

FTC Targets Private Equity Acquisitions in Latest Lawsuit Against Texas Anesthesiology Practice

Private equity investment in health care across the country has continued to garner the attention of health policy researchers and policymakers in recent years. Stakeholders are concerned that private equity ownership of physician practices prioritizes profit over patient care quality. Despite concerns of potential impacts on price and quality arising from these private equity transactions in the health care industry, few enforcement actions have occurred. Last month, the Federal Trade Commission (FTC) took the lead in challenging one of these arrangements, suing a private equity firm retroactively in federal court for its monopolistic acquisitions of anesthesiologist practices in Texas to drive up prices.

The Allegations

On September 21, in a first of its kind enforcement action, the FTC filed a lawsuit in the District Court of Texas against U.S. Anesthesia Partners (USAP) and its private equity owner Welsh Carson Anderson & Stowe. Welsh Carson is a private equity firm based in New York, while USAP is one of the nation's largest anesthesia providers, operating in a handful of states including Texas, Colorado, Florida, and Maryland. The FTC alleges that Welsh Carson and USAP used a combination of consolidation and anticompetitive practices over many years to eliminate competition and raise prices of anesthesia services in Texas,

including the Houston, Dallas and Austin metro areas. Together, the FTC claims these practices constituted 1) monopolization in violation of Section 2 of the Sherman Act, Section 7 of the Clayton Act, and Section 5 of the FTC Act, and 2) horizontal market allocation and price fixing agreements in violation of Section 1 of the Sherman Act. In a [106-page complaint](#), the FTC laid out the alleged decade-long scheme in three parts:

1. Consolidation through serial acquisitions: Welsh Carson employed what's referred to as a "roll-up" strategy that first created USAP in 2012 and then continued to buy out and consolidate more than a dozen competing anesthesiology physician groups throughout Texas, starting with Houston and expanding to Dallas, then to other areas including Antonio, Austin, Amarillo, and Tyler. In each area, USAP would start by buying up the largest practice in the region. As a result, many acquisitions raised the Herfindahl-Hirschman Index (HHI) by 200 to more than 2,500 in the relevant region. This scheme effectively eliminated competition and increased the market share of USAP, making it the dominant provider of anesthesia services in Texas, with market shares of 69.5% in Houston, 68.3% in Dallas and 52.5% in Austin. More importantly, along with each acquisition, USAP was able to raise rates for the acquired practice to that of USAP's higher rates.
2. Price-setting arrangements: Given its market power, USAP entered exclusive contracts to provide anesthesia services at hospitals in Houston and Dallas. Under this arrangement, the remaining independent practices that were not acquired by USAP could only provide services at these hospitals through independent agreements with USAP as third-party providers. As part of these agreements, USAP would set the same high USAP rates for these outsourced services and then share a portion of the mark-up from the

higher rate with the non-USAP providers.

3. Market allocation arrangements: USAP also entered a market allocation agreement around 2013 with a major competitor, whose information is redacted, to keep it from entering USAP's market for providing anesthesia services.

The complaint further claims that Welsh Carson was the mastermind in the decade-long USAP anticompetitive scheme. The private equity firm acted as co-founder of USAP, has seats on the USAP board, and continues to direct USAP's corporate strategy and decision-making even though its ownership share of USAP has decreased from the initial 50% to the present day's 23%. As a result of these strategic arrangements and resulting monopoly and market power, the complaint alleges that insurer contracted rates with USAP were 95% higher than its in-network median for Texas. The FTC requests permanent injunction and equitable relief to remedy the alleged anticompetitive conduct.

What Does it Mean

This new lawsuit is in line with the federal antitrust agenda in recent years. The federal enforcement agencies have been aggressively pursuing new antitrust enforcement actions, with new proposed merger guidelines released in July that explicitly called out serial acquisitions by private equity firms. The Source and UC Berkeley's Petris Center jointly submitted comments in support of the draft merger guidelines that will enhance federal merger review. Relatedly, the FTC and DOJ also proposed new [pre-transaction reporting requirements](#) (Hart-Scott-Rodino filings) targeted at the roll-up strategy of private equity firms, specifically by requiring entities to disclose prior acquisitions in the past 10 years as well as minority investors that could exert influence. The expanded rules hope to capture smaller transactions such as private equity investment

in physician practices that would fall below the HSR-threshold and previously escaped review. This case also takes the pre-transaction notice and review guidance a step further to challenge transactions retroactively.

With increased attention on private equity acquisitions and investment, including the enforcement of state corporate practice of medicine laws, the FTC lawsuit could pioneer a new policy focus and potential enforcement actions against private equity. At the very least, it could bring greater scrutiny to private equity ownership and serve as deterrent action to such transactions.