

TO: Illinois and Indiana Medical Staffs and  
Participants in Peer Review

FROM: Jerry P. Clousson, J.D., L.L.M.

SUBJECT: Peer Review Post-Patrick v. Burgett

DUE TO THE PATRICK DECISION, UNTIL COMPLIANCE WITH THE REQUIREMENTS OF THE HEALTH CARE QUALITY IMPROVEMENT ACT OF 1986 HAS BEEN INSURED AT A PARTICULAR HOSPITAL, PHYSICIAN ACTORS IN PEER REVIEW HAVE AN ANTITRUST RISK. THIS RISK IS SIGNIFICANT WHEN THE REVIEWED PHYSICIAN'S PRIVILEGES RELATE TO A HOSPITAL FACILITY OR CAPABILITY WHICH IS NOT OTHERWISE AVAILABLE IN THE COMMUNITY. REJECTION OR TERMINATION OF MEDICAL STAFF MEMBERSHIP AND/OR REDUCTION OF PRIVILEGES SHOULD BE MADE WITHOUT PARTICIPATION BY COMPETITORS OF THE REVIEWED PHYSICIAN, IF POSSIBLE. THIS MIGHT MEAN OBTAINING NECESSARY SPECIALTY EXPERTISE FROM A PHYSICIAN WHO IS RETIRED FROM ACTIVE PRACTICE OR FROM SOME OUTSIDE SOURCE, SUCH AS A MEDICAL SCHOOL, OR QUALITY ASSURANCE CONSULTANT, WHETHER OR NOT THIS SUGGESTION IS FOLLOWED, CIRCUMSTANCES PRECEDING A CREDENTIALING ACTION ALWAYS SHOULD BE FULLY DOCUMENTED. WRITTEN REPRIMANDS, CRITICISMS, WARNINGS, ETC. SHOULD BE RETAINED IN THE PHYSICIAN'S FILE. WE SUGGEST DISCLOSURE TO THE PHYSICIAN AT THE TIME OF ISSUANCE. AN APPLICANT'S FAILURE TO MEET OBJECTIVE APPOINTMENT CRITERIA ALSO SHOULD BE DOCUMENTED.

Patrick v. Burgett, et al. \_\_\_\_\_ U.S. \_\_\_\_\_ (S. Ct., May 16, 1988) abolished "state action" immunity from personal liability for antitrust violations in expelling from medical staff membership and/or reducing privileges unless the state actually and actively supervises peer review. No state official in either Illinois or Indiana has or exercises ultimate authority over private hospital privilege determinations.

This decision is especially relevant in Indiana where physician participants in peer review procedures heretofore could rely upon the state action immunity declared in Maresse v. Interqual, Inc., et al., 748 F.2d 373 (7th Cir. 1984). It is the writer's opinion that Patrick abolishes this immunity because no Indiana state agency actually and actively reviews, or even could review, private decisions regarding hospital privileges to determine whether such decisions comport with state regulatory policy and to correct abuses. No such "state action" immunity similar to Maresse has been presumed for Illinois physicians since the decision of the 7th Circuit Court of Appeals in Tambone v. Memorial Hospital for McHenry Hospital, Inc., 825 F. 2nd 1132 (7th Cir. 1987). It is my belief that the degree of state agency supervision required by Patrick has not been established in Illinois since the cause of action considered in Tambone.

The United States Supreme Court also decreed in Patrick that Oregon state courts did not provide the required state supervision because limited judicial review of procedure was inadequate supervision. The Courts would have had to review the merits of a privilege determination. In Indiana and Illinois (until the Barrows decision) state courts have exercised limited judicial review of whether the Medical Staff Bylaws' procedures were followed in expulsion from staff membership or the reduction of staff privileges. No judicial review of the substantive merits of a privilege determination has been available. Also, no judicial review of exclusion of an initial applicant for medical staff membership or privileges has been available.

The decision of the Illinois Supreme Court in William Barrows v. Northwestern Memorial Hospital, \_\_\_ Il 2nd \_\_\_ (Il S. Ct., May, 1988) does not conclusively dispose of the question of whether Illinois state courts can review the merits of a peer review decision to determine whether the action constituted a violation of antitrust laws. The decision seems to state that, in the absence of alleged economic concerns, there is no right to review of private hospital peer review decisions based on any quasi-public nature of such hospital. There is some indication, however, that such peer review actions might be subject to review on their merits in the state court if typical antitrust grounds could be alleged. However, there is also an implication that Illinois statutes have abolished civil liability for antitrust actions such as monopolizing and restraint of trade. The court specifically referred to the Medical Practice Act, Ill. Rev. Stat. 1985, Ch. 111, par. 4406 and the 1985 amendments to the Hospital Licensing Act, Ill. Rev. Stat, 1985, Ch. 111 1/2, par. 151.2 as well as the Illinois Health Finance Reform Act, Ill. Rev. Stat. 1985, Ch. 111 1/2, par. 6503-4. See, Rodriguez-Herdman v. Ravenswood Hospital et al., which retroactively applies the 1985 Amendments to the Hospital Licensing Act. If that is the case, then no appropriate state court regulation would apply under Patrick, unless injunctive relief alone is considered sufficient. It is quite possible that the above-mentioned Illinois statutes which immunize physicians from civil liability arising from their participation in peer review will not, in themselves, protect against civil liability for federal antitrust violations.

As the Supreme Court indicates in Patrick, the only immunity from federal antitrust liability in Illinois and Indiana at the present time would appear to be that which may come into effect under the Health Care Quality Improvement Act of 1986, 42 U.S.C.A., Sections 11101-11152, which essentially immunizes peer review action from liability if the action was taken "in the reasonable belief that (it) was in the furtherance of quality health care." It is to be noted that several other procedural criteria are necessary for this federal immunity to exist.