

Memorandum

FTC Files Antitrust Complaint Against Provider of Anesthesia Services and Private Equity Investor, Alleging “Roll-Up” Acquisition Strategy and Other Anticompetitive Behavior

September 22, 2023

On September 21, 2023, the FTC announced¹ an enforcement action in the Southern District of Texas against private equity firm Welsh, Carson, Anderson & Stowe (WCAS) and its portfolio company U.S. Anesthesia Partners (USAP), alleging a decade-long scheme to monopolize hospital anesthesia practices and otherwise lessen competition for anesthesia services in the Houston, Dallas and Austin metro areas through anticompetitive acquisitions and other unlawful agreements with competitors.

The Complaint² alleges three related courses of conduct that, individually and in combination, have had the anticompetitive effect of increasing reimbursement rates (*i.e.*, raising prices) for in-hospital anesthesia services in the three Texas metro areas. The alleged conduct includes:

1. Monopolizing and lessening competition in the relevant markets through a “roll-up” acquisition strategy;
2. Entering into price-fixing agreements with independent anesthesia practices that shared hospital customers in Houston and Dallas; and
3. Entering into a market allocation agreement with a “significant potential competitor” (whose identity is redacted).

The Complaint leads with and provides the most detail about the roll-up allegation.

FTC alleges that in each of Houston, Dallas and Austin, USAP made an initial platform acquisition of the largest local anesthesia practice, and then subsequently made additional tuck-in acquisitions (three in Houston, six in Dallas, and one in Austin, most recently in 2020). The Complaint alleges that many of these tuck-ins were individually presumptively unlawful under the 2010 Horizontal Merger Guidelines currently in force and, together, allowed USAP to monopolize or lessen competition in the relevant markets, resulting in USAP having market shares of 69.5% in Houston, 68.3% in Dallas, and 52.5% in Austin.

Both Lina Khan at FTC and Jonathan Kanter at DOJ have made targeting PE roll-ups a key pillar of their M&A enforcement agenda. Recall that in 2022 the FTC brought a highly-publicized series of actions against JAB

¹ The press release is available [here](#).

² The Complaint is available [here](#).

Consumer Partners related to their acquisition of two specialty and emergency veterinary clinic networks, securing significant divestitures (and prior notice and approval obligations) as part of a consent decree. Yesterday's press release quotes Lina Khan as saying that "[t]he FTC will continue to scrutinize and challenge serial acquisitions, roll-ups, and other stealth consolidation schemes that unlawfully undermine fair competition and harm the American public."

The price-fixing agreements at issue consist of price-setting agreements by which USAP would acquire an exclusive contract to provide anesthesia services at a hospital and outsource some of that work (including at the hospital's request) to third-party anesthesia practices. USAP would bill the payors for the anesthesia services rendered by both USAP and third-party providers at USAP's higher rates. As the Complaint alleges, "USAP then paid the non-USAP providers, typically sharing some portion of the mark-up from using USAP's higher rates." Much of the discussion of the market allocation agreement, including the identity of the counter-party, is redacted.

Yesterday's 106-page Complaint names as defendants USAP, the WCAS funds invested in USAP, the funds' GPs, and the WCAS management entities. The Complaint calls WCAS the "mastermind" and seeks to explain that "at all relevant times, Welsh Carson has formulated, directed, controlled, had the authority to control, dictated, encouraged, or actively and directly participated in the anticompetitive conduct" through its seats on the USAP board and active role in developing the roll-up strategy (*e.g.*, citing to ordinary course strategic planning documents from WCAS and advisors hired by WCAS or working at WCAS's direction, and a USAP "Business Development Playbook" that called for WCAS to have an active role in USAP M&A). No individuals or co-investors are named.

The Complaint seeks an injunction and other equitable relief, including structural relief, sufficient to prevent similar and related conduct in the future.

Whether or not yesterday's complaint results in a trial, it is an important messaging tool for the FTC. The key takeaways are:

- **Private equity roll-ups, especially in the healthcare space, remain high on the FTC's agenda.**
- **The FTC's enforcement priorities extend retroactively to prior acquisitions and conduct (*e.g.*, the most recent acquisition at issue here was in 2020).**
- **The FTC will extend liability to private equity funds and management entities where they have taken an active role in the alleged anticompetitive conduct.**

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