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Fla. Records Ruling Hurts Patient Safety, High Court Told

By **Allison Grande**

Law360, New York (July 7, 2017, 8:05 PM EDT) -- A pair of major hospital groups on Thursday backed a bid to convince the U.S. Supreme Court to review a ruling that a Florida constitutional amendment requiring broad access to incident reports for malpractice cases overrides a federal law that made this data confidential, arguing the paradigm undermines a "critical tool for improving patient safety."

The amici curiae brief lodged by the American Hospital Association and the Federation of American Hospitals sides with Southern Baptist Hospital of Florida, which in a **May 31 petition** urged the high court to overturn a Florida Supreme Court **decision from January** that required it to comply with discovery orders requesting adverse incident reports over a three-year period issued in a suit brought by a man whose sister suffered a catastrophic neurological injury at Southern Baptist.

Southern Baptist had argued that the Florida high court's conclusion that the state amendment nullified the privilege established by the federal Patient Safety Act "turns preemption on its head" and should not be allowed to stand, a contention with which the hospital groups agreed in their brief Thursday.

"The Florida Supreme Court's decision below significantly compromises the effectiveness of the Patient Safety Act," the groups wrote. "Even before the Florida Supreme Court's opinion, providers hesitated to participate in patient safety organizations for fear that the Patient Safety Act's privilege would not be enforced by state courts. The decision below confirms those fears."

The dispute that the Supreme Court is being asked to take up centers on the conflict between Florida's Amendment 7, a citizen initiative adopted in 2004 that gives individuals the right to access incident reports from health care facilities regarding adverse medical events, and the federal Patient Safety Act of 2005, which declared these type of reports to be privileged and confidential to encourage participation in the national voluntary system the law set up for health care providers to share and analyze patient safety data.

The hospital groups asserted in their brief that Congress in enacting the federal law recognized the "ever-present threat of medical malpractice litigation" that discouraged many providers from sharing and learning from each other's mistakes, and instead sought to create a "culture of safety" where errors and their causes could be "openly discussed" without fear of reprisal.

But the Florida Supreme Court's holding flies in the face of this determination, and instead threatens to return the state to where it was before the enactment of the Patient Safety Act, where providers had "virtually no privileged way to conduct critical self-analysis" and therefore simply chose not to join patient safety organizations, which Congress modeled after a similar reporting model in the aviation industry that has been credited with helping to "greatly increase" safety in that sector, the groups argued.

"That inability to conduct privileged self-analysis will ultimately harm patients more than it harms hospitals," the groups wrote.

Even if some hospitals do continue to participate in patient safety organizations, which currently

have backing from more than 2,200 hospitals nationwide, individual providers' reports are likely to be "chilled" due to the enhanced risk of future litigation, according to the groups. If enough providers take this course, reports to patient safety organizations will "dry up" and those that do come in may be so self-censored that they are essentially useless in analyzing or predicting patient safety trends, the groups argued.

"The Patient Safety Act — and its privilege for reports to patient safety organizations — is a critical tool for improving patient safety," the groups wrote. "The [Supreme] Court should grant the writ and reassure these hospitals and other providers that they can report, study, and learn from errors and near-errors without fear of public disclosure — just as Congress intended."

The groups added that aside from chilling critical reporting, the Florida Supreme Court's decision was unnecessary to assure that negligent providers are held accountable for careless and avoidable mistakes, since patients still have access to their medical records and can use the "traditional tools of discovery" to build a case in the event of an incident.

"All plaintiffs cannot do under the federal Patient Safety Act is obtain the reports providers make to patient safety organizations," the groups noted. "The Florida Supreme Court may not like that limitation, but that is the balance Congress struck, and it was a choice for Congress, not the courts, to make."

The AHA represents nearly 5,000 hospitals, health care systems, and other health care organizations, plus 43,000 individual members, while the FAH is the national representative of more than 1,000 investor-owned or managed community hospitals and health systems in the U.S., according to their brief.

The American Medical Association and PSO Florida, among others, have also filed amici briefs in the case in recent weeks, according to the Supreme Court docket.

Bryan S. Gowdy of Creed & Gowdy PA, who represents the respondent, Jean Charles Jr., who initiated the medical malpractice action against Southern Baptist on behalf of his sister and her minor children, told Law360 on Friday that he believed the push for the high court to take up the case wouldn't get far, given that the hospital settled the lawsuit with his client in October 2014, including the discovery dispute that is the subject of the petition.

"No case or controversy exists, and thus the U.S. Supreme Court is unquestionably without jurisdiction under Article III of the Constitution to review the opinion below," Gowdy said. "Given these facts, I cannot explain why so many amici are paying legal fees to prepare briefs in a case that is undoubtedly moot and unreviewable by the Court."

A representative for Southern Baptist did not immediately respond to a request for comment Friday.

The hospital groups are represented by Catherine E. Stetson and Sean Marotta of Hogan Lovells, Melinda Reid Hatton and Maureen Mudron of the American Hospital Association, and Kathleen Tenoevery and Erin Richardson of the Federation of American Hospitals.

Southern Baptist is represented by William E. Kuntz, Michael H. Harmon and Earl E. Googe Jr. of Smith Hulsey & Busey, and Carter G. Phillips, Benjamin Beaton, Tobias S. Loss-Eaton and Kurt Johnson of Sidley Austin LLP.

Charles is represented by John J. Schickel, Howard C. Coker, Charles A. Sorenson and Aaron Sprague of Coker Schickel Sorenson Posgay Camerlengo & Iracki, and Bryan S. Gowdy of Creed & Gowdy PA.

The case is Southern Baptist Hospital of Florida Inc. v. Charles et al., case number 16-984, in the Supreme Court of the United States.

--Editing by Orlando Lorenzo.