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## Court Finds Economic Credentialing Is Against Public Policy

On February 27, 2009, in a highly anticipated decision, the Circuit Court of the Thirteenth Division of Arkansas decided *Murphy v. Baptist Health*, providing declaratory and injunctive relief to physicians upon finding Baptist Health's economic credentialing policy unenforceable. The plaintiff physicians were all part owners of Arkansas Heart Hospital, a private acute care hospital in Little Rock. Under Baptist Health's credentialing policy, the plaintiff physicians were not eligible for clinical privileges at Baptist Health. The court found that the policy constituted both tortious interference with patient-physician relationships and a violation of a state deceptive trade practices statute. The *Murphy* decision implicates the ongoing public policy discussions surrounding economic credentialing, as well as the economic impact of a specialty hospital on community nonprofit general hospitals.

### Background

Physician investment in for-profit specialty hospitals has been an issue of significant concern to nonprofit community-based hospitals for several years. Nonprofit hospitals fear that the investment relationship with for-profit hospitals will cause investor physicians to refer more profitable specialty procedures to the specialty hospitals, rather than to the nonprofit hospitals that depend on revenues generated by such procedures to provide money-losing service lines, such as emergency and obstetrical services. In response, many nonprofit community hospitals engage in a practice of "economic credentialing," wherein the nonprofit hospital refuses to grant privileges to physicians based on certain economic reasons, such as investing in a competing for-profit specialty hospital.

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In 2003 the Centers for Medicare and Medicaid Services, pursuant to the Medicare Modernization Act of 2003, initiated a temporary moratorium prohibiting physician investor referrals to new specialty hospitals not currently under development. While the moratorium temporarily mitigated concern over the growth of specialty hospitals and the impact on nonprofit hospitals, the termination of the moratorium has again raised this issue to prominence. In response, nonprofit hospitals may again consider economic credentialing as a means of addressing the problem. In light of this, state court responses to the issue of economic credentialing will be important in evaluating the long-term viability of this tactic.

### **The *Murphy* Decision**

The *Murphy* court provided injunctive relief to plaintiff physicians based primarily on the finding that Baptist Health's economic credentialing policy was tortious interference with a business expectancy. The court found that by refusing to credential physicians with part ownership in another Arkansas hospital, Baptist Health interfered with the physicians' relationships with their patients. According to the court, the patient-physician relationship leads to a business expectancy that should be protected. Important to the court's analysis was that Baptist Health is the sole in-network inpatient provider for a large payor panel. Baptist Health's refusal to credential physicians would interfere with physicians' relationships with those patients whose insurance only reimbursed for treatment at Baptist Health.

The court also provided an extensive analysis of the public policy ramifications of Baptist Health's economic credentialing policy, ultimately finding that the policy was improper. First, the court reemphasized the importance of the physician-patient relationship, as well as the importance of a patient's right to choose his or her physician. The court found that "strong patient-physician relationships are the underpinning of good medicine." Second, the court found that not only is economic credentialing disfavored, but public policy favors the establishment of specialty hospitals such as Arkansas Heart Hospital, and the court used economic data to support its conclusions. Dr. Allen Dobson of Dobson DaVanzo & Associates, a nationally-known authority on these issues, provided expert testimony regarding economic research indicating that economic credentialing does not benefit the community. In addition, Dr. Dobson testified that profits at hospitals like Baptist Health are not harmed, and are sometimes helped, by competing physician-owned specialty hospitals. The court's reliance on economic research indicates that a hospital's contention that its economic viability is endangered is not sufficient to protect an economic credentialing policy; data or other probative evidence will be required.

### **Implications**

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Although the specifics of common law claims such as tortious interference vary by state, the claim of interference with prospective business relationships is generally available. In addition, the expansive discussion of public policy included testimony providing a larger economic context applicable to hospitals in all jurisdictions. The court used the American Medical Association's (AMA) Code of Ethics, and the Health and Ethics Policies of the AMA, as evidence of the impropriety of economic credentialing. The AMA policies legitimate the disfavored status of economic credentialing generally, and will impact future courts' determinations of impropriety of hospital conduct in similar cases.

The court in *Murphy* cites opinions from various states, distinguishing its facts to support its conclusion. For example, it compares the facts in *Murphy* to the Ohio case of *Walborn v. UHHS/CSAHS-Cuyahoga, Inc.*, a 2003 case from the Cuyahoga County Court of Common Pleas. In *Walborn*, the court denied physicians an injunction against a hospital's economic credentialing policy. The court in *Murphy* distinguishes *Walborn* on three grounds: (1) the court in *Walborn* found that the credentialing policy was a reasonable way to protect the hospital's continued viability; (2) the competing facility had a policy steering referrals away from the defendant hospital; and (3) *Walborn* was based on an Ohio statute, not a claim of tortious interference. By highlighting the economic distinctions, the *Murphy* court signals that plaintiff's evidence that their ownership stake in the competing hospital was not an economic burden on Baptist Health was a significant factor in the court's decision.

While responses to economic credentialing issues will vary by state, given the recent nature of the *Murphy* decision, it may serve as a bellwether in regards to future responses to the issue. Notable is the court's use of economic analysis showing that specialty hospitals may not have the feared negative economic impact on nonprofit community hospitals, which undercuts many of the arguments presented in support of economic credentialing. While the impact of *Murphy* in other jurisdictions remains to be seen, it may serve as a guidepost to all parties involved in economic credentialing issues as to the potential resolution of those issues.

For further information regarding this decision, please contact your principal Squire Sanders lawyer or one of the individuals listed in this alert.

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