



JONES DAY
COMMENTARY

HOSPITALS SHOULD EXERCISE CAUTION: PUBLIC POLICY MAY INVALIDATE ECONOMIC CREDENTIALING POLICIES

The Arkansas Supreme Court may have energized the debate concerning economic credentialing by upholding a preliminary injunction that prevented Baptist Health from denying privileges to six cardiologists with ownership interests in a competing specialty hospital. In *Baptist Health v. Murphy*, Case No. 04-430 (Feb. 2, 2006), the Supreme Court ruled that a lower court had not abused its discretion in determining that the cardiologists would likely succeed on their claim that Baptist Health tortiously interfered with the business relationship between the cardiologists and their patients. While the decision has no direct impact on hospitals outside Arkansas, it suggests hospitals may not have an absolute right to exclude physicians from their medical staffs and emphasizes the need for hospitals to exercise caution in adopting economic credentialing policies. Moreover, the decision could spur additional attempts by physicians and medical societies to invalidate existing economic credentialing policies.

OWNERSHIP IN SPECIALTY HEART HOSPITAL TRIGGERED LOSS OF PRIVILEGES

Baptist Health is a tax-exempt health care provider that owns and operates hospitals and other health care facilities, including a comprehensive heart center in the Little Rock, Arkansas area. The cardiologists who sued Baptist Health were partners in Little Rock Cardiology Clinic, P.A. ("LRCC"), and had staff privileges at Baptist Health hospitals. LRCC owned 14.5 percent of Arkansas Heart Hospital (the "Heart Hospital"), which specializes in cardiac care and competes with Baptist Health for referrals of cardiac patients. Additionally, two of the cardiologists had direct ownership interests of one and three percent in the Heart Hospital.

In May 2003, Baptist Health adopted an economic conflicts of interest policy. Under the policy, any physician who, directly or indirectly, acquires or holds an ownership or investment interest in a competing hospital, such as the Heart Hospital, is ineligible for clinical privileges or the renewal of clinical privileges at Baptist Health hospitals. In February 2004, Baptist Health began notifying the cardiologists that their privileges would not be renewed because of the ownership interests that they held individually or through LRCC in the Heart Hospital.

On February 10, 2004, the cardiologists sued Baptist Health in the U.S. District Court for the Eastern District of Arkansas to enjoin enforcement of the policy. The cardiologists alleged that the policy violated several federal and state laws, including the federal anti-kickback statute, and tortiously interfered with the business relationships that they had with their patients. The federal court dismissed the cardiologists' claims on February 24, 2004 for a lack of subject matter jurisdiction.

Immediately following the dismissal, the cardiologists filed an identical suit in state court. The trial court conducted a hearing on the cardiologists' preliminary injunction request on February 26, 2004. The trial court found that the cardiologists were likely to succeed on the merits of their claims, including that the credentialing policy violated the federal anti-kickback statute and that the cardiologists would suffer irreparable harm if it did not enjoin the enforcement of the policy. Baptist Health appealed the trial court's decision and, given the importance of the issues involved, the Arkansas Supreme Court assumed jurisdiction over the case.

TRIAL COURT FOUND POLICY TORTIOUSLY INTERFERED WITH PHYSICIAN-PATIENT RELATIONSHIP

On June 2, 2005, the Arkansas Supreme Court remanded the case to the trial court because it had failed to provide adequate findings of fact to support its conclusion that the cardiologists were likely to prevail on their claims at trial. The Supreme Court, however, did not disturb the preliminary injunction that the trial court had originally imposed. On remand, the trial court found that the cardiologists had a substantial likelihood of success in establishing that the pol-

icy would tortiously interfere with the business relationships between the cardiologists and their patients.

The trial court noted that, for their claim of tortious interference to succeed under Arkansas law, the cardiologists had to establish that: (1) they had a valid contractual relationship or business expectancy with their patients; (2) Baptist Health knew of this relationship or expectancy; (3) Baptist Health interfered intentionally with this relationship or expectancy, inducing or causing a breach or termination of it; (4) they suffered damage as a result of Baptist Health's interference; and (5) Baptist Health's interference was improper. The trial court found that the credentialing policy improperly interfered in the physician-patient relationship for three reasons:

- The policy conferred remuneration in the form of credentials on physicians in exchange for the referral of Medicare and Medicaid patients in violation of the federal anti-kickback statute and similar state statutes.
- The policy violated Arkansas regulations regarding the criteria that hospitals may develop for medical staff bylaws.
- The policy constituted an unconscionable trade practice in violation of the Arkansas Deceptive Trade Practices Act.

The trial court found that the cardiologists would suffer irreparable harm, absent an injunction, because they would be forced to explain the loss of their privileges to their patients and insurance carriers. Additionally, the trial court determined that enforcement of the policy would significantly disrupt the cardiologists' relationships with their patients and with referring physicians. After the trial court had articulated its findings, the Supreme Court then considered whether the trial court had clearly erred by enjoining enforcement of the credentialing policy.

SUPREME COURT REJECTED ANTI-KICKBACK CONCLUSION BUT FOUND PUBLIC POLICY VIOLATION

The Arkansas Supreme Court concluded that the trial court did not clearly err in determining that the cardiologists were likely to prevail on their tortious interference claim. In doing so, however, the Supreme Court departed from the reasoning of the trial court in explaining why the interference caused by the credentialing policy was improper.

The trial court had found that the interference was improper because the credentialing policy violated the federal anti-kickback statute. The Supreme Court specifically rejected this finding by stating:

While the [credentialing policy] creates a disincentive for [the cardiologists] to maintain ownership in a competing hospital, we do not agree that it creates a disincentive for them to refer their patients to facilities other than Baptist. Based on the record before us, we do not believe that [the cardiologists] have established that [Baptist Health's] conduct constitutes a violation of the [anti-kickback statute].¹

Similarly, the Supreme Court held that the trial court had erred by finding that the policy violated state regulations governing medical staff bylaws.

The Supreme Court, however, could not bring itself to find that the trial court had clearly erred by determining that Baptist Health's economic credentialing policy was unconscionable and, therefore, illegal under the Arkansas Deceptive Trade Practices Act.² The trial court had found that a shortage of cardiac beds frequently existed in the Little Rock area. It reasoned that the credentialing policy would further reduce the number of beds available to patients of cardiologists who had their privileges taken away and, in so doing, violate public policy. Baptist Health challenged the trial court's finding by arguing that an economic conflicts of interest policy applicable to board members, administration, and medical staff could not be unconscionable. This argument did not persuade the Supreme Court, and it upheld the finding that the credentialing policy violated public policy because of its potential impact on patient care.

The Supreme Court then examined whether the cardiologists would suffer irreparable harm absent an injunc-

tion. It rejected the trial court's conclusion that harm to the reputation of the cardiologists served as a sufficient basis for granting the injunction. Instead, the Supreme Court affirmed the decision to enjoin enforcement of the policy because the loss of privileges would harm the cardiologists by disrupting physician-patient relationships.

SCOPE OF DECISION MAY BE LIMITED BY ARGUMENTS NOT CONSIDERED ON APPEAL

In reaching its decision, the Arkansas Supreme Court did not consider whether Baptist Health had an absolute right to refuse to deal with the cardiologists. Based on the briefing, the Supreme Court believed that Baptist Health raised this argument for the first time on appeal, and, therefore, the court would not consider it. For the same reason, the Supreme Court did not address whether Baptist Health could escape liability for tortious interference because it was not a "stranger" to the relationship between the cardiologists and their patients. Thus, it is difficult to predict whether the cardiologists will prevail outside the preliminary-injunction phase if the case goes to trial on the merits. Similarly, the extent to which courts in other jurisdictions will apply notions of tortious interference or unfair trade practices to economic credentialing cases is unclear.

DECISION DEMONSTRATES HOSPITALS SHOULD EXERCISE CAUTION

The Arkansas Supreme Court's decision demonstrates that the debate over economic credentialing is still alive. Credentialing policies that categorically refuse privileges to physicians with significant economic conflicts of interest almost certainly do not violate the federal anti-kickback

1. The Office of Inspector General of the U.S. Department of Health and Human Services ("OIG") solicited public comments in December 2002 regarding the application of the anti-kickback statute to economic credentialing practices. The OIG has not released any specific guidance based on the public comments. In its January 2005 supplemental compliance program guidance for hospitals, however, the OIG stated that "although conditioning privileges on a particular number of referrals or requiring the performance of a particular number of procedures, beyond volumes necessary to ensure clinical proficiency, potentially raises substantial risk under the anti-kickback statute, a credentialing policy that *categorically* refuses privileges to physicians with significant conflicts of interest would not appear to implicate the anti-kickback statute in most situations." 70 Fed. Reg. 4858, 4869 (Jan. 31, 2005).

2. See, e.g., Ark. Code § 4-88-107(a)(10).

statute.³ But, given the decision, physicians and medical societies may continue to attack these policies under state laws, such as those governing deceptive trade practices. Hospitals desiring to adopt economic credentialing policies should work with experienced legal counsel to create policies that will withstand scrutiny under state laws. Hospitals should also be prepared to respond to charges that such policies adversely affect patient care and, as a result, violate public policy. One method to refute these charges would be to develop a record documenting the impact that a physician's economic conflict of interest has on the patient care that the hospital provides.

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3. See footnote 1.