

## APPELLATE COURT OF ILLINOIS: REPUTATIONAL HARM INSUFFICIENT TO DEFEAT HOSPITALS' IMMUNITY

The Fourth District of the Appellate Court of Illinois reaffirmed that claims by a physician that a hospital's failure to renew his privileges caused actual and intentional harm to his professional reputation are barred by the Illinois's Hospital Licensing Act. Only claims alleging an actual or deliberate intention to physically harm the physician or others trump a hospital's immunity under the Act. This decision has an immediate, statewide effect and protects hospitals engaging in rigorous peer review.

### THE CASE

This arises from an Illinois hospital deciding not to renew practice privileges for the plaintiff-physician. The Plaintiff sued the hospital for damages arising from harm to his reputation under Illinois common law and the Illinois Whistleblower Protection Act. The hospital asserted that the plaintiff's allegations were barred by the immunity provided under the Hospital Licensing Act and that the claims under the Illinois Whistleblower Protection Act did not apply to it as it is not a "publicly funded" hospital. The trial court certified four questions to be determined by the appellate court:

1. Is a physician required to plead actual or deliberate intention to cause physical harm to his or her person in order to defeat the immunity provided under the Licensing Act?;
2. Alternatively, does a physician defeat such immunity when he or she only alleges actual or deliberate intentions to harm his or her professional reputation?;
3. Does a hospital's immunity under the Licensing Act preclude claims brought under the Whistleblower Act?; and
4. Are hospitals "publicly funded" under the Whistleblower Act by virtue of receiving payment via assignment of Medicaid benefits under the Social Security Act?

### THE DECISION

The appellate court held that under the Licensing Act, and consistent with its previous decision in *Lo v. Provena Covenant Medical Center*, claims that a hospital's peer review determination harms a physician's professional reputation are barred by the Act's immunity provision. The exception is only for those complaints setting forth allegations that a hospital actually harmed or had a deliberate intention to harm the physical safety of a physician through its determination:

We construe section 10.2 of the Hospital Act in harmony with its clearly stated overarching purpose and conclude that the unintentional harm—that is, the "utter indifference to or conscious disregard for a person's own safety and the safety of others" *clarifies* the type of intentional "harm" the legislature contemplated.

That overarching purpose is to provide for candid, effective peer review and the court cautioned that adopting the plaintiff's interpretation would eviscerate this critical public policy:

If merely denying a physician hospital privileges could result in civil liability for the medical facility or members of a credentialing committee, candid reviews would likely cease.

The court determined that claims of retaliation made under the Whistleblower Act are not subject to the immunity provision of the Licensing Act. To state claims under the Whistleblower Act, a plaintiff must show that a hospital is "publicly funded." Here, the plaintiff alleged that the private hospital's acceptance of Medicaid reimbursement satisfied this requirement, but the court disagreed. The court held that assignment of Medicaid benefits is a form of payment - not funding - and, therefore, acceptance of Medicaid payments does not make an otherwise private hospital "publicly funded" for purposes of the Whistleblower Act. The court did not limit itself to the assignment of benefits question but found that payment of any kind for a service was distinct from funding. Therefore, payments by Illinois's Medicaid program would not make a hospital subject to the Whistleblower Act. Only funding for a particular project, such as an experimental medical trial, would subject a hospital to liability under the Act.

## HEALTH CARE TAKEAWAY

Illinois hospitals and health care entities should welcome the appellate court's erudite analysis, one which clarifies any alleged ambiguity that existed after its decision in *Lo*. Peer review is an important process that is strengthened by the immunity provided under the Licensing Act. This decision protects that immunity - thereby protecting the peer review process. Further, private hospitals have received important guidance from the appellate court on the Whistleblower Act's threshold requirements as they relate to payments received by Medicaid beneficiaries. Should you have any questions regarding this decision, its impact or peer review litigation, please contact:

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*Disclosure: Hall Render attorneys, David B. Honig, Christopher C. Eades and Drew B. Howk represent the defendant in this matter.*