

September 26, 2023

FTC Sues Private Equity Firm Over Portfolio Company's "Roll Up Strategy"

- The FTC is challenging a series of acquisitions of anesthesiology practices by private equity firm Welsh Carson. This is the Biden Administration's biggest move so far against "roll up" acquisitions, which have been criticized by the antitrust agencies.
- Notably, in addition to potential divestitures, the FTC is seeking broad relief against Welsh Carson that could potentially interfere with its ability to make future acquisitions in other markets.

Late last week, the Federal Trade Commission (FTC) sued entities affiliated with private equity firm Welsh, Carson, Anderson & Stowe (Welsh Carson), along with Welsh Carson's partially owned portfolio company U.S. Anesthesiology Partners, Inc. (USAP), for allegedly pursuing an illegal "roll up strategy" to consolidate anesthesia practices in Houston, Dallas and other parts of Texas. The FTC is asserting claims under Section 7 of the Clayton Act (governing mergers), Section 1 of the Sherman Act (governing agreements in restraint of trade), Section 2 of the Sherman Act (governing monopolization) and Section 5 of the FTC Act (governing unfair methods of competition). The complaint seeks "structural relief" (i.e., divestitures) and to enjoin defendants' "similar and related" future conduct. This is the Biden Administration's first litigated case challenging so-called "roll ups" or "serial acquisitions" by a private equity firm. These types of acquisitions have gained recent attention from both the FTC and Antitrust Division of the U.S. Department of Justice, including in the recently released [Draft Merger Guidelines](#).

Roll up strategy challenged. According to the FTC's [complaint](#), Welsh Carson formed USAP in 2012 to pursue what it called an anticompetitive "roll up strategy" of purchasing and consolidating anesthesiology practices in key markets in Texas, including Dallas and Houston, in violation of Section 2 of the Sherman Act (which prohibits illegal monopolization) and Section 7 of the Clayton Act (which prohibits acquisitions that "may . . . substantially . . . lessen competition, or . . . tend to create a monopoly"). Specifically, the FTC alleges that USAP and Welsh Carson monopolized and conspired to monopolize "hospital-only anesthesia" markets in Houston, where USAP has a 70% share, and Dallas, where USAP has a 68% share. The complaint also alleges that "tuck-in" acquisitions in Houston and Dallas violated Section 7. Notably, based on market concentration statistics alleged by FTC, some of the individual acquisitions challenged would be presumptively unlawful under both the current Horizontal Merger Guidelines and the recent Draft Merger Guidelines, but others would not. Nevertheless, the FTC asserts that the acquisitions were illegal "whether considered individually or as a series."

Also of note: the acquisitions here presumably did not meet the threshold for pre-merger notification and are being challenged years after closing. This may be generally characteristic of roll-up acquisitions. Indeed, Chair Lina Khan, in an [op-ed](#) discussing the complaint, wrote that "[o]ne reason why enforcers may not have scrutinized the impact of roll-ups previously is the relatively small size of each acquisition." This complaint serves as a reminder that non-reportable acquisitions can attract agency scrutiny, sometimes years after closing.

Relief sought against private equity sponsor. In the op-ed, Chair Khan also wrote: "The antitrust laws may apply to parent companies and investors if they directly participate or conspire to participate in anti-competitive conduct." Here, the FTC named Welsh Carson as a defendant and alleged that it "controlled, directed, dictated or encouraged USAP's conduct with respect to,

and directly and actively participated in," the acquisitions. Notably, the FTC seeks to enjoin Welsh Carson from pursuing "similar and related conduct in the future," in addition to the relief it seeks against USAP. According to the complaint, Welsh Carson is likely to pursue similar roll up strategies in anesthesiology or other medical specialties in the future in violation of the antitrust laws if the court does not intervene. If the court agrees with FTC, it could issue an injunction requiring Welsh Carson to seek prior approval from FTC before making acquisitions, not just of Texas anesthesiology practices, but perhaps also medical practices in other states or medical specialties.

Single acquisitions as unfair methods of competition. The FTC is also challenging USAP's acquisition of only one anesthesiology practice in each of Tyler, Amarillo and San Antonio under Section 5 of the FTC Act. Here, the FTC does not allege that these practices compete with each other or with USAP's holdings in other metro areas in a way that might support a claim under Section 7 of the Clayton Act. To the contrary, the FTC admits these acquisitions "did not increase market concentration." Nevertheless, the FTC argues that these acquisitions constituted "unfair methods of competition" under Section 5 because USAP subsequently raised the acquired practices' rates. The FTC [announced](#) late last year that it would, in certain cases, pursue "standalone" claims for unfair methods of competition under only Section 5 of the FTC Act (rather than in conjunction with the Clayton or Sherman Acts). This case may provide an opportunity for the courts to examine the extent to which the FTC has "standalone" authority under Section 5.

Price-fixing and market allocation also alleged. The FTC asserts that USAP and Welsh Carson violated Section 1 of the Sherman Act through "collaboration agreements" with competing anesthesiology practices that amounted to price-fixing conspiracies. According to the complaint, USAP agreed with competitors to provide billing and other back-end services for the competitors, including billing payors in USAP's name and at USAP's rates for services provided by the competitors. The FTC alleges that USAP and Welsh Carson violated the Sherman Act by maintaining these agreements, although most were entered into by USAP's predecessor companies. The complaint also asserts a separate Section 1 violation arising out of an alleged market allocation agreement entered into between USAP and "an actual or potential competitor." Certain details of this agreement are redacted in the public version of the complaint; however, geographic allocations similar to what is described by the FTC in the complaint have previously been the subject of criminal prosecution by the DOJ in an exercise of its prosecutorial discretion.

* * *

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

Andrew C. Finch
+1-212-373-3417
afinch@paulweiss.com

Katherine B. Forrest
+1-212-373-3195
kforrest@paulweiss.com

Jacqueline P. Rubin
+1-212-373-3056
jrubin@paulweiss.com

Scott A. Sher
+1-202-223-7476
ssher@paulweiss.com

Joshua H. Soven
+1-202-223-7482
jsoven@paulweiss.com

Eyitayo "Tee" St. Matthew-Daniel
+1-212-373-3229
tstmatthewdaniel@paulweiss.com

Aidan Synnott
+1-212-373-3213
asynnott@paulweiss.com

Brette Tannenbaum
+1-212-373-3852
btannenbaum@paulweiss.com

Associate Jake Philipoom contributed to this Client Memorandum.