BLOG

FTC Seeks to Put Private Equity Roll-Up Strategies to Sleep

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The Federal Trade Commission's (FTC) continued scrutiny of private equity "roll-up" strategies resurfaced in a recent complaint filed in Texas federal court alleging that the private equity firm Welsh, Carson, Anderson & Stowe (Welsh Carson) and its portfolio company U.S. Anesthesia Partners, Inc. (USAP) entered into a "multi-year anticompetitive scheme to consolidate anesthesiology practices in Texas, drive up the price of anesthesia services provided to Texas patients, and boost their own profits." The lawsuit is notable both for challenging a series of roll-up acquisitions and for including a claim based on a novel theory that roll-up acquisitions may violate Section 5 of the FTC Act.

The FTC alleges that Welsh Carson and USAP executed a consolidation strategy via a series of allegedly illegal tactics:

- **Roll-Up Strategy:** The complaint alleges that over nine years, USAP and Welsh Carson bought "nearly every large anesthesia group in Texas," raising each acquired party's prices along the way. According to the complaint, this allowed them to "take the highest rate of all . . . then peanut butter spread that across the entire state of Texas."
- **Price-Setting Agreements:** According to the FTC, USAP maintained "price-setting arrangements" with independent third-party anesthesia groups "that had been charging lower prices." These agreements allegedly allowed USAP to use each of these groups to provide services at hospitals, but charge USAP's "own high prices" and then split the additional revenues with the lower-priced anesthesia group.
- **Market Allocation:** Finally, the complaint alleges that Welsh Carson and USAP "entered a market allocation [arrangement] with another large anesthesia services provider" to which they later "expressed appreciation for [the provider's] 'constructive' attitude towards USAP's and Welsh Carson's interest in sidelining a significant rival."

FTC Chairwoman Lina Khan referenced this suit as an example of the agency's previously announced efforts to rein in anticompetitive serial acquisition strategies. She noted that "[h]istorically, there's been less attention paid to stealth consolidation through serial acquisitions, . . . and so, we thought it was incredibly important to be scrutinizing these practices."

Notably, the FTC's complaint against Welsh Carson's roll-up strategy does not come in the context of a pre-merger review, but rather in a post-consummation investigation. Indeed, the most recent acquisition identified in the

complaint occurred in 2020. This action highlights the FTC's willingness to review consummated transactions if it believes that anticompetitive behavior has impacted the markets in which the earlier transaction occurred.

The complaint also identifies additional allegedly anticompetitive "non-merger" business practices, including:

- Entering exclusive (or nearly exclusive) contracts "at hospitals through Houston, Dallas, and across Texas;"
- Conducting a "multi-front 'pressure' campaign" to force a large insurer to "accept USAP's high rates," noting that "even the biggest insurers have had to bow to USAP's dominance;" and
- Creating an environment of increasing prices through USAP's own alleged price increases, as well as by increasing the leverage of other anesthesia groups, allowing them to threaten to "raise their reimbursement rates by selling their practices to USAP" unless insurers met their demands for price increases.

In addition to Sherman Act claims alleging monopolization and agreements not to compete, the agency also brought suit under Section 7 of the Clayton Act and under Section 5 of the FTC Act. The standalone Section 5 claim that the roll-up acquisitions constitute unfair competition is a novel application of Section 5, which is part of the FTC's fairly recent efforts to apply Section 5 to behavior that may not be prohibited by other antitrust laws.

TAKEAWAY

This complaint serves as a reminder to private equity firms—in particular, those making health care investments—that antitrust enforcers will be reviewing closely their roll-up acquisitions and associated business practices. As such, these firms will want to carefully consider whether even transactions that do not require HSR notification could be determined to be anticompetitive, and whether any contemplated post-consummation behavior could be construed as anticompetitive. Firms should involve counsel to help evaluate the relative antitrust risk of any such measures to ensure that they will not increase the likelihood of an investigation or enforcement action.
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Authors

Richard Falek

Conor Reidy

Hannah E. Gallagher

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Richard Falek

Conor Reidy

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