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## FTC's Carilion Clinic Breakup — Outlier Or Omen?

*Law360, New York (November 16, 2009)* -- For the first time since 1994, the Federal Trade Commission has challenged and forced the divestiture of an exclusively outpatient service line acquisition not involving a full-scale hospital or health care system merger or acquisition.

On Oct. 7, 2009, Carilion Clinic agreed to sell the outpatient imaging center and outpatient surgery center it had purchased in 2008 in Roanoke, Va.

For years, the greatest focus of antitrust concern in health care merger and acquisition activity has been on the mergers of hospitals and health care systems.

In fact, after numerous failures, the FTC had recent success against Evanston Northwestern Healthcare's acquisition of Highland Park Hospital in Chicago and prevented the merger of Inova Health System with Prince William Healthsystem in Northern Virginia.

With the recent Carilion Clinic victory, the question now is whether this was simply a case of bad facts or if this is a signal by the FTC that it is shifting focus to integration efforts in outpatient service lines.

In either case, it is a reminder that even partial acquisitions or acquisitions of service lines can create antitrust risks that an acquirer has to address.

In August 2008, Carilion Clinic in western Virginia acquired two physician-led outpatient clinics: Center for Advanced Imaging, a clinic providing advanced imaging, including MRI and CT services ("CAI"); and Center for Surgical Excellence, an ambulatory surgery center ("CSE"). The purchase price was alleged to be \$20 million.

As alleged by the FTC, the acquisition resulted in the reduction of competitors for advanced outpatient imaging and for outpatient surgery services from three to two: Carilion Clinic and the large HCA-Lewis-Gale Medical Center ("HCA").

Because of the \$20 million purchase price, Carilion's acquisition of CAI and CSE did not trigger pre-merger notification to the FTC and the U.S. Department of Justice under the Hart-Scott-Rodino Act ("HSR").

Regardless, the FTC challenged the acquisition during the summer of 2009, and Carilion ultimately conceded in October.

The result was full divestiture of the acquired clinics by Carilion with the sale of the clinics at no minimum price; a stiff penalty given the state of the economy and because the transaction had closed just a year earlier.

There are a few takeaways from this settlement. First, just because a deal does not trigger HSR pre-merger notification does not mean regulators cannot or will not challenge it.

If a transaction results in greater market concentration in the hands of fewer competitors, regulators will scrutinize the deal, even if actual anti-competitive effects of the transaction are not readily apparent.

For example, the anti-competitive harm in the Carilion matter, on its face, seemed somewhat speculative.

Because Carilion agreed to settle and avoid contesting the merits of the FTC's complaint, Carilion did not test the validity of the FTC's allegations in the complaint which are the only statements of fact regarding the acquisition and the impact on competition that we have.

As alleged by the FTC, prior to the merger, both CAI and CSE offered services "in a facility more accessible than Carilion's or HCA's hospital-based services" and "offered high-quality services at prices substantially lower than Carilion's or HCA's pricing."

Post-closing, the FTC alleged that out-of-pocket costs could significantly increase for some patients and only for certain services. These factual allegations raise a few questions.

If the acquired clinics were the more accessible, high-quality and cheaper providers in the market, why didn't consumers, i.e., commercial payers, purchase more from CAI and CSE to challenge the larger Carilion and HCA facilities?

Did the one year operation of CAI and CSE by Carilion provide any evidence of actual and broad based and sustainable price increases?

The FTC admitted that CSE had just begun outpatient surgery services prior to the Carilion acquisition and therefore could not identify market share and market concentration.

To what extent did CSE's limited presence in the market actually impact or could be reasonably foreseeable to impact competition?

Regardless of whether the FTC could ultimately prove that the answers to these questions would establish the existence of anticompetitive harm, the mere presence of a concentrated market led to FTC action.

Second, it serves as a reminder that even though there may be legitimate reasons for integration of certain service lines, buyers must be prepared to explain, and if necessary, defend, the benefit of their acquisitions to the market.

Here, it is unclear whether the FTC had a strong case or whether Carilion simply made a cost-benefit analysis, especially in the current economic environment, and chose to settle rather than incur legal expenses on top of the acquisition costs it likely had not yet recouped.

Over the past few years, health care systems and hospitals have increased acquisitions of physician groups and ancillary service lines in numerous markets. Such activity is not likely to wane, unless buyers fail to consider the lessons of the Carilion case.

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