Pain Physician, Volume 3, Number 1, pp 97-98
2000, Association of Pain Management Anesthesiologists®

Health Care News

The following compilation of health care news is reprinted from *Health Law Trends*, which is a publication of Arent Fox Kintner Plotkin & Kahn, PLLC with permission.

Recent Court Decisions Reflect Conflicting Attitudes About Exclusive Contracts

William A. Sarraille, JD

Two recent opinions illustrate the tremendous differences in the manner the courts treat exclusive contracts. These opinions highlight some of the complexities and ambiguities facing:

1. hospitals, ambulatory surgical centers, and other institutional providers in offering exclusive agreements,
2. the physicians receiving exclusive offers, and
3. the physicians who are excluded by such offers.

In Major vs. Memorial Hospital Association, California's Fifth District Court of Appeals was asked to overturn a trial court determination in favor of a hospital that had established an exclusive contract with an anesthesiology group. The case, brought by three anesthesiologists who were excluded from providing services as a consequence of the exclusive contract, was filed alleging claims for tortious interference with professional business relationships, breach of contract, defamation, denial of due process, and conspiracy. One of the three excluded anesthesiologists also alleged that the exclusive contract was a sham, designed to exclude him from the hospital staff because of his race.

In upholding the trial court's decision, the appellate court stated that the exclusive arrangement was warranted for a variety of reasons. Prior to the development of a "closed" anesthesiology department, the hospital had an "open" department, which was, in the appellate court's view, characterized by scheduling problems, missing narcotics, poorly documented usage of narcotics, and a high complication rate. The court also pointed to the "open" department's members' alleged "inability to maintain professional relations between themselves and other members of the medical staff" and its "squabbl[ing]."

Despite acknowledging that the selection process for the recipient of the exclusive contract was "not a model of consistency," the appellate court stated that it was not its role "to question the wisdom" of the decision to pursue a "closed" department. The appellate court specifically rejected an argument, advanced in an amicus brief filed by the California Medical Association, that the substandard care allegations at the heart of the hospital's case required notice and a hearing under the hospital's bylaws.

In another recent case that has sent shudders throughout the institutional health care market place, a Florida jury awarded $22.8 million to two radiation oncologists whose privileges were terminated after an exclusive contract was awarded to other physicians. The lawsuit, which was filed against JFK Medical Center and the University of Miami, resulted in $2.5 million in compensatory damages and $20.3 million in punitive damages.

The case involved the often difficult issue of "economic credentialing." "Economic credentialing" involves making privileging decisions based on economic considerations, such as the terms offered by a group requesting an exclusive contract, rather than on quality of care, training, competency, and other traditional credentialing criteria. The defendants in the JFK Medical Center case contended that the hospital bylaws permit "economic credentialing" and that there is no "public policy" that prohibits economic

From Arent Fox Kintner Plotkin & Kahn, PLLC, Washington, DC. *Mr. Sarraille is a partner in the Washington, DC and New York, NY law firm of Arent Fox. He serves as AOPMA's General Counsel. Address correspondence: William A. Sarraille, JD, Arent Fox, 1050 Connecticut Avenue, Washington, DC 20036

criteria in privileging determinations. The plaintiffs argued to the court that such considerations were improper and void as a matter of public policy.

In the aftermath of the verdict, the Florida Hospital Association has expressed its concern that the verdict undermines institutional providers' ability to contract on an exclusive basis. Despite such concerns, the trial judge upheld the verdicts in post-trial motions.

These two widely divergent cases underscore the uncertainty in exclusive contract arrangements and the need for the management of institutions and physician and other practitioner staff to secure careful legal advice regarding the meaning and significance of hospital and other institutional bylaw provisions. Because of the uncertainty and risk, we are increasingly being asked to provide advice about how to manage institutional and practitioner staff relationships in an effort to avoid the often disastrous consequences to institutions or their staffs (and sometimes both) that can occur when relationships go awry.

The increased incidence of privileging disputes and the prevalence of exclusive agreements reflect several strong currents in the health care industry. With declining profit margins and mounting losses in some sectors, a powerful set of forces is driving institutions, including health plans, hospitals, ambulatory surgical centers, and nursing homes, to focus on the economic effects of privileging and credentialing decisions in order to rationalize and coordinate the delivery of services, cost control measures, and risk-based and other payment mechanisms. Accordingly, the number of privileging cases is only likely to increase as time passes.