

## **Preclusion Doctrines and Peer Review: Arizona Hospital Peer Review Process Given Same Preclusive Effect as Court Judgment**

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You only get one bite at the apple. Lawyers use this expression to describe the legal concept that a cause of action may not be relitigated after it has already been judged on the merits. The twin components of this concept are known as issue preclusion – or collateral estoppel – and claim preclusion – or, in Latin, *res judicata*. Recently, a United States District Court decision in Arizona classified a hospital's peer review hearing process, affirmed upon appeal, as an adjudicatory proceeding under Arizona law, akin to an administrative decision. In doing so, the court determined that the hospital's peer review hearing process, especially when affirmed on statutory appeal, should be afforded the same preclusive effect as a court judgment.[1]

### **Hospital Revokes Doctor's Privileges and Terminates Physician Services Agreements**

Doctor Seyed Mohsen Sharifi Takieh, M.D. ("Dr. Sharifi") is an interventional cardiologist. For 13 years, he was an active medical staff member of multiple Banner Health network hospitals ("Banner").[2] Dr. Sharifi's relationship with each hospital was governed by a Physician Services Agreement ("PSA"). In December 2018, following a 21-month investigation, Banner terminated Dr. Sharifi's medical staff membership and clinical privileges at the Banner hospitals, and terminated each PSA between Dr. Sharifi and Banner, allegedly based on patient care issues, alteration of medical records, and disruptive behavior.[3] In his lawsuit, Dr. Sharifi alleged that Banner's actions were actually racially motivated by his Iranian nationality and Arab descent, in violation of Section 1981 of the Civil Rights Act of 1866 42 U.S.C. § 1981 ("Section 1981").[4] In his complaint, Dr. Sharifi included documentation of multiple instances where witnesses reported observing conversations where Dr. Sharifi's competitors and Banner leadership discussed Dr. Sharifi using racist terms.[5]

During his time on Banner hospitals' medical staffs, Dr. Sharifi conflicted with Banner leadership on several occasions. In 2009, Dr. Sharifi raised concerns about what he believed to be the disproportionate number of his cases sent to peer review and his belief that the peer review referrals were racially motivated. In 2014, Dr. Sharifi testified against Banner in a wrongful death action. In 2015, Banner investigated staff complaints alleging sexual harassment by Dr. Sharifi. Dr. Sharifi

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maintained that Banner manufactured the complaints. In February 2017, Dr. Sharifi raised patient care concerns about the Chief Medical Officer (“CMO”) at Banner Baywood Medical Center (“BBMC”).[6]

In March 2017, one month after raising concerns about the CMO, the BBMC Medical Executive Committee (“MEC”) initiated a peer review of three of Dr. Sharifi’s cases. A cardiology committee delegated by the MEC conducted the peer review and found Dr. Sharifi exhibited “reckless behavior” in two cases. Dr. Sharifi successfully appealed the cardiology committee’s findings to the MEC and the findings were reversed. While his appeal was pending, the MEC referred 16 more of Dr. Sharifi’s cases for external review. Based on the results of the external review, Dr. Sharifi was asked to agree to prospective approval and retroactive review of each case he performed at BBMC. He refused and the MEC imposed the requirements as a corrective action due to alleged concerns related to patient care and medical record documentation.

In November 2017, Dr. Sharifi requested a fair hearing challenging the MEC’s corrective action. The hearing was eventually held in September 2018. While the results of the fair hearing are not clear from the facts of the case, in December 2018, Dr. Sharifi was notified in writing by BBMC’s Chief Executive Officer that his PSAs had been unilaterally revoked and his clinical privileges had been terminated.

## **Dr. Sharifi Files Two Lawsuits**

Dr. Sharifi initiated two lawsuits following the revocation of his PSAs and termination of his clinical privileges. First, Dr. Sharifi sought injunctive relief in Arizona State court to prevent Banner from implementing the MEC’s corrective action. The state court held in favor of Banner, finding that Banner’s alleged reasons for revoking Dr. Sharifi’s PSAs were supported by substantial evidence, and the other procedural issues that Dr. Sharifi raised regarding the peer review hearing did not support injunctive relief.[7] Dr. Sharifi appealed the Arizona State court decision. The appeal of that case is still pending as the time of this writing.

Second, in December 2019, Dr. Sharifi initiated a lawsuit in Federal court alleging that the termination of his PSAs and privileges at Banner was racially motivated, in violation of Section 1981. Section 1981 prohibits discrimination based on race when making or enforcing contracts, and creates a federal cause of action for employment discrimination on the basis of race.[8] The contractual relationship in this case is the PSA between Dr. Sharifi and Banner.[9] The court focused its Section 1981 analysis on the PSAs, and did not analyze the termination of Dr. Sharifi’s privileges.

Banner moved to dismiss Dr. Sharifi’s Section 1981 complaint. In evaluating whether Dr. Sharifi’s Section 1981 complaint should be dismissed, the court also addressed several issues regarding whether a hospital’s peer review activity precludes a physician from pursuing litigation in court to contest issues that were previously decided through the hospital’s peer review process.

## **Court Reaffirms U.S. Supreme Court’s But-For Standard of Causation for § 1981 Claims**

Prior to 2020, the Ninth Circuit had held that in order to survive a motion to dismiss or summary judgment against a Section 1981 claim of racial discrimination, a plaintiff must only show that race was a “motivating factor” in the underlying action. However, in 2020, the U.S. Supreme Court established the more stringent “but-for” causation standard for sustaining a Section 1981 claim.[10]

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Under the current law, in order to successfully allege a Section 1981 claim of racial discrimination Dr. Sharifi was required to plead and ultimately prove that “but for” intentional discrimination on account of race, he would not have suffered the loss of a legally protected right – here, the termination of the Banner PSAs and the consequential revocation of his privileges at the Banner hospitals. If there exists, or if Dr. Sharifi’s complaint alleges, a non-discriminatory reason for Banner’s actions, then Dr. Sharifi’s Section 1981 claims cannot go forward.[11]

Here, the court determined that Dr. Sharifi’s complaint alleged four non-discriminatory reasons for Banner’s termination of the PSAs and privileges: (i) retaliation for Dr. Sharifi’s 2014 testimony against Banner in a wrongful death case; (ii) anti-competitive motivation on the part of several other physicians including the then-president of the medical staff and the head of Banner’s Interventional Radiology Department; (iii) retaliation for Dr. Sharifi reporting patient care concerns regarding the BBMC CMO; and (iv) previously suing Banner’s Senior Associate General Counsel and reporting her to her state bar association. Moreover, while Dr. Sharifi could possibly amend his complaint to remove the non-discriminatory reasons, the court also determined that Dr. Sharifi’s Section 1981 claim would not be able to proceed due to the preclusive effect of Banner’s peer review process.

### **Hospital’s Peer Review Process Eligible for Preclusive Effect**

The court found that Banner’s peer review activity should be afforded the same preclusive effect as a judgment of a court, and, under the doctrines of claim preclusion and issue preclusion, Dr. Sharifi is barred from contesting the results or process of Banner’s peer review activity. As such, the results of Banner’s peer review process provide another, separate race-neutral reason for terminating Dr. Sharifi PSAs and clinical privileges, and thereby prevent him from moving forward with his Section 1981 complaint.

In brief, the preclusion doctrines prevent a party from relitigating in a separate lawsuit a claim or issue that has already been decided on the merits in a previous proceeding between the parties.[12] Federal courts are required to give the decisions of state administrative agencies acting in a judicial capacity the same preclusive effect that the decision would be entitled to in the state’s courts.[13] Further, if a judgment of an administrative agency entails the essential elements of adjudication, then a court must give that decision the same preclusive effect as a judgment of a court.[14] The essential elements of an adjudication include:

1. Adequate notice to persons to be bound by the adjudication;
2. The right to present evidence and legal argument, and a fair opportunity to rebut evidence and argument by opposing parties;
3. Issues of law and fact are formulated similar to how they would be in a court, and decided according to procedures similar to those of a court;
4. A rule of finality, specifying a point in the proceeding when a final decision will be rendered and by whom; and
5. Such other procedural rights elements as necessary to ensure due process and conclusiveness of the proceeding.[15]

Under Arizona law, hospitals are required to establish a peer review committee to conduct non-

judicial review of care provided at the hospital for the purpose of reducing morbidity and mortality and improving patient care.[16] Additionally, a provider has the right under Arizona law to seek judicial review of a hospital peer review decision, along with injunctive relief to prevent the implementation of the peer review decision.[17] Here, the court found that the peer review process entailed the essential elements of an adjudication. Because Banner is required by statute to create a peer review process and Dr. Sharifi had a statutory right to seek judicial review of Banner's decision, the peer review process was akin to a state administrative agency acting in a quasi-judicial capacity, and was therefore eligible for preclusive effect on the basis of claim preclusion. Further, the court found that even if an Arizona court would not construe Banner's peer review decision as akin to an administrative agency acting in quasi-judicial capacity, the peer review process was sufficiently similar to a judicial proceeding to be eligible for the same preclusive effect as a judgment of a court on a basis of issue preclusion.

Because Dr. Sharifi was precluded from contesting the results of Banner's peer review activity, he could not contend in this case that but-for his race he would not have been subject to the peer review activity. Consequently, the results of Banner's peer review process provide a separate non-discriminatory basis for terminating his PSAs and clinical privileges, and the court dismissed Dr. Sharifi's Section 1981 complaint with prejudice.[18] Dr. Sharifi has subsequently appealed the court's decision to the Ninth Circuit Court of Appeals. That appeal remains pending at the time of this writing.

## Key Takeaways

The *Takieh* decision expands the preclusive effect afforded to a hospital's peer review and fair hearing process. Under the court's reasoning, if properly administered, a hospital's peer review and fair hearing process is the one bite at the apple. The hospital's peer review process is akin to a state administrative agency acting in a quasi-judicial capacity, and sufficiently similarly to a judicial proceeding so that the hospital's decision to revoke a physician's PSA and privileges after a fair hearing is entitled to the same claim preclusive effect as a court judgment.

If other courts apply the Arizona District Court's interpretation, the preclusive effect of peer review processes would naturally vary from state to state based on: (i) the preclusive effect afforded to the decision of an administrative agency in the state; (ii) the statutory requirement for hospitals to establish a peer review process; and (iii) the right of providers to seek judicial review of the hospital's peer review decision or other safeguards to ensure that physicians are provided adequate due process.

While the application of the court's reasoning in this case would vary from state to state, this case's holding establishes a precedent that could have a sizeable impact on the future interpretation and analysis of hospital peer review processes and their preclusive effect in subsequent litigation. Regardless of whether other courts apply the *Takieh* ruling, the court's decision should highlight for every hospital the value and importance of establishing and operating a peer review and hearing process that includes due process rights and incorporates the essential elements of adjudication. Taking such proactive steps may save a hospital time and money in relitigating peer review matters and allow the hospitals and their medical staffs to focus their efforts on improving quality care.

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[1] *Sharifi Takieh v. Banner Health*, CV-19-05878-PHX-MTL, 2021 WL 268808, at \*11 (D. Ariz. Jan. 27, 2021).

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[2] *Id.* at 1.

[3] *Id.*

[4] *Id.*

[5] *Id.* at 2, 3, and 16.

[6] *Id.* at 2.

[7] *Takieh*, 2021 WL 268808 at 4.

[8] 42 U.S.C. § 1981.

[9] *Takieh*, 2021 WL 268808 at 5.

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[10] *Comcast Corp. v. Natl. Assn. of African Am.-Owned Media*, 140 S. Ct. 1009, 1014 (2020).

[11] *Astre v. McQuaid*, 804 Fed. Appx. 665, 667 (9th Cir. 2020).

[12] The doctrine of claim preclusion, also called *res judicata*, bars a party to a final judgment on the merits from relitigating a claim and all of the issues that would or could have been litigated in the original case as part of that claim, while issue preclusion, also called collateral estoppel, only bars a party to a judgment from relitigating those issues that were actually litigated. Any prior adjudication of an issue in another action that is determined to be sufficiently definite to be given conclusive effect should be considered to be a final judgment on the merits for the purposes of issue preclusion (see Restatement (Second) of Judgments § 13).

[13] *Univ. of Tenn. v. Elliott*, 478 U.S. 788, 796, 799 (1986).

[14] *A. Miner Contracting, Inc. v. Toho-Tolani County Imp. Dist.*, 311 P.3d 1062, 1068 (Ariz. App. 1st Div. 2013).

[15] Restatement (Second) of Judgments § 83(2) (1982).

[16] A.R.S. § 36-445.

[17] A.R.S. § 36-445.02(B).

[18] *Takieh*, 2021 WL 268808 at 19.

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National Law Review, Volume XI, Number 215

Source URL:<https://natlawreview.com/article/preclusion-doctrines-and-peer-review-arizona-hospital-peer-review-process-given-same>