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Sixth Circuit: “Single-Network” Hospitals Not Exempt from Section One Scrutiny

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On March 22, 2016, the U.S. Court of Appeals for the ***Sixth Circuit*** allowed a claim to proceed under § 1 of the Sherman Act against four hospitals acting as a single network under a joint operating agreement. ***Med. Center at Elizabeth Place, LLC v. Atrium Health Sys.***, No. 14-4166 (6th Cir. Mar. 22, 2016). A divided panel reversed the ruling of the district court, which had granted summary judgment for the defendant hospitals on the premise that they were operating as a single entity and therefore had not engaged in concerted action subject to § 1. The Sixth Circuit’s opinion sheds light on a topic of growing importance in the health care industry: how to distinguish a lawful joint venture from a horizontal conspiracy.

To answer that question, the majority examined “the nature of the business relationship among the defendants, focusing on whether that relationship remain[ed] that of separate, competing entities or whether there [was] a single center of decisionmaking.” *Id.* at 10 (citing *American Needle, Inc. v. Nat’l Football League*, 560 U.S. 183 (2010)). Even though the joint venture was “a separate corporate entity with its own management structure” and the “joint operating agreement provide[d] for sharing revenue pursuant to an agreed upon formula,” the court decided the record supported a conclusion that defendants were separate actors capable of conspiring under § 1. *Id.* In support of this conclusion, the court cited evidence that the intention behind the joint venture was to prevent the plaintiff hospital from entering the local health care market. *Id*. at 4 (for example, evidence that defendant’s executive told plaintiff, “you are the enemy [and] this is war”). Additional facts supporting this conclusion included that the hospitals “remain[ed] separate legal entities, each with their own assets, filing their own tax returns and maintaining a separate corporate identity with its own CEO and Board of Directors.” *Id.* at 11. Further, the hospitals continued to compete with each other for physicians and patients and to make their own decisions regarding staffing and patient care. *Id.*

In recent years, as antitrust regulators have subjected mergers in the health care arena to increasing scrutiny, many have viewed joint operating agreements as an attractive alternative. The Sixth Circuit’s opinion in *Elizabeth Place* serves as an important reminder that courts “look[] beyond labels” in distinguishing lawful joint venture activities from concerted conduct subject to § 1. *Id.* at 7. In other words, a formal joint operating arrangement will not spare accused conspirators from antitrust scrutiny, particularly in the face of evidence of anticompetitive intent. Companies should exercise caution to avoid the appearance that a joint venture is being used as a tool to harm

competitors or eliminate competition. In both internal documents and external communications, companies should avoid the use of war-like words that may signal anticompetitive intent or effect. It is always prudent to involve counsel in communications with competitors, as these communications pose the highest level of antitrust risk.

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