

PE Firm Escapes FTC's Challenge to Texas Anesthesiology Roll-Up

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A Texas federal court dismissed the Federal Trade Commission's (FTC) lawsuit against private equity (PE) owner, Welsh, Carson, Anderson & Stowe (Welsh Carson), while allowing to proceed the agency's challenge against U.S. Anesthesia Partners' (USAP) series of acquisitions.^[1]

Background

Rather than directly employ anesthesiologists, many hospitals contract with outside anesthesiologists or anesthesia groups to ensure around-the-clock access to anesthesia services. In 2012, Welsh Carson created USAP, which began to buy other anesthesia practices in Texas, eventually owning at least 15 practices. According to the FTC's complaint, USAP would add each acquired practice to its existing insurance contracts and thereby raise the rates of the newly acquired practices' services to match its own higher reimbursement rates.^[2] Today, USAP "handles nearly half of all hospital-only anesthesia cases in Texas, and earns almost 60% of all hospital anesthesia revenue paid by Texas insurers, employers, and patients."^[3]

When Welsh Carson formed USAP it owned 50.2% and chose company leadership. In 2017, the firm sold half of its stake in USAP.^[4] Since then, one of the firm's funds owns 23% of USAP and has the right to appoint only two of USAP's 14 board members.^[5]

In September 2023, the FTC sued Welsh Carson and USAP, claiming that they engaged in anticompetitive practices to monopolize Texas' anesthesiology.^[6] Allegedly, "Welsh Carson masterminded the plan for USAP to roll up markets across Texas and inflate prices," pointing to internal communications at Welsh Carson where the firm allegedly bragged about being USAP's "primary architect."^[7] From the FTC's perspective, Welsh Carson's minority ownership in USAP was no shield from liability because there is nothing to "prevent Welsh Carson from re-upping its investment in USAP, retaking formal control of the company, and directing yet more anticompetitive acquisitions."^[8] The FTC also pointed to Welsh Carson's duplication of its anesthesiology consolidation strategy in the radiology market as evidence the firm would continue its anticompetitive practices.

The FTC claims that it was entitled to an injunction under Section 13(b) of the FTC Act. Section 13(b) provides that when the FTC has reason to believe "that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the [FTC]," it may sue in federal district court to enjoin those practices.^[9] Welsh Carson and the USAP each moved to dismiss the claims against it.

The Court's Decision

First, in granting the motion to dismiss for Welsh Carson, the court ruled that the FTC did not adequately allege that Welsh Carson is *currently violating* antitrust laws. The court acknowledged that an acquisition of assets in a company may subject one to liability for monopolization or an unlawful transaction that may substantially lessen competition.^[10] Welsh Carson, however, owns only 23% of USAP, and the FTC did not “cite[] a case in which a minority, noncontrolling investor — [regardless of how] hands-on — is liable under Section 13(b) because the company it partially owned made anticompetitive acquisitions.”^[11] In contrast, in denying the motion to dismiss for USAP, the court stated that USAP’s alleged continued acquisitions and dominance in the state’s anesthesiology market “constitute ongoing activity and plausibly contribute to the monopoly power and unfair competition that the FTC’s complaint alleges.”^[12]

Second, the court ruled that the FTC did not adequately allege that Welsh Carson is *about to violate* antitrust laws. As stated, the FTC argued that nothing prevents Welsh Carson from again becoming a controlling investor in USAP and directing anticompetitive acquisitions. The court disposes of this by pointing out that “the mere capacity to do something does not meet the requirement that the thing is likely to recur.”^[13] And the fact that USAP is continuing its alleged anticompetitive practices “goes to USAP’s violations, not Welsh Carson’s.”^[14] The court also acknowledged that Welsh Carson seeks to replicate its strategy in other health care markets, but “comments from ... executives indicating a desire to consolidate other health care markets do not show that Welsh Carson is about to violate antitrust laws.”^[15]

Takeaways

Governance separation matters. Welsh Carson was a minority, noncontrolling investor. It controlled only two of USAP’s 14 board seats. This gave the firm the meaningful separation from USAP it needed. Firms should be mindful that courts will examine the extent of board control no matter how “hands-on” or “hand-off” the investor is regarding operations.

The FTC is concerned about serial acquisitions. The agency’s December 2023 merger guidelines provide that the agency will “examin[e] both the firm’s history and current or future strategic incentives” by evaluating “documents and testimony reflecting [the firm’s] plans and strategic incentives both for the individual acquisitions and for its position in the industry broadly.”^[16] In the FTC’s press release after filing the lawsuit, FTC Chair Lina M. Khan remarked that the “FTC will continue to scrutinize and challenge serial acquisitions, roll-ups, and other stealth consolidation schemes.”^[17] Firms should ensure that procompetitive effects from or reasons for strategies are spelled out in their business development and strategy documents. Firms should assume that their informal and formal comments will be interpreted skeptically by antitrust authorities. Accordingly, documents discussing the acquisition pipeline or strategy, for example, should be factual and not overstate the plan as one to roll-up, control, or own an entire market or geography.

Consult an expert. Commercial arrangements with competitors that, in any way, implicate rates, prices, production levels, or information regarding same should be carefully reviewed with antitrust counsel.

Acquisitions in health care put agencies on heightened alert. The FTC’s complaint is replete with references to Welsh Carson’s involvement in health care. This concern extends to the states, as well. For instance, in

February 2024, USAP reached an agreement with Colorado Attorney General Phil Weiser that required it to divest and pay monetary relief.^[18] Weiser remarked that “[w]hen private equity gets involved in health care with a focus on raising prices to make a quick buck, bad things happen for consumers.”^[19] Firms investing in health care-related markets should be aware that federal and state agencies are looking out for serial acquisitions in the sector.

Brad Smutek, a 2024 summer associate with Troutman Pepper who is not admitted to practice law in any jurisdiction, also contributed to this article.

[1] No. 4:23-cv-03560, 2024 WL 2137649 (S.D. Tex. May 13, 2024).

[2] *Id.* at *1.

[3] *Id.* at *2.

[4] *Id.* at *3.

[5] *Id.*

[6] See *Complaint, FTC v. U.S. Anesthesia Partners, Inc.*, No. 4:23-cv-03560 (S.D. Tex. Sept. 21, 2023), [here](#).

[7] *Id.* at *93.

[8] *Id.* at *94.

[9] 15 U.S.C. § 53(b).

[10] *FTC v. U.S. Anesthesia Partners*, No. 4:23-CV-03560, 2024 WL 2137649, at *4 (S.D. Tex. May 13, 2024).

[11] *Id.* at *5.

[12] *Id.* at *8.

[13] *Id.* at *6.

[14] *Id.* at *5.

[15] *Id.* at *6.

[16] Merger Guidelines 23 (2023), [here](#).

[17] Press Release, Fed. Trade Comm'n, FTC Challenges Private Equity Firm's Scheme to Suppress Competition in Anesthesiology Practices Across Texas (Sept. 21, 2023), [here](#).

[18] Press Release, Colorado Office of the Attorney General, Private Equity-Run U.S. Anesthesia Partners to End Colorado Health Care Monopoly under Agreement with Attorney General Phil Weiser (Feb. 27, 2024), [here](#).

[19] *Id.*

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