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## Arkansas Democrat Gazette

NORTHWEST ARKANSAS EDITION

### Doctor-ban trial asks if profit trumps patient

BY TOBY MANTHEY

*Posted on Sunday, March 30, 2008*

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An “economic conflict-of-interest” policy imposed by Baptist Health has ignited debate that often comes down to this: Are some hospitals and doctors more concerned about their own success than what’s best for patients ?

The policy, also called “economic credentialing,” denies doctors privileges at Baptist Health hospitals if they own a stake in a competing facility. The Baptist Health system, the largest in Arkansas, includes Baptist Health Medical Center in Little Rock, as well as facilities in North Little Rock, Arkadelphia, Heber Springs and elsewhere.

Doctors at Little Rock Cardiology Clinic — who share ownership of Arkansas Heart Hospital in Little Rock with Charlotte, N. C.-based MedCath Corp. — want the policy declared illegal and unenforceable.

In a lawsuit against Baptist Health, the 11 doctors allege that the policy interferes with the doctor-patient relationship in an unconscionable way.

The suit over the 5-year-old policy went to trial March 10 in Pulaski County Circuit Court. Testimony in the bench trial, meaning there is no jury, ended March 20, although a ruling from Judge Collins Kilgore isn’t expected anytime soon.

Attorneys are scheduled to submit findings of fact and conclusions of law and post-trial briefs April 25. Responses are due May 9, and an order isn’t expected until several weeks later.

“In order to effectively practice medicine, the physician — a cardiologist in Little Rock, Arkansas — has to be able to admit patients to Baptist to satisfy those patients that want to go to

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Baptist or need to go to Baptist,” Scott Beau, a cardiology clinic doctor, testified in court earlier this month.

A temporary court injunction remains in effect that has allowed the cardiologists in the lawsuit to maintain privileges in the Baptist system.

The cardiologists say patients go to Baptist because of insurance advantages, the influence of Baptist advertising, because a relative works there, or for other reasons, such as because they’re Baptist ministers.

“To not have privileges to admit at Baptist would be a significant detriment to the care of my patients,” Beau said.

Russ Harrington, Baptist’s president and chief executive officer, testified in court that Baptist developed the policy in response to the opening of specialty hospitals such as the Arkansas Surgical Hospital in North Little Rock that Baptist worried would “cherry-pick” the most profitable patients, such as many cardiology patients.

Supporters say the policy should be upheld, because it ensures that such patients help subsidize Harrington the cost of charity care or services that operate at a loss, such as neonatal intensive care units.

Defeating the policy, others say, would allow patients to receive care from their preferred doctor in the hospital of their choice. It also would allow more competition, which spurs hospitals to invest in more technology.

Participating in the trial on the cardiologists’ side were the Arkansas Medical Society and the American Medical Association, which believes the case has national implications.

Michael Maves, the medical association’s chief executive officer, testified that the policy lacks “real opportunity” for doctors to appeal, or for due process to demonstrate they’re not cherry-picking.

“It assumes that they’re cherry-picking and conducting unethical behavior,” he said.

Jean Mitchell, a health-care economist at Georgetown University in Washington testified on behalf of Baptist about referral patterns of doctors with stakes in specialty hospitals.

The use of profitable procedures tends to increase when specialty hospitals enter markets, she said.

Studies generally find doctors refer healthier patients to their own hospitals and treat patients with better insurance there, she said.

Mitchell said she found such trends in her study of Arizona heart hospitals in Tucson and Phoenix, jointly owned by Med-Cath and doctors.

Glen Mays, an associate professor at the University of Arkansas for

medical sciences in Little Rock, said Thursday that Mitchell's statements are consistent with studies he has seen.

But "I don't think we can infer that these outcomes are resulting purely from the economic interests that a physician has to self-refer, or refer cases that are going to be profitable to the facility they have an ownership stake in," Mays said. "That's certainly one of the things that may be driving this pattern, but it may not be the only thing." It's medically appropriate in some cases, he said, to send sicker patients to general hospitals. Patients with one ailment may need many specialists to treat complicating conditions.

Baptist officials said they didn't conduct a study of admissions data to determine whether doctors with stakes in Arkansas Heart Hospital steered less profitable patients to Baptist.

Beau, the cardiology clinic doctor, said the "vast majority" of his uninsured, nonpaying and Medicaid patients end up at the Heart Hospital.

"I think their outcomes are better at the Heart Hospital, and I want to do what's best for my patient," he said.

Doctors at the cardiology clinic denied that money influenced where they send patients.

One exhibit introduced in court showed that Dr. Bruce Murphy, the most-senior partner in the clinic and the company president, made \$ 5. 3 million in 1998 through 2007 from dividends for his stake in the Heart Hospital and from a 2001 sale of stock in the hospital to MedCath. Murphy testified that the money was minor compared with his overall compensation for providing cardiac services. Beau received \$ 1. 9 million during the same period, but he said his stake didn't affect where he sent patients. "It would be unethical for me to put that thought above my patient's care," Beau said, although he agreed that "an unscrupulous physician could potentially be swayed." UNFAIR POLICY ? The cardiologists have argued that the policy is unfair because it punishes doctors who aren't "cherry-picking." The policy bars doctors from serving on Baptist staffs or having hospital privileges if they or immediate family members — even someone like a son-in-law, or the spouse of a grandparent — have a financial interest in a competing facility. Privileges are denied even if a relative's ownership wouldn't affect referrals. "[A ] pediatrician is not going to send her babies to a geriatric hospital just because her husband has an ownership interest in it," testified Dr. Regina Benjamin, a family physician who practices in Bayou La Batre, Ala. "So this policy didn't take any of those things into consideration." Janet Cathey, a gynecologist married to Steven Cathey, a neurosurgeon who was invested in Arkansas Surgical Hospital, was told in March 2005 that she would lose privileges at Baptist. Her husband's ownership was later sold, and Janet Cathey reached a settlement with Baptist and maintains privileges.

Phillip Peters, an endocrinologist and Baptist's chief of staff in 2002 and 2003, answering questions from the medical association's

attorney Jack R. Bierig, agreed it would be unfair for Janet Cathey to lose privileges.

But Peters said he thought Baptist's policy was a reasonable way to protect itself from specialty hospitals.

Bierig asked Peters if he had considered, as an alternative, a "fact-based review of the actual practices of the physician," which could include a complaint to the cardiology department if cherry-picking was suspected.

He said he had considered it, but other things weighed on his thoughts. Peters said he didn't feel there was a need for specialty hospitals, and he was concerned about the quality of care there compared with general hospitals.

"What happens at the spine hospital if a patient goes into diabetic ketoacidosis or if they have a heart attack or if they develop respiratory failure or [have ] a stroke ?" he asked.

LEGAL BATTLES AHEAD Maves, the medical association executive, said the Arkansas case is the only economic credentialing case he knew of in which his group has intervened. If the lawsuit is successful, association spokesman Robert Mills wrote in an e-mail, "we hope Baptist Health and other hospitals will be encouraged to address economic realities in today's health-care environment through innovation and fair competition, rather than relying on unfair policies." A victory for the economic credentialing policy could set a precedent that would mean "one less legal barrier" for hospitals considering similar policies, Mays said.

Unless changes in government regulation reduce competition from specialty hospitals, he expects more hospitals to consider the policies.

St. Vincent Health System, Baptist's main competitor in Little Rock, doesn't practice economic credentialing.

"In the event that a court approves economic credentialing, we see no reason at present to change our current practice," St. Vincent spokesman Margaret Preston said in a statement Wednesday.

More legal cases spawned by the policy are under way, including an antitrust case brought by the cardiology clinic related to the policy that's scheduled for trial the week of Nov. 3 in U. S. District Court at Little Rock.

In another case in the federal court, Middleton, Wis.-based Platte River Insurance Co. has alleged that in applying for liability insurance, Baptist misled the company about Baptist's knowledge of litigation risks stemming from the economic credentialing policy.

A trial in that case is scheduled for the week of June 2.

**FEEDBACK:**

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