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FTC Lawsuit Debuts New Enforcement Agenda Targeting Private Equity "Roll-Up" Acquisitions Against Texas Anesthesia Provider and PE Sponsor Alleging Multiple Antitrust Violations

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On September 21, 2023, the Federal Trade Commission (FTC) filed a complaint against U.S. Anesthesia Partners, Inc. (USAP) and its private equity (PE) investor Welsh, Carson, Anderson & Stowe (WCAS) alleging that the two engaged in a decade-long anticompetitive scheme to consolidate anesthesiology practices in Texas and beyond that has significantly increased the prices for anesthesiology services in the state and three metropolitan markets. In its 100-page complaint, the FTC provides uncharacteristic detail regarding the conception, execution, and effects of the alleged scheme, in an effort to bolster its first direct challenge to the "roll-up" strategy as an antitrust violation. This latest action by the FTC is significant for several reasons:

- It marks the first lawsuit following recent public statements by agency heads admonishing the potential anticompetitive effects of roll-up acquisitions by PE firms;
- It puts in action the FTC's 2022 policy statement that previewed the possible use of Section 5 of the FTC Act (Section 5) as a standalone means to pursue roll-up acquisitions, among a battery of other conduct, that historically has been beyond enforcement under the Sherman and Clayton Acts. This focus is also seen in the Department of Justice (DOJ)/FTC proposed revisions to the HSR form and draft Merger Guidelines, which include sections on prior acquisitions and roll-up acquisitions;
- It would create new precedent that a series of small acquisitions was anticompetitive. Many of the groups that were acquired had small market share (sometimes even less than 1%) and were likely not notified to the agencies for pre-merger clearance under Hart-Scott-Rodino (HSR);
- It seeks to hold WCAS, which only had a minority ownership interest in USAP, liable based on the allegation that WCAS created and actively directed USAP's corporate strategy and decision-making, particularly with respect to mergers and acquisitions; and
- It uses Section 5 to address conduct similar to a monopoly leveraging or a "cross-market" merger theory of harm in other Texas markets outside of Houston and Dallas where monopolies are alleged.

Leaders at both agencies have signaled their concern about potential anticompetitive effects of roll-up acquisitions by PE firms. In July 2020, then Commissioner Rohit Chopra singled out PE acquisitions of physician practices as an area of concern, and specifically identified specialties such as anesthesiology and emergency medicine because of the potential that they could result in collateral consequences such as surprise medical billing by out-of-network physicians. In June 2022, Deputy Assistant Attorney General Andrew Forman identified PE roll-ups in health care as an area of focus and stated that the DOJ is looking into "whether in particular circumstances a series of often smaller transactions can cumulatively or otherwise lead to a substantially lessening of competition or tendency to create a monopoly." In separate interviews, both Assistant Attorney General Jonathan Kanter and FTC Chair Lina Khan stated that individual acquisitions in isolation by a PE firm may not raise competitive concern in a vacuum, but that the aggregate result of multiple acquisitions could be problematic. Also in June 2022, in connection with the FTC's settlement of JAB's (a PE firm) acquisition of SAGE Veterinary Partners, then Bureau of Competition Director Holly Vedova stated that "[p]rivate equity firms increasingly engage in roll up strategies that allow them to accrue market power off the Commission's radar." In the JAB matter, the FTC imposed a prior approval requirement for future acquisitions in the relevant markets as well a novel prior notice requirement for future acquisitions of any veterinary clinic in the country within 25 miles of a JAB clinic. Chair Khan noted that these prior approval and notice requirements will "allow the FTC to better address the stealth roll-ups by private equity firms."

In line with these public comments, the agencies have also begun to incorporate an emphasis on roll-ups, or "serial" acquisitions, into their enforcement policies. In November 2022, the FTC issued a policy statement expanding the scope of its interpretation of "unfair methods of competition in or affecting commerce" under Section 5. The policy statement noted that conduct previously found to have violated Section 5 included "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."

Following that, in June 2023, the FTC and DOJ proposed revisions to the HSR instructions and filing form that would require both parties to report prior acquisitions going back ten years in any industry in which the parties report horizontal overlap, effectively quadrupling the information currently required to be submitted (currently five years for the acquiring person only).

Then in July 2023, the FTC and DOJ issued draft Merger Guidelines. Section 9 of the draft Merger Guidelines states that "when a merger is part of a series of multiple acquisitions, the Agencies may examine the whole series" and that "where one or both of the merging parties has engaged in a pattern or strategy of pursuing consolidation through acquisition, the Agencies will examine the impact of the cumulative strategy under any of the

Guidelines to determine if that strategy may substantially lessen competition or tend to create a monopoly."

On December 7, 2023, the White House issued new initiatives aimed at lowering health care costs by promoting competition, including scrutinizing anticompetitive acquisitions and anticompetitive practices. The Fact Sheet notes that private equity ownership in the health care industry has "ballooned" with approximately $750 billion in deals between 2010 and 2020 in sectors such as physician practices, nursing homes, hospices, home care, autism treatment, and travel nursing. Some of the announced actions include:

- Launching a cross-governmental public inquiry into corporate greed in health care: "The DOJ, FTC, and HHS will issue a joint Request for Information to seek input about how private equity and other corporations' increasing power and control of our health care is affecting Americans." HHS will appoint a Chief Competition Officer and DOJ's Antitrust Division and FTC will name Counsels for Health Care to lead these efforts.
- Identifying anticompetitive "roll ups" that currently evade antitrust review: "Businesses, including private equity firms, health insurers, and health systems sometimes use a 'roll up' strategy, in which a series of relatively small acquisitions can lead to the consolidation of a market and contribute to worse patient outcomes while increasing taxpayer costs." HHS, DOJ, and FTC will engage in data sharing to help antitrust enforcers identify potentially anticompetitive transactions that might otherwise evade review by antitrust enforcers.

The FTC's complaint against USAP and WCAS will put to the test the agencies' theory that a series of smaller acquisitions can be aggregated together as an antitrust violation, even if one or more of the acquisitions in isolation may not be violations. As previewed in the Section 5 policy statement and draft Merger Guidelines, the FTC alleges that the roll-up acquisitions were violations of both Section 5 as well as Clayton Act Section 7 (Section 7). Given the absence of precedent of the FTC successfully challenging roll-up acquisitions under either Section 5 or Section 7 (and that the draft Merger Guidelines have not been finalized), it will be of great interest to track the FTC's litigation strategy on proving the roll-up acquisitions as either Section 5 and/or Section 7 violations. The thoroughness of the complaint, which goes step-by-step through the motive for each acquisition in full detail, suggests that the FTC is aware it will bear a high burden to convince a court that its new theory of anticompetitive harm is viable.

Some of the complaint's allegations about USAP's acquisitions in the Dallas market are instructive of how the FTC's case differs from prior enforcement actions. In 2016, USAP acquired BMW Anesthesiology and Medical City Physicians, each of which had nine and seven anesthesiologists respectively. USAP acquired these smaller groups (along with others) after initially acquiring Pinnacle Anesthesia Consultants, the largest group in Dallas (and the state). The FTC has challenged other physician acquisitions involving relatively

small numbers of physicians. St. Luke's involved the acquisition of 18 PCPs and Sanford involved the acquisition of 23 PCPs, six pediatricians, seven OB/GYNs, and six general surgeons. However, the market shares of the acquired groups in those cases were significantly greater than the two groups acquired by USAP in Dallas. In St. Luke's, the acquired group had a 39% market share resulting in a combined 57% market share; in Sanford, the acquired group had market shares of 30-60% resulting in a combined 77-100% market share. In contrast, the BMW and Medical City physician groups acquired by USAP each had less than 1% market share, but the FTC alleges that USAP had a 59-68% combined market share after acquiring multiple Dallas groups. Moreover, the FTC alleges that the acquisition of these two smaller groups was significant in controlling anesthesiology services at HCA's flagship facility Medical City Dallas and that after acquiring both groups, USAP controlled approximately 80% of the anesthesiology services at HCA's flagship hospital.

The complaint also devotes considerable time to establishing WCAS's foundational role in USAP's expansion strategy, highlighting that WCAS's minority ownership of USAP will likely be a key issue during the litigation. For most of the time period in which the FTC alleges USAP engaged in anticompetitive conduct and undertook the series of acquisitions, WCAS was not a majority owner of USAP. When WCAS created USAP in 2012, WCAS owned 50.2% of the company. Between 2013 and 2017, WCAS's ownership stake decreased to 44.8% and further decreased in 2017, and today WCAS owns about 23% of USAP. Nevertheless, the complaint lists out several allegations as to why WCAS should be held culpable for USAP's actions, including:

- WCAS "formulated, directed, had the authority to control, dictated, encouraged, or actively and directly participated in the anticompetitive conduct" of USAP;
- WCAS was guaranteed two USAP board seats at all times, and from 2012 to 2017, WCAS had the right to appoint the majority of the board of directors including its chair;
- One WCAS director that sat on USAP's board from 2012 to 2022 acted on behalf of WCAS and signed deal documents as part of the roll-up strategy and led the negotiations for the alleged market allocation agreement; and
- WCAS hired all of USAP's original management team including the CEO, CFO, COO, and head of HR.

The FTC's claims are also structured to provide alternative ways to find WCAS liable. The complaint alleges both monopolization and conspiracy to monopolize the Houston and Dallas markets under Sherman Act Section 2 (Section 2) by USAP and WCAS. Thus, even if the court were to find that WCAS did not have control over USAP and its acquisition strategy, the FTC may rely on a secondary theory that WCAS was a co-conspirator with USAP in monopolizing the Houston and Dallas markets.

The FTC's allegations extend to other parts of Texas (Tyler, Amarillo, and San Antonio) where USAP acquired groups but previously did not have a presence, i.e., the acquisitions did not result in any change in concentration in those markets. For these markets, the FTC alleges that prices increased nonetheless because USAP was able to leverage its dominance statewide with commercial insurance payers. These isolated acquisitions (along with the other serial acquisitions and other alleged conduct) are all pled together as a standalone Section 5 violation within the Texas market. It will be interesting to follow how the FTC frames these acquisitions where there was no change in concentration, whether by using a Section 2 monopoly leveraging theory, a Section 7 "cross-market" merger theory of harm, or something novel under the Section 5 "unfair methods of competition" standard, which is not well-defined.

The defendants have now weighed in on the FTC's allegations. On November 20, 2023, USAP and WCAS filed motions to dismiss, which notably were separate. Some of their major arguments include:

- The FTC lacks statutory authority to bring the case under Section 13(b) of the FTC Act because it has not commenced a parallel administrative proceeding and there is no ongoing or imminent legal violation;
- The FTC's alleged market of "commercially insured hospital-only anesthesia services" is too narrowly defined and improperly excludes anesthesia services provided at outpatient facilities;
- The FTC has not plausibly alleged monopoly power, exclusionary conduct, a Clayton Act violation, or an agreement to fix prices;
- The conspiracy claims cannot be sustained because USAP and WCAS are not separate economic entities under the *Copperweld* doctrine.

Much of the WCAS motion is focused on the corporate separateness between WCAS and USAP—highlighting that many of the FTC allegations are only directed at USAP or that WCAS cannot be liable for alleged antitrust violations by USAP. But at the same, time WCAS joined USAP in the argument that the two entities are incapable of conspiring with each other because they should be viewed as a single entity under *Copperweld v. Independence Tube*, 467 U.S. 752 (1984).

On the same day the defendants filed their motions to dismiss, a Houston workers benefit fund filed a class action complaint against USAP and WCAS in the same federal district court as the FTC action that largely mirrors the FTC allegations with a few differences. First, the alleged relevant geographic market in the private action is the state of Texas, whereas the FTC's allegations focus on local markets of Houston, Dallas, and Austin MSAs. Second, since there is no private right of action under FTC Act Section 5, the private action is limited to alleged violations of Sherman Act Sections 1 and 2 and Clayton Action Act Section 7. Although Texas law has a "Little FTC Act" (TEX. BUS. & COM. CODE ANN. § 17.46)

that prohibits deceptive trade practices, the private right of action is limited to certain enumerated acts that do not encompass Section 5's potentially broader scope.

USAP's strategy has also drawn press and political attention. On November 26, 2023, Senators Elizabeth Warren (D-MA) and Richard Blumenthal (D-CT) sent a letter to the CEO of USAP requesting information based on a *Washington Post* investigation finding that USAP and WCAS "have used anticompetitive practices to reduce patients' quality of care, increase prices, and suppress workers' wages." The letter focuses on USAP's roll-up acquisitions in the Denver area as well as USAP's use of non-compete agreements, which require physicians who attempt to leave USAP and work elsewhere in the Denver area to pay "damages" amounting to more than $200,000.

One industry group has come to the support of the defendants. On November 27, 2023, the American Investment Council (AIC) filed an amicus brief supporting WCAS's motion to dismiss the FTC's suit. AIC states that private equity creates high paying jobs, enhances gross domestic product, and produces above-market returns for investors including pensions, charities, and universities and that to hold WCAS liable for its minority stake in USAP runs contrary to the legal principles of corporate separateness and limited investor liability. Furthermore, AIC argues that allowing claims to proceed against WCAS (and PE firms generally) would chill progress, investment, and competition.

Other issues and questions raised by the FTC's complaint include:

- The FTC typically prefers to have the state attorney general join as co-plaintiff in provider merger challenges because of the local nature of such deals. The Texas AG is not a co-plaintiff. This could be because many of the acquisitions/conduct are old and thus laches may be a defense against the Texas AG as it was a successful defense against state AGs in the Meta litigation. Also, since only the FTC can enforce Section 5, the FTC may have wanted to pursue this case alone to fully test the boundaries of Section 5.
- The original version of the complaint contained a heavily-redacted section alleging that USAP and WCAS entered into a Sherman Act Section 1 market allocation with another anesthesia services provider, which arrangement could potentially have been referred to DOJ as a criminal violation. A less redacted version of the complaint is now available and identifies Envision Health Corp. as the other entity that agreed to this alleged market allocation. Envision declared bankruptcy earlier in 2023 after PE firm KKR acquired it in 2018. Envision and UnitedHealthcare clashed over reimbursement issues starting in 2018, and ultimately UnitedHealthcare terminated its contract with Envision. When Moody's downgraded its rating of Envision in 2022, it noted that the No Surprises Act legislation and its termination by UnitedHealthcare presented significant challenges to its business model.

- The FTC alleges that USAP's use of non-competes poses high entry barriers but does not specifically allege that the non-competes were separate antitrust violations in either the Section 2 or Section 5 counts. Given the FTC's current proposed rule on non-competes would invalidate all non-competes, the omission of such an allegation in the complaint could be interpreted as an implicit concession that some non-competes (e.g., physician non-competes) may be valid.
- The FTC primarily seeks injunctive and equitable relief to prevent USAP and WCAS from engaging in similar conduct in the future, and also includes a request for unspecified structural relief. If the FTC wins on liability, divestiture or unwinding of some of the acquisitions that occurred over the past decade may prove challenging, which may explain the FTC's reluctance to specify what it believes to be appropriate structural relief. Previously, the FTC did not seek divestiture of a consummated hospital merger in Evanston/Highland Park because it was a "highly unusual case" where divestiture would be too costly and potentially risky, and instead imposed a conduct remedy requiring the parties to separately negotiate with managed care organizations to revive competition. But commentators have noted that the non-structural remedy imposed in that case was ineffective. Whether the FTC will insist on a structural remedy in this case, and how it would approach the multiple different groups that were acquired in Houston and Dallas regarding divestitures, will be informative of how the FTC views its role in unwinding "serial" acquisitions.
- Relatedly, the FTC seeks to enjoin WCAS "from engaging in similar and related conduct in the future." The FTC alleges that WCAS has engaged in a similar roll-up strategy in other specialties such as emergency medicine and radiology with other portfolio companies, as well as outside of Texas (perhaps referring to the *Washington Post* investigation suggesting similar conduct in Denver). If the FTC wins on liability with regard to USAP, the antitrust and health care bar will be closely following whether the injunctive relief sought applies to WCAS for other specialties and in other geographies, and if the FTC requests prior approval/notice similar to the requirements in the JAB settlement.

The latest FTC action is a culmination of the agencies' recent focus in public statements and policy proposals on roll-up acquisitions by PE firms in the health care space. Two months after filing the complaint, Chair Khan has already suggested that there may be more enforcement actions to come involving roll-up acquisitions in health care as well as in other industries. Bringing more cases is consistent with Chair Khan's view of a longtime FTC "bias in favor of inaction," but it is clear the FTC will face challenges for it to set new precedent that serial acquisitions violate antitrust law.

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