

FEDERAL TRADE COMMISSION FILES SUIT SEEKING INJUNCTION AGAINST U.S. ANESTHESIA PARTNERS AND PRIVATE EQUITY FIRM WELSH CARSON FOR ALLEGED THREE-PART SCHEME TO MONOPOLIZE TEXAS ANESTHESIA MARKET

On September 21, 2023, the Federal Trade Commission ("FTC") sued U.S. Anesthesia Partners, Inc. ("USAP") and private equity firm Welsh, Carson, Anderson & Stowe ("Welsh Carson"), alleging a multi-year anticompetitive scheme to consolidate anesthesia practices in Texas, entering into price-setting arrangements with other independent anesthesia practices, and by entering a market allocation agreement with another large anesthesia provider, all of which led to higher prices. The alleged violations of Sherman Act Section 1, Sherman Act Section 2, FTC Act Section 5, and Clayton Act Section 7 come almost a year after it was publicly reported that the FTC was investigating USAP for having "too much power in some regional markets through acquisitions."¹ The complaint informs the fact scenario that could underly an FTC challenge to private equity and portfolio company strategies around "roll-up" and "tuck-in" acquisitions that the agencies have articulated as concerning in the proposed Merger Guidelines.² Further, by the FTC taking the unusual step of including both the portfolio company and the private equity firm in its complaint, it appears the FTC is looking to put the larger private equity community on notice. Although the case could prompt private antitrust actions, it is worth noting that

¹ David Michaels, *FTC Probes Market Power of One of Country's Biggest Anesthesia Providers*, The Wall Street Journal (Oct. 1, 2022), available at <https://www.wsj.com/articles/ftc-probes-market-power-of-one-of-countrys-biggest-anesthesia-providers-11664644401>.

² Dep't of Justice & Fed. Trade Comm'n, *Draft FTC-DOJ Merger Guidelines for Public Comment* (July 18, 2023), available at https://www.ftc.gov/system/files/ftc_gov/pdf/p859910draftmergerguidelines2023.pdf.

the FTC is only seeking an injunction and "other equitable relief" to prohibit the defendants from engaging in similar future conduct.

BACKGROUND

According to the FTC, the plan to roll up hospital-based anesthesia services in certain geographies was almost a decade in the making. The FTC alleges that in early 2012, a former executive at a large national anesthesia group emailed a partner at Welsh Carson seeking to create a nationwide player in the anesthesia market through an "aggressive 'buy and build' consolidation strategy." The new practice, called New Day Anesthesia ("**New Day**"), would pursue a strategy of "consolidating practices with high market share in a few key markets," giving them "[n]egotiating leverage with commercial payors."

The FTC claims that the first geographic market New Day chose was Houston. The FTC complaint asserts the following: in November 2012, with a deal to acquire Greater Houston Anesthesiology increasingly likely, Welsh Carson released a press statement, announcing it was forming USAP; in December 2012, USAP acquired Greater Houston Anesthesiology, which, according to the FTC, had a 39% market share by cases and a 50.5% market share by revenue in the market of hospital-only anesthesia services; a month later, USAP and Welsh Carson created a presentation which laid out plans for USAP to "Roll Up Houston" through a series of "tuck-in acquisitions." The complaint goes on to claim that, between 2014 and 2020, USAP acquired three other practices in the Houston area, and as a result, USAP is eight times larger than its next closest competitor in Houston, handles roughly 60% of hospital-only anesthesia cases, and accounts for 70% of payors' hospital-only anesthesia costs.

The FTC claims that Houston was not the only major market that USAP targeted. The complaint says that from 2014 to 2016, USAP acquired seven practices in Dallas, and as a result of these acquisitions, USAP now has over 900 anesthesia providers and accounts for 57% of hospital-only anesthesia cases and 68.5% of revenue in Dallas.

According to the FTC, many of the "tuck in" acquisitions eliminated head-to-head competition between USAP's existing practices and target provider groups. Moreover, the FTC claims that, following each of its acquisitions, USAP significantly raised its reimbursement rates for each of the acquired practices and used its overall increased negotiating leverage to extract higher prices, which the defendants referred to as "synergies." According to the complaint, USAP was able to "create a monopolist with the ability to raise prices for anesthesia care." One insurer claimed, according to the FTC, that USAP's rates were 95% higher than the average in-network rates for Texas and 65% higher than the average in Houston.

The second allegation in the complaint claims that some providers chose not to partner with USAP because it could have implications for affiliation with medical schools or teaching hospitals. In some of these instances, it is alleged that USAP and these independent providers entered into "price-setting arrangements" whereby USAP would provide management or administrative services for the

independent providers, and the independent providers would participate in USAP's contracts with payors.

Finally, in what is a heavily redacted portion of the complaint, the FTC alleges that USAP entered into a market allocation agreement with an unnamed entity. The agreement had the purpose and effect of keeping the company, who was a "significant competitor," out of the redacted geographic market as a potential threat to USAP.

As a result of its conduct, the FTC alleges that USAP was able to obtain, maintain, and expand its monopoly power in the market for hospital-based anesthesia services in Houston, Dallas, and across Texas. The FTC believes that, through its increased prices, which in some instances led other non-affiliated practices to raise their rates, USAP and Welsh Carson cost Texans tens of millions of dollars.

The FTC is seeking a permanent injunction to prevent USAP and Welsh Carson from engaging in similar and related conduct in the future, along with other equitable relief, including but not limited to structural relief, as the Court finds necessary to redress and prevent recurrence of FTC Act Section 5 and Clayton Act Section 7 violations.

KEY TAKEAWAYS

The complaint marks the first major case brought by the FTC since the announcement of its *Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act* from November 2022, where the FTC said it could pursue "a series of mergers, acquisitions, or joint ventures that tend to bring about the harms that the antitrust laws were designed to prevent, but individually may not have violated the antitrust laws."³ What is not clear, however, is whether the FTC would have brought such a case based on the "roll up" acquisitions alone, as the price-setting arrangements and market allocation schemes could theoretically have resulted in an antitrust action on their own.

Second, it should be noted that the complaint is filled with statements found in ordinary course documents of the parties.

Third, the action taken by the FTC continues the focus by both antitrust agencies on healthcare, as has been articulated in public speeches over the past year. In the days before the complaint was issued, on September 18th, Chair Lina Khan told an audience at the Oliver Wyman Health Innovation Summit in Chicago, "We all know healthcare is not like buying a toaster. It really can be life or death for people, and so that's why this is a particular area of focus for us."⁴ She went on to state, "We have, in certain instances, just seen blind spots. Where we've seen a whole set of deals that are below our radar, that are kind of slowly and incrementally consolidating a market, and then five years in, 10 years in, you have two players, three players that have come to dominate." The following day, AAG Jonathan Kanter delivered remarks at the 2023 Georgetown Antitrust Law Symposium, where he said, "We hear a startlingly similar concern from doctors,

³ Fed. Trade Comm'n, *Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act* (Nov. 10, 2022), available at https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf.

⁴ Anjalee Khemlani, *Healthcare: FTC Chair Lina Khan to crack down on 'below radar' deals*, Yahoo! Finance (Sept. 19, 2023), available at <https://finance.yahoo.com/news/healthcare-ftc-chair-lina-khan-to-crack-down-on-below-radar-deals-141104819.html>.

nurses and other healthcare workers who report that consolidation has made it harder to do what they love and treat patients with care and flexibility. One ICU nurse from California said what so many in her profession did. She worked for a community hospital that had 'remarkable care' for patients. But after a merger, she says nursing ratios dropped, vacation time was stripped from nurses and practice expectations became 'unsafe.' Her comment urges the department to 'prevent further mergers that limit choice for consumers, especially in healthcare,' and to 'enforce the antitrust laws already passed.'⁵

Finally, the FTC intended to send a message by naming both USAP and Welsh Carson as defendants in this lawsuit. By adding Welsh Carson as a defendant, the FTC is seeking to ensure there is no severability between the private equity firm and the portfolio company and to prevent Welsh Carson from engaging in similar conduct in the future. As articulated throughout the complaint, the FTC sought to emphasize the large role private equity played throughout this alleged scheme. As the case plays out, it will be important to see what precise conduct the FTC seeks to prohibit, and if it wins, how far a court may go with an injunction against a private equity firm in future acquisitions.

⁵ Dep't of Justice, *Assistant Attorney General Jonathan Kanter Delivers Remarks at the 2023 Georgetown Antitrust Law Symposium* (Sept. 19, 2023), available at <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-2023-georgetown-antitrust>.

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