

FTC LOSES IN ITS ATTEMPT TO BIND PRIVATE EQUITY FIRM WELSH CARSON TO ALLEGED ANTITRUST VIOLATIONS BY U.S. ANESTHESIA PARTNERS

On May 13, 2024, the U.S. District Court for the Southern District of Texas, Houston Division, granted Welsh, Carson, Anderson & Stowe's ("**Welsh Carson's**") motion to dismiss in *Federal Trade Commission v. U.S. Anesthesia Partners, Inc.*, but denied U.S. Anesthesia Partners, Inc.'s ("**USAP's**") motion. The Complaint, which was filed on September 21, 2023, by the Federal Trade Commission ("**FTC**"), alleges that USAP and Welsh Carson, currently a minority investor in USAP, participated in a multi-year anticompetitive scheme to consolidate anesthesia practices in Texas, engage in price-setting arrangements and market allocation agreements with other anesthesia practices, leading to higher prices.¹

BACKGROUND

Welsh Carson, a private equity ("**PE**") firm, along with several physician partners, founded USAP in 2012. The FTC claimed that Welsh Carson and USAP started with a "goal to drive profits by consolidating Texas' hospital anesthesia market."² Over several years, USAP acquired a number of anesthesia practices, expanded its operations in Houston, Dallas, Tyler, Austin, Amarillo and San Antonio, and grew its share in the FTC's alleged commercially insured, hospital-based anesthesia markets in Houston and Austin to north of 50%. Although Welsh Carson initially owned 50.2% of USAP, in 2017 it reduced its ownership interest to 23%. Today, Welsh Carson has the right to appoint only two of the fourteen USAP board seats.

¹ See Client Alert, Clifford Chance, *Federal Trade Commission Files Suit Seeking Injunction Against U.S. Anesthesia Partners and Private Equity Firm Welsh Carson for Alleged Three-Part Scheme to Monopolize Texas Anesthesia Market*, available at <https://www.cliffordchance.com/briefings/2023/09/federal-trade-commission-files-suit-seeking-injunction-against-u.html>.

² See *Fed. Trade Comm'n v. U.S. Anesthesia Partners, Inc.*, 4:23-cv-03560, at 2 (S.D. Tex. May 13, 2024).

Nevertheless, despite Welsh Carson's minority ownership interest and corresponding board representation at USAP, the FTC alleged in its [Complaint](#) that Welsh Carson is responsible for USAP's "roll-up" strategy.

Largely focusing on Welsh Carson's reduction of its stake in USAP (in 2017), combined with its lack of control, the court found that the substantive antitrust law allegations against USAP did not extend to Welsh Carson.³

COURT'S ANALYSIS OF SECTION 13(B) TO WELSH CARSON

The FTC brought its claims against Welsh Carson and USAP under Section 13(b) of the FTC Act which allows the FTC to bring enforcement actions where it has "reason to believe . . . that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the [FTC]." In considering Welsh Carson's motion to dismiss, Judge Hoyt of the Southern District of Texas looked at whether Welsh Carson "is violating" or is "about to violate" antitrust laws.

The court found that the FTC could not show that Welsh Carson "is violating" antitrust laws under 13(b). To determine whether Welsh Carson is committing ongoing antitrust violations, the court looked at: (1) whether "Welsh Carson holds stock in USAP;" (2) whether "holding assets that result in reduced competition is an ongoing violation of antitrust laws;" and (3) whether "Section 13(b) permits the FTC to address ongoing violations." With respect to Welsh Carson, the court focused only on the second issue. In evaluating this question, the court found that Welsh Carson's Fund XII's holding of a minority stake in USAP alone did not amount to an ongoing violation of antitrust laws under Section 2 of the Sherman Act or Section 7 of the Clayton Act.

The court went on to differentiate Welsh Carson's situation from other non-PE cases cited by the FTC and further provided its own examples. First, the court explained that *United States v. E. I. du Pont de Nemours & Co.*, was not a case under Section 13(b) of the FTC Act and did not involve a defendant with a minority, noncontrolling stake in the purchasing entity.⁴ Second, the court distinguished *Community Publishers, Inc. v. Donrey Corp.*, where a violation of the Clayton Act Section 7 was attributed to a parent company because the parent and subsidiary had substantially overlapping ownership.⁵ Here, the Welsh Carson fund does not have "ownership" over USAP.

The court also found the FTC had not alleged facts that indicate Welsh Carson was "about to violate" the antitrust laws, emphasizing that Section 13(b) requires more than mere speculation and conjecture about potential future violations.

KEY TAKEAWAYS

The FTC tried to pierce the corporate veil by holding a PE firm directly liable for the actions of its minority held portfolio company but failed. This decision stands for the proposition that a PE firm with only a minority ownership position and board representation cannot be liable under Section 13(b) of the FTC Act for alleged

³ The court also rejected the argument that the FTC is unconstitutionally constituted because its commissioners are not removable at will by the President.

⁴ See *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 592 (1957).

⁵ See *Cmty. Publishers, Inc. v. Donrey Corp.*, 882 F. Supp. 138 (W.D. Ark. 1995).

violations of the antitrust laws by one of the PE firm's investments absent any evidence that it was "about to violate" the law. The grant of Welsh Carson's motion to dismiss is a blow to the FTC's attempts to step up enforcement against PE firms. That said, the court's decision to deny the motion to dismiss as to USAP should continue to serve as an example of the FTC aggressively investigating, what they refer to as, "roll-up" strategies, particularly in the healthcare sector.

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