Westlaw Today
powered by Reuters

Court refuses FTC request for injunctive relief against a non-controlling private equity investor

By Nathaniel L. Asker, Esq., Aleksandr B. Livshits, Esq., Nathaniel A. Bronstein, Esq., and Megan C. Ingram, Esq., Fried, Frank, Harris, Shriver & Jacobson LLP*

JUNE 20, 2024

A federal district court dismissed[1] private equity firm Welsh, Carson, Anderson & Stowe from a Federal Trade Commission (FTC) lawsuit[2] seeking to enjoin the firm and its portfolio company, U.S. Anesthesia Partners (USAP), from making future "roll-up" acquisitions of anesthesia practices and abusing USAP's alleged dominant market position.[3]

The court found that the FTC had not adequately alleged that Welsh Carson was engaged in an ongoing antitrust violation or was in a position to imminently commit future antitrust violations, given that Welsh Carson was only a minority investor and accounted for just two of fourteen board seats in USAP.

The FTC brought a lawsuit in federal district court in Texas alleging that Welsh Carson and several physician partners formed USAP and, through a series of at least fifteen non-HSR reportable acquisitions, rolled-up anesthesiology practices.

While this decision confirms a major limitation on the FTC's ability to add private equity firms with minority investments as defendants in suits seeking injunctive relief, scrutinizing and challenging roll-up strategies will remain a focus for the FTC and Department of Justice, as evidenced by the agencies' recent announcement that they are seeking information from the public about roll-up transactions that may have harmed competition.[4]

Background

The FTC brought a lawsuit in federal district court in Texas alleging that Welsh Carson and several physician partners formed USAP and, through a series of at least fifteen non-HSR reportable acquisitions, rolled-up anesthesiology practices to accumulate dominant positions in multiple geographies across Texas.

The FTC sought to enjoin both USAP and Welsh Carson from making future roll-up acquisitions and leveraging USAP's alleged dominant market position, arguing that an injunction was needed because the firms would likely continue to engage in this anticompetitive conduct.[5]

Welsh Carson was included in the lawsuit because, according to the FTC, it was the private equity firm that created and implemented USAP's alleged anticompetitive strategy, financed the acquisitions, and hired USAP executives that led the business. Importantly, Welsh Carson sold its controlling interest in USAP in 2017, reducing its stake to 23% and retaining the right to appoint only two of fourteen directors.

The court agreed that the FTC had adequately alleged the potential for ongoing antitrust violations by USAP and denied USAP's motion to dismiss.

With respect to Welsh Carson, however, the court reached a different conclusion, finding that the FTC's allegations concerning the private equity firm's current and ongoing conduct — which were based on the firm holding a minority interest and two of fourteen board seats in USAP — were insufficient to establish a potential ongoing antitrust violation by the private equity firm itself.

Welsh Carson was included in the lawsuit because, according to the FTC, it was the private equity firm that created and implemented USAP's alleged anticompetitive strategy.

The court stated that while holding a controlling interest may have met the requisite standard, liability does not extend to a minority investor, however hands-on, that is not itself engaged in an ongoing antitrust violation.

In the words of the court, "the act of receiving profits [...] is not an ongoing antitrust violation." In addition, having "the mere capacity

Thomson Reuters is a commercial publisher of content that is general and educational in nature, may not reflect all recent legal developments and may not apply to the specific facts and circumstances of individual transactions and cases. Users should consult with qualified legal counsel before acting on any information published by Thomson Reuters online or in print. Thomson Reuters, its affiliates and their editorial staff are not a law firm, do not represent or advise clients in any matter and are not bound by the professional responsibilities and duties of a legal practitioner. Nothing in this publication should be construed as legal advice or creating an attorney-client relationship. The views expressed in this publication by any contributor are not necessarily those of the publisher.

Thomson Reuters™

to [engage in an antitrust violation] does not meet the requirement that the [violation] is likely to recur."[6]

Practical implications and takeaways

The court's ruling is a victory for the private equity industry, highlighting the limits of the FTC's power to seek injunctions in federal court against minority investors.

In the words of the court, "the act of receiving profits ... is not an ongoing antitrust violation."

However, while Welsh Carson was dismissed from the FTC's federal court action, the FTC has separate administrative authority under the Federal Trade Commission Act to investigate and prosecute anticompetitive behavior in an administrative court. This outcome may incentivize the FTC to bring more administrative proceedings against investors going forward rather than proceeding before the federal court.[7]

It is also important to remember that the Welsh Carson/USAP lawsuit is just one of a series of recent FTC and DOJ actions targeting private equity roll-ups, which included challenges to serial acquisitions in the oil and gas and veterinary industries, as well as the recent call to action for the public to notify the agencies of private equity roll-ups that may have harmed competition.

Companies contemplating strategic add-ons should therefore carefully consider this regulatory environment and proceed with appropriate planning, including up-front evaluation of potential antitrust considerations and the potential impact of such transactions on a range of constituencies, including benefits to customers and employees through greater efficiencies, access to capital, and the ability to invest in innovation as a result of each transaction and the strategy as a whole.

Notes:

[1] *Federal Trade Comm'n v. U.S. Anesthesia Partners, Inc., et al.*, No. 4:23-CV-03560, 2024 WL 2137649 (S.D. Tex. May 13, 2024).

[2] https://bit.ly/3z8HFLi

[3] *Federal Trade Comm'n v. U.S. Anesthesia Partners, Inc., et al.*, No. 4:23-CV-03560, 2024 WL 2137649 (S.D. Tex. May 13, 2024).

[4] *FTC and DOJ Seek Info on Serial Acquisitions, Roll-Up Strategies Across U.S. Economy*, Fed. Trade Comm'n. (May 23, 2024), https://bit.ly/4c16g3y.

[5] The FTC brought the lawsuit under Section 13(b) of the FTC Act, which empowers the agency to seek an injunction in federal district court to block alleged antitrust conduct, such as pending acquisitions, so that the FTC may determine the lawfulness of those actions through a separate administrative proceeding. Importantly, the statute requires that there be an allegedly ongoing or imminent antitrust violation, such as a pending acquisition.

[6] 2024 WL 2137649 at 15.

[7] *Id*. at 8 ("Section 13(b) is not a catch-all statute ... The FTC is authorized to conduct its agency actions through Section 5(b) of the FTC Act, which is a much broader grant of antitrust authority, and looks backward, while Section 13(b) looks forward.").

About the authors






(L-R) **Nathaniel L. Asker** is a partner in **Fried, Frank, Harris, Shriver & Jacobson LLP**'s global antitrust and competition department. He advises public companies, private equity firms and their portfolio companies on antitrust aspects of mergers, acquisitions and joint ventures. He can be reached at nathaniel.asker@friedfrank.com. **Aleksandr B. Livshits** is also a partner in the global antitrust and competition department, where he works with clients on antitrust merger reviews, including governmental investigations of complex cross-border transactions and antitrust compliance issues. He can be reached at aleksandr.livshits@friedfrank.com. **Nathaniel Bronstein** is an associate in the global antitrust and competition department. His work includes complex cross-border transactions, antitrust investigations and antitrust compliance counseling. He can be reached at nathaniel.bronstein@friedfrank.com. **Megan C. Ingram** is also an associate in the global antitrust and competition department. She can be reached at megan.ingram@friedfrank.com. Asker, Livshits and Bronstein are located in New York, while Ingram is in Washington, D.C. The authors would like to thank partner Bernard (Barry) A. Nigro Jr. for his contribution to this article. This article was originally published May 29, 2024, on the firm's website. Republished with permission.

This article was published on Westlaw Today on June 20, 2024.

*** © 2024 Nathaniel L. Asker, Esq., Aleksandr B. Livshits, Esq., Nathaniel A. Bronstein, Esq., and Megan C. Ingram, Esq., Fried, Frank, Harris, Shriver & Jacobson LLP**

This publication was created to provide you with accurate and authoritative information concerning the subject matter covered, however it may not necessarily have been prepared by persons licensed to practice law in a particular jurisdiction. The publisher is not engaged in rendering legal or other professional advice, and this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional. For subscription information, please visit legalsolutions.thomsonreuters.com.