



FTC Lawsuit Targets Private Equity

On September 21, 2023, the Federal Trade Commission (FTC) sued U.S. Anesthesia Partners (USAP), a Texas-based anesthesia provider, and Welsh, Carson, Anderson & Stowe (Welch Carson), a private equity firm.¹ The FTC alleged that the two companies executed an anticompetitive scheme for multiple years to consolidate anesthesiology practices in Texas, boost their profits, and drive up the price of anesthesia services rendered to patients.² This Health Capital Topics article will discuss the lawsuit and how it appears to fit in with the FTC's recent moves to crack down on anticompetitive actions in healthcare.

According to the FTC, Welsh Carson created USAP in 2012 after they had noticed a fragmented anesthesiology market which consisted of multiple small physician practices.³ Since USAP's inception, they have acquired over twelve anesthesiology practices across Texas, comprising over 750 nurses and 1,000 physicians.⁴ After acquiring these anesthesiology practices, USAP raised pricing within these anesthesiology practices to reflect USAP's higher pricing.⁵ Following the acquisitions, USAP then entered into arrangements with other independent anesthesiology groups to charge higher pricing for services rendered, and split any additional revenue with the independent groups.⁶

The FTC's complaint alleges that the scheme between USAP and Welsh Carson "cost Texans tens of millions of dollars more each year in anesthesia services than before USAP was created."⁷ The FTC asserts that Welsh Carson: (1) entered into price-setting agreements with other practices; (2) executed a roll-up scheme, acquiring, merging, and consolidating multiple smaller companies into its portfolio; and (3) entered into a market allocation arrangement with a competitor.⁸ According to the FTC, these actions met the bar for unlawful restraints of trade, unfair methods of competition, conspiracy to monopolize, unlawful monopolization, and unlawful acquisitions, in violation of the Sherman Act, the Clayton Act, and the FTC Act.⁹

The FTC lawsuit against USAP and Welsh Carson represents the latest in a series of federal government actions to increase scrutiny of private equity deals.¹⁰ The lawsuit is notable for multiple reasons, as it: (1) is the first litigated serial acquisition challenge; (2) represents a pattern of heightened regulatory concern over private equity roll-up strategies; and (3) targets a minority stakeholder, a private equity firm.¹¹ Previously, both the

FTC and the Department of Justice (DOJ) have been vocal about their need to scrutinize private equity transactions, with Assistant Attorney General Jonathan Kanter arguing in May 2022 that the roll-up model is "often very much at odds with the law and very much at odds with the competition we're trying to protect."¹²

In response to the suit, Welsh Carson expressed disappointment with the FTC and stated that the decision to pursue the case was "unprecedented and disregards well-settled principles of law."¹³ Welsh Carson also mentioned that USAP's commercial reimbursement rates did not climb higher than the cost of medical inflation for nearly a decade.¹⁴ USAP also released a statement shortly after the suit was announced, stating that it would "vigorously defend itself against the FTC's misguided allegations."¹⁵ A member of USAP's board, Derek Schoppa, M.D., stated that "the FTC's intended outcome threatens to disrupt and restrict patients' equitable access to quality anesthesia care in Texas and will negatively impact the Texas hospitals and health systems that provide care in underserved communities."¹⁶ Schoppa also stated that "the FTC's civil complaint is based on flawed legal theories and a lack of medical understanding about anesthesia, our patient-oriented business model, and our level of care for patients in Texas."¹⁷

In the FTC statement, Commissioner Lina Khan said that "private equity firm Welsh Carson spearheaded a roll-up strategy and created USAP to buy out nearly every large anesthesiology practice in Texas. Along with a set of unlawful agreements to set prices and allocate markets, these tactics enabled USAP and Welsh Carson to raise prices for anesthesia services—raking in tens of millions of extra dollars for these executives at the expense of Texas patients and businesses."¹⁸ Khan also stated that "the 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."¹⁹

The federal government has made a number of different, and increasingly emboldened, moves in the healthcare antitrust space over the past few years. As discussed in previous Health Capital Topics articles:

- In December 2018, the U.S. Departments of Health and Human Services (HHS), Treasury, and Labor, issued a report entitled, “Reforming America’s Healthcare System Through Choice and Competition,” exploring how to improve the U.S. healthcare delivery system by increasing competition in the healthcare industry;²⁰
- The FTC challenged a number of hospital mergers and acquisitions in 2022, indicating heightened regulatory scrutiny of hospital transactions;²¹

- In August 2022, the FTC published a policy paper and fact sheet regarding the use of Certificates of Public Advantage laws (COPAs) by states in regulating healthcare mergers. Specifically, the FTC asserted that COPAs negatively impact healthcare costs, quality of care, and hospital staff wages;²²
- On January 5, 2023, the Federal Trade Commission (FTC) published a proposed rule that would ban employers from imposing non-competes clauses on their employees.²³

It seems that the FTC’s lawsuit against USAP and Welsh Carson is yet another indication of the administration’s focus on enhancing competition in the healthcare industry.

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2 *Ibid.*

3 “FTC sues PE-backed anesthesia provider for monopolistic roll-ups, price setting” By Dave Muoio, Fierce Healthcare, September 21, 2023, <https://www.fiercehealthcare.com/providers/ftc-sues-pe-backed-anesthesia-provider-monopolistic-roll-ups-price-setting> (Accessed 10/4/23).

4 *Ibid.*

5 *Ibid.*

6 *Ibid.*

7 *Ibid.*; Federal Trade Commission, September 21, 2023.

8 Muoio, Fierce Healthcare, September 21, 2023; “Roll Up Strategy” By CFI Team, Corporate Finance Institute, December 18, 2022, <https://corporatefinanceinstitute.com/resources/valuation/roll-up-strategy/> (Accessed 10/4/23).

9 Muoio, Fierce Healthcare, September 21, 2023.

10 “Walking the Walk: FTC Lawsuit Targets Private Equity Roll-Up Strategy” Schulte Roth & Zabel LLP, October 2, 2023, <https://www.lexology.com/library/detail.aspx?g=a426af1e-90db-4807-bce4-f579c4c764b1> (Accessed 10/4/23).

11 *Ibid.*

12 *Ibid.*

13 “FTC lawsuit targets serial acquisitions by private equity” By Stefania Palma, Financial Times, September 21, 2023, <https://www.ft.com/content/cf24c968-3bf0-49f7-a63f-2c912dabc5ae> (Accessed 10/4/23).

14 *Ibid.*

15 Muoio, Fierce Healthcare, September 21, 2023.

16 *Ibid.*

17 *Ibid.*

18 Federal Trade Commission, September 21, 2023.

19 “FTC Challenges Private Equity Firm’s Scheme to Suppress Competition in Anesthesiology Practices Across Texas” Federal Trade Commission, September 21, 2023, <https://www.ftc.gov/news-events/news/press-releases/2023/09/ftc-challenges-private-equity-firms-scheme-suppress-competition-anesthesiology-practices-across> (Accessed 10/4/23).

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21 “FTC Scrutiny Results in Several Scrapped Hospital Deals” Health Capital Topics, Vol. 15, Issue 6 (June 2022), https://www.healthcapital.com/hcc/newsletter/06_22/HTML/FT-C/convert_ftc-health-capital-topics.php (Accessed 10/25/23).

22 “FTC Discourages Certificates of Public Advantage Laws” Health Capital Topics, Vol. 15, Issue 8 (August 2022), https://www.healthcapital.com/hcc/newsletter/08_22/HTML/FT-C/convert_ftc-policy-against-copas-8.26.22.php (Accessed 10/25/23).

23 “FTC Proposes Banning Non-Compete Clauses” Health Capital Topics, Vol. 16, Issue 1 (January 2023), https://www.healthcapital.com/hcc/newsletter/01_23/HTML/NO-NCOMPETE/convert_noncompete-proposed-rule-topics-article.php (Accessed 10/25/23).



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