Antitrust Issues in Health Care

John M. Kirsner, Esq.
jkirsner@ssd.com
614.365.2722

Christopher H. Gordon, Esq.
cgordon@ssd.com
202.626.6284
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

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.”

Department of Justice – Increased Antitrust Enforcement

• Department of Justice reversed course on Antitrust Policy
  • 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”*

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