physicians participating in effective peer review.[15]

In light of these findings, Congress enacted the HCQIA, in an attempt to encourage professional peer review among physicians[16] by providing protection from private money damage liability related to peer review activities.[17] Under the HCQIA, a peer review participant's activities enjoy immunity from private damage claims, provided that the peer review actions are conducted:

> (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 . . . , and
> (4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts.[18]

If all four criteria are met, a peer review participant "shall not be liable in damages."[19] To qualify for the Act's protection, the statute further requires that health care entities report all adverse peer review actions to the Board of Medical Examiners.[20] Under the HCQIA, a peer review action is presumed to satisfy the four elements of 42 U.S.C. § 11112(a).[21] The plaintiff must prove by a preponderance of the evidence that one or more elements were not met in order to rebut the presumed immunity of a defendant's peer review action.[22] Courts, relying on the language of the statute and the Act's legislative history, have construed this immunity to extend only to money damages.[23] Therefore, a plaintiff denied damages pursuant to HCQIA immunity may still seek injunctive and declaratory relief.[24] In other words, the Act does not provide immunity from suit.[25]

A. Subjective v. Objective Standard

Three of the four immunity elements under 42 U.S.C. § 11112(a) incorporate "reasonableness" in the criteria for assessing a peer review action.[26] Two of these three elements explicitly require "reasonable *belief*."[27] Despite the presence of

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14. *See id.* § 11101(4).
15. *See id.* § 11101(5).
16. *See id.*
17. *See id.* § 11101(4).
18. *Id.* § 11112(a).
19. *Id.* § 11111(a)(1).
20. *See id.* § 11111(b), 11133(a).
21. *See id.* § 11112(a).
22. *See id.*
23. *See* Imperial v. Suburban Hosp. Ass'n, 37 F.3d 1026, 1031 (4th Cir. 1994) (holding that HCQIA protection is "limited to damages liability").
24. *See* Bryan v. Holmes, 33 F.3d 1318, 1322 (11th Cir. 1994).
25. *See* Manion v. Evans, 986 F.2d 1036, 1042 (6th Cir. 1993) (finding that the HCQIA does not grant the right not to stand trial). *See also* Decker v. IHC Hosp. Ass'n, 982 F.2d 433 (10th Cir. 1992) (holding that denials of motions to dismiss under the HCQIA are not immediately appealable).
26. *See* § 11112(a)(1), (2), (4).
27. *See id.* § 11112(a)(1), (4) (emphasis added).

subjective language[28] in the statute and supporting legislative history,[29] the circuit courts that have addressed this matter overwhelmingly apply an objective standard.[30]

B. Establishing the HCQIA's Objective "Reasonable Belief" Standard

Austin v. McNamara[31] illustrates the adoption and application of the objective interpretation of the HCQIA's "reasonable belief" standard. The plaintiff-neurosurgeon in *Austin* challenged the defendant's immunity under the HCQIA based on evidence that the other neurosurgeons were hostile and contemptuous of him.[32] The *Austin* court examined the HCQIA's legislative history to determine whether Congress intended the reasonableness requirements to create an objective or subjective standard.[33] Ultimately, the court construed the reasonableness requirements to represent an objective standard that precluded its consideration of any evidence of bad faith.[34]

Presumably, the *Brown* court, in accord with *Austin*, rejected any consideration of animosity or anti-competitive motives of the defendants[35] in determining the issue of HCQIA immunity.[36] The Tenth Circuit Court relied on persuasive authority[37] in accepting the objective standard described in *Austin* and *Mathews*.[38] In this respect, *Brown* follows the majority of circuit courts in its application of the objective standard to the HCQIA "reasonableness" requirements of 42 U.S.C.

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28. *See id.* (requiring "reasonable *belief*") (emphasis added). "Encouraging *Good Faith* Professional Review Activities" is the title of the HCQIA's chapter 117. *See id.* §§ 11101-11152 (emphasis added).

29. The House Committee on Energy and Commerce originally considered a "good faith" standard for peer review actions. *See* H.R. REP. NO. 99-903, at 10 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6384, 6392. Responding to concerns that courts would require "*only* a test of the [peer reviewers'] subjective state of mind . . . the Committee changed to a *more* objective 'reasonable belief' standard." *Id.* at 10, 1986 U.S.C.C.A.N. at 6392-93 (emphasis added).

30. *See, e.g.*, Mathews v. Lancaster Gen. Hosp., 87 F.3d 624, 635 (3d Cir. 1996) (determining that Congress intended to create an objective standard by using the words "reasonable belief"); Bryan v. Holmes, 33 F.3d 1318, 1323 (11th Cir. 1994). ("[T]he statute's reasonableness requirements were intended to create an objective standard of performance, rather than a subjective good faith standard."); Austin v. McNamara, 979 F.2d 728, 734 (9th Cir. 1992) (one dissenting) (concluding that peer review participants' bad faith is immaterial because the § 11112(a) reasonableness standards test is objective).

31. 979 F.2d 728 (9th Cir. 1992).

32. *See id.* at 734.

33. *See id.* (discussing H.R. REP. NO. 99-903, at 10); *see also supra* note 29.

34. *See Austin*, 979 F.2d at 734. The *Austin* court dismissed the plaintiff's allegations of peer review animosity as "irrelevant to the reasonableness standards of § 11112(a)." *Id.*

35. The court described evidence indicating that Drs. Williams and Brown were not only competitors, but experienced a personality conflict. *See* Brown v. Presbyterian Healthcare Servs., 101 F.3d 1324, 1335 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 1461 (1997). The court further indicated that Dr. Williams and a nurse who made anti-Semitic remarks about Dr. Brown were responsible for selecting all five of the charts reviewed during the peer review process. *See id.*

36. In *Brown*, the jury considered evidence of the defendants' bad faith as elements of other claims, because the plaintiff's attorney structured the lawsuit to include prima facie tort, defamation, tortious interference with contract, and antitrust actions. *See Brown*, 101 F.3d at 1327.

37. Both *Austin* and *Mathews* were decisions of other circuits, neither of which were affirmed at the U.S. Supreme Court level.

38. *See Brown*, 101 F.3d at 1333 (citing *Mathews*, 87 F.3d at 635; *Austin*, 979 F.2d at 734) (noting that reasonableness of peer review actions determined by objective standard). The court did not reexamine the language of the statute, *see supra* note 28, or the legislative history on this issue, *see supra* note 29.

§ 11112(a).[39] However, the court uniquely made reference to the plaintiff's expert witness in finding that his opinion testimony created a jury question on the issue of "reasonable effort."[40]

IV. RATIONALE

The court found that Brown successfully challenged the defendants' immunity under the HCQIA by presenting "sufficient evidence for a reasonable jury to find, by a preponderance of the evidence, the peer review action was not taken after a 'reasonable effort to obtain the facts of the matter.'"[41] Because this is an essential element for immunity under the HCQIA,[42] the court determined that the defendant was not entitled to the Act's protection from monetary damages.[43]

Before analyzing the HCQIA immunity issues the *Brown* court reviewed the reasons for the statute's enactment.[44] It noted that Congress determined a need to "provide qualified immunity from damages actions for hospitals, doctors and others who participate in professional peer review."[45] The court briefly described the HCQIA's four peer review immunity requirements[46] and the accompanying presumption standard under the Act.[47] Finally, the *Brown* court noted its acceptance of the objective standard for determining the reasonableness of a peer review action under the HCQIA.[48]

A. Overcoming the Immunity Presumption

The *Brown* court relied on the testimony of the plaintiff's expert witness, Dr. Norman Lindley, in upholding the finding that the defendants were not entitled to the qualified immunity of the HCQIA.[49] Dr. Lindley testified that he disagreed both with the review panel's final decision regarding Dr. Brown,[50] and with the panel's method of review.[51] Specifically, he objected to the panel's formal review of only two charts prior to its final decision as being "unreasonably narrow."[52]

The *Brown* court referred to the number of reviewed charts, the length of panel

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39. *See* cases cited *supra* note 30.

40. *See Brown*, 101 F.3d at 1334.

41. *Id.* at 1333 (quoting the statutory language of 42 U.S.C. § 11112(a)(2)).

42. *See* § 11112(a)(2).

43. *See Brown*, 101 F.3d at 1334. The Tenth Circuit Court of Appeals upheld the district court's finding that Defendants were not, as a matter of law, immune from damages related to the revocation of Plaintiff's obstetrical privileges. *See id.*

44. *See id.* at 1333. Referring to the Act's findings, the court noted the Congress' concern with rising medical malpractice claims, the need for improved quality of medical care, and the discouraging effect of the threat of money damages on physician participation in professional peer review. *See id.* (citing 42 U.S.C. § 11101).

45. *Id.* (citing Imperial v. Suburban Hosp. Ass'n, 37 F.3d 1026, 1028 (4th Cir. 1994)).

46. *See id.* (citing 42 U.S.C. § 11112(a)).

47. *See id.* (citing 42 U.S.C. § 11112(a)).

48. *See id.*

49. *See id.* at 1333-34. Specifically, the court found that the plaintiff "presented sufficient evidence for a reasonable jury to find . . . the peer review action was not taken after a 'reasonable effort to obtain the facts of the matter.'" *Id.* at 1333. Thus, the court apparently determined that the defendants failed to satisfy element (2) of the Act's peer review standards. *See* 42 U.S.C. § 11112(a)(2).

50. *See Brown*, 101 F.3d at 1333-34 (noting Dr. Lindley's opinion that Dr. Brown "obtained appropriate consultation when necessary").

51. *See id.*

52. *See id.* at 1334.

deliberations, and the manner of peer review,[53] but did not note whether these factors alone could create an issue regarding the HCQIA immunity presumption. Rather, it apparently considered Dr. Lindley's *opinion* regarding the data as sufficient evidence to create a jury question.[54]

The defendants pointed to their own experts[55] and asserted that a "difference of opinion among experts" does not create an issue regarding the reasonableness of the peer review panel's actions.[56] The court flatly rejected this argument, speculating that under this assumption, a peer review participant would enjoy absolute immunity from liability, so long as a participant had one expert to testify on his or her behalf.[57] The court expressed concern that this position would contradict Congress' provision for "qualified immunity,"[58] and would deny the jury its responsibilities.[59]

V. ANALYSIS

The HCQIA seeks to improve the quality of medical care by encouraging effective, good faith professional peer review.[60] The Tenth Circuit's decision in *Brown* substantially narrows the protection afforded peer review participants under the HCQIA. In doing so, the *Brown* court may have undermined the purpose and functions of the Act.[61]

A. The Role of Expert Witness Testimony

The *Brown* court found that Dr. Lindley's testimony, standing alone, was a sufficient basis for the plaintiff to ultimately overcome the presumption that the defendant made a reasonable effort to obtain the facts.[62] It based this decision on a fear that finding immunity despite a difference of professional opinion would contravene "Congress' intention to provide 'qualified immunity,'" by rendering peer review participants "absolutely immune from liability for [their] actions."[63]

The Tenth Circuit's fears are exaggerated because the HCQIA does not provide absolute immunity to a defendant. The Act was designed to provide peer review participants with immunity from monetary damages, subject to satisfaction of the

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53. *See id.* at 1333. The facts of the peer review process were not in dispute. The formal peer review panel reviewed two charts, deliberated approximately two hours, and heard testimony from both Drs. Williams and Brown. *See id.*

54. "Thus, *from Dr. Lindley's testimony*, a reasonable jury could have found the panel's review . . . not taken after a 'reasonable effort to obtain the facts.'" *Id.* at 1334 (emphasis added).

55. "[T]he defendants presented evidence from a number of doctors who testified the review panel's actions satisfied the requirements of 42 U.S.C. § 11112(a)." *Id.* at 1334 n.9.

56. *See id.*

57. *See id.*

58. *See id.*

59. *See id.* (citing Moe v. Avions Marcel Dassault-Breguet Aviation, 727 F.2d 917, 930 (10th Cir. 1984)). "[T]he jury's responsibility [is] to weigh the evidence and determine the credibility of witnesses." *Id.*

60. *See* 42 U.S.C. § 11101 (1994).

61. *See id.* § 11101(3), (5) (noting the need to promote medical peer review by providing "incentive[s] and protection for physicians engaging in effective professional peer review").

62. *See Brown*, 101 F.3d at 1334. "Thus, *from Dr. Lindley's testimony*, a reasonable jury could have found the panel's review to be unreasonably restrictive and not taken after a 'reasonable effort to obtain the facts.'" *Id.* (emphasis added).

63. *Id.* at 1334 n.9.

required conditions.[64] In reviewing the legislative history, the Tenth Circuit itself noted in *Decker v. IHC Hospitals, Inc.*,[65] that the HCQIA "provides protection *only from damages in private actions,* and *only for proper peer review.*"[66] Therefore, a defendant may be shielded from damages in some circumstances, but is always potentially subject to the plaintiff for declaratory or injunctive relief.[67]

The *Brown* court's view of conflicting expert opinion is unique among its cited cases. The courts in the cited cases found that conflicting expert testimony might create a question as to whether the peer review action itself (suspension or revocation of privileges) was correct, but did not find that this conflict created a material issue regarding the defendants' "reasonableness" requirements related to 42 U.S.C. § 11112(a) immunity criteria.[68]

B. The HCQIA Reasonable Effort Element

The cases cited in *Brown* do not specifically address the effect of conflicting expert testimony on the presumption regarding a "reasonable effort to obtain the facts of the matter."[69] However, in *Mathews v. Lancaster General Hospital* the court examined the general meaning and application of "reasonable effort" within the context of 42 U.S.C. § 11112(a)(2).[70]

The plaintiff in *Mathews* challenged the reasonableness of the committee's efforts alleging a lack of committee integrity[71] rather than on the basis of conflicting expert reports.[72] The *Mathews* court determined that the "totality of the process"

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64. "The threat of private *money damage* liability . . . discourages physicians from participating in effective professional peer review." 42 U.S.C. § 11101(4) (1994) (emphasis added). A participant whose peer review action "meets all the standards specified in section 11112(a) . . . shall not be liable in *damages* . . . with respect to the action." *Id.* § 11111(a)(1) (emphasis added).

65. 982 F.2d 433 (10th Cir. 1992).

66. *Id.* at 437 (quoting H.R. REP. NO. 99-903, at 9 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6384, 6391) (second emphasis added).

67. *See* Bryan v. Holmes, 33 F.3d 1318, 1322 (11th Cir. 1994). "Congress granted immunity from monetary damages . . . while preserving causes of action for injunctive or declaratory relief . . . ." *Id.*

68. *See, e.g.*, Austin v. McNamara, 979 F.2d 728 (9th Cir. 1992). In that case, a Judicial Review Committee (JRC) found that the Medical Executive Committee's (MEC) decision to revoke the plaintiff's privileges was "unreasonable." *See id.* at 732. The *Austin* court, in upholding the defendant's immunity under the Act, determined that the JRC's statements called into question the ultimate reasonableness of the plaintiff's suspension, but not the MEC's "reasonable belief that the [suspension] was warranted." *Id.* at 735. *See also* Mathews v. Lancaster Gen. Hosp., 87 F.3d 624 (3d Cir. 1996). In *Mathews*, the plaintiff's expert report conflicted with the results of the defendants' outside reviewer. *See id.* at 636 n.9. The court found that while "conflicting reports raise an issue of fact as to whether [the plaintiff] provided acceptable care, they do not call into question whether the Board's decision in relying on the [outside] report was reasonable" related to § 11112(a)(1). *Id.* Likewise, the *Mathews* court found that the same conflicting reports regarding § 11112(a)(4) did not "rebut the presumption that the Board made its decision in the reasonable belief that [the action] . . . was warranted by the facts known." *Id.* at 638.

69. The *Mathews* court discussed "reasonable effort" without referring to conflicting testimony. *See Mathews*, 87 F.3d at 637. *Austin* considered conflicting expert reports, but did not focus on "reasonable effort" as a separate element. *See Austin*, 979 F.2d at 735. In *Islami v. Covenant Medical Center*, 822 F. Supp. 1361 (N.D. Iowa 1992) the court examined only the element of "notice and hearing" under the Act and no conflicting expert reports were at issue. *See id.* at 1377-78.

70. *See Mathews*, 87 F.3d at 637.

71. *See id.* The plaintiff claimed that a failure of reasonable effort was demonstrated by the presence of competitors on the review committee, lack of independent investigation of the committee, and lack of consideration of routine internal quality reviews. *See id.*

72. *See id.* (noting that the plaintiff's expert report reached a contrary conclusion regarding acceptability of the plaintiff-physician's care).

leading up to a board's action should evidence a "reasonable effort to obtain the facts" in order to satisfy the requirement of 42 U.S.C. § 11112(a)(2).[73] The court examined several factors as part of the "totality of the process" related to a "reasonable effort:" (1) number of recommendations to the board; (2) length of review; and (3) number of cases reviewed.[74] In finding that the defendants met the 42 U.S.C. § 11112(a)(2) requirement, the *Mathews* court made no reference to the plaintiff's contradictory expert report.[75] Interestingly, the *Brown* court never referenced *Mathews* in its analysis of "reasonable effort," despite the fact that it is the only cited case that examines that element in any significant detail.

The court in *Austin v. McNamara*[76] also discussed "reasonable effort," albeit within the context of a peer reviewer's reasonable belief that the action was warranted.[77] The plaintiff in *Austin* based his challenge to the peer review panel's action partially on the conflicting recommendations of the Judicial Review Committee (JRC).[78] The JRC found the plaintiff's suspension "unreasonable" and reinstated him, subject to consultations and review.[79] In light of the JRC's reinstatement conditions, the court determined that "no reasonable jury could find that the JRC report is sufficient to establish the nonexistence of the defendants' 'reasonable belief' and 'reasonable effort.'"[80] It is unclear whether the *Austin* court intended its reasoning to apply to each phrase *independently* or to the section *as a whole*, because the court examined "reasonable effort" only in conjunction with the "reasonable belief" clause of 42 U.S.C. § 11112(a)(4).[81] As with *Mathews*, the *Brown* court did not refer to *Austin* in its discussion of reasonable effort.

C. *Summary Judgment Issues*

The *Brown* court also expressed concern about interfering with the jury functions of weighing evidence and determining witness credibility.[82] Despite the court's concerns, the HCQIA is designed to dispose of peer review immunity issues sooner rather than later. For example, legislative history indicates that the HCQIA specifically intended for courts to make early determinations of defendant immunity under its provisions.[83] The Eleventh Circuit in *Bryan v. Holmes*[84] interpreted this

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73. *See id.*

74. *See id.* The peer review action in *Mathews* followed a two year investigation that included an internal and outside review, two board recommendations and 208 chart reviews. *See id.*

75. The court's opinion does not indicate whether the plaintiff raised the expert's contradictory report as a challenge to the reasonableness of the panel's efforts. *See id.*

76. 979 F.2d 728 (9th Cir. 1992).

77. *See id.* at 735; *see also* 42 U.S.C. § 11112(a)(4) (1994).

78. *See Austin*, 979 F.2d at 734-35.

79. *See id.* at 732.

80. *Id.* at 735.

81. The clause requires "reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts." 42 U.S.C. § 11112(a)(4).

82. *See* Brown v. Presbyterian Healthcare Servs., 101 F.3d 1324, 1334 n.9 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 1461 (1997) (citing Moe v. Avions Marcel Dassault-Breguet Aviation, 727 F.2d 917, 930 (10th Cir. 1984)).

83. *See* H.R. REP. NO. 99-903, at 12 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6384, 6394.

> The Committee intends that these provisions allow defendants to file motions to resolve the issue of immunity in as expeditious a manner as possible. The provisions . . . allow a court to make a determination that the defendant has or has not met the standards . . . . even though other

history to mean that the Act's immunity is a question of law to be decided by the court, and further recommended that the merits of the case be referred to the jury without reference to the immunity issues.[85] Although the Eleventh Circuit Court of Appeals prefers to resolve HCQIA immunity motions at summary judgment, it allows for jury participation in certain circumstances.[86]

D. Judicial Alternatives

To effect its laudable goals, the Act must provide clear, predictable standards that insure immunity to a compliant peer reviewer. Courts must apply the standards evenly and consistently in every case. Otherwise, physicians' lack of confidence in the judicial enforcement of the statute's protection might well result in the reluctance to participate in effective peer review which initially inspired the HCQIA's enactment.[87]

There are various ways that courts in the future might determine the immunity issues under the HCQIA. The following alternatives attempt to describe clear, predictable standards or require a greater sufficiency of evidence to rebut the immunity presumption compared with the Tenth Circuit's relatively weak "difference of professional opinion" standard.

1. Court-Determined Standards

The *Brown* court could have weighed the evidence presented by the experts without reference to their opinions regarding the reasonableness of the defendant's action. In essence, this means considering objective evidence such as length of review and number of charts. The court could determine minimal standards that would satisfy the "reasonable effort" requirement for immunity, in the same way that the Act currently provides safe harbor criteria that satisfy the "adequate notice and hearing" requirement.[88] Although experts could testify regarding medical diagnoses, acceptability of treatment regimes, and other medical/technical issues, their testimony would become irrelevant on the question of what constitutes a "reasonable effort" in a peer review action. The obvious advantages to this approach

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issues in the case remain to be resolved.

Id. The American Medical Association (AMA) supported this congressional intent to resolve immunity issues in the early stages of litigation. *See* Bryan v. Holmes, 33 F.3d 1318, 1332 n.25 (11th Cir. 1994) (referencing *amicus curiae* brief of the AMA).

84. 33 F.3d 1318 (11th Cir. 1994).

85. *See id.* at 1332-33.

86. *See id.* at 1333. The *Bryan* court would allow a jury to resolve "disputed subsidiary issues" of HCQIA immunity "by responding to special interrogatories." *Id.* Although the court declared that "adequate notice" is an example of a disputed issue that the jury could decide, it did not indicate what evidence would throw the issue into dispute. *See id.* It concluded that the jury should "[u]nder no circumstances" determine the ultimate question of whether the defendant is immune under the HCQIA provisions. *See id.*

87. *See* Josephine M. Hammack, Comment, *The Antitrust Laws and the Medical Peer Review Process*, 9 J. CONTEMP. HEALTH L. & POL'Y 419, 433-34 (1993) (noting physicians' reticence to review their colleagues prior to the HCQIA's enactment).

88. The HCQIA requires "adequate notice and hearing" under 42 U.S.C. § 11112(a)(3). The Act deems that the "adequate notice and hearing" requirement is satisfied by a health care entity that meets the conditions listed in subsection (b). The Act does not exclude other procedures from qualifying as "adequate notice and hearing" and expressly states that a peer review body's failure to meet these conditions does not necessarily "constitute failure to meet the standards of subsection (a)(3)." 42 U.S.C. § 11112(b)(3)(D)(ii).

are its "bright-line" qualities: ease of application, efficiency and predictability.

The primary drawbacks to this approach flow from its standardized nature. Rigid criteria may deny peer review panels the flexibility in responding to various situations. For instance, a panel's brief investigation of one particularly egregious incident may constitute a sufficiently reasonable effort to obtain the facts prior to revoking a physician's privileges. On the other hand, a panel may satisfy the "reasonable efforts" criteria without expending the efforts actually necessary under the circumstances.

2. Modified "Difference of Professional Opinion" Standard

The *Brown* court could have found that a professional difference of opinion regarding the reasonableness of the peer review panel's efforts *does not* create a jury question. Alternatively, the court could have found that an expert's testimony that no reasonable professional could consider the peer review effort reasonable, *does* create an issue for the jury.[89] This approach would satisfy the Tenth Circuit Court's concern with removing issues from the jury.[90] This requirement essentially raises the bar that the plaintiff must meet, thereby strengthening the defendant's damage immunity presumption under the HCQIA.[91]

This method of dealing with conflicting expert testimony is easy to apply, and the court can quickly dispense with immunity issues under the HCQIA. The disadvantage is that its potentially narrow focus will prevent the court from considering additional circumstances, facts, and testimony on this issue. This standard evokes the same type of dilemma as the *Brown* court's "difference of opinion" standard.[92]

3. Judicial Assistance

Part of the difficulty with deciding immunity issues under the HCQIA is the necessity for judges and juries to evaluate conflicting expert testimony.[93] How does

89. The difference in this assertion is that the plaintiff's expert is, in effect, expressing not only his or her opinion that the defendant failed to act reasonably, but that *no reasonable professional could find otherwise*. Arguably, the HCQIA immunity presumption is intended to protect the reasonable physician peer reviewer. *See, e.g., Bryan*, 33 F.3d at 1333 (noting that the HCQIA presumption places the burden on the plaintiff to "prov[e] that the peer review process was *not* reasonable"). However, reasonable physicians can and do disagree. This standard avoids the creation of a jury question simply where reasonable physicians disagree.

90. Rather than removing the issue from the jury, this approach would simply require a stricter standard of conflicting expert testimony in order to create a jury question. *See supra* notes 55-59 and accompanying text (noting the *Brown* court's concern in finding immunity despite the existence of differing expert opinions).

91. This standard applied in *Brown* would have resulted in the defendants retaining damages immunity under the HCQIA because Dr. Lindley testified only that he considered the panel's efforts unreasonable. *See* Brown v. Presbyterian Healthcare Servs., 101 F.3d 1324, 1334 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 1461 (1997). On the other hand, under this approach, if Lindley further stated that *no* reasonable physician/peer reviewer could consider the panel's effort to obtain the facts reasonable, the court would find that his testimony created a jury question on that issue.

92. *See id.* at 1334 n.9. Plaintiffs will likely overcome the HCQIA's presumption of immunity (or create a jury question on the issue) if they can obtain one qualified witness who is willing to testify in this manner. Similarly, defendants will likely retain damages immunity if plaintiffs lack a witness' opinion to this effect.

93. *See, e.g.*, Paul S. Milich, *Controversial Science in the Courtroom*: Daubert *and the Law's Hubris*, 43 EMORY L.J. 913, 914, 923 (1994) (noting the problem of asking juries to decide the scientific reliability of principles and methods propounded by various expert witnesses).

one determine whether the plaintiff's or defendant's expert has accurately assessed a medical peer review panel's effort to obtain the facts? Lay judges and juries may not possess the background to knowledgeably sift through the facts and methods of medical peer review. Moreover, lay persons may have difficulty assigning weight to conflicting expert testimony.[94] Medical peer reviewers may feel insecure taking peer review action that might be evaluated by uncertain lay standards.

The court could enlist the assistance of various individuals in resolving difficult or complex technical issues related to the medical peer review process and the application of HCQIA immunity. Examples of available judicial support include masters,[95] court-appointed experts,[96] and advisory juries.[97] A comprehensive examination of these judicial tools is beyond the scope of this Note.[98]

Masters and court-appointed experts appear to be particularly suited to resolving issues engendered by the HCQIA's immunity standards.[99] Masters wield broad powers, and subject to judicial discretion, may rule on the admissibility of evidence, take witness testimony, and render findings of fact and conclusions of law.[100] Therefore, an expert master can be an extremely flexible tool.[101] Court-appointed experts are provided for in Rule 706 of the Federal Rules of Evidence. Experts may serve the court by presenting a neutral assessment of the scientific methods and principles at issue.[102] Although they do not possess the extensive scope of authority available to masters, their range of duties make them extremely useful in scientific, technical, and complex cases.[103] Although judicial experts can provide valuable

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94. *See, e.g.*, Joe S. Cecil & Thomas E. Willging, *Accepting* Daubert's *Invitation: Defining a Role for Court-Appointed Experts in Assessing Scientific Validity*, 43 EMORY L.J. 995, 1009-10 (1994) (describing judicial appointments of experts to assist the court in understanding unfamiliar technical subjects and conflicting expert testimony).

95. *See* FED. R. CIV. P. 53.

96. *See* FED. R. EVID. 706.

97. *See* FED. R. CIV. P. 39.

98. There is much written material on the subject of judicial assistance in technical cases. *See generally*, FEDERAL JUDICIAL CTR., REFERENCE MANUAL ON SCIENTIFIC EVIDENCE (1994) (discussing the judicial management of expert evidence); Cecil & Willging, *supra* note 94 (examining the use of court-appointed experts); Jody Weisberg Menon, Note, *Adversarial Medical and Scientific Testimony and Lay Jurors: A Proposal for Medical Malpractice Reform*, 21 AM. J.L. & MED. 281 (1995) (discussing lay judge and jury understanding of medical and scientific testimony); John W. Wesley, Note, *Scientific Evidence and the Question of Judicial Capacity*, 25 WM. & MARY L. REV. 675 (1984) (examining the ability of lay judiciary to comprehend complex technical information and the use of judicial tools).

99. Federal rules prohibit the use of advisory juries in cases where trial by jury is a right. *See* FED. R. CIV. P. 39(c).

100. *See* FED. R. CIV. P. 53(c), (e); Margaret G. Farrell, *Special Masters, in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE *supra* note 98, at 575, 598 (1994).

101. In a case similar to *Brown*, the court might simply request a master to render his or her personal expert opinion regarding the peer review panel's efforts, and consider the testimony as a piece of evidence. Alternatively, the court could direct the master to issue a conclusion of law determining whether the defendants met the requirement of conducting a "reasonable effort to obtain the facts of the matter."

102. *See* Milich, *supra* note 93, at 925.

103. Commentators have noted how courts utilize the various roles of the expert. In one case, the court-appointed expert advised the court on computer technology, pointing out legal deficiencies and suggesting different standards. *See* Cecil & Willging, *supra* note 94, at 1000-01 (discussing Computer Assocs. Int'l v. Altai, Inc., 775 F. Supp. 544 (E.D.N.Y. 1991), *aff'd in relevant part*, 982 F.2d 693 (2d Cir. 1992)).The judge adopted and applied the expert's suggested standard. *See id.* at 1001. The court of appeals upheld a challenge to the expert's role in that case, finding that the technical nature of the controversy justified the expert's expanded role. *See id.* In contrast, the court-appointed expert in another case rendered an opinion only on the narrow issue of the scientific

assistance to the bench, another consideration is the potential for increased litigation costs if the case goes to trial.[104]

4. Subjective Intent Standard

Probably the least judicially acceptable approach, but perhaps most in accord with the original legislative intent of the HCQIA, the court might have examined evidence of the peer reviewers' subjective intent or motives in its determination of immunity under the 42 U.S.C. § 11112(a) criteria. The court could consider evidence indicating a defendant's animosity or hostility toward the plaintiff when evaluating the "reasonable belief" behind a peer review participant's action.[105] Thus, the court might have reached the same result, removal of the defendants from HCQIA immunity, for different reasons.[106] This approach finds support in the Act's language,[107] legislative history,[108] and some court dicta.[109] Moreover, judicial evaluation of a peer review committee's motives might have the beneficial result of encouraging an impartial peer review process.[110] However, it is unlikely that courts will adopt this approach in light of the overwhelming judicial preference for the objective standard.[111]

VI. IMPLICATIONS

A. *Effect on Professional Peer Review*

The critical problem inherent in the *Brown* ruling is its potential chilling effect on rigorous, effective, peer review activity among health care professionals. The decision creates the potential for the inverse of the "absolute immunity" scenario

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acceptability of a specific calculation. *See id.* at 1001-02 (discussing Renaud v. Martin Marietta Corp., 749 F. Supp. 1545 (D. Colo. 1990), *aff'd*, 972 F.2d 304 (10th Cir. 1992)).

104. Masters and court-appointed experts are compensated from specified funds or the costs may be allocated to the parties. *See* FED. R. CIV. P. 53(a); FED. R. EVID. 706(b). On the other hand, if a case is disposed of by a master without a trial, the cost may be insignificant compared to that of a three week trial.

105. Judge Pregerson's dissenting opinion supported this approach in *Austin v. McNamara*, 979 F.2d 728, 741 n.3 (9th Cir. 1992). "Evidence of motive and intent is relevant to show whether the defendants possessed a reasonable belief that the final revocation was warranted by the facts known." *Id.*

106. The court might have found that evidence of the defendants' anti-competitive motives or hostility created a question of whether the peer review panel acted in a "reasonable belief" that the revocation "was in furtherance of quality health care." 42 U.S.C. § 11112(a)(1) (1994).

107. *See supra* note 28.

108. *See supra* note 29.

109. Although circuit courts unanimously agree that the Act's immunity requirements establish an objective standard, *see supra* note 30, a few have discussed subjective elements (bias, hostility) in reaching their decisions. For instance, the court held in *Mathews v. Lancaster General Hospital* that subjective intent was irrelevant in determining whether the defendants had a reasonable belief that peer review action was taken in furtherance of quality health care. *See* 87 F.3d 624, 636 (3d Cir. 1996). Nevertheless, in upholding HCQIA immunity regarding § 11112(a)(1), the same court stated that "the evidence supports the conclusion that defendants were *motivated* by legitimate health care concerns." *Id.* (emphasis added). Likewise, the court in *Bryan v. Holmes* declared that "assertions of hostility" were irrelevant in determining HCQIA immunity, but only after noting a lack of evidence that such hostility determined the peer review outcome. *See* 33 F.3d 1318, 1335 (11th Cir. 1994). These cases seem to indicate a judicial willingness to consider the peer reviewers' underlying motives for taking action.

110. Health care institutions may screen out peer review members with strong anti-competitive motives or personal conflicts to insure a more disinterested, unbiased peer review panel. Alternatively, "outside review" may be officially incorporated into the peer review process.

111. *See* cases cited *supra* note 30.

that the court feared would result if it reversed the lower court decision.[112] Under its ruling, a plaintiff can create a jury question regarding the defendant's immunity presumption by producing an expert witness who testifies that one or more elements were not met. This result frustrates Congress' intent to improve the quality of medical care through professional peer review,[113] by weakening the HCQIA's "incentive and protection for physicians engaging in effective peer review."[114]

The *Brown* decision rendered the HCQIA's immunity presumption virtually meaningless by reducing the evidentiary burden required to rebut it. A jury question immediately results when a plaintiff produces an expert witness who testifies that the peer review process was unreasonable. After *Brown*, health care institutions face a dilemma in monitoring the quality of their medical personnel. Facilities that restrict staff privileges may face increased risk of litigation by the disciplined staff member.[115] On the other hand, the unrestricted activity of incompetent staff exposes the facility to claims of negligence.[116] Fearing personal liability for monetary damages, peer review panel members may attempt to avoid finding professional misconduct,[117] resulting in meaningless peer review proceedings. A decrease in effective medical peer review will likely be accompanied by a corresponding decline in the quality of patient care.[118]

B. Suggestions for Practitioners

1. Defendant's Perspective

Attorneys for medical institutions, both in-house counsel and consultants, may face the issues presented in *Brown*. There are two areas of concerns following the court's decision.

First, peer review must be sufficient in scope to minimize the risk that an expert will testify that it did not constitute a reasonable effort to obtain the facts. Although a review of one chart may establish a violation, the moral of *Brown* suggests that more is required than an examination of that chart. The Tenth Circuit did not establish a minimum number of chart reviews that satisfy the "reasonable effort" standard.[119] Nevertheless, a panel should consider reviewing at a minimum, a cross-

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112. *See* Brown v. Presbyterian Healthcare Servs., 101 F.3d 1324, 1334 n.9 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 1461 (1997) (expressing concern that peer review defendants would enjoy absolute immunity if one expert testifies that HCQIA standards were met).

113. *See* 42 U.S.C. § 11101(1), (3) (1994).

114. *Id.* § 11101(5).

115. *See* John Neff, Note, *Physician Staff Privilege Cases: Antitrust Liability and the Health Care Quality Improvement Act*, 29 WM. & MARY L. REV. 609, 612-14 (1988) (discussing the importance of hospital staff privileges to physicians); John E. Graf, Comment, Patrick v. Burget: *Has the Death Knell Sounded for State Action Immunity in Peer Review Antitrust Suits?*, 51 U. PITT. L. REV. 463, 468-70 (1990) (noting the increase in lawsuits resulting from denial and revocation of physician privileges).

116. *See, e.g.*, BARRY R. FURROW ET AL., HEALTH LAW 274-76 (3d ed. 1997) (noting cases which held that hospitals have a duty to properly screen or restrict medical staff privileging).

117. *See, e.g.*, Neff, *supra* note 115, at 632 (noting physician reluctance to participate in peer review in light of potential antitrust liability).

118. *See, e.g.*, Hammack, *supra* note 87, at 437 (discussing the importance of the medical peer review process as a means of maintaining the quality of health care).

119. *See* Brown v. Presbyterian Healthcare Servs., 101 F.3d 1324 (10th Cir. 1996), *cert. denied*, 117 S. Ct.

section or a random sampling of a particular physician's charts as part of its process.[120] Ideally, institutional policy should require sufficient time to conduct a thorough review, and provide for evaluation by more than one panel.[121]

Second, it is important to avoid any evidence of bad faith motivation on the part of the peer reviewers. After *Brown*, it is likely that the issues regarding peer review immunity will go to a jury trial.[122] Ideally, the peer review process should exclude any member from participating in a review of a physician with whom s/he has a personal conflict or strong competitive relationship.[123]

2. Plaintiff's Perspective

Attorneys representing physicians who are the subject of an adverse peer review action also need to be familiar with *Brown*. If there is evidence that the disciplinary action was motivated by hostility, animosity, or anti-competitive motives toward the plaintiff physician, the attorney should consider exploiting the "subjective" language ("reasonable belief") incorporated in two of the required elements for HCQIA immunity.[124] However, an argument that the defendant's bad faith motives are sufficient to overcome the Act's immunity presumption will probably fail if the courts continue to construe the 42 U.S.C. § 11112(a) elements as establishing an objective standard of conduct.[125]

The plaintiff attorney should retain a competent expert witness who, after reviewing the evidence, will testify not only that the peer review *action* itself was unreasonable, but that the peer review *process* was unreasonably conducted as well. Particularly strong will be an expert's testimony that the requirements of 42 U.S.C.

1461 (1997). The court pointed out that the plaintiff's expert, Dr. Lindley, reviewed all of Dr. Brown's obstetrical patient charts spanning a six month period. *Id.* at 1333-34. The court further noted Dr. Lindley's opinion that the formal review of "only two charts" was "unreasonably narrow," and that from Lindley's testimony a jury could find the panel's review "not taken after a 'reasonable effort to obtain the facts.'" *Id.* at 1334.

120. *See, e.g.*, Mathews v. Lancaster Gen. Hosp., 87 F.3d 624, 637 (3d Cir. 1996) (finding reasonable effort following a two year investigation involving 208 chart reviews); Austin v. McNamara, 979 F.2d 728, 731-32 (9th Cir. 1991) (noting that thirty cases were initially examined, followed by five additional chart reviews prior to privilege revocation).

121. Although the Tenth Circuit Court did not focus on these factors, other jurisdictions have specifically cited them in determining whether a peer review effort was reasonable. *See e.g.*, Bryan v. Holmes, 33 F.3d 1318, 1335 (11th Cir. 1994) (finding "reasonable effort" after physician's conduct had been evaluated by the executive committee, a peer review panel, and an appellate review panel); Smith v. Ricks, 31 F.3d 1478, 1486 (9th Cir. 1994) (holding that plaintiff did not rebut presumption of "reasonable effort" when the hospital "conducted a thorough review over the course of almost two years").

122. Although bad faith is irrelevant under an objective standard of HCQIA immunity, evidence of bad faith may be presented to support other claims that require or permit proof of motivation. *See supra* note 36. A jury may be confused by the variety of claims and elements and consider evidence of bad faith in determining whether a defendant met the HCQIA immunity criteria. Thus, to avoid prejudice, a defendant might request the court to separately consider the issue of immunity prior to the plaintiff's presentation of other claims. *See* FED. R. CIV. P. 42(b).

123. Although a hostile staff member may raise an initial complaint regarding a physician, there should be no further involvement of the complaining member beyond that necessary to gather information for peer review purposes.

124. *See* 42 U.S.C. § 11112(a)(1), (4) (1994).

125. In order to introduce evidence of the defendant's bad faith, consider presenting claims that require or permit evidence of the defendant's motivation, together with the claim that the defendant lacks HCQIA immunity. *See, e.g., supra* note 36.

§ 11112(a) were not met, and that no reasonable peer review participant could find otherwise.

VII. CONCLUSION

Who would accept a judgeship if she were potentially liable for damages when a litigant suffers an adverse decision? Similarly, in the absence of strong, clearly defined immunity from private damage awards, what physician will step forward to "judge" another in the context of professional peer review?

In a typical professional peer review action, both the reviewer and the one reviewed have critical interests at stake. The scrutinized physician is concerned that she will lose her staff privileges. The peer reviewer fears that an adverse panel decision may lead to a money damage award for an aggrieved physician who files a claim against an individual panel member. Similarly, a healthcare institution is potentially subject to liability for failure to screen out incompetent staff, while at the same time it risks litigation from a physician whose privileges it revokes.

The Tenth Circuit Court's decision in *Brown* eroded the limited immunity of the HCQIA afforded to those who participate in professional peer review. By allowing one expert's conflicting testimony to question peer review immunity under the HCQIA, the court has taken a step toward dismantling strong, effective medical peer review.

DIANE GUPTON