

FTC Sues Hospital for Purchase of Clinics

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Recent action by the Federal Trade Commission signals increased scrutiny and possible divestiture of completed hospital mergers and acquisitions deemed to threaten competition. Providers who have recently completed mergers or acquisitions or who are contemplating them should take heed.

On July 24, 2009, the Commission filed a complaint against Carilion Clinic, alleging the Virginia hospital system's \$20 million acquisition of two other facilities will reduce competition and result in higher healthcare costs. Carilion's acquisition of the Center for Advanced Imaging (CAI) and Center for Surgical Excellence (CSE) occurred in August 2008, but the \$20 million was too low to trigger automatic antitrust review. The government does not often pursue consummated mergers, but there is no rule preventing such investigations. Thus, even though notification rules make acquisitions of a certain size reportable, transactions falling below the threshold are not protected against a government challenge.

The Commission seeks to have Carilion divest, or sell off, CAI and CSE and related assets in a manner that restores the clinics as viable competitors. The Commission's complaint claims Carilion must divest itself of CAI and CSE because "Carilion now faces only one competitor, HCA Lewis-Gale (HCA), in the provision of advanced outpatient imaging and surgical services." This, according to the Commission "reduced competition ..., and will result in higher prices and reduced non-price competition for these services." Health plans, as the direct customers for outpatient services, will see higher prices, which are "ultimately borne by patients in the Roanoke area through higher premiums and out-of-pocket expenditures."

Carilion is the dominant hospital system in Southwest Virginia, controlling about 80 percent of the hospital beds in the Roanoke area. It also has ownership interest in eight acute care hospitals and other healthcare businesses, including outpatient clinics. According to the Commission, CAI and CSE, prior to the acquisition, offered patients imaging and surgery services in a facility more accessible than Carilion or HCA's hospital settings. CAI and CSE also offered the same or better-quality services at prices substantially lower than Carilion or HCA.

The Commission has not made public its perceived change in market shares following the acquisition, but its complaint charges the merger leaves only HCA and Carilion to compete for both imaging services and outpatient surgical services, resulting in a merger to duopoly. A duopoly raises particular antitrust concerns because it leaves only two parties to lead the market, making coordinated interaction among them easier. The Commission alleged several anticompetitive effects arising from the merger, primarily less competition for available services and higher prices.

Specifically, the Commission cited CAI and CSE's ability to compete as a key reason that Carilion had continued to invest in improvements to its quality, services, and amenities. Post-merger, Carilion faces less pressure to continue these improvements. The Commission also relied upon CAI and CSE's independence as a leading driver of lower prices. Since independent centers have to compete for health plans, physicians, and patients, but are unable to provide the full slate of services available at hospitals, independent centers have to offer highly competitive rates in order to be included.

Following Carilion's acquisition, however, health plans can no longer threaten to exclude CAI and CSE from their networks, giving health plans less leverage when negotiating price. Carilion, thereby, can charge higher rates for the outpatient services, and the Commission predicts out-of-pocket costs for some services to increase by almost 900%.

This recent action by the Commission indicates increased scrutiny of health care mergers and acquisitions. King and Ballou attorneys are available to assist in antitrust matters should you have any questions.

The FTC's Complaint can be found at:

<http://www.ftc.gov/os/adjpro/d9338/090724carilioncmpt.pdf>

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