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# FTC challenges alleged "roll up" and other anticompetitive conduct by sponsor and portfolio company

By Megan Granger, Adam Hemlock, and Katya Dajani

You may have seen that the FTC sued Welsh Carson and its portfolio company, U.S. Anesthesia Partners (USAP), in the Southern District of Texas, alleging various antitrust violations. This is the first enforcement action coming out of the FTC's initiative to retroactively investigate private equity "roll up" strategies that was announced shortly after Chair Lina Khan's appointment in June 2021. In a memo to FTC staff dated September 22, 2021, Chair Khan wrote: "*The growing role of private equity and other investment vehicles invites us to examine how these business models* ***may distort ordinary incentives in ways that strip productive capacity and may facilitate unfair methods of competition*** *and consumer protection violations*."

The FTC alleges that Welsh Carson and USAP undertook a series of acquisitions that, taken as a whole, gave USAP a high market share and monopoly power in the markets for certain anesthesia services in Houston, Dallas, and Austin. In addition, the FTC alleges that USAP entered into price-setting and market allocation agreements with competitors.

## Five Key Takeaways from the Complaint

1. **The FTC's allegations encompass all available civil antitrust violations.** Citing activity as far back as 2012, the complaint alleges ten counts of anticompetitive conduct in certain Texas "hospital-only anesthesia" markets, including monopolization, price fixing, and market allocation agreements. Rather than simply alleging that an acquisition led to market power, this case weaves in additional agreements with competitors as part of the anticompetitive behavior.

2. **The "roll-ups" and "tuck-in" acquisitions are presented as if the activities themselves are anticompetitive.** The complaint is replete with references to Welsh Carson's "consolidation strategy" via "roll-ups" or "tuck-in" acquisitions, a term frequently used by private equity business teams to describe smaller deals in one industry that are often unreportable under the HSR statute.

   The FTC uses market share and HHI charts to allege that even though the acquisitions individually did not materially increase concentration, the series of provider acquisitions taken as a group left USAP with market shares of over 60-70% – and monopoly power. These levels, when achieved by acquisition, are often viewed as problematic by enforcers.

3. **Welsh Carson is portrayed as the mastermind behind the strategy and thus equally liable**. The FTC alleges that Welsh Carson "formulated, directed, controlled, had the authority to control, dictated, encouraged, or actively and directly participated in the anticompetitive conduct" described in the complaint. The allegations focus on Welsh Carson's substantial involvement in acquisition strategy, negotiating and overseeing contracts with insurers, providing operational, strategic and financial support, and otherwise playing a significant role in the alleged anticompetitive conduct.

4. **Internal documents remain critical in enforcement actions.** Though the FTC presents data appearing to demonstrate high market shares and monopoly power, that evidence is amplified by quotes from internal documents to animate the anticompetitive intent of Welsh Carson's and USAP's conduct. Notable examples include a USAP executive writing "cha-ching" after a price increase implemented through an acquisition; pursuing an acquisition because the target could enter the space and "spoil the market"; and multiple documents suggesting that USAP employees were aware of possible compliance implications of the company's conduct.

5. **Private equity acquisitions will remain enforcement targets.** Though the complaint may be viewed by some as a "shot across the bow" at private equity M&A, the facts alleged here – very high market shares, monopoly power, evidence of anticompetitive intent, an awareness of anticompetitive effects, and *per se* unlawful agreements with competitors – are unusually strong and not present in most private equity M&A. It is also notable that the FTC has been focused on healthcare markets, and that the facts here may particularly resonate with a court (*e.g.*, meaningful price increases flowing directly from acquisitions).

**Weil guidance remains the same**. We continue to recommend involving antitrust counsel early in consideration of deals or embarking on sector-focused acquisition strategies (even if not large or HSR reportable), implementing rigorous document creation controls to avoid miscommunication, engaging in early planning for acquisitions of multiple targets in one industry, and recognizing that post-transaction price increases are very likely to be viewed by authorities as reflecting the exertion of newly-attained market power.

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