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Anti-SLAPP protections for hospital peer reviews: questions linger

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In Bonni v. St. Joseph Health System, 2021 DJ DAR 7721 (July 29, 2021), the California Supreme Court clarified the scope of protection under the anti-SLAPP law for communication and conduct related to hospital physician peer review. Such activity is frequently the basis of physicians' lawsuits against hospitals alleging retaliation in violation of Health and Safety Code Section 1278.5, an anti-retaliation statute that protects physicians and hospital workers who complain about suspected unsafe patient care and conditions.

Fifteen years ago, in Kibler v. Northern Inyo County Local Hospital District, 39 Cal. 4th 192 (2006), the court held that physician peer review is an "official proceeding" under the anti-SLAPP statute. After Kibler, hospitals regularly brought anti-SLAPP motions to challenge physicians' suits, including those under Section 1278.5, arising from peer review activity. However, the court recently indicated in a case not involving a hospital or physician that Kibler only involved a narrow scope of the peer review process. Park v. Board of Trustees of Cal. State U., 2 Cal. 5th 1057, 1070 (2017) (denying anti-SLAPP protection for claim arising from the denial of tenure to a college professor, explaining "Kibler does not stand for the proposition that disciplinary decisions reached in a peer review process, as opposed to statements in connection with that process, are protected"). Since Park, there has not been a clear delineation between protected and unprotected physician peer review activity.

In Bonni, the court provided the missing clarification. In particular, mandated reporting of disciplinary actions taken against physicians by hospitals and medical staffs to the Medical Board of California and the federal National Practitioner Data Bank is protected. Physician disciplinary reporting requirements imposed by state and federal law ensure a robust flow of information among hospitals, the government and the public so that all are well-informed about problem physicians and so that government regulators have the information necessary to monitor physician licensing and behavior.

Also protected, Bonni held, are medical staff committees' recommendations for corrective action to the hospital board, as well as arguments before peer review hearing panels in support of proposed discipline, and hospital board committees' recommendations to the board regarding discipline. Pre-suit settlement negotiations are protected petitioning activity as well. And general allegations that a hospital retaliated against a physician by subjecting him or her to a lengthy and humiliating peer review process are protected.

Extending anti-SLAPP protections to these peer review communications, the court held, "reflects a core function of the anti-SLAPP statute in hospital peer review cases. To adequately protect patient welfare, the system depends on the ability of those with expertise to speak frankly about the competence of medical professionals without fear of retribution." In determining the nature of the allegations on which a challenged cause of action is based, a court must look not only to the words of the complaint, but also to statements the plaintiff made in opposing the anti-SLAPP motion.

The Bonni court rejected the physician's argument that where a defendant moves to strike an entire cause of action, the court must use an all-or-nothing approach to assess the cause of action as a whole

and rule that the defendant has "waived" the right to strike allegations of protected activity. Instead, the court reconfirmed its prior holding in Baral v. Schnitt, 1 Cal. 5th 376 (2016), explaining that where a cause of action is "mixed" -- based on allegations of both protected and unprotected activity -- it must be treated as protected for purposes of prong one of the anti-SLAPP analysis. Under Bonni, if a defendant is uncertain whether every allegation contained in a cause of action is protected, it may still move to strike the entire cause of action without fear of losing the entire motion if the court finds some allegations unprotected.

Bonni did not hold that all aspects of the physician peer review process are protected by the anti-SLAPP law. It rejected the contention that the actual disciplinary action and other noncommunicative peer review actions are inherently or necessarily in furtherance of protected speech. "Treating disciplinary acts indistinguishably from speech -- such that if stating a given viewpoint would warrant constitutional and anti-SLAPP protection as an exercise of free speech rights, the same protection should extend equally to any actions motivated by that viewpoint -- assumes, at root, that conduct generally is tantamount to speech. But expression and nonexpressive acts do not have equal stature in First Amendment law." But while the court held that the hospital in Bonni had not drawn the requisite connection to the ability to speak, it declined to rule out the possibility of such a connection on other facts.

Bonni noted that a suit does not arise from protected activity where statements made during the peer review process are not the alleged basis of liability but rather are only evidence of alleged retaliatory motive. As Justice Joshua Groban's concurring opinion points out, this construction of the anti-SLAPP law might chill participation in peer review. He explained that if anti-SLAPP law protects peer reviewers' statements at peer review proceedings but not their peer review actions, then "the most reasonable answer [to the question whether peer review statements are protected] under our current jurisprudence would be, 'not really.' That [anti-SLAPP] protection might apply if the physician were to proceed under a theory of defamation, but not if the physician utilized the statements as crucial evidence in proving the discipline was retaliatory, would seem to provide little comfort to those participating in the peer review process." Justice Groban observed that the Legislature is free to alter the statute to broaden protections for the peer review process.

Issues remaining after Bonni

The absolute privilege of Civil Code Section 47(b)(3).

Bonni addressed only the first prong of the anti-SLAPP law, and not the merits or second prong, as to which Dr. Bonni must prove probable merit on remand. Accordingly, the court did not mention that physicians' Section 1278.5 claims arising from mandated reporting -- an issue presented in Bonni and other cases -- likely will never survive prong two analysis.

On remand, the trial court will address the hospital's argument that Civil Code Section 47(b)(3) bars claims based on reporting. Section 47(b)(3) forecloses liability for any "publication" made "in any ... official proceeding authorized by law."See ComputerXpress, Inc. v. Jackson, 93 Cal. App. 4th 993, 1015 (2001). And case law establishes that hospitals' reports to the National Practitioner Data Bank and the Medical Board are subject to the absolute privilege. See Joel v. Valley Surgical Center, 68 Cal. App. 4th 360, 372 (1998) (reports to the National Practitioner Data Bank and Medical Board were "absolutely privileged under Civil Code section 47");Dorn v. Mendelzon, 196 Cal. App. 3d 933, 942 (1987) ("The [Medical Board] report ... unquestionably falls within the protection of this privilege."). Section 47(b)(3) is absolute -- allegations of improper motive or falsity are irrelevant. Therefore, when a physician bases a Section 1278.5 claim on mandated reporting that is protected under Bonni, that claim should always fail.

Federal damages immunity and preemption of state peer review laws.

Lurking in the background of Bonni is the federal peer review law, the Health Care Quality Improvement Act. HCQIA expressly immunizes hospitals and other peer reviewers from claims for damages and other financial disincentives arising from peer review participation. The federal statute allows state peer review laws to co-exist with HCQIA only to the extent they supplement or increase, rather than lessen, the financial incentives for participating in peer review.Id.Sections 11111(a)(1), 11115. It is far from clear that damages are an appropriate remedy under Section 1278.5, a statute that arguably authorizes only equitable relief. Shaw v Superior Court, 2 Cal. 5th 983, 1002-03 (2017) (declaring that Section 1278.5 affords no jury trial rights, in part because trial courts alone are expected to exercise equitable powers to fashion statutory remedies). But physicians routinely claim and argue that they are entitled to damages for alleged retaliatory peer review under Section 1278.5, as well as attorney fees. If the statute does allow such remedies, then it is in conflict and cannot co-exist with HCQIA. Diaz v. Provena Hospitals, 817 N.E.2d 206, 212-13 (Ill.App.Ct. 2004) (holding state law preempted by HCQIA where that law prohibited a report required by HCQIA),app. den., 213 Ill.2d 55 (2005). The Bonni decision itself recognizes the need to encourage voluntary and robust participation in peer review. And the court, in 2014, identified and briefly discussed in dicta the potential preemptive effect of HCQIA, essentially inviting future courts to resolve the issue. See Fahlen v. Sutter Central Valley Hospitals, 58 Cal. 4th 655, 686 (2014).

As with many decisions in a complex evolving subject area, the clarifications provided in the Bonni decision answer some but not all of the remaining questions that arise from physicians' statutory claims of retaliatory peer review against hospitals and physician peer reviewers.

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