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Washington Courts Confirm Scope of Washington Peer Review Act and Award Attorney Fees to Prevailing Hospital

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Hospitals, physicians and other healthcare providers who engage in peer review should familiarize themselves with Washington's Peer Review Act, RCW 7.71 *et seq.*, a statute that provides substantial protections to participants in peer review, and mandates the award of attorney fees to victorious parties in peer review challenges.

The Peer Review Act is "the exclusive remedy" in Washington for an "action taken by a professional peer review body of health care providers . . . that is found to be based on matters not related to the competence or professional conduct of a health care provider." The Act adopts the provisions of the federal Health Care Quality Improvement Act ("HCQIA"), which protects participants in peer review from damages liability under state law, provided certain procedural requirements of the HCQIA are met.

Through the Peer Review Act, the Washington legislature has limited peer review actions to "appropriate injunctive relief," and, if HCQIA damages immunity is found not to apply, limits damages to "lost earnings directly attributable to the action taken by the professional review body." The Act also provides for a mandatory award of attorney fees to the party that prevails in a peer review case.

Until recently, there were few court interpretations of the scope of the Peer Review Act. In the earliest opinion to consider the Act, *Morgan v. PeaceHealth*, 101 Wn. App. 750, 14 P.3d 771 (2000) (Div. 1), the court of appeals devoted most of its analysis to the HCQIA, and found that the defendant had met the requirements for damages immunity. While the court did discuss a request for an award of attorney fees, it analyzed the appropriateness of fees under the HCQIA, and did not address the attorney fee provision of the Peer Review Act.

Since *Morgan*, two divisions of the court of appeals have affirmed the applicability of the Peer Review Act to hospital disciplinary actions, and saddled the complaining physician with substantial attorney fee liability as a result. Most recently, on April 22, 2010, the Division III Court of Appeals affirmed that a hospital appropriately terminated a physician's medical staff privileges, and affirmed the award of substantial attorney fees associated with the lawsuit. *Perry v. Rado*, -- P.3d --, 2010 WL 1610746 (Apr. 22, 2010). In *Perry*, an obstetrician challenged his termination in a suit against Kadlec Regional Medical Center, its medical staff, a now-defunct competitor group practice, and various individual physicians. He initially filed suit in federal court, alleging antitrust violations, but his federal claims were dismissed due to a failure to adequately allege harm to consumers, a decision affirmed last year. 504 F. Supp. 2d 1043 (E.D. Wash. 2007), *aff'd*, No. 07-35684 (9th Cir. Aug. 6, 2009). His state court case sought damages and reinstatement of his privileges. The court of appeals affirmed that the hospital was immune from damages liability under the HCQIA, and that his

state common law claims were barred because the Peer Review Act provides the exclusive remedy for peer review discipline. The defendants were awarded more than $386,000 in trial court attorney fees plus their fees on appeal.

At around the same time, Division I of the Court of Appeals issued an opinion in another peer review case, *Cowell v. Good Samaritan Community Health Care*, 153 Wn. App. 911, 225 P.3d 294 (2009). There, the court affirmed that Good Samaritan was immune from damages liability under the HCQIA, and also affirmed an award of about the same sum of attorney fees as was awarded in *Perry*, despite the plaintiff's protest that she was "merely testing the scope of a statute on which there is no law."

A final, but significant, aspect of the Peer Review Act is its very short statute of limitations. The Act requires that all claims be asserted within one year of the peer review body's action. The author recently represented a hospital that successfully argued that a physician's claims for breach of contract and tortious interference stemming from his previous voluntary relinquishment of his clinical privileges arose under the Peer Review Act, and thus were untimely under the

Act's one-year statute of limitations. *Sambasivan v. Kadlec Regional Medical Center*, No. 08-2-01534-1 (Benton County). As the prevailing party, the hospital was again awarded its attorney fees.

The legislature designed the Washington Peer Review Act to create a formidable barrier to suits by physicians who are unhappy with peer review actions. Recent decisions in three different cases demonstrate judicial antipathy towards such cases, and confirm the threat of substantial liability for physicians who wrongfully accuse a hospital of misbehaving. Hospitals and physicians should take note that physician challenges to peer review action face a steep uphill battle before the Washington courts.

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