

## FTC targets PE in major new challenge to roll-up

September 26, 2023 | Client Update | 5-minute read

Last week, the FTC alleged that a private equity firm undertook a “multi-year anticompetitive scheme” to dominate Texas anesthesiology practices through: (1) “serial” acquisitions leading to monopoly-level shares and (2) price-setting and market allocation agreements. This lawsuit is one of several efforts by the antitrust agencies to increase scrutiny of private equity investments.

On September 21, 2023, the FTC filed a complaint in federal court against private equity firm Welsh Carson, Anderson & Stowe (“Welsh Carson”), alleging that a series of acquisitions made by Welsh Carson-controlled entity U.S. Anesthesia Partners (“USAP”) was part of a deliberately “anti-competitive scheme” in the healthcare sector. The FTC’s complaint seeks “structural relief” which might include unwinding prior deals (but that is not entirely clear from the complaint), which were largely small enough not to require filings under the HSR Act.

The current leadership of the DOJ and FTC have publicly advocated increased enforcement of private equity roll-up strategies for some time, and there are other instances of major antitrust enforcement actions against private equity, including a recent [interlocking directorate action](#). Nevertheless, this action appears to be the first time that the antitrust agencies have sought to reverse a series of acquisitions by PE firms in a given sector by initiating a lawsuit that has not been settled in advance.

### **The FTC alleges that Welsh Carson made a series of acquisitions to create a dominant anesthesiology provider and then maintained its dominance through price-setting agreements and market allocation.**

The FTC’s [complaint](#), filed in federal court for the Southern District of Texas, does not challenge a single transaction by Welsh Carson and its affiliated entities. Instead, it challenges a series of acquisitions that it describes as a common “scheme to consolidate anesthesia practices in Texas, drive up the price of anesthesia services provided to Texas patients, and increase their own profits.”

- The complaint alleges this roll-up involved the acquisition of “nearly every large anesthesia practice in Texas” and that “USAP handles about 60% of the hospital-only anesthesia cases and accounts for almost 70% of payors’ hospital-only anesthesia costs” in Houston.
- The complaint further alleges that USAP and Welsh Carson protected their dominance with price-setting agreements with independent anesthesia groups and a market allocation agreement to avoid competing with a major rival.
- The FTC alleges that defendants’ conduct supports claims of monopolization and conspiracy to monopolize in violation of Section 2 of the Sherman Act, and roll-up conduct in violation of Section 7 of the Clayton Act and Section 5 of the FTC Act, seeking equitable relief (including potential divestitures) and a permanent injunction from continuing such conduct.

- Notably, the complaint names as a defendant not only USAP, the relevant portfolio company, but also multiple sponsor sub-entities, describing the sponsor’s internal management structure in detail.

## Agency leadership has publicly called for enforcement of roll-up strategies.

Current agency leadership at both U.S. agencies have repeatedly called for more aggressive enforcement against the PE practice of roll-ups as part of a broader strategy to advance market power.

- Leaders of both agencies have said that PE roll-ups are in the agencies’ crosshairs. FTC Chair Lina Khan has [publicly stated](#) there are “life and death consequences” when buyouts place large sections of the economy under the control of Wall Street. Jonathan Kanter, Assistant Attorney General for the DOJ Antitrust Division, [stated](#) that the DOJ will conduct “fuller assessment[s]” of PE deals noting that the “business model is often very much at odds with the law, and very much at odds with the competition [the DOJ] is trying to protect.”
- Roll-ups are particularly likely to attract the agencies’ attention in healthcare, which has been on the agencies’ radar for its unique market dynamics that result in perceived anticompetitive effects at the consumer level.
  - DOJ Deputy Assistant Attorney General Andrew Forman has remarked that private equity firms “can be fundamentally different than other market participants” in this sector because “certain private equity transactions and conduct suggest an undue focus on short-term profits and aggressive cost-cutting.”
  - The American Antitrust Institute, a left-leaning think tank, earlier this year [reported](#) that PE firms currently hold a 30% market share across physician practice markets in several metropolitan areas across the United States, and that PE acquisitions “are associated with price and expenditure increases.”
  - The FTC recently [required](#) JAB Consumer Partners to divest veterinary clinics in several geographic areas as part of its acquisition of the parent company of veterinary clinic owner Ethos, among other relief. The FTC had previously ordered JAB to undertake divestitures as part of two previous acquisitions in 2020 and 2022.
- The FTC and DOJ also are targeting roll-ups in their proposed changes to the HSR form and Draft Merger Guidelines.
  - In July 2023, the agencies [announced](#) proposed changes to the HSR form that, among other things, would require PE firms to identify all new minority investors, produce an organizational chart of all associate entities, provide draft documents and materials prepared for supervisory team leads that involve assessments of the transaction, and list all officers, directors and board observers of each subsidiary. The changes will also require the acquiror to list all prior transactions in an overlap sector, regardless of size, within the prior 10 years.
  - The FTC and DOJ also announced changes in their [proposed Draft Merger Guidelines](#) explicitly stating that if a party is engaging in a series of transactions, the agencies may analyze the overall strategy of such acquisitions or look at them collectively.

## Key takeaways

- **PE investments (including in healthcare) remain under increased antitrust scrutiny.** This complaint executes on FTC priorities by litigating a roll-up theory against a private equity firm, with no pre-negotiated settlement. This lawsuit follows another recent action against PE for interlocking directorates and recent proposed merger control changes that, in part, increase scrutiny of PE.
- **There is uncertainty, however, concerning whether USAP challenge will establish a clear precedent.** The case may not be a reliable bellwether for future challenges to PE roll-ups given the specific facts of the case. In particular, the complaint alleges unusually high market shares at monopoly levels (60%-70%) and additional anticompetitive behavior including price-fixing agreements with other Texas anesthesiology practices and a market allocation agreement.
- **The FTC is seeking to prompt disclosure of private equity business and publicize the internal structures of sponsors and their portfolio companies.** By naming the parent PE firm of Welsh Carson and its many subsidiaries as defendants, as well as detailing board directors and internal organizational charts, the FTC is signaling that it will seek to reduce PE firms’ ability to avoid regulatory scrutiny through corporate structures.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

**D. Jarrett Arp**

+1 202 962 7150  
jarrett.arp@davispolk.com

**Arthur J. Burke**

+1 212 450 4352  
+1 650 752 2005  
arthur.burke@davispolk.com

**Ronan P. Harty**

+1 212 450 4870  
ronan.harty@davispolk.com

**Nathan Kiratzis**

+1 212 450 4157  
nathan.kiratzis@davispolk.com

**Christopher Lynch**

+1 212 450 4034  
christopher.lynch@davispolk.com

**Gregory S. Morrison**

+1 212 450 3455  
gregory.morrison@davispolk.com

**Suzanne Munck af Rosenschold**

+1 202 962 7146  
suzanne.munck@davispolk.com

**Howard Shelanski**

+1 202 962 7060  
howard.shelanski@davispolk.com

*This communication, which we believe may be of interest to our clients and friends of the firm, is for general information only. It is not a full analysis of the matters presented and should not be relied upon as legal advice. This may be considered attorney advertising in some jurisdictions. Please refer to the firm's privacy notice for further details.*