

# ANTITRUST & TRADE PRACTICES

## *Alert*

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

---

### Federal Trade Commission Challenges Virginia Hospital System's Completed Acquisition of Competing Imaging Center and Ambulatory Surgery Center

July 30, 2009

#### **Key Points:**

- Almost a year after the fact, the FTC has challenged the completed acquisition of an outpatient imaging center and its affiliated outpatient surgery center by Carilion Clinic, a Virginia hospital system. The FTC claims the transaction reduces competition for these services in Roanoke, Virginia and will result in increased healthcare costs for consumers.
- A strategy of acquiring competing centers when other attempts to combat them have failed may not survive FTC scrutiny.
- The challenge affirms that the federal enforcement agencies in the Obama era are closely scrutinizing mergers and acquisitions in the healthcare industry. Even relatively small transactions may be investigated and challenged.

#### **The Federal Trade Commission Challenges Hospital's Completed Transaction**

In August 2008, Carilion Clinic, a southwest Virginia hospital system, paid \$20 million to acquire the Center for Advanced Imaging (CAI) and its affiliated Center for Surgical Excellence (CSE), competitors of Carilion in Roanoke, Virginia. CAI was a provider of advanced outpatient imaging services that opened in 2003. Its owners opened CSE to offer outpatient surgical services, gaining regulatory approval to operate as an ambulatory surgery center in 2008. The transaction was not subject to pre-merger review by the federal antitrust agencies because the purchase price was less than \$63.1 million – the lowest Hart-Scott-Rodino reporting threshold in effect at the time.

Nearly a year after the acquisition, on July 23, 2009, the FTC issued an administrative complaint challenging the transaction.<sup>1</sup> The complaint alleges Carilion is the dominant hospital system in southwest Virginia, controlling 80 percent of the hospital beds in the Roanoke area. The FTC states that by eliminating direct competition between Carilion and CAI and CSE for the sale of advanced outpatient imaging services and outpatient surgical services, the acquisition will harm competition and lead to increased prices. The FTC argues that reducing the number of competitors in Roanoke from three to two reduces the leverage of health plans to bargain for lower prices. The complaint also asserts that the acquisition will not improve patient care or create cost-reducing efficiencies. The FTC seeks to require Carilion to divest CAI, CSE, and certain physician practices.

There are frequent allegations by similar specialty centers that their full-service hospital competitors have engaged in various practices designed to thwart competition, including opposing certificates of need, denying privileges to physicians who own competing specialty centers, and pressuring payers not to do business with the specialty centers. It has been reported that Carilion opposed CAI's application for additional MRI equipment and CSE's application for a certificate of public need. The FTC appears to believe that Carilion then followed the old adage, "if you can't beat them, join them."

In addition, Carilion's competitive practices in the Roanoke area have been in the news before. In 1989, the Department of Justice challenged Carilion's acquisition of a competing Roanoke hospital. Carilion won the case when a federal court found that the merger would not be an unreasonable restraint of trade. Fast forward almost twenty years to August 28, 2008 – one day before Carilion's acquisition of CAI and CSE was publicly announced – when the Wall Street Journal published a lengthy front page story detailing the dramatic escalation of healthcare costs in Roanoke that occurred after the 1989 merger.<sup>2</sup> The article points to Carilion's dominant market position as a major cause of the increase in healthcare costs in Roanoke.

### What's Next?

The FTC's challenge of the Carilion acquisition is in the preliminary stages and could continue for quite some time. Whatever the outcome, the FTC's challenge shows that even small healthcare transactions are subject to scrutiny under the reinvigorated antitrust enforcement regime of the Obama administration. Further, completion of a merger or acquisition is no guarantee that the antitrust agencies won't raise a challenge after the fact. For example, in 2004 the FTC challenged a hospital merger in suburban Chicago that had been completed four years earlier. The FTC concluded in 2007 that the merger violated the antitrust laws.<sup>3</sup>

As we reported in a previous alert,<sup>4</sup> the Obama administration has singled out healthcare as an industry in which it believes previous lax antitrust enforcement has led to higher prices for consumers. In light of the intense effort to reform healthcare and squeeze costs out of the

---

<sup>1</sup> The Complaint and Press Release can be viewed at <http://www.ftc.gov/os/adjpro/d9338/index.shtm>

<sup>2</sup> John Carreyrou, *Nonprofit Hospitals Flex Pricing Power*, WALL STREET JOURNAL, Aug. 28, 2008, at A1.

<sup>3</sup> See *In the Matter of Evanston Northwestern Healthcare Corp.*, FTC Docket No. 9315 (Final Order April 24, 2008).

<sup>4</sup> [Antitrust in the Obama Administration: Are You Prepared for Heightened Enforcement?](#)

system, we believe antitrust scrutiny of healthcare mergers, large or small, proposed or completed, will intensify during the Obama administration.

### Bass, Berry & Sims Antitrust & Trade Practices Group

**Ross Booher**  
(615) 742-7764  
[rbooher@bassberry.com](mailto:rbooher@bassberry.com)

**David R. Esquivel**  
(615) 742-6285  
[desquivel@bassberry.com](mailto:desquivel@bassberry.com)

**Wendee M. Hilderbrand**  
(615) 742-7252  
[whilderbrand@bassberry.com](mailto:whilderbrand@bassberry.com)

**Lucas Ross Smith**  
(615) 742-6526  
[lsmith@bassberry.com](mailto:lsmith@bassberry.com)

**E. Steele Clayton, IV**  
(615) 742-6205  
[sclayton@bassberry.com](mailto:sclayton@bassberry.com)

**Erin M. Everitt**  
(615) 742-7997  
[eeveritt@bassberry.com](mailto:eeveritt@bassberry.com)

**Taylor J. Phillips**  
(615) 742-7802  
[tphillips@bassberry.com](mailto:tphillips@bassberry.com)

**John-David H. Thomas**  
(615) 742-7998  
[jdthomas@bassberry.com](mailto:jdthomas@bassberry.com)

**Joshua R. Denton**  
(615) 742-7761  
[jdenton@bassberry.com](mailto:jdenton@bassberry.com)

**R. Dale Grimes, Chair**  
(615) 742-6244  
[dgrimes@bassberry.com](mailto:dgrimes@bassberry.com)

**Matthew J. Sinback**  
(615) 742-7910  
[msinback@bassberry.com](mailto:msinback@bassberry.com)

*The materials contained herein have been abridged from the sources cited and should not be construed or relied upon for legal advice. Readers are urged to consult legal counsel concerning particular situations and specific legal questions.*

*To ensure compliance with requirements imposed by the IRS, we inform you that this message is not intended to be used, and cannot be used, by the addressee or any other person for the purpose of avoiding penalties that may be imposed under the Internal Revenue Code.*

315 Deaderick Street • Suite 2700 • Nashville, TN 37238-3001 • (615) 742-6200  
The Tower at Peabody Place • 100 Peabody Place, Suite 900 • Memphis, TN 38103-3672 • (901) 543-5900  
1700 Riverview Tower • 900 S. Gay Street • Knoxville, TN 37902 • (865) 521-6200