By Carolina Bolado

Law360, Miami (November 10, 2015, 5:19 PM ET) -- A recent Florida appeals court decision curbing a state constitutional amendment that requires broad access to incident reports of adverse medical events has set up a potential fight in the Florida Supreme Court over the reach of federal confidential reporting provisions — a fight that could ultimately limit the scope of malpractice cases.

The First District Court of Appeal on Oct. 28 quashed discovery orders requiring Southern Baptist Hospital of Florida Inc. to grant access to a number of reports of adverse incidents that occurred at the hospital over a three-year period. The discovery orders were issued in a suit brought by a man whose sister suffered a catastrophic neurological injury at Baptist.

The appeals court ruled that the federal Patient Safety and Quality Improvement Act, which aimed to build a system where medical providers could share medical error data confidentially so as to identify systemic problems and improve outcomes, preempts Florida's Amendment 7, a citizen initiative that gives individuals the right to access incident reports from a health care facility regarding adverse medical events.

The decision runs counter to an unpublished order issued by the Fourth District Court of Appeal earlier this year, a fact that the plaintiffs' attorneys pointed out last week in an effort to get the Florida Supreme Court to take up the case as one of great public importance.

Bryan Gowdy of Creed & Gowdy PA, who represents the plaintiffs, filed a motion for certification Nov. 2 with the state's high court.

“This ruling means that patients who are injured by medical malpractice will be denied vital patient safety information that they previously had a constitutional right to under the Florida Constitution,” Gowdy said.

The ruling could affect how plaintiffs bring medical malpractice claims, including, for example, negligent credentialing claims, according to Gowdy. The incident reports could help plaintiffs show that a hospital knew that the doctor being sued regularly made errors or if similar adverse incidents were common at the hospital, he said.

Amendment 7, adopted in 2004, allows for broad access to reports of adverse medical events — not just for plaintiffs already embroiled in medical malpractice litigation but even for potential patients. Gowdy pointed out, for example, that anyone considering seeing a certain doctor could request reports of adverse incidents involving that doctor.

But this broad access bumps up against the Patient Safety Act, enacted in 2005 to set up a system of patient safety organizations and a national database to report adverse events. The statute set up confidentiality provisions for patient safety work product to encourage participation by hospitals and other providers.

The goal, according to George Meros of GrayRobinson PA, who represents the hospital, was to “replace the concept of blame and shame with an atmosphere of patient safety.”

He added that the study that eventually led to the federal law found that the traditional tort system had not worked to decrease medical errors.

“If you have a broad array of data from around the country, then the breadth of that data is much more helpful to generating greater safety and a full understanding of medical errors and how they can be prevented,” Meros said. “That's why hospitals from around the country are so interested in this. It's beginning to yield results.”

Meros pointed out that not everything fits into the category of privileged patient safety work product, such as Code 15 reports required by the state, which must be reported to the Florida Agency for Health Care Administration within 15 days of an adverse incident. In addition, an annual report generally describing that year's adverse incidents and a listing of litigation involving the health care facility would also not be considered privileged.

Even with the confidentiality provisions, potential medical malpractice plaintiffs still have access to their records and to the information necessary for them to pursue litigation, according to Meros, who said the text of Amendment 7 is “extraordinarily broad.”

“In this particular case, the plaintiffs claim the right under Amendment 7 to access approximately 70,000 medical records, all of which are separate from the adverse incident report related to the plaintiff in the case,” Meros said. “They are seeking information unrelated to the actual circumstances here.”

But trial lawyers say they're not sure the hospitals are actually generating the required reports and they believe that many facilities may be substituting one type of report for another.

Philip Burlington of Burlington & Rockenbach PA, who filed an amicus brief in the case for trial lawyer group Florida Justice Association, gave the example of a case he is arguing at the moment involving a mother who died during a cesarean section. The hospital says there is no Code 15 report on the incident, and the detailed operative report that was handed over does not say what was the actual case of death.

“Theoretically, they are still supposed to satisfy all of the state reporting requirements,” Burlington said. “It's the suspicion that hospitals are not filing reports for the state. What does a patient do if a hospital doesn't generate it? AHCA is overtaxed — how are they even going to know?”

It's not just in Florida where the confidentiality provisions of the Patient Safety Act have butted heads with state regulations. The Kentucky Supreme Court — the only state supreme court to rule on this issue so far — last year ruled in Tibbs v. Bunnell that incident reports may be allowed in discovery if they are prepared according to state laws regulating health care facilities.

The U.S. Supreme Court has asked the solicitor general to weigh in on whether or not it should take up the Kentucky hospital's petition to hear the case.

“There's a lot of activity,” Gowdy said. “We're all watching what the U.S. Supreme Court may or may not do with regard to patient safety.”

In the end, Meros said, the issue is a simple one governed by the supremacy clause of the U.S. Constitution. Federal law trumps state law, he said.

“Plaintiffs asked the First District to ignore the plain words of the act and render it a dead letter,” Meros said. “This court recognized it had a federal constitutional obligation to enforce congressional enactments and the supremacy clause. This case is not about popularity, it is about enforcing the supremacy clause.”

Southern Baptist Hospital is represented by William E. Kuntz, Michael H. Harmon and Earl E. Googe Jr. of Smith Hulsey & Busey, George N. Meros Jr. and Andy Bardos of GrayRobinson PA, and Jack E. Holt III of Grower Ketcham Rutherford Bronson Eide & Telan PA.

The plaintiffs are 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 1D15-0109, in the First District Court of Appeal of Florida.

--Editing by Jeremy Barker and Kelly Duncan.