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Hospital Must Report Voluntary Surrender of Privileges to the NPDB Notwithstanding Potential Invalidity of Underlying Action



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The rules governing National Practitioner Data Bank ("NPDB") reporting requirements often present questions for hospital administrators and their counsel. A recent Illinois Appellate Court decision¹ provides guidance concerning NPDB reporting requirements where a physician voluntarily surrenders privileges during the course of corrective action proceedings. The decision clarifies that a physician's surrender of privileges must be reported to the NPDB even where the summary suspension that precipitated the surrender of privileges fails to satisfy the statutory requirements for a summary suspension. The updated "NPDB Guidebook" released by the U.S. Department of Health and Human Services ("HHS") in April 2015 pro-

¹ *Lai v. Gottlieb Mem'l Hosp.*, 2015 IL App (1st) 142319-U, 2015 BL 161996 (Ill. Ct. App. 5/22/15).

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vides additional clarification concerning NPDB reporting obligations, including a new, expanded section of frequently asked questions and answers relating to adverse clinical privilege actions.

National Practitioner Data Bank

Congress enacted the Health Care Quality Improvement Act of 1986 ("HCQIA")² to improve the quality of medical care.³ Among other objectives, HCQIA seeks to prevent physicians from moving state to state without disclosure or discovery of certain adverse information relevant to their professional competence or conduct.⁴ To accomplish this goal, Congress created the NPDB as "an information clearinghouse" to facilitate the comprehensive review of the professional credentials of health care practitioners.⁵

HCQIA requires that certain designated entities report to the NPDB specified information concerning the licensure, clinical privileges, and professional society memberships of a health care practitioner. Hospitals and health care entities must report: (1) professional review actions related to a physician's competence or conduct that adversely affect clinical privileges for more than 30 days; and (2) a physician's voluntary surrender or restriction of clinical privileges while under, or to avoid, investigation for possible professional incompetence or conduct.⁶ The recent Illinois Appellate Court decision in *Lai v. Gottlieb Mem'l Hosp.* involved the interplay between these two reportable events.

Gottlieb Memorial Decision

In *Gottlieb Memorial*, the hospital summarily suspended a physician's surgical privileges after a patient suffered post-surgical complications. The following day, the hospital provided the physician with written notice of certain procedural rights, but not his right to a

² 42 U.S.C. § 11101 *et seq.*

³ NPDB Guidebook, at A1-A2 (April 2015).

⁴ *Id.*

⁵ NPDB Guidebook, at D-1 (April 2015). *See also* 45 C.F.R. § 60.1 (2010) (NPDB was intended "to collect and release certain information relating to the professional competence and conduct of physicians, dentists, and other health care practitioners").

⁶ NPDB Guidebook, at E-29 (April 2015).

Fair Hearing within 15 days of the summary suspension as required by the Illinois Hospital Licensing Act.⁷

The hospital's Medical Executive Committee ("MEC") subsequently voted to uphold the summary suspension and also terminate the physician's privileges. Upon learning of the MEC's decision, the physician resigned his privileges. The hospital thereafter notified the physician that it would report both the summary suspension and the voluntary surrender of privileges to the NPDB.

The physician filed suit challenging the summary suspension on various procedural grounds, including the hospital's failure to notify him of his right to a Fair Hearing within 15 days of the summary suspension.⁸ The physician further argued that the hospital failed to provide him written notice of either the MEC's adverse action terminating his privileges, or his right to a Fair Hearing on the MEC's adverse action terminating his privileges.

The physician sought to enjoin the hospital from reporting the summary suspension or his surrender of privileges to the NPDB until he received a hearing on the summary suspension in compliance with all legal requirements. The physician argued that reporting his surrender of privileges to the NPDB would be improper because, at the time of his resignation, the only "investigation" pending was "the legally and procedurally improper summary suspension proceeding."⁹ The appellate court rejected this argument, finding that HCQIA required that the hospital report the surrender of privileges to the NPDB regardless of whether the summary suspension complied with the requirements for a summary suspension set forth in the Hospital Licensing Act. The court reasoned that the reporting requirements mandated by HCQIA preempted any provisions of the Hospital Licensing Act.¹⁰ The court also rejected the physician's request for relief based on his claim that the summary suspension failed to comply with HCQIA standards. The court concluded that compliance with HCQIA standards is only relevant to assessing whether the hospital is entitled to immunity from civil damages arising from a professional review action, but does not afford practitioners a cause of action to redress non-compliance with HCQIA standards.¹¹

The *Gottlieb Memorial* decision ultimately rests on principles of "federal preemption." The court held that the provisions of HCQIA—and the ensuing NPDB reporting requirements—preempt state law. As such, the hospital was required to report the surrender of privileges irrespective of whether the summary suspension complied with the state law requirements for a summary suspension set forth in the Hospital Licensing Act. The court reasoned that excusing hospitals from reporting a surrender of privileges based on non-compliance

with state law requirements would frustrate the legislative intent underlying HCQIA, i.e., to improve the quality of health care by facilitating the disclosure of information relevant to assessing a health care practitioner's competence or conduct.

In so ruling, the *Gottlieb Memorial* decision recognizes that the surrender of privileges while under investigation is relevant information when assessing a physician's professional qualifications, irrespective of the event or events precipitating the surrender of privileges.¹² Similarly, and consistent with this policy, a surrender of privileges while under investigation must be reported to the NPDB even if the investigation eventually reveals no wrongdoing by the physician.¹³

A Related Twist: The "Failure to Renew" Privileges

In reaching its decision, the *Gottlieb Memorial* court relied on a prior Illinois Appellate Court decision involving the related question of whether a state court may enjoin a hospital from reporting a physician's failure to renew privileges while under investigation.¹⁴

In *Diaz v. Provena Hospitals*, the physician filed suit challenging the summary suspension of her clinical privileges by the defendant hospital. The physician requested a temporary restraining order ("TRO") seeking to enjoin the hospital from terminating her privileges and reinstating her to the medical staff. The trial court entered a TRO barring the hospital from "implementing" the termination of her privileges until after an evidentiary hearing. Consequently, the hospital did not report the summary suspension to the NPDB.¹⁵

However, after the TRO was entered—and while the corrective action proceeding was ongoing—the physician failed to seek renewal of her privileges, and her privileges therefore lapsed. The hospital then reported the physician's failure to renew her privileges to the NPDB.¹⁶ The trial court concluded that the hospital violated the TRO by reporting the physician's surrender of privileges to the NPDB and ordered the hospital to submit a "void" report to the NPDB. The hospital refused, and the trial court held the hospital in contempt of court.

On appeal, the Illinois Appellate Court reversed the contempt order. The appellate court concluded that HCQIA required that the hospital submit the NPDB report once the physician failed to renew her privileges, and that the trial court "lacked the authority to order the Hospital to violate federal law."¹⁷ In explaining the principle of federal preemption, the court noted that "requiring the Hospital to retract a report that it was re-

⁷ See 210 ILCS 85/10.4(b)(2)(C).

⁸ The hospital's medical staff bylaws apparently did not comply with § 10.4(b) of the Hospital Licensing Act; the court noted that the bylaws "did not even provide for an expedited hearing after a summary suspension." 2015 IL App (1st) 142319-U, ¶ 10.

⁹ *Gottlieb Memorial*, 2015 IL App (1st) 142319-U, ¶ 15.

¹⁰ *Gottlieb Memorial*, 2015 IL App (1st) 142319-U, ¶ 33 ("HCQIA preempts state law, so plaintiff's attempt to support his claim for injunctive relief based upon state law is unavailable.").

¹¹ *Gottlieb Memorial*, 2015 IL App (1st) 142319-U, ¶ 30 (noting that no private right of action exists under HCQIA).

¹² *Gottlieb Memorial*, 2015 IL App (1st) 142319-U, ¶ 29.

¹³ NPDB Guidebook, at E-46, FAQ No. 21; see also E-42, FAQ No. 9; E-45, FAQ No. 18.

¹⁴ See *Diaz v. Provena Hosp.*, 352 Ill. App. 3d 1165 (2d Dist. 2004).

¹⁵ See NPDB Guidebook, at E-48 (April 2015) ("An adverse action enjoined prior to implementation should not be reported.").

¹⁶ The non-renewal of privileges is generally not reportable to the NPDB. However, a physician's non-renewal of privileges while under investigation is deemed the "surrender" of privileges and therefore reportable. NPDB Guidebook, at E-33 (April 2015).

¹⁷ *Provena Hospitals*, 352 Ill. App. 3d at 1170.

quired to make under the HCQIA . . . directly thwarts Congress's objectives in enacting the HCQIA."¹⁸

What Is an "Investigation"?

The updated NPDB Guidebook was only recently released in April 2015, and therefore not addressed in *Gottlieb Memorial*. Among other revisions, the updated NPDB Guidebook broadens the definition of "investigation" and interprets that term "expansively."¹⁹ Therefore, a preliminary question for hospital administrators assessing their NPDB reporting obligations following a surrender of privileges is whether the surrender of privileges occurred during an "investigation."

According to the NPDB Guidebook, "an investigation is not limited to a health care entity's gathering of facts or limited to the manner in which the term 'investigation' is defined in a hospital's by-laws."²⁰ Rather, an "investigation" runs from "the start of an inquiry until a final decision on a clinical privileges action is reached."²¹

A routine, formal peer review process under which a health care entity evaluates, against clearly defined measures, the competence of all practitioners is not considered an "investigation."²² However, the use of a formal, targeted process to review specific issues related to a specific practitioner's professional competence or conduct is deemed an "investigation" for purposes of NPDB reporting.²³

The definition of "investigation" used in a hospital's by-laws may be considered, but is not controlling, when determining whether a surrender of privileges occurred during an "investigation."²⁴ Hospitals should maintain evidence documenting when an investigation was initiated. The NPDB Guidebook notes that acceptable "evidence" would include minutes or excerpts from committee meetings, orders from hospital officials directing an investigation, or written notices advising a practitioner of an investigation.²⁵

Importantly, a hospital must report a practitioner who surrenders privileges while under investigation ir-

respective of the practitioner's knowledge of the investigation. This bright-line rule presumes that practitioners would regularly assert they lacked knowledge of any "investigation" at the time they surrendered their privileges to avoid NPDB reporting. To avoid such disputes, the NPDB Guidebook provides that a practitioner's knowledge of an investigation is irrelevant for purposes of NPDB reporting.²⁶

Conclusion

Gottlieb Memorial is a reminder that hospital administrators must have a working knowledge of the rules governing NPDB reporting of adverse clinical privilege actions. The decision illustrates that a single review action may trigger multiple, although independent, NPDB reporting obligations. The review action in *Gottlieb Memorial* gave rise to three separate reportable events: (1) the summary suspension, (2) the MEC's decision to uphold the summary suspension and terminate privileges, and (3) the physician's voluntary surrender of privileges. In addition to NPDB reporting obligations, hospital administrators must separately determine whether the adverse clinical privilege action requires a report to state licensing authorities.

The *Gottlieb Memorial* decision also serves to remind hospital administrators to meticulously follow all procedural requirements mandated by the Hospital Licensing Act when pursuing corrective action to minimize potential legal challenges. This seemingly obvious and simple undertaking may prove difficult in the context of summary suspension proceedings where immediate action is often required and the Hospital Licensing Act mandates expedited hearing procedures. Relatedly, hospital administrators must ensure that their medical staff by-laws comply with all relevant provisions of the Hospital Licensing Act, including any recent amendments. Finally, the NPDB Guidebook should be consulted for specific guidance concerning reporting obligations for adverse clinical privilege actions.

¹⁸ 352 Ill. App. 3d at 1173.

¹⁹ NPDB Guidebook, at E-34 (April 2015).

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ Although the rules governing NPDB reporting by state licensing authorities are outside the scope of this article, the authors note that the opposite rule applies where a practitioner voluntarily surrenders his or her license while under investigation. In that context, the NPDB Guidebook provides that state licensing authorities must report a practitioner's voluntary surrender of a license only where the practitioner had prior notice of an investigation. NPDB Guidebook, at E-62-63 (April 2015).