# PUBLICATION

## Peer Review Not Protected: U.S. Supreme Court Will Not Disturb Florida Decision Limiting the Patient Safety and Quality Improvement Act

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**A multi-year discovery dispute regarding the adverse medical incident reports of a Jacksonville, Florida hospital concluded on October 2, 2017 when the United States Supreme Court denied a petition for a writ of certiorari in *Southern Baptist Hospital of Florida, Inc. v. Charles*. Because the Supreme Court declined to hear the case, the Supreme Court of Florida's January 2017 decision will continue to limit the protections afforded to certain peer review activities under the federal Patient Safety and Quality Improvement Act (PSQIA).**

Health care providers that collect and report information to patient safety organizations (PSOs) should perform a detailed review of their patient safety evaluation (PSE) systems, as reporting systems may require restructuring to ensure that the privileges afforded by PSQIA will apply.

### The Patient Safety and Quality Improvement Act vs. Florida Constitution Amendment 7

PSQIA was enacted in 2005 with the goal of improving patient safety and health care quality by establishing a voluntary, confidential, and non-punitive system for the reporting of medical errors and near-miss data. The free-flow of information was intended to improve patient outcomes. As a result, providers, facilities, and health systems have established PSE systems to collect and report data to PSOs, which then aggregate, analyze, and use the information to help minimize medical risk by providing feedback and assistance.

Recognizing that the collection and reporting of this data also presents the potential for increased liability exposure, Congress established a statutory privilege for "patient safety work product," which generally includes "any data, reports, records, memoranda, analyses (such as root cause analyses), or written or oral statements" created for or supplied to a PSO.

In contrast, in 2004, Florida adopted a constitutional amendment commonly referred to as "Amendment 7," which established a state-wide right of access to the adverse medical incident records of health care providers. Because of the breadth of this provision, Amendment 7 has frequently been relied upon by plaintiffs in medical malpractice litigation to collect records from defendant providers.

The conflict between the confidentiality afforded by PSQIA and the access secured via Amendment 7 was squarely before the court in *Charles*. There, a medical malpractice plaintiff served written discovery requests seeking all adverse medical incident reports in the defendant hospital's history as well as other records of treatment and care during specific time periods. In response, the defendant hospital produced two occurrence reports related to the patient at issue, but objected to providing any additional adverse medical incident data based upon the privileges afforded by PSQIA.

After the trial court granted the motion to compel and the First District Court of Appeal reversed, the plaintiff appealed to the Supreme Court of Florida. Favoring access under Amendment 7, Florida's high court held that the hospital's adverse medical incident records did not qualify as patient safety work product under PSQIA and that the federal act did not preempt Amendment 7. Thus, the adverse medical incident data sought was discoverable.

The Florida Supreme Court specifically opined that the requested reports were not privileged because Florida law required the hospital to maintain the records. In so holding, the court effectively established a rule whereby Florida health care providers must create reports **solely** for the purpose of submission to a PSO in order for the reports to qualify as privileged patient safety work product. Further, even if this conflicts with the stated purposes of PSQIA, the United States Supreme Court's October 2, 2017 denial of the hospital's petition for a writ of certiorari concludes the inquiry.

Now, even if prepared via a PSE system and reported to a PSO, PSQIA will not protect from discovery the adverse medical incident reports created by Florida health care providers to comply with state reporting obligations. Health care providers should take steps to revise their PSE systems accordingly.

### What You Need to Know

Because the U.S. Supreme Court will not revisit the decision in *Charles*, Florida health care providers should review and consider whether their PSE systems combine state-required reporting obligations with reports to PSOs. The combination of reporting functions is likely to limit the ability to shield such reports from discovery in civil litigation.

If you have any questions or would like assistance in evaluating your PSE systems, please contact a member of the BakerOber Health Law Group or Health Care Litigation Team.