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FTC Files Antitrust Charges Against a Private Equity Sponsor

The current FTC leadership has been making strong statements against private equity roll-ups, across industry sectors. On September 21, 2023, the FTC acted on this rhetoric by suing a large health care provider in Texas, along with its founding private equity sponsor. According to the FTC, they "executed 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."[1] The lawsuit is highly aggressive. It marks the first time the current FTC has sued a private equity sponsor for leading a roll-up. The FTC believes similar conduct is widespread, and the FTC is aiming to deter it.

FTC Allegations

The FTC alleges in its complaint that Welsh, Carson, Anderson & Stowe ("Welsh Carson") created US Anesthesia Partners, Inc. in 2012 for the purpose of carrying out an "aggressive" roll-up strategy. According to an internal presentation quoted by the FTC, the strategy sought to "consolidat[e] practices with high market share in a few key markets" thereby giving US Anesthesia "[n]egotiating leverage with commercial payors." Over the next decade, US Anesthesia acquired, in total, over a dozen anesthesiology practices in Texas, with more than 1,000 doctors and 750 nurses. In the years prior to the complaint, Welsh Carson sold half of its position but retained influence over corporate strategy and decision-making, according to the FTC.

Soon after it was founded, US Anesthesia acquired the largest anesthesia physician group in the greater Houston region, which already had nearly 40% market share by number of cases, according to the FTC. Then, between 2014 and 2020, USAP made "tuck-in" acquisitions of the three next largest anesthesia groups, which increased its market share to about 60% in Houston. Likewise, in Dallas, US Anesthesia first acquired the leading anesthesia group in the area, which had about 40% market share, and then acquired seven more practices in Dallas, bringing its market share to 57%, according to the FTC. US Anesthesia also acquired groups in four other metropolitan areas elsewhere in Texas. As a result of this "consolidation strategy," the FTC alleges, US Anesthesia became the dominant provider of anesthesia services in Texas and "one of the most expensive, with reimbursement rates that are double the median rate of other anesthesia providers in Texas."[2] According to the FTC, US Anesthesia "now controls nearly 60% of hospital-only anesthesia costs statewide, and approximately 43% of cases." In addition, according to the FTC, US Anesthesia supplemented the roll-up strategy by entering into price-setting agreements with several independently-owned anesthesia groups, and by entering into a market allocation agreement with a large potential competitor.

The FTC is asking the Court (1) to declare that the roll-up strategy was a violation of antitrust laws; and (2) to prevent the parties from engaging in similar and related conduct in the future.

Points To Consider

The complaint against US Anesthesia and its sponsor represents a new step in an aggressive campaign. The current FTC leadership is hostile toward private equity roll-ups; and it is hostile toward private equity buyers in general.[3] Private equity sponsors should consider safeguards in this hostile environment:

- The FTC and DOJ have proposed to adopt new Merger Guidelines. They will presume that a company with 30 percent market share has a dominant position. They will assess whether any merger has the potential to entrench the dominant position. Sponsors should

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consult counsel if they are considering any combination that involves a market share at this level or beyond.

- The FTC has proposed new Hart-Scott-Rodino rules. They will call for the parties to disclose prior acquisitions (in the same line of commerce codes) over the past 10 years. This requirement is aimed at identifying roll-ups. When a sponsor submits an HSR filing for a current transaction, the FTC and DOJ could decide to go back in time and challenge prior acquisitions as well. Prior acquisitions can be subject to challenge even if they were too small to require an HSR filing.
- The FTC and DOJ have launched a campaign to enforce the law against interlocking directorates. In the private equity context, the FTC and DOJ may charge a violation when a sponsor has board representation on two portfolio companies that compete with one another (with at least one of those companies not majority owned). This law has some technical features. Since the FTC and DOJ are already hostile, a sponsor should be careful not to make a technical violation.
- On the same day as the complaint was filed, Lina Khan, Chair of the FTC, wrote an opinion piece in the Financial Times titled "It's time to halt roll-up schemes that violate antitrust laws."[4] Khan emphasized that the FTC is committed to scrutinizing roll-ups across industries by private equity sponsors, large technology companies, and others.

If a deal has potential to provoke concern at the FTC/DOJ, each side should discuss it with counsel very early in the process.

[1] https://www.ftc.gov/news-events/news/press-releases/2023/09/ftc-challenges-private-equity-firms-scheme-suppress-competition-anesthesiology-practices-across

[2] https://www.ftc.gov/system/files/ftc_gov/pdf/2010031usapcomplaintpublic.pdf

[3]
See https://www.ftc.gov/system/files/ftc_gov/pdf/p221202sec5enforcementpolicystatement_002.pdf; https://www.ftc.gov/system/files/ftc_gov/pdf/p859910draftmergerguidelines2023.pdf

[4] https://www.ft.com/content/93103af9-768a-4545-9166-20389c254edc

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