



LEGAL
COUNSEL
WORLDWIDE

Antitrust Issues in Health Care

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Overview

- Change in Antitrust Landscape
 - Increased Antitrust Enforcement
 - Increased Scrutiny of Competitor Collaborations
- Federal Trade Commission and Department of Justice in the new administration
- *In the matter of Carilion Clinic*

New Administration Focus on Health Care Enforcement

- Obama stated his intent to prosecute antitrust more vigorously than Bush, in part to help control health care costs*
- Director of FTC's Bureau of Competition Richard A. Feinstein was previously head of FTC's Health Care division

* Statement of Senator Barack Obama to the American Antitrust Institute, *available at* <http://www.antitrustinstitute.org/Archives/obama2.ashx> (Feb. 20, 2008).

FTC Focus on Health Care

- “[FTC] will work to stop anticompetitive agreements among physicians, and monitor hospital, pharmaceutical, and other mergers that threaten to raise the cost of health care.”
 - FTC Annual Report, March 2009
- FTC Chairman Jon Leibowitz
 - “Ensuring that consumers receive the benefits of health care competition will continue to be a priority of this Agency in the [Obama] administration.”*

FTC – Increased Attention to Health Care

- After more than a decade of no successful anticompetitive hospital merger enforcement:
 - Success in *Evanston Northwestern Healthcare Corp.* in 2007, a consummated merger successfully attacked retroactively
 - FTC blocked Inova acquisition of Prince William Health System in 2008
 - Now Carilion settlement
- Continuing enforcement of anti-competitive provider group contracting with payors
 - Fifth Circuit upholds FTC in *North Texas Specialty Physicians* in 2008

Department of Justice – Increased Antitrust Enforcement

- Christine Varney, Assistant Attorney General for the Antitrust Division
 - “The Antitrust Division must step forward and take a leading role in the development of the Government's multi-faceted response to the current market conditions. Vigorous antitrust enforcement action under Section 2 of the Sherman Act will be part of the Division's critical contribution to this response.”*

* Christine Varney, Vigorous Antitrust Enforcement in This Challenging Era, Remarks as prepared for the United States Chamber of Commerce, May 12, 2009, *available at* <http://www.usdoj.gov/atr/public/speeches/245777.htm>

Department of Justice – Increased Antitrust Enforcement

- Department of Justice reversed course on Antitrust Policy
 - Effective May 11, 2009, withdrew a 2008 report entitled *Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act*
 - Report allowed too many hurdles to government action
 - In withdrawing the report, Varney stated that “the Antitrust Division will be aggressively pursuing cases where monopolists try to use their dominance in the marketplace to stifle competition and harm consumers”*

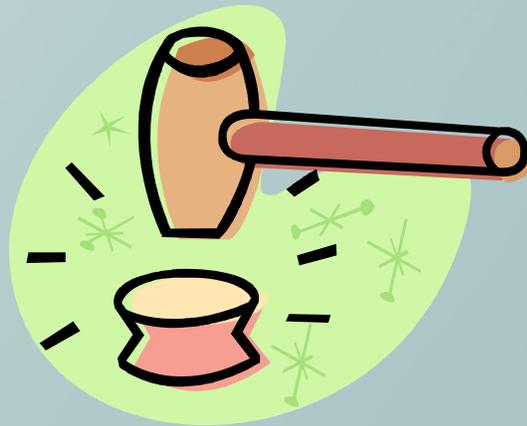
* Department of Justice, Justice Department Withdraws Report on Antitrust Monopoly Law, *available at* http://www.usdoj.gov/atr/public/press_releases/2009/245710.htm

Expanding FTC Act Section 5

- Section 5 of the FTC Act seeks broadly to prevent unfair methods of competition
 - Primary way to attack anticompetitive health care conduct outside of the merger context
- FTC Chairman Leibowitz seeks to use Section 5 more expansively
 - “[T]he framers of the FTC Act gave the Agency a mandate . . . to use Section 5 to supplement and bolster the antitrust laws by providing, in essence, a jurisdictional ‘penumbra’ around them. . . . [W]e need to further develop . . . this aspect of our enforcement responsibility – and to use all the arrows in our jurisdictional quiver to ensure that competition is robust, innovative, and beneficial to consumers.”*

Recent Enforcement – Carilion Clinic

- First reported antitrust enforcement action related to outpatient services
- FTC found that the purchase of an imaging center and an outpatient surgical center was anti-competitive



Carilion Clinic

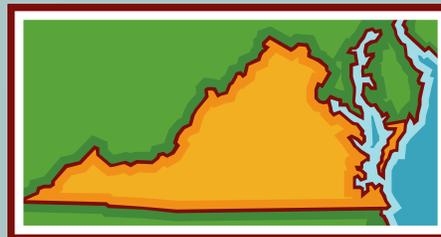
- Non-profit corporation in the Commonwealth of Virginia, with a principal place of business in Roanoke
- Controls approximately 80 percent of the hospital beds in the Roanoke area
- Existing services include:
 - Eight acute care hospitals
 - Outpatient imaging services
 - Outpatient surgical services
 - ASC JV with various physicians
 - Various other health care businesses

In the matter of Carilion Clinic

- Carilion Clinic acquired the Center for Advanced Imaging (“CAI”) and the Center for Surgical Excellence (“CSE”)
- CAI was the only non-hospital-owned imaging center in the Roanoke, Virginia area
- CSE had just received a Certificate of Public Need and license for outpatient surgical services from the State, and ASC certification from Medicare
- One remaining competitor for outpatient surgical services and imaging – HCA Lewis-Gale (“HCA”)

The Relevant Markets

- Product Markets
 - Advanced Outpatient Imaging Services
 - Outpatient Surgical Services
- Geographic Market
 - Extends 15 to 20 miles around Roanoke and Salem, Virginia
 - Evidenced by Carilion’s ability to impose “significant and non-transitory price increases upon private payors”



Basis for Antitrust Violation

- Acquisition of CAI presumptively unlawful
 - 1992 DOJ and FTC Horizontal Merger Guidelines
 - Increase in market concentration exceeded guidelines
- CSE market concentration could not be quantitatively measured
 - CSE began operations immediately before acquisition
 - FTC found that based on plans for expansion, CSE ***“likely would have become a significant independent provider of outpatient surgical services in competition with Carilion but for the acquisition.”***

FTC - Alleged Anticompetitive Effects

- Reduces imaging and surgical services providers in the Roanoke area from three to two
- Reduces health plans' leverage when negotiating rates with Carilion
 - Carilion concedes it planned to increase rates
- Increases patients' out-of-pocket costs
- HCA will have little incentive to compete in a stable duopoly with the elimination of the only non-hospital-owned competitor

Other Issues/Carilion Unwind

- Entry Barriers to competition

- Virginia Certificate of Need
- Medicare certification



- No Efficiencies

- Acquisition will not result in improved care

- Carilion agreed to unwind the deal

