

HEALTH LAW

Update

NEWS FOR THE CLIENTS AND FRIENDS OF BASS, BERRY & SIMS PLC

Konvalinka v. Chattanooga-Hamilton County Hospital Authority: Are Documents Produced Pursuant to a Corporate Integrity Agreement Protected from Requests for Public Records?

June 30, 2009

Introduction

On June 2, 2009, the Tennessee Court of Appeals concluded that a hospital's corporate integrity agreement documents are not protected from public disclosure under Tennessee law.¹ With this determination, the Court of Appeals remanded the case to determine whether such documents would be protected under federal law. The case relates back to the 2003-2005 investigation of Chattanooga-Hamilton County Hospital Authority d/b/a Erlanger Medical Center and Erlanger Health System ("Erlanger") by the U.S. Department of Justice (the "DOJ") and the U.S. Department of Health and Human Services Office of Inspector General (the "OIG").

Background

In April 2003, the DOJ served Erlanger with a subpoena requesting documents and information concerning a variety of subjects, including physician contracts.² The government alleged violations of the Stark law and the Anti-Kickback Statute relating to Erlanger's relationships with Erlanger's faculty practice plan and its participating physicians, the University of Tennessee's physicians and its relationship with Erlanger, and those physicians who served on Erlanger's Board of Trustees.

According to the government, beginning in 1995, Erlanger entered into a series of transactions through which it allegedly paid remuneration intended to induce physicians to refer patients to its

¹ *Konvalinka v. Chattanooga-Hamilton County Hospital Authority*, Tenn. Ct. App., No. E2008-02091-COA-R3-CV, 2009 Tenn. App. LEXIS 328 (June 2, 2009). Note that there are separate, factually unrelated cases from 2006 and 2008 by the same name, which Bass, Berry & Sims PLC discussed in its Health Law Update: "Court Interprets Scope of Tennessee Peer Review Statute," (April 27, 2006).

² "Erlanger Answers County Questions on \$40 Million Payout," *The Chattanooga.com* (January 18, 2006); see also Settlement Agreement dated October 24, 2005 as reproduced in "Erlanger Agrees to Pay \$40 Million on 'Ongoing' Federal Investigation: Payments to Be Stretched Out Through 2007," *The Chattanooga.com* (October 24, 2005).

facilities.³ Erlanger, which is affiliated with the University of Tennessee, set up a 'faculty practice plan' known as University of Tennessee Physicians Inc. and entered into a number of professional service agreements, including medical director contracts, recruiting agreements, joint venture agreements and leases with several large physician groups practicing in the area, which the government alleged violated the Anti-kickback Statute and the Stark law.⁴ Further, according to the government, Erlanger allegedly submitted false claims to Medicare and TRICARE for inpatient and outpatient hospital and home health services referred, ordered or arranged by certain physicians because Erlanger's violations of the Stark law precluded billing Medicare for items or services referred or ordered by those physicians.

On October 24, 2005, Erlanger and the OIG entered into a settlement agreement pursuant to which they agreed to settle the OIG's claims for \$40 million. At the same time, Erlanger entered into a Corporate Integrity Agreement (the "CIA") with a term of five years.⁵ The CIA requires that Erlanger maintain a compliance program that includes a compliance officer and compliance committee; training and education; and procedures to ensure compliance with the federal Anti-Kickback Statute and Stark law. The CIA places a heavy emphasis on effective oversight of Erlanger's financial arrangements with any actual or potential source of health care business or actual or potential recipients of health care business from Erlanger (the "Arrangements").⁶

The CIA also requires that Erlanger form a compliance committee to monitor compliance with the CIA and report directly to the OIG. Additionally, Erlanger is obligated to establish a disclosure program allowing employees to disclose concerns regarding potential questions of compliance with federal fraud and abuse laws.⁷ The CIA also requires that Erlanger submit annual reports to the OIG regarding various elements of compliance with the CIA and federal law, including Erlanger's responses and corrective action plans related to any issues raised about the Arrangements.⁸

The settlement resolved only the government's civil and administrative claims against Erlanger. It did not cover any criminal liability on the part of Erlanger or any civil or administrative claims against individuals who were the subjects of criminal investigation or charges.

³ Settlement Agreement dated October 24, 2005 as reproduced in "Erlanger Agrees to Pay \$40 Million on 'Ongoing' Federal Investigation: Payments to Be Stretched Out Through 2007," *The Chattanooga.com* (October 24, 2005).

⁴ Settlement Agreement dated October 24, 2005 as reproduced in "Erlanger Agrees to Pay \$40 Million on 'Ongoing' Federal Investigation: Payments to Be Stretched Out Through 2007," *The Chattanooga.com* (October 24, 2005).

⁵ The settlement included a \$37 million settlement with the federal government and a \$3 million settlement with the State of Tennessee. "Erlanger Agrees to Pay \$40 Million on 'Ongoing' Federal Investigation: Payments to Be Stretched Out Through 2007," *The Chattanooga.com* (October 24, 2005); *See also* OIG, The Department of Health and Human Services and the Department of Justice Health Care Fraud and Abuse Control Program Annual Report For FY 2006, page 12 (November 2007), available at <http://oig.hhs.gov/publications/docs/hcfac/hcfacreport2006.pdf> (last accessed June 25, 2009)

⁶ The CIA also requires specific training about relationships that potentially implicate the federal Anti-Kickback Statute or Stark law and Erlanger's relevant policies and procedures; stringent procedures for tracking and monitoring to ensure that each arrangement complies with the federal Anti-Kickback Statute and Stark law.

⁷ Corporate Integrity Agreement between OIG and Chattanooga-Hamilton County Hospital Authority d/b/a Erlanger Medical Center and Erlanger Health System, dated October 24, 2005, pp. 3-4, available at http://oig.hhs.gov/fraud/cia/agreements/chattanooga_hamilton_county_hospital_10242005.pdf (last accessed June 25, 2009).

⁸ *Id.* at pp. 14-15 and 25.

Trial Court Decision

In March 2008, John P. Konvalinka served a request for access to public records on Erlanger seeking access to fifty-three separate groups of documents.⁹ Only three of the fifty-three requests were at issue in the instant case, covering the following areas: (i) copies of all compliance reports submitted to the compliance committee; and (ii) copies of all meeting minutes of the medical center's compliance committee and of Erlanger's CIA compliance committee. It is unclear on what specific basis Konvalinka sought access to Erlanger's documents because the trial court records are not available. However, from the Court of Appeals decision, it appears that Konvalinka asserted that Erlanger is subject to public records requests because it is a public entity. Erlanger filed a Motion for Protective Order pertaining to these document requests.

Erlanger claimed that the records at issue were protected from disclosure pursuant to exceptions to the Tennessee Public Records Act, which protects "all investigative records in the possession of ... the office of inspector general" and "records and other materials in the possession of the office of the attorney general".¹⁰ In addition, Erlanger claimed that several federal statutes and regulations protected the disclosure of these documents, including certain provisions of the Federal Freedom of Information Act ("FOIA") and related regulations of the U.S. Department of Health and Human Services ("DHHS").¹¹

The trial court ruled that Tenn. Code Ann. §10-7-504(a)(2)(A) would protect these documents. This conclusion is based on statutory language providing that investigative records of, and in possession of, the 'office of inspector general' are confidential and are not open to inspection by members of the public. The trial court found that the reference in the Tennessee statute to office of inspector general includes both state and federal offices of inspector general. The trial court found that Konvalinka failed to respond to the hospital's argument that the compliance records are in effect 'investigative records of the OIG' under the plain language of Tenn. Code Ann. § 10-

⁹ *Konvalinka v. Chattanooga-Hamilton County Hospital Authority*, Tenn. Ct. App., No. E2008-02091-COA-R3-CV, 2009 Tenn. App. LEXIS 328 (June 2, 2009). Available at <http://www.tsc.state.tn.us/OPINIONS/TCA/PDF/092/John%20Konvalinka%20v%20Hamilton%20Co%20Hosp%20Authority%20OPN.pdf> (last accessed June 25, 2009).

¹⁰ *Konvalinka v. Chattanooga-Hamilton County Hospital Authority*, Tenn. Ct. App., No. E2008-02091-COA-R3-CV, 2009 Tenn. App. LEXIS 328 (June 2, 2009). Available at <http://www.tsc.state.tn.us/OPINIONS/TCA/PDF/092/John%20Konvalinka%20v%20Hamilton%20Co%20Hosp%20Authority%20OPN.pdf> (last accessed June 25, 2009). See also Tenn. Code Ann. §§ 10-7-504(a)(2)(A) and (a)(5)(A). The Tennessee Public Records Act makes all state, county and municipal records public, except for records or information in them that have been declared confidential by state law. Tenn. Code Ann. § 10-7-504 enumerates several categories of confidential state records. The language of the individual provisions of Tenn. Code Ann. § 10-7-504 sets forth certain documents as confidential and unavailable to public disclosure, such as those related to government investigations.

¹¹ *Konvalinka v. Chattanooga-Hamilton County Hospital Authority*, Tenn. Ct. App., No. E2008-02091-COA-R3-CV, 2009 Tenn. App. LEXIS 328 (June 2, 2009). Available at <http://www.tsc.state.tn.us/OPINIONS/TCA/PDF/092/John%20Konvalinka%20v%20Hamilton%20Co%20Hosp%20Authority%20OPN.pdf> (last accessed June 25, 2009). See also 5 U.S.C. §§ 552(b)(4) and (b)(7); 45 C.F.R. §§ 5.65(b)(4) and 5.68. FOIA requires federal agencies to make available public information, provided that certain confidential and investigative records are not subject to FOIA's disclosure requirements. DHHS has adopted regulations implementing FOIA's standards for all of its programs and units.

7-504(a)(2)(A). According to the trial court, the statute clearly protects such documents and exempts them from public disclosure.

Tennessee Court of Appeals Decision

On review, the Court of Appeals held that the Tennessee General Assembly did not intend to refer to the federal Department of Health and Human Services Office of Inspector General in the state law.¹² Consequently, Erlanger could not protect the records under Tennessee law if only the OIG had possession of the documents. As an alternative, Erlanger sought protection by further arguing that the state office of inspector general had "constructive" possession of the documents provided to the OIG. However, the Court of Appeals concluded that, at a minimum, the clear language of the Tennessee statute required the state attorney general to have actual physical possession of the documents in order for the exception to apply and, therefore, the statute did not protect Erlanger's documents.

The Tennessee Court of Appeals also held that even though the state statute does not protect the requested documents from disclosure, the inquiry was not ended. The appellate court concluded that the OIG's ability to require that certain documents generated under the CIA remain confidential is consistent with nondisclosure provisions of the Freedom of Information Act and regulations adopted by HHS. Though Konvalinka appears to have sought access to the Erlanger documents on the basis that Erlanger is a state governmental entity, the court determined that the OIG's ability to make corporate integrity agreements documents confidential is not eliminated simply because the OIG entered into the agreement with a state governmental entity such as Erlanger.

Because the trial court did not address whether documents are protected by the federal confidentiality provisions found at 45 C.F.R. §§ 5.65 and 5.68, the Court of Appeals held as follows: "Because these documents are not in the record before us, we cannot determine if they are confidential under the applicable federal law. Therefore, we remand this case to the Trial Court for a determination as to whether all or any portions of the requested documents are protected from disclosure pursuant to either federal statute(s) or federal regulation(s)."¹³

What to Watch

It will be interesting to observe how the Tennessee Chancery Court reviews this case and how it rules on the federal treatment of Konvalinka's documentation request. If Konvalinka is successful in his bid for this information, there could be a chilling effect on the extent to which public or quasi-public healthcare providers share confidential information with the OIG as part

¹² *Konvalinka v. Chattanooga-Hamilton County Hospital Authority*, Tenn. Ct. App., No. E2008-02091-COA-R3-CV, 2009 Tenn. App. LEXIS 328 (June 2, 2009). Available at <http://www.tsc.state.tn.us/OPINIONS/TCA/PDF/092/John%20Konvalinka%20v%20Hamilton%20Co%20Hosp%20Authority%20OPN.pdf> (last accessed June 25, 2009).

¹³ Page 10, *Konvalinka v. Chattanooga-Hamilton County Hospital Authority*, Tenn. Ct. App., No. E2008-02091-COA-R3-CV, 2009 Tenn. App. LEXIS 328 (June 2, 2009). Available at <http://www.tsc.state.tn.us/OPINIONS/TCA/PDF/092/John%20Konvalinka%20v%20Hamilton%20Co%20Hosp%20Authority%20OPN.pdf> (last accessed June 25, 2009).

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