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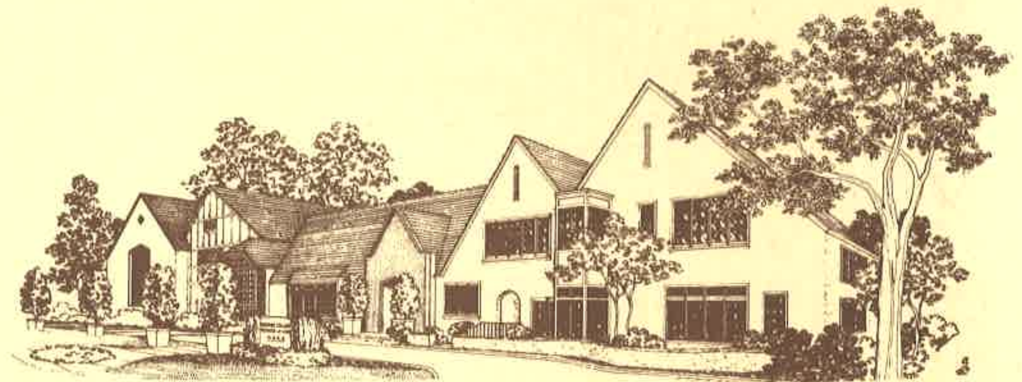

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A DISCUSSION OF VARIOUS PROVISIONS OF THE HEALTH CARE QUALITY IMPROVEMENT ACT*

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The Health Care Quality Improvement Act contains several provisions which are central to the Act and warrant discussion. These provisions pertain to the immunities, presumptions, standards, and notice and hearing procedures available under the Act.

The immunity provisions are contained in subchapter 1 of the Act. There is immunity for "professional review actions" if the standards set forth in 42 U.S.C. § 11112(a) have been satisfied. Central to those standards are the notice and hearing provisions. Before further discussing the provisions of section 11112(a), it is necessary to address the question of who may obtain immunity under the Act. The first entity entitled to immunity is the "professional review body." This review body is defined as the health care entity itself, and the governing body or any committee of that entity which conducts professional review activity. The term "professional review body" is expressly defined to include any committee of the medical staff which assists the governing body in a professional review activity.

In addition, any person acting as a member of the staff of the professional review body, any person under contract with that review body, or any person who participates or assists the professional review body, with respect to a professional review action, may obtain immunity under the provisions of the Act. Also entitled to immunity are all witnesses and others providing information to the professional review

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body regarding the competence or professional conduct of the physician. This is so unless the information is false and the person providing it knew that such information was false. Hence, the Act is all-inclusive in providing protection for peer review activities to anyone who may be involved in the peer review process, provided the criteria under the Act have been satisfied.

This paper will discuss the immunity from liability for damages which are sought pursuant to either federal or state causes of action. In this respect, the Act is quite unusual in that it may cut across previously enacted statutory schemes, affecting directly, for example, the Sherman Antitrust Act. There is immunity under the federal antitrust laws if the conditions of section 11112(a) are satisfied, without regard to whether a state chooses to opt out of the provisions of the Act.

Although reference is made to immunity for peer review actions, technically, under the Act, there is immunity only for "professional review actions." These review actions are defined as actions or recommendations of a professional review body which are "based on the competence or professional conduct of an individual physician (which conduct affects, or could affect, adversely the health or welfare of a patient or patients), and which affects (or may affect) adversely the clinical privileges, or membership in a professional society, of the physician." Physicians who file damage actions in the future will try to avoid the immunity provisions of the Act by contending that the action taken is not based on the competence or professional conduct of the individual physician. Rather, the action is based upon a personal vendetta of a particular competitor or group of competitors seeking to put the plaintiff out of business. The Act, however, provides that "an action is not considered to be based on the competence or professional conduct of a physician" and, therefore, the immunity provisions would not apply if the action is based primarily on several defined categories which have nothing to do with legitimate peer review. The defined categories include the physician's association (or lack of association) with a professional society; the physician's fees or the physician's advertising or engaging in other competitive acts intended to solicit or retain business; the physician's participation in prepaid group health plans, salaried employment, or any other manner of delivering health services; the physician's association in practice with a member or members of a particular class of health care practitioners or professionals; or any other matter that does not relate to the competence or professional conduct of a physician.

These express statutory exceptions to the immunities under the Act clearly set forth the congressional intent that anti-competitive actions against physicians are not provided immunity under the Act and, indeed, that only legitimate peer review activities are given protection. It is quite apparent that in virtually every suit where the immunity provisions of the Act are raised as a defense in the future, the parties will litigate the question of whether the action is really based upon the competence or professional conduct of the physician, or whether it is based on some other matter that the plaintiff urges is the true motivation behind the disciplinary action.

Assuming that under the Act a professional review action is taken by a professional review body as defined by the Act, it becomes necessary to examine the criteria that must be satisfied to achieve immunity. Immunity exists only if certain standards with respect to the professional review action are satisfied, and specified procedural protections are provided. First, the professional review action must be taken under the reasonable belief that the action was in the furtherance of quality health care. Second, it must be taken after a reasonable effort to obtain the facts of the matter. Third, there must have been adequate notice and a hearing afforded to the physician involved. Finally, the professional review action must have been taken in the reasonable belief that the action was warranted by the facts which were known after a reasonable effort to obtain the facts, and after meeting the notice and hearing requirements.

The adequate notice and hearing procedures must be provided to the physician before the professional review action is taken. This is so, unless the action involves a suspension or restriction to investigate the need for suspension, and the suspension or restriction is for no more than fourteen days, or unless there is an immediate suspension or restriction with subsequent notice and a hearing where such an immediate suspension or restriction is necessary, because of an imminent danger to the health of any individual.

It is obvious that these provisions will also constitute an arena of litigation in virtually all cases that arise where immunity is sought by defendants under the Act. The Act expressly provides that a professional review action is presumed to have met the four standards of section 11112(a) which are necessary to obtain immunity, unless that presumption is rebutted by a preponderance of the evidence. Thus, the burden will be on plaintiffs to show, by a preponderance of the

Subsection (b) of section 11112 of the Act sets forth, in detail, the requisite notice and hearing protections. A health care entity is "deemed" to have met the adequate notice and hearing requirement if the physician has been given notice of the proposed review action; the reasons for the action; the right to request a hearing; and adequate notice of the place, time, and date of the hearing, if a hearing is requested. The Act provides that the physician should be given no less than thirty days within which to request a hearing, and that a hearing should not be scheduled less than thirty days after notice of the hearing is provided. Further, the physician must be given a list of witnesses expected to testify at the hearing. In addition, the hearing must be held before a mutually acceptable arbitrator, a hearing officer not in direct economic competition with the physician, or a hearing officer or hearing panel not in direct economic competition with the physician involved.

The notice and hearing provisions also provide that the physician has the right to representation by an attorney; the right to have an adequate record made of the proceedings; the right to call, examine and cross-examine witnesses, and to present evidence; and the right to obtain a written decision, including an explanation of the basis for the decision. Although the Act provides that the failure to meet all of the conditions described in the notice and hearing provisions "shall not, in itself, constitute failure to meet the standards" of the adequate notice and hearing requirements, it is likely that the courts will find that inadequate procedural protections were provided if any important protections are denied to a physician. Such denials may include the right to an impartial hearing officer or the right to representation by an attorney.

In conclusion, the Act originated from a concern that institutions and physicians engaged in legitimate peer activities should be permitted to carry out those activities without having to face the prospect of potential liability from frivolous lawsuits. Congress did understand, however, that instances arise when the peer review process is abused and is employed as an instrument to eliminate troublesome competitors, or is otherwise employed for anti-competitive reasons having nothing to do with legitimate peer review. As a measure to prevent such abuses, basic protections which are inherent to due process and fair procedure, such as the right to counsel, are provided by the Act.