PE Firm Welsh Carson Escapes FTC's Antitrust Suit against Portfolio Company

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On May 13, 2024, a Texas federal court dismissed the Federal Trade Commission's ("FTC") antitrust lawsuit against private equity firm Welsh, Carson, Anderson and Stowe ("Welsh Carson") concerning alleged misconduct by the firm's portfolio company, U.S. Anesthesia Partners ("USAP"). The decision marks a significant victory for Welsh Carson and the private equity sector.

Background. The FTC sued Welsh Carson and USAP in September 2023 in a first-of-its-kind case concerning the alleged use of roll-up, serial acquisitions as a tool to dominate the Texas anesthesiology market.[1] In particular, the FTC alleged that Welsh Carson and USAP engaged in a years-long scheme to buy up "nearly every large anesthesia practice in Texas" and subsequently suppress competition by, among other things, hiking rates paid by patients and insurers, fixing prices and colluding with a rival to illegally allocate the market. A Welsh Carson fund held only a 23% stake in USAP by the time the FTC's suit was filed, but the FTC argued that the private equity firm controlled two board seats of USAP and remained in effective control of the company.

Welsh Carson in its motion to dismiss argued that the FTC's complaint targeted "mere investors" and ran counter to established corporate law principles. Welsh Carson maintained that its actions were consistent with typical private equity practices such as advisory support and financial oversight.

Decision. The Court agreed with Welsh Carson and dismissed the FTC's claims, essentially finding that private equity firms are not liable for the actions of their portfolio companies.[2] The Court held that the FTC did not establish that Welsh Carson "is violating" or "is about to violate" the antitrust laws, as required under Section 13(b) of the FTC Act—particularly in light of the firm's status as a minority investor. "The FTC has not cited a case in which a minority, noncontrolling investor—however hands-on—is liable under Section 13(b) because the company it partially owned made anticompetitive acquisitions," the ruling said. Such a holding "would expand the FTC's

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[1] *Federal Trade Commission v. U.S. Anesthesia Partners Inc and Welsh, Carson, Anderson & Stowe et al.*, U.S. District Court for the Southern District of Texas, No. 4:23-cv-03560.

[2] The Court dismissed the FTC's claims against Welsh Carson but allowed the claims against USAP to proceed.

reach further than any court has yet seen fit; it would also expand liability to minority investors whose subsidiaries reduce competition. This Court will not adopt this novel interpretation."

The Court also rejected the FTC's argument that "receiving profits from an entity that may be violating antitrust laws is itself a violation of antitrust laws," holding that "[t]he act of receiving profits from USAP is not an ongoing antitrust violation." The fact that Welsh Carson had set up USAP and determined its strategy initially "does not change the analysis," the Court said. Lastly, comments from Welsh Carson executives expressing a desire to make acquisitions and consolidate other healthcare markets did not show that the firm plans to violate antitrust laws. The Court proffered that the FTC can "return with a new lawsuit under Section 13(b) if and when Welsh Carlson signals—beyond mere speculation and conjecture—that it is actually about to violate the law."

Implications. The ruling is a significant victory for the private equity sector and shows the limits of the FTC's power to sue in federal court under Section 13(b). The Court respected the corporate form and declined to hold "a minority, non-controlling [private equity sponsor]—however hands-on—[ ] liable under Section 13(b) because the company it partially owned made anticompetitive acquisitions." In contrast, the decision is a setback for the FTC, which has taken a more aggressive stance under the Biden administration against private equity acquisitions and alleged anticompetitive behaviors in the healthcare industry.

The Court's refusal to apply Section 13(b) to address Welsh Carson's future plans is also good news for private equity sponsors wishing to pursue a roll-up or serial acquisition strategy. The FTC's and DOJ's 2023 Merger Guidelines state that where an acquisition is part of a "pattern or strategy of multiple acquisitions in the same or related business lines," the agencies may examine "both the firm's history and current or future strategic incentives." But the FTC's Section 13(b) authority only applies when a party "is about to violate" the antitrust laws—it does not empower the FTC to enjoin past actions that are not continuing, nor does it extend to the mere intent to make acquisitions in the future. The Court's decision—that the FTC "can return" when a sponsor "is actually about to violate the law"—is a useful reminder that future plans cannot serve as the basis to challenge an existing transaction under Section 13(b). Rather, the challenge must be based on the actual transaction or activity, not the sponsor's or its portfolio company's future plans.

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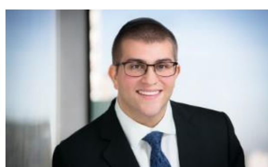
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