

FTC's Aggressive Focus on PE Blunted by Recent Court Decision

Alert

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Private Equity (PE) has been a popular and frequent target of the Biden Administration's recent antitrust enforcement efforts. Earlier this year, the Federal Trade Commission (FTC) and Department of Justice Antitrust Division (DOJ) held workshops focusing on PE's role in health care. Just last week, the FTC and DOJ issued a joint request for information from the public about PE and other serial acquisitions, or "roll ups," in industries beyond health care.¹

All of this attention has not gone unnoticed, but a recent district court decision may put a brake on at least one of the most ambitious enforcement efforts against PE firms.

On May 23rd, U.S. District Judge Kenneth M. Hoyt tossed antitrust claims against PE firm Welsh, Carson, Anderson & Stowe (Welsh Carson), while preserving monopolization allegations against its portfolio company, U.S. Anesthesia Partners (USAP).

This decision limits the FTC's ability to add PE firms with minority investments as defendants in suits seeking injunctive relief. At the same time, the decision does not prevent the FTC or the DOJ from using other antitrust enforcement mechanisms to scrutinize and challenge roll-ups by PE firms.

CASE BACKGROUND

The FTC had sought a permanent injunction - under Section 13(b) of the FTC Act - against both Welsh Carson and USAP. The FTC sued Welsh Carson and USAP in federal district court in Texas alleging that USAP rolled-up 15 anesthesiology practices across Texas and through those non-reportable transactions, achieved a dominant position in several geographies. The FTC wanted to stop both firms from making any future "roll up" acquisitions of anesthesia practices and from abusing USAP's alleged market dominant

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position.²

The district court denied USAP's motion to dismiss, finding that the FTC had adequately alleged the potential for USAP to engage in ongoing antitrust violations. The same was not true of Welsh Carson. The FTC included Welsh Carson in its complaint because the firm allegedly helped create, implement and finance USAP's alleged anticompetitive strategy. The problem was that the court found that the FTC had not adequately alleged that Welsh Carson was engaged in an ongoing antitrust violation or could imminently commit future antitrust violations. The court relied, in part, on the fact that Welsh Carson was a minority investor in USAP, with just a 23% share and only had the ability to appoint two of 14 board seats.

Ultimately, Judge Hoyt refused to endorse the FTC's novel theory that Welsh Carson's 23% ownership stake in USAP was enough to constitute an "ongoing violation" under the Section 13(b) of the FTC Act. Judge Hoyt explained that "Welsh Carson's ongoing conduct must reduce competition."³ The court said that "[i]t is not clear how owning a minority share in a company that reduces competition satisfies the statute."⁴

KEY POINTS

The decision limits the FTC's ability to seek injunctions in federal court against minority investors. But the FTC still has several enforcement tools at its disposal, including the ability to investigate allegedly anticompetitive conduct through civil investigative demands. The agency also can file a complaint under its administrative process rather than taking the case to a federal court. This decision may drive the FTC to pursue similar cases against minority investors through administrative proceedings rather than federal court.

Indeed, the FTC's recent call for information from the public about roll-up transactions suggests that PE firms will need to remain vigilant and proactive in this enforcement environment.

PE firms and other companies making serial acquisitions should work with competition counsel to document the pro-competitive benefits of planned and past sector acquisitions as well as consider antitrust risks earlier in the deal cycle.

For more information on the private equity court decision, please contact [Jeetander Dulani](#), [William Kearney](#), [Nicci Warr](#) or the Stinson LLP contact with whom you regularly work.

¹ [Enforcers Want To Know Where Roll-Ups Are Happening - Law360](#)

² [Federal Trade Commission v. U.S. Anesthesia Partners Opinion](#)

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³ [Federal Trade Commission v. U.S. Anesthesia Partners Complaint](#)

⁴ Id.

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