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Fla. Physicians, Plaintiffs Lawyers Battle Over Med-Mal Discovery

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A West Palm Beach, Fla., attorney has won a ruling declaring that the state Legislature's implementing law for last year's Patient Right to Know ballot initiative is unconstitutional because it fails to provide full public access to records on medical errors.

The ruling is at least the second recent Florida circuit court decision in favor of medical malpractice plaintiffs who want to use the new constitutional amendment to obtain previously confidential hospital records on medical errors and physician discipline.

Amendment 7 was passed overwhelmingly by voters last November, and the Legislature passed an implementing law this past spring.

Last month, Theodore Babbitt, a partner at Babbitt Johnson Osborne & LeClainche in West Palm Beach, won a bench ruling from Martin Circuit Judge Robert M. Makemson in a malpractice case that the implementing statute "has the effect of negating significant purposes in portions of the amendment, frustrates the will of the amendment, so I will therefore declare that statute unconstitutional."

Since the amendment and the implementing law were approved, plaintiff and defense lawyers have battled in circuit courts across Florida over discovery of sensitive hospital records on medical errors. The disclosure of such records could have a major impact on the outcome of malpractice litigation -- as well as on the ability of hospitals and their medical staffs to conduct physician peer review and monitor quality of care.

Plaintiff and defense attorneys say that circuit judges in South Florida and other parts of the state have issued disparate rulings on these discovery requests, with some holding that peer review records are discoverable and others saying they're not. Several cases are in the appellate process.

In July, 3rd Judicial Circuit Judge E. Vernon Douglas in Lake City ruled in a malpractice case that "the Legislature did not attempt to 'implement' Amendment 7. … They attempted to abolish it."

The defendants have appealed Douglas' order declaring the statute unconstitutional and ordering them to turn over peer review records

to the 1st District Court of Appeal. Douglas agreed to stay the order at least until the appellate court decides whether to hear the case.

Both plaintiff and defense camps agree that the issue will have to be resolved by the Florida Supreme Court or the Legislature.

"This is waiting for resolution at the appellate level," said Lincoln Connolly, of Rossman Baumberger Reboso & Spier in Miami who is representing several malpractice plaintiffs who are seeking hospital peer review records. "There have been a few trial court orders compelling production of records. But to my knowledge, no trial court has forced a hospital to turn over the records before it gets a chance to appeal."

"You have conflicting decisions not just in different circuits but even within the same circuit," said Vanessa Reynolds, a partner at Conrad & Scherer in Fort Lauderdale, Fla., whose firm represents hospitals. "Those issues ultimately will have to be resolved by the Supreme Court."

Bill Bell, general counsel for the Florida Hospital Association, said perhaps two-dozen judges around the state have upheld the implementing legislation, and that he expects the matter to end up in the Supreme Court within the next two years. "There are good public policy reasons" for barring the use of such material in medical malpractice litigation.

State Rep. David Simmons, R-Orlando, a lawyer who heads the House Judiciary Committee, said that if the Supreme Court ultimately strikes down the implementing law, he'll push to have the Legislature place a measure on the ballot to repeal Amendment 7.

But there may be another complicating factor. State Rep. Dan Gelber, D-Miami Beach, said the Patient Safety and Quality Improvement Act of 2005 passed by Congress may trump both Amendment 7 and the state implementing legislation. The new law says that material generated by "patient safety organizations" is privileged and is not subject to discovery in federal or state court or administrative proceedings.

Congress "protected peer review and very clearly intended to pre-empt state statutes," Gelber said. "I think they'll have to look at the federal statute to see if it would force us to make changes."

EXEMPT FROM DISCOVERY

Amendment 7 landed on the ballot last year as a result of a battle between Florida physicians and plaintiffs lawyers. The Florida Medical Association, dissatisfied with the caps on noneconomic damages it won in 2003, decided to ask voters to place a drastic cap on contingency fees for plaintiff lawyers in malpractice cases.

The Academy of Florida Trial Lawyers launched a counterattack, which its leaders say was intended to force the doctors to drop their initiative. The academy proposed ballot initiatives to require public disclosure of medical errors and to permanently revoke the medical license of any doctor found to have committed malpractice three times.

Hospital, business and insurance groups tried unsuccessfully to convince the doctors to drop their initiative in exchange for getting the plaintiffs lawyers to drop their measures. All three amendments ended up passing overwhelmingly. Since then, there have been pitched fights in the courts and the Legislature over all three measures.

The language of Amendment 7 gives "patients the right to review, upon request, records of health care facilities' or providers' adverse medical incidents, including those which could cause injury or death." It said patients' identities should not be disclosed.

But the implementing law, SB 938, which was strongly pushed by the Florida Hospital Association, makes records, including hospital peer review records, exempt from public disclosure and, therefore, exempt from discovery in civil court cases.

Unlike the amendment, the statute sets relatively narrow limits on who may obtain hospital records on medical errors. It defines the patient who may obtain such records as "an individual who has sought, is seeking, is undergoing, or has undergone care or treatment in a health care facility or by a health care provider."

Plaintiffs Karen Beane and Gary Beane challenged that statute in their Martin Circuit Court malpractice suit.

The Beanes seek hospital records in their case against Dr. Robert Pare, Treasure Coast OB/GYN Associates and Martin Memorial Medical Center. They allege that Dr. Pare used an improper medication for the inducement of labor and delivery. As a result, the suit alleges, Karen Beane suffered a uterine rupture, was forced to undergo a complete abdominal hysterectomy and was left unable to bear children.

Judge Makemson said the implementing law for Amendment 7 violates the state constitution because it defies the will of the voters. A written order containing the judge's ruling has yet to be entered in the case.

Babbitt, who represents the Beanes, said the ruling makes clear that the Legislature caved to pressure from the medical and hospital lobbies when it passed the law this spring to implement Amendment 7.

In the 3rd Judicial Circuit malpractice case, Douglas consolidated three discovery cases against Lake City Medical Center, Pendrak

Surgical Group, P.A., and Dr. Robert Pendrak. He ruled that the law implementing Amendment 7 is unconstitutional because the amendment clearly states that patients have the right to access any records made or received during the course of business by a health care facility or provider relating to any adverse medical incident.

The language of Amendment 7 states that "the phrase 'adverse medical incident' means medical negligence, intentional misconduct and any other act, neglect or default of a health care facility or health care provider that caused or could have caused injury to or death of a patient, including, but not limited to, those incidents that are required by state or federal law to be reported to ... or reviewed by any health care facility peer review, risk management, quality assurance, credentials, or similar committee, or any representative of any such committees."

SETTLEMENTS AND PEER REVIEW

Amendment 7 opens up a new area of attempted discovery. The disclosure of hospital records on medical errors undoubtedly would have a major impact of the outcome of malpractice litigation, both plaintiff and defense lawyers say.

Plaintiff lawyers are seeking to use the opportunity broadly. Among other things, they hope to pin down hospitals' corporate negligence in failing to crack down on doctors with chronic quality problems.

"If you find hospital records saying the doctor screwed up and that this is the fourth time he's done it, that would lead to early resolution of disputes," Connolly said. It would be hard for the hospital to deny liability when it had previously sanctioned the doctor, he noted.

In his cases, Connolly is filing independent actions under Amendment 7 -- outside the malpractice cases -- seeking to force hospitals to disclose medical error and peer review records. He said he's filing these independent actions to sidestep defense claims that the records are privileged.

"There's no question that the availability of material like this in a suit has a dramatic impact on the settlement dynamic," said June Hoffman, a shareholder at Fowler White Burnett in Miami, which represents health care providers.

But lawyers who represent hospitals argue that the most significant impact of having to disclose these sensitive hospital records is that it would jeopardize the traditional hospital peer review system.

Hospitals and doctors who participate in peer review long have been granted confidentiality to enable them to investigate possible medical errors and take corrective action against medical staff. Without that protection from disclosure and discovery in malpractice cases, hospital lawyers say, doctors simply won't participate.

That's already happening as a result of Amendment 7, Reynolds said. "Peer review protections came about so you gave doctors a chance to speak confidentially about peers who were not performing well," she said. "Now doctors are reluctant, if not absolutely loath, to participate. They feel they've been stripped of incentives and protections to participate."

She said doctors won't feel reassured until the Supreme Court rules on the constitutionality of the implementing bill, which exempts peer review records from discovery.

But Sheldon Schlesinger, a prominent malpractice plaintiffs lawyer in Fort Lauderdale, scoffed at that argument, saying hospital peer review has proven to be a failure in protecting the public from bad medicine.

"There was an Iron Curtain hiding vital information that existed until [Amendment 7] passed," he said. "The hospitals want to maintain the same attitude they've always had -- see no evil, hear no evil, speak no evil."

To Rep. Simmons, the battle over Amendment 7 illustrates the need to make it harder to amend the state constitution. "This is a uniquely bitter war between the doctors and the lawyers," Rep. Simmons said. "And we, the people of Florida, are their stomping grounds."

Now, both the doctors and the plaintiff lawyers probably feel "a lot of morning-after remorse," said Gelber, a lawyer and former federal prosecutor who sits on the House Judiciary Committee. "It was a food fight that should not have been fought in Florida's constitution."