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by Womble Carlyle

# FOCUS

## President's Message

**Curtis L. Schehr**

By just about any measure, we live in challenging times, particularly when one considers the global economic meltdown that has affected most all of us in some manner.

While there are some encouraging signs of economic recovery on the horizon, most experts believe the road to recovery will be fairly lengthy and have a meaningful incline. There are few sectors of the economy that did not suffer during the last two years, and the legal profession is no exception. Against this relatively stark backdrop, the importance and value of WMAcCA to the in-house bar and broader legal community has never been stronger.

I am proud to be a part of this organization and to serve as president for 2010. I would like to thank Manik Rath, our immediate past president, for his leadership and dedicated service to the association.

The members of WMAcCA should also be proud. WMAcCA is the largest single chapter in the Association of Corporate Counsel, with almost 1800 members from more than 700 companies and

private sector organizations. WMAcCA recently won the Chapter of the Year Award in the large chapter category. Contributing to that award was the chapter's exceptionally strong programming accomplishments during 2009, with the vast majority of programs offering CLE opportunities to our members.

Several weeks ago, the WMAcCA board of directors and other volunteer leaders met to discuss the association's objectives for 2010. The three goals I outlined at the chapter leadership meeting focused on WMAcCA's principal stakeholders: our members, our sponsors and everyone else.

### Membership Growth and Retention

We are resolved to continue improving our membership by (1) ensuring that current large law department memberships are maximizing their utilization of their membership categories;



(2) recruiting new large law department members; (3) improving outreach to the in-house community generally and recruiting new members; and (4) increasing member participation in WMAcCA activities.

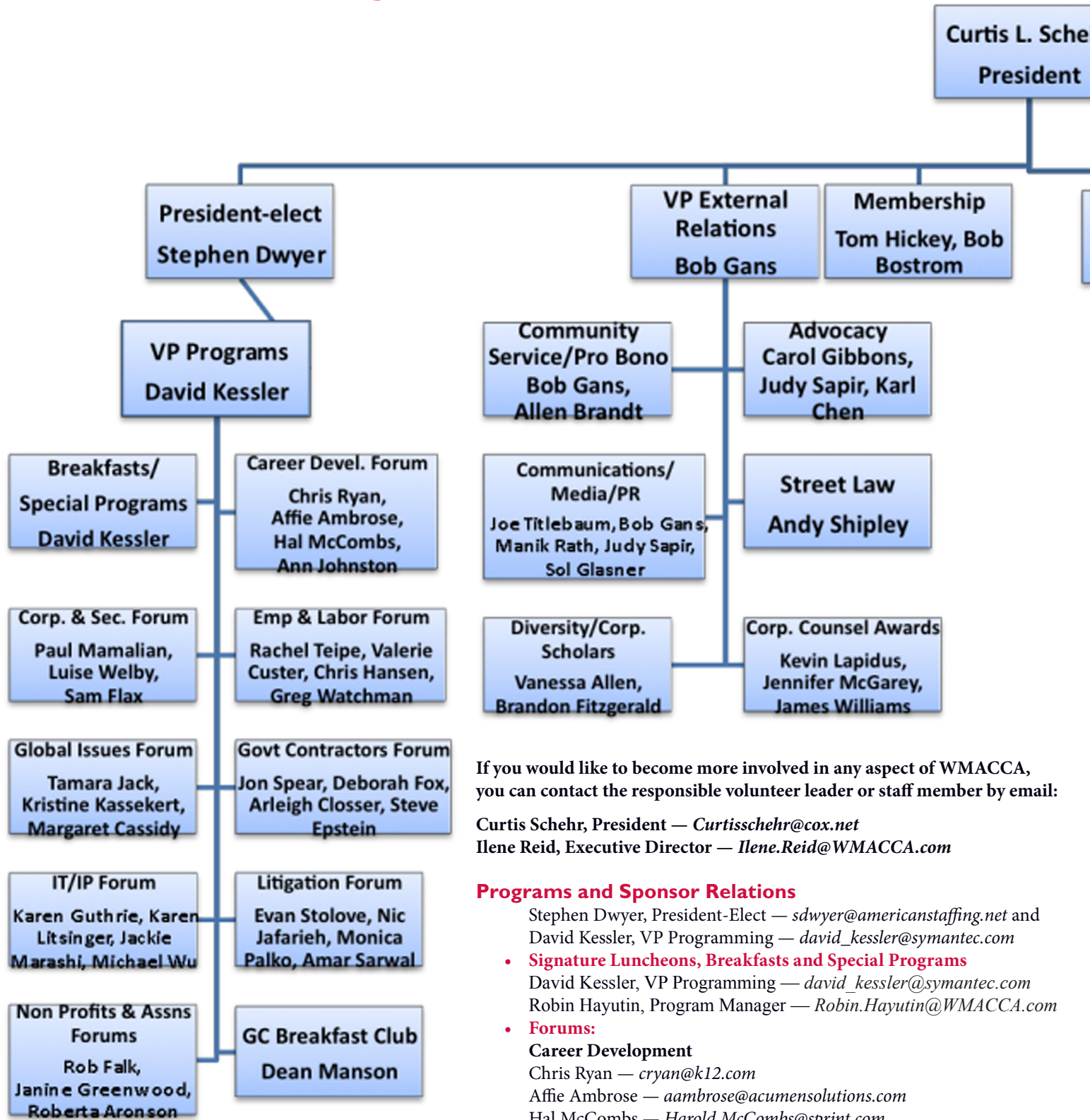
I am pleased to report this initiative will be spearheaded by Tom Hickey and Bob Bostrom, who have already outlined several actions to be taken to accomplish these objectives. We'll update you on our progress during the course of the year ahead.

### Sponsor Relations

In large measure because of WMAcCA's growth and accomplishments, we have been able to attract top tier sponsors from law firms, accounting firms and a variety of other service providers. Our sponsors fund a majority of WMAcCA's annual operating budget and are vitally important to the high-quality programming we present throughout the year. To optimize WMAcCA's sponsor

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# WMACCA 2010 Organizational Chart



If you would like to become more involved in any aspect of WMACCA, you can contact the responsible volunteer leader or staff member by email:

Curtis Schehr, President — [Curtisschehr@cox.net](mailto:Curtisschehr@cox.net)

Ilene Reid, Executive Director — [Ilene.Reid@WMACCA.com](mailto:Ilene.Reid@WMACCA.com)

## Programs and Sponsor Relations

Stephen Dwyer, President-Elect — [sdwyer@americanstaffing.net](mailto:sdwyer@americanstaffing.net) and  
David Kessler, VP Programming — [david\\_kessler@symantec.com](mailto:david_kessler@symantec.com)

- **Signature Luncheons, Breakfasts and Special Programs**  
David Kessler, VP Programming — [david\\_kessler@symantec.com](mailto:david_kessler@symantec.com)  
Robin Hayutin, Program Manager — [Robin.Hayutin@WMACCA.com](mailto:Robin.Hayutin@WMACCA.com)

- **Forums:**

- **Career Development**

Chris Ryan — [cryan@k12.com](mailto:cryan@k12.com)

Affie Ambrose — [aambrose@acumensolutions.com](mailto:aambrose@acumensolutions.com)

Hal McCombs — [Harold.McCombs@sprint.com](mailto:Harold.McCombs@sprint.com)

Ann Johnston — [annjohnston1@hotmail.com](mailto:annjohnston1@hotmail.com)

- **Corporate and Securities**

Sam Flax — [Samuel.Flax@americancapital.com](mailto:Samuel.Flax@americancapital.com)

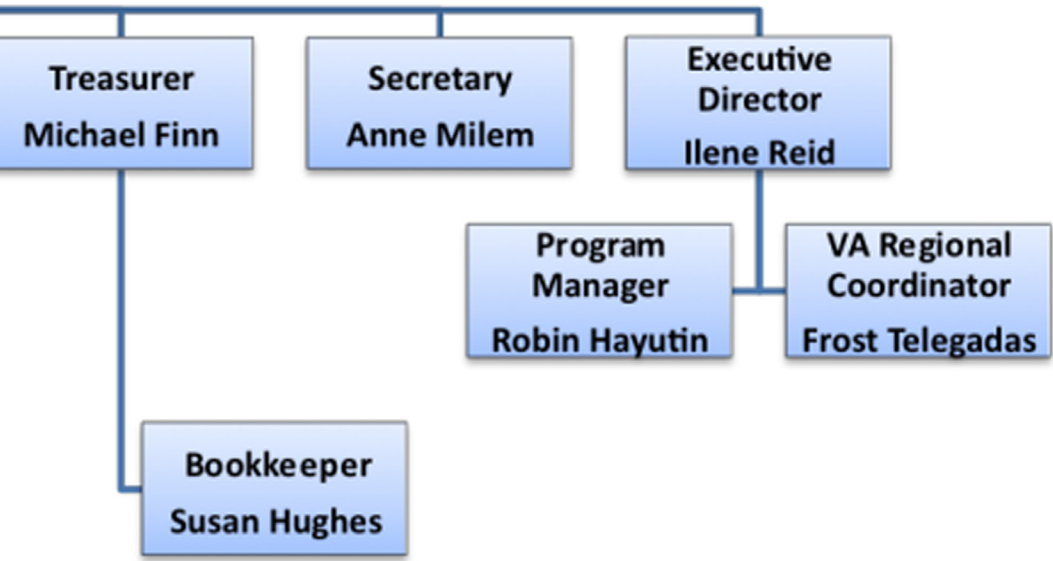
Paul Mamalian — [Paul.Mamalian@apptis.com](mailto:Paul.Mamalian@apptis.com)

Luise Welby — [Luise\\_Welby@freddiemac.com](mailto:Luise_Welby@freddiemac.com)

- **Employment and Labor**

Valerie Custer — [valerie.custer@gdit.com](mailto:valerie.custer@gdit.com)

Chris Hansen — [hansenc@usa.redcross.org](mailto:hansenc@usa.redcross.org)



Rachel Teipe — [rachel.teipe@gd-ais.com](mailto:rachel.teipe@gd-ais.com)  
 Greg Watchman — [Gregory\\_Watchman@freddiemac.com](mailto:Gregory_Watchman@freddiemac.com)

**Global Issues**

Tamara Jack — [tjack@lmi.org](mailto:tjack@lmi.org)  
 Kristine Kassekert — [kkassekert@centreconsulting.com](mailto:kkassekert@centreconsulting.com)  
 Margaret Cassidy — [Margaret.Cassidy@us.pwc.com](mailto:Margaret.Cassidy@us.pwc.com)

**Government Contractors**

Jon Spear — [jon.spear@verizonbusiness.com](mailto:jon.spear@verizonbusiness.com)  
 Steve Epstein — [steve.epstein@boeing.com](mailto:steve.epstein@boeing.com)  
 Deborah Fox — [Deborah.Fox@qinetiq-na.com](mailto:Deborah.Fox@qinetiq-na.com)  
 Arleigh Closser — [aclosser@juniper.net](mailto:aclosser@juniper.net)

**Litigation**

Evan Stolove — [evan\\_stolove@fanniemae.com](mailto:evan_stolove@fanniemae.com)  
 Nic Jafarieh — [Nicolas.Jafarieh@salliemae.com](mailto:Nicolas.Jafarieh@salliemae.com)  
 Monica Palko — [monicapalko@aol.com](mailto:monicapalko@aol.com)  
 Amar Sarwal — [asarwal@uschamber.com](mailto:asarwal@uschamber.com)

**Non-Profits and Associations**

Rob Falk — [rob.falk@hrc.org](mailto:rob.falk@hrc.org)  
 Janine Greenwood — [greenwood@studentclearinghouse.org](mailto:greenwood@studentclearinghouse.org)  
 Roberta Aronson — [Roberta.Aronson@nrucfc.coop](mailto:Roberta.Aronson@nrucfc.coop)

**Technology and IP**

Karen Guthrie — [karen.guthrie@sprint.com](mailto:karen.guthrie@sprint.com)  
 Karen Litsinger — [klitsinger@mirixa.com](mailto:klitsinger@mirixa.com)  
 Jackie Marashi — [jackie.marashi@wirelessmatrix.com](mailto:jackie.marashi@wirelessmatrix.com)  
 Michael Wu — [mwu@rosettastone.com](mailto:mwu@rosettastone.com)

• **General Counsel Breakfast Club**

Dean Manson — [Dean.Manson@hughes.com](mailto:Dean.Manson@hughes.com)

**External Relations**

Bob Gans, VP External Relations — [rgans@csc.com](mailto:rgans@csc.com)

• **Community Service and Pro Bono**

Bob Gans — [rgans@csc.com](mailto:rgans@csc.com)  
 Allen Brandt — [abrandt@gmac.com](mailto:abrandt@gmac.com)

• **Advocacy**

Carol Rick Gibbons — [carol.gibbons@capitalone.com](mailto:carol.gibbons@capitalone.com)  
 Karl Chen — [karl.chen@towerswatson.com](mailto:karl.chen@towerswatson.com)  
 Judy Sapir — [jsapir@apcoworldwide.com](mailto:jsapir@apcoworldwide.com)

• **Communications and Media/Public Relations**

Bob Gans — [rgans@csc.com](mailto:rgans@csc.com)  
 Joe Titlebaum — [jtitlebaum@aol.com](mailto:jtitlebaum@aol.com)  
 Manik Rath — [mrath@lmi.org](mailto:mrath@lmi.org)  
 Judy Sapir — [jsapir@apcoworldwide.com](mailto:jsapir@apcoworldwide.com)  
 Sol Glasner — [sglasner@mitre.org](mailto:sglasner@mitre.org)

• **Street Law**

Andy Shipley — [andrew.shipley@ngc.com](mailto:andrew.shipley@ngc.com)

• **Diversity Initiative and Corporate Scholars Program**

Vanessa Allen — [vanessa.l.allen@altria.com](mailto:vanessa.l.allen@altria.com)  
 Brandon Fitzgerald — [brandonfitzgerald@mcca.com](mailto:brandonfitzgerald@mcca.com)

• **Corporate Counsel Awards**

Kevin Lapidus — [klapidus@sunedison.com](mailto:klapidus@sunedison.com)  
 Jennifer McGarey — [jennifer.mcgaray@rcn.net](mailto:jennifer.mcgaray@rcn.net)  
 James Williams — [james.williams@liquidityservices.com](mailto:james.williams@liquidityservices.com)

**Membership**

Bob Bostrom — [Robert\\_Bostrom@freddiemac.com](mailto:Robert_Bostrom@freddiemac.com)  
 Tom Hickey — [thomasdhickey@comcast.net](mailto:thomasdhickey@comcast.net)

**Central and Southern Virginia Steering**

Vanessa Allen — [vanessa.l.allen@altria.com](mailto:vanessa.l.allen@altria.com)  
 Carol Rick Gibbons — [carol.gibbons@capitalone.com](mailto:carol.gibbons@capitalone.com)  
 Frost Telegadas, Regional Administrator — [frost.telegadas@wmacca.com](mailto:frost.telegadas@wmacca.com)

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relations, we need to (1) take steps to determine the level of our sponsors' satisfaction; (2) ensure that our sponsors avail themselves of all the benefits of their sponsorships; and (3) cultivate new sponsors. Stephen Dwyer, our president-elect, has agreed to lead this important initiative in 2010.

### Internal and External Communications

It is imperative that we continue to improve the image and profile of the in-house bar. While WMACCA has clearly made important progress in this area, increasing the recognition of in-house counsel and WMACCA in the external commu-

nity remains a challenging task that requires determination and focus from all of us. WMACCA's goals are to (1) continue to build our media/public relations outreach with support from our media consultant, Allison & Partners, and from increased involvement by WMACCA members by, for example, serving as subject matter experts or participating in our byline program; and (2) better utilize our internal communication tools (e.g., e-newsletter, webpage, etc.) to provide value to our members, and develop a social media strategy that will enhance member services. Bob Gans, WMACCA's vice president of external relations, will lead this initiative with support

from Joe Titlebaum, Manik Rath, Judy Sapir and Sol Glasner.

### Your Role

WMACCA is fortunate to have volunteer leaders who believe in the organization and are passionate about its mission and objectives. Nonetheless, WMACCA is your organization. WMACCA's relative success in accomplishing each of the objectives outlined above will depend largely on the responsiveness of the membership in supporting these goals through active participation. I strongly encourage you to get involved by contacting any of our chapter leaders and I hope to see you soon at a chapter event.

## Board Members and Contacts

### President

**Curtis L. Schehr**  
Attorney  
703.896.0087  
curtisschehr@cox.net

### President Elect

**Stephen C. Dwyer**  
American Staffing Association  
703.253.2037  
sdwyer@americanstaffing.net

### Vice President—

#### Programming

**David A. Kessler**  
Symantec Corporation  
703.668.8803  
david\_kessler@symantec.com

### Vice President— External Relations

**Robert E. Gans**  
CSC  
703.641.2595  
rgans@csc.com

### Secretary

**Anne L. Milem**  
Sallie Mae, Inc.  
703.984.5933  
anne.milem@salliemae.com

### Treasurer

**Michael F. Finn**  
General Dynamics AIS  
703.251.7368  
michael.finn@gd-ais.com

### Immediate Past President

**Manik K. Rath**  
LMI  
703.917.7315  
mrath@lmi.org

### Board of Directors

**Vanessa L. Allen**  
**Robert Bostrom**  
**Samuel A. Flax**  
**Carol Rick Gibbons**  
**Kevin S. Lapidus**  
**Karen M. Litsinger**  
**Dean A. Manson**  
**Jennifer McGarey**  
**Andrew E. Shipley**  
**James E. Williams**  
**Michael C. Wu**

### Membership Cochair

**Thomas D. Hickey**  
Cyren Call Communications  
Corporation  
703.906.3624  
thomasdhipkey@comcast.net

### Membership Cochair

**Robert Bostrom**  
Freddie Mac  
703.903.2690  
robert\_bostrom@freddiemac.com

### Executive Director

**Ilene G. Reid**  
Phone: 301.881.3018  
Fax: 301.881.2065  
Ilene.Reid@WMACCA.com

### Virginia Regional Coordinator

**Frost B. Telegadas**  
804.282.7212  
Frost.Telegadas@WMACCA.com

### Program Manager

**Robin G. Hayutin**  
703.242.8773  
Robin.Hayutin@WMACCA.com

## Mergers on the Examining Table: The FTC Ratchets up Antitrust Enforcement in the Healthcare Sector

By Brian A. Hayles, Esq., Womble Carlyle Sandridge & Rice, PLLC

If you have picked up a newspaper or turned on the television recently, you probably noticed that the healthcare industry is under the microscope. “Reform” is the watchword of the day, with President Barack Obama’s plan to overhaul the healthcare system representing one of the most controversial and ambitious agenda items of his young presidency. While it is difficult to predict whether or when reform legislation will be enacted, it is reasonably clear that the relentless debate over “ObamaCare” will not subside anytime soon.

Against this political backdrop, it is perhaps not surprising that the antitrust enforcement agencies – the Federal Trade Commission (FTC), in particular – have been active in the healthcare sector. In the past six months, there have been at least three significant healthcare-related mergers and acquisitions in which the parties — faced with the prospect of a protracted battle with the FTC — opted to walk away from their respective transactions. In some respects, these enforcement actions are consistent with the heightened scrutiny the agencies applied to healthcare transactions in the waning days of the Bush administration. *See, e.g., In the Matter of Inova Health System and Prince William Health System, Inc.*, FTC Docket No. 9339. Nevertheless, the emphasis that President Obama has placed on healthcare reform suggests that the federal antitrust agencies will continue to be enforcement-heavy in this arena. In that vein, the following is a brief synopsis of three recent FTC enforcement actions in the healthcare sector: Carilion Clinic, Thoratec Corporation and CSL Limited.

### I. Carilion Clinic

Carilion Clinic is the largest hospital system in southwest Virginia, holding an ownership interest in eight acute care hospitals and various other healthcare facilities. Through its holdings, Carilion controls approximately 80 percent of

the hospital beds in Roanoke, VA. Carilion provides outpatient imaging services at three of its locations and outpatient surgery services at four of its locations. On August 22, 2008, Carilion acquired the Center for Advanced Imaging (CAI) and the Center for Surgical Excellence (CSE), the only independent providers of advanced outpatient imaging and surgical services, respectively, in the Roanoke area. The acquisition carried a reported purchase price of \$20 million. As a result of the acquisition, the number of imaging and surgical services providers in the area decreased from three to two, with HCA Lewis-Gale placing the only competitive constraint on Carilion.



On July 23, 2009 — nearly one year after the acquisition was consummated — the FTC issued an Administrative Complaint challenging the transaction. *Complaint, In the Matter of Carilion Clinic*, Docket No. 9338, at [www.ftc.gov/os/adjpro/d9338/090724carilioncmpt.pdf](http://www.ftc.gov/os/adjpro/d9338/090724carilioncmpt.pdf). According to the FTC, Carilion’s acquisition “significantly reduced competition in the two affected markets, and will result in higher prices and reduced non-price competition for these services.” Compl. at 2. The relevant product markets were defined as (1) “advanced outpatient imaging services sold to private payors, including commercial health plans”; and (2) “outpatient surgical services.” Compl. at 4. The relevant geographic market was defined as “the Roanoke area, which includes the Counties and Cities of Roanoke and Salem, Virginia.” Compl. at 4. The FTC alleged that the transaction would lead to numerous anticompetitive effects, includ-

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ing an increase in patients' out-of-pocket expenses by 900 percent for some services and would create a disincentive for Carilion and HCA to aggressively compete on a going-forward basis. Compl. at 7. The primary relief sought by the FTC was Carilion's divestiture of the facilities in question. Compl. at 9.

In light of this challenge, Carilion agreed to unwind the transaction by selling CAI and CSE within three months to a buyer approved by the FTC. Carilion also agreed to several measures aimed at restoring competition, such as a six-month prohibition on soliciting for employment any physician who had referred patients to the CAI since January 1, 2008. This measure, according to the FTC, will allow CAI's new owner to develop and reestablish its referral base. See Federal Trade Commission Press Release, Commission Order Restores Competition Eliminated by Carilion Clinic's Acquisition of Two Outpatient Clinics (Oct. 7, 2009), at [ftc.gov/opa/2009/10/carilion.shtm](http://ftc.gov/opa/2009/10/carilion.shtm).

One significant aspect of the Carilion matter is that the transaction in question — with a relatively low acquisition price of \$20 million — did not require premerger notification under the Hart-Scott-Rodino Act (HSR). The fact that the FTC nevertheless saw fit to challenge the transaction underscores the notion that it is not only focusing on large mergers and acquisitions, but also on those smaller transactions that otherwise fly below the HSR radar.

## **II. Thoratec Corporation**

Thoratec Corporation, headquartered in Pleasanton, CA, is a producer of medical devices used to sustain end-stage heart failure patients, known as left ventricular assist devices (LVAD). LVADs are surgically implanted and assist such patients by mechanically pumping blood into the patient's native heart. LVADs are commonly used in two clinical settings: (1) to assist patients on a short-term basis while they are awaiting heart transplants, *i.e.*, "bridge to transplant therapy"; and (2) as a long-term alternative for patients who — because of advanced age or other medical conditions — are not suitable transplantation candidates, *i.e.*, "destination therapy." Thoratec's HeartMate II and HeartMate XVE are the only LVADs currently approved by the U.S. Food and Drug Administration (FDA) for commercial sale.

Massachusetts-based HeartWare International, Inc. is one of a handful of companies that is currently developing LVADs. HeartWare is permitted to sell limited quantities of its LVAD — known as HVAD — in connection with its participation in ongoing FDA clinical trials. If these trials are successful, HeartWare could receive FDA approval and eventually compete directly with Thoratec in the LVAD market.

On February 12, 2009, Thoratec and HeartWare entered into an Agreement and Plan of Merger, pursuant to which Thoratec proposed to acquire 100 percent of HeartWare's voting securities. The cash and stock transaction was valued at approximately \$282 million, thus triggering HSR's premerger notification requirements.

On July 28, 2009, the FTC filed an Administrative Complaint challenging the transaction. Complaint, In the Matter of Thoratec Corporation and HeartWare International, Inc., Docket No. 9339, at [www.ftc.gov/os/adjpro/d9339/090730thorateadminccmpt.pdf](http://www.ftc.gov/os/adjpro/d9339/090730thorateadminccmpt.pdf). The complaint characterized Thoratec as a monopolist in three relevant product markets: (1) LVADs; (2) LVADs as a bridge to transplant therapy; and (3) LVADs as a destination therapy. Compl. at 3. The relevant geographic market was defined as the United States. *Id.* The FTC alleged that a variety of anti-competitive effects would flow from the merger, including the elimination of current and future competition between the firms and the increased likelihood that Thoratec would collude with other LVAD manufacturers. *Id.* at 4. On July 31, 2009, the parties announced that they were abandoning the transaction.

The FTC's predominant competitive theory in the Thoratec case was the elimination of *potential* competition. This is because HeartWare — with its LVAD currently the subject of clinical trials — has not fully entered the relevant product markets. The "potential competition" theory has been utilized by the FTC in prior enforcement actions, see, e.g., Cephalon, Inc., 138 F.T.C. 583, 635-36 (2004), but it creates a complex proof structure that makes the prosecution of such claims particularly thorny. It is therefore difficult to determine whether the facts of the Thoratec case were especially well-suited for this competitive theory, or whether one should expect an increase in enforcement actions based on the alleged loss of potential competition.

## **III. CSL Limited**

Plasma-derivative protein products are essential for treating a host of rare and life-threatening medical conditions, such as autoimmune and coagulation diseases. Patients dependent on such therapy can spend in excess of \$90,000 per year on these products. CSL Limited (CSL) is the second-largest supplier of plasma-derivative protein therapies in the world. Talecris Biotherapeutics Holdings Corporation is a wholly-owned subsidiary of Cerberus-Plasma Holdings, LLC. Talecris is the third-largest producer of plasma-derivative protein therapies in the world. CSL and Talecris are both vertically integrated, owning and operating plasma collection and manufacturing facilities across the United States.

*continued on Extra 3*

*continued from Extra 2*

On August 12, 2008, CSL entered into an Agreement and Plan of Merger to acquire Talecris from Cerberus. The transaction was valued at approximately \$3.1 billion, easily triggering HSR premerger reporting requirements. Pursuant to applicable HSR provisions and a timing agreement entered into between the parties and the FTC staff, the acquisition could have been consummated on or after May 29, 2009. On May 27, 2009, the FTC challenged the transaction, filing an Administrative Complaint. *Complaint, In the Matter of CSL Limited and Cerberus-Plasma Holdings, LLC*, Docket No. 9337, at <http://www.ftc.gov/os/adjpro/d9337/090527cslcmpt.pdf>.

The Complaint alleged four separate relevant product markets: (1) immune globulin, commonly known as “Ig”; (2) albumin; (3) alpha-1; and (4) Rho-D. *Compl.* at 8. The relevant geographic market was defined as the United States. *Compl.* at 10. According to the FTC, the transaction would constitute a three-to-two or a five-to-four merger, depending on the product market in question. *Compl.* at 2. Additionally, CSL’s post-merger market share would range from 42 percent to 82 percent in these various product markets. *Compl.* at 10.

While the FTC alleged that the merger would result in the aggrandizement of market share in the relevant product markets, its chief competitive concern rested on the notion that, post-merger, CSL could impermissibly coordinate with its remaining competitors. This is due largely to the fact that the industry has traditionally operated as a “tight oligopoly.” *Compl.* at 2. According to the FTC, there is a history of competing firms “closely monitor[ing] each other, collecting and cataloging an extraordinary wealth of timely competitive information, to ensure that all are engaged in desired ‘rational’ and ‘disciplined’ behavior.” *Id.* Furthermore, a spate of industry consolidation in recent years has resulted in greater market concentration, tighter supply, and higher prices for many plasma-derivative protein products. *Compl.* at 6-7. In the FTC’s view, “Talecris is the one firm in the industry that can thwart the prevailing restrained, oligopolistic approach.” *Compl.* at 8. Although the parties initially signaled that they would oppose the FTC’s challenge, CSL announced on June 8, 2009 that it would not proceed with the acquisition. [www.ftc.gov/opa/2009/06/csl.shtm](http://www.ftc.gov/opa/2009/06/csl.shtm).

While the FTC’s competitive theories focused on the peculiarities of the plasma-derivative protein products industry, there is nonetheless at least one take-away that applies to virtually all enforcement actions: In evaluating the competitive impact of a transaction, the antitrust enforcement agencies frequently gather industry information from a variety of extraneous sources. Here, for instance, the FTC’s view of the oligopolistic nature of the industry

was reinforced by comments made by a competitor’s Chief Financial Officer during a conference call with investors. *Compl.* at 7. This underscores the importance of carefully evaluating not only a firm’s internal “deal-related” documents, but other information available in the public domain, when developing an antitrust rationale in support of a transaction.

#### **IV. Conclusion**

In light of these enforcement actions, one might assume that those in the healthcare industry — hospital systems in particular — are losing an appetite for mergers and acquisitions. To the contrary, in the past several months, there has been a marked uptick in announced transactions. This proliferation is likely due to several factors, including (1) the tightening of the credit markets over the past two years, which has left smaller, stand-alone hospitals cash-strapped; and (2) the general sense among industry experts that national healthcare reform will result in lower reimbursement. *See Vince Gallaro, Urge to Merge, MODERN HEALTHCARE*, Aug. 17, 2009 at 6-7, 16.

It is highly likely that, with an increase in healthcare-related transactions, there will be a commensurate increase in enforcement activity. Tighter enforcement would seemingly be consistent with the current administration’s focus on healthcare reform. The Carilion, Thoratec, and CSL Limited cases demonstrate that the FTC is prone to employ a variety of competitive theories as the basis for an antitrust challenge, may take enforcement actions after a transaction has been consummated and may challenge those transactions falling below HSR reporting thresholds. Faced with such challenges, some firms may conclude that abandoning a transaction is more appealing than waging a time-consuming and costly war with an antitrust enforcement agency.

*Brian A. Hayles is an attorney in the Charlotte, NC office of Womble Carlyle Sandridge & Rice, PLLC. His practice is devoted exclusively to antitrust and trade regulation. Brian frequently represents health care clients in private antitrust-related litigation and before the Federal Trade Commission Bureau of Competition, the Department of Justice Antitrust Division, and state attorneys general related to merger activity and other competitive collaborations. He can be reached at 704.331.4966 or BHayles@wcsr.com.*

*Womble Carlyle Sandridge & Rice, PLLC, is the 2010 Diamond Sponsor of WMACCA.*

*This article originally appeared in the December 2009 issue of Antitrust News, the newsletter published by the Antitrust & Trade Regulation Law Section of the North Carolina Bar Association. (Volume 20, No. 1). Reprinted with permission, all rights reserved.*