

# Health Care Antitrust Alert: FTC Orders Roanoke Hospital To Divest Recently Acquired Outpatient Clinics To Restore Competition

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On October 7, 2009, the Federal Trade Commission (FTC) announced a consent order with Carilion Clinic, the largest health care service provider in the Roanoke, Virginia area, requiring Carilion's divestiture of two recently acquired independent outpatient medical centers. The FTC had challenged Carilion's acquisition of the two clinics as anti-competitive under Section 7 of the Clayton Act.<sup>1</sup> Carilion will now have three months to sell the clinics and all related assets to a buyer approved by the FTC. The consent order also contains other conduct provisions regarding patient referrals, which aim to restore competition among health care providers for outpatient imaging and surgical services in the Roanoke area. This case highlights both the growing trend toward hospital ownership or affiliation with freestanding outpatient providers, clinics, and surgical centers and the government's alertness to hospital and physician consolidation in outpatient settings (as opposed to the traditional focus on hospital mergers involving competing acute inpatient facilities).

## The Federal Trade Commission's Complaint

In August 2008, Carilion acquired the only two independent providers of advanced outpatient imaging and surgical services in Roanoke. According to the FTC, these clinics competed directly with Carilion and offered high-quality and accessible care at prices lower than Carilion's. The acquisition of these two centers by Carilion left the hospital with one competitor in the relevant geographic market for these outpatient services (the other major hospital system). The FTC's complaint alleged that "the acquisition's anti-competitive price effects will directly and substantially harm patients by increasing their out-of-pocket costs," as much as 900% for certain procedures. The administrative complaint also explicitly stated that the acquisition would "eliminate price and non-price competition" in the markets for these outpatient services. As a result, the FTC sought Carilion's divestiture of the acquired clinics and related assets to restore a competitive market.

## The Proposed Consent Order

The FTC's consent order contains the traditional divestiture remedy favored by the antitrust remedy to restore competition. Under the order, Carilion must divest, within three months, the two outpatient clinics and related assets necessary to permit the buyer to operate the centers independently and to compete effectively in the marketplace. These related assets, spelled out in

the consent order, include medical, financial and personnel files, medical supplies and other inventory, and permits and licenses, among others.

Significantly, and perhaps because the acquisition had previously been consummated, the FTC required relief beyond simple divestiture designed to facilitate the buyer's ability to restore competition to the outpatient services market. These provisions include:

- For a period of one year, Carilion may not change any existing policy for the purpose of restricting its employed physicians who have referred patients to the imaging clinic from continuing to make these referrals.
- For a period of six months, Carilion is prohibited from soliciting for employment any physician or physician's practice that has referred patients to the imaging clinic since the acquisition.
- Carilion is mandated to preserve the viability, marketability, and competitiveness of the two clinics' assets.
- Carilion is required to offer financial incentives to the personnel of the clinics to remain with each business during the sale, transition period, and—at the option of the buyer—post-sale.
- Carilion is prohibited from disclosing competitively sensitive information.

The FTC's public interest statement accompanying the consent order indicates that the Commission believes that the relief imposed will resolve the competitive issues raised by the Carilion acquisition, by reestablishing price, quality and service competition for these outpatient services in the Roanoke area.

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## Endnotes

<sup>1</sup> 15 U.S.C. § 18.

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