

ANTITRUST & TRADE PRACTICES

Alert

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

Carilion Clinic Agrees to Divest Centers: An Update on the FTC's Challenge of Carilion's Completed Acquisition of Outpatient Imaging Center and Ambulatory Surgery Center

October 8, 2009

Key Points:

- An agreement has been reached to resolve the FTC's challenge by Carilion's divesting the outpatient imaging center and an outpatient surgery center it acquired in 2008.
- Carilion has also agreed to take other actions and refrain from certain otherwise lawful activities to restore the clinics' independent competitive strength.
- The FTC may appoint a monitor – at Carilion's expense – to ensure Carilion's compliance with the agreement.
- The FTC is closely scrutinizing mergers and acquisitions involving hospitals. This is the second time in just over a year that the FTC has stopped or reversed a hospital system's acquisition of a competing healthcare facility.

FTC Consent Agreement Requires Carilion to Divest and Limit Competition with Clinics

In July, we alerted you that the FTC was challenging Carilion Clinic's completed 2008 acquisition of an outpatient imaging center and its affiliated outpatient surgery center.¹ The FTC claimed the acquisition eliminated competition between Carilion and the centers and would lead to higher prices for consumers. The FTC demanded that Carilion divest the centers and certain related physician practices.

Yesterday, the FTC announced that a consent agreement has been reached with Carilion.² Under the terms of the agreement, Carilion must sell the centers to a buyer or buyers approved by the FTC within three months. Until the sale is completed, Carilion must preserve the centers' assets. Carilion also must offer financial incentives to employees of the centers that encourage them to stay both before and after the sale.

Carilion has also agreed to take steps to restore the clinics' independent competitive strength. For a period of six months, Carilion cannot recruit physicians that referred patients to the imaging center in

¹ [Federal Trade Commission Challenges Virginia Hospital System's Completed Acquisition of Competing Imaging Center and Ambulatory Surgery Center.](#)

² Documents filed in the case can be viewed at <http://www.ftc.gov/os/adjpro/d9338/index.shtm>

2008 and 2009. It also cannot forbid its own physicians who have referred patients to the imaging center from continuing to do so for a period of one year.

Finally, the agreement permits the FTC to appoint a monitor to ensure that Carilion complies with the agreement. Carilion is required to pay for the monitor if one is appointed.

What's Next?

It is clear that the FTC is scrutinizing both proposed and completed mergers involving hospitals and other medical facilities. The Carilion case marks the second time in just over a year that the FTC has successfully challenged a hospital system's acquisition of a competing healthcare facility. In May 2008, the FTC brought a case to block the proposed acquisition of a Northern Virginia hospital by Inova Health System Foundation, alleged by the FTC to be the largest hospital system in that area. Inova and the hospital abandoned the transaction in June 2008.

This trend can be expected to continue. In a July 2009 statement to the Senate Subcommittee on Consumer Protection, Product Safety, and Insurance, Richard Feinstein, Director of the FTC's Bureau of Competition, signaled that the FTC is particularly focused on hospital mergers as a target for stepped up enforcement.

If you have any questions regarding the issues addressed in this Alert, please feel free to contact any of the attorneys in the Antitrust and Trade Practices Group listed below.

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