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Monopoly and Price Fixing or Just Hot Gas? FTC Sues U.S. Anesthesia Partners and Welsh, Carson For Antitrust Violations

On September 21, 2023, the Federal Trade Commission (“FTC”) filed suit against U.S. Anesthesia Partners, Inc. (“USAP”) and Welsh, Carson, Anderson & Stowe (“WCAS”), its private equity creator and backer, alleging that they engaged in a years-long anticompetitive scheme in connection with the market for anesthesiology services in Texas.

The civil antitrust lawsuit was filed in the U.S. District Court for the Southern District of Texas. Note that anyone who can pay the filing fee can bring suit and the Biden administration’s FTC under its Chair, Lina Khan, has been extremely aggressive in filing them. A complaint, even if filed by the FTC, is just that, a complaint, a completely one-sided statement of alleged facts and the application of the law. USAP has issued a statement denying the FTC’s claims.

The government’s move in filing the complaint is consistent with public criticism by the FTC, U.S. Department of Justice, and many state governments, of roll-up activity that involves a series of comparatively small (i.e., not subject to Hart-Scott-Rodino Act filing) acquisitions that result in significant market control.

Key Allegations

The FTC alleges that USAP and WCAS engaged in a multiyear scheme to consolidate and monopolize the Texas market for anesthesiology services. It claims that the result is that USAP controls nearly 60% of the market, by cost, for hospital anesthesia in Texas, and approximately 43% of cases.

According to the complaint:

“USAP’s acquisitions have hit Texans’ wallets hard. With each deal, USAP raised the acquired group’s prices to USAP’s (often much) higher price. As one insurance executive summarized, USAP and Welsh Carson used acquisitions to ‘take the highest rate of all . . . and then peanut butter spread that across the entire state of Texas.’ Welsh Carson and USAP euphemistically referred to this practice—wielding its increasingly dominant market position to net tens of millions of dollars in additional profits—as ‘synergies.’ Before USAP made a single acquisition, WelshCarson’s executives, in plotting their ‘roll up,’ underscored that ‘captur[ing] significant synergies’ was a key part of their scheme. Following one acquisition, a USAP executive put it more bluntly: ‘Cha-ching!’”

The FTC also alleges that the defendants entered into agreements with remaining, independent anesthesia practice to set prices. According to the complaint:

“Second, USAP supported its ‘roll-up’ strategy by entering or maintaining price-setting arrangements with other, independent anesthesia groups that shared key hospitals in Houston and Dallas. Under these price-setting arrangements, USAP charges its own high prices for services in fact provided by those independent groups that had been charging lower prices. Like its acquisitions, USAP’s price-setting arrangements yielded ‘synergies’—or additional revenues—that USAP then split with each independent group. Despite USAP’s own executives recognizing that these price-setting arrangements are ‘odd from a compliance standpoint,’ two of them remain in use today and USAP has signed or pursued multiple others.”

And, the FTC alleges that that USAP and WCAS entered into a market allocation agreement with another competing group. According to the complaint:

“ . . . , USAP and Welsh Cason entered a market allocation with another large anesthesia services provider, . . . [NAME AND RELATED INFORMATION REDACTED] The Welsh Carson partner who acted as USAP’s chief negotiator made clear that this market allocation agreement was “what we want,” and he later expressed appreciation for . . . [NAME REDACTED] . . . “constructive” attitude towards USAP’s and Welsh Carson’s interest in sidelining a significant rival.”

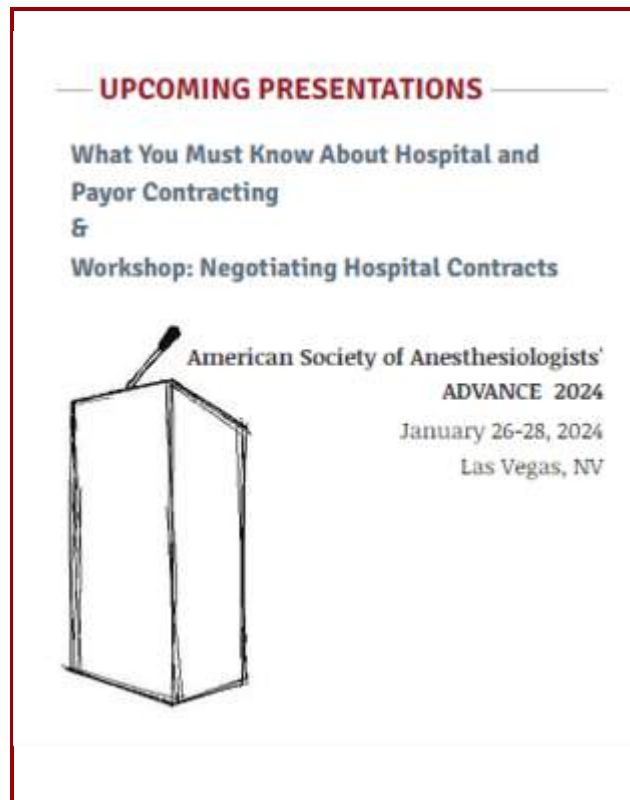
The FTC seeks both an injunction as to further conduct and “structural relief” to remedy past conduct; that type of relief might include an ordered break up of USAP.

Some of the Many Takeaways for Your Group

1. Although the Biden administration is hot to demonize consolidation, there’s nothing inherently illegal about roll-up strategies. However, roll-up strategies that are schemes to monopolize are another story.
2. If the FTC wins its case, USAP could be broken up, creating new opportunities in the market.
3. From the alleged quotes of statements made by USAP and WCAS officials contained in the complaint, it appears as if an insider is cooperating with the FTC.
4. Although the case is civil, not criminal, there’s no guaranty that the government won’t, via the Department of Justice, bring a companion criminal antitrust case against the defendant entities and, potentially, individuals who worked or are working on their behalf. An individual’s culpability for criminal conduct is not shielded by the fact that it was committed on behalf of an employer.
5. Some of the specific allegations underlying the grand “schemes” claimed by the FTC, such as the allegation that the defendants entered into agreements with competitors to allocate the market, mean that other groups and individuals might become targets of either or both civil or criminal actions.
6. Among the FTC’s specific allegations is that in some cases in which USAP could not convince another group to sell, it would enter into an agreement with the other group in which USAP would bill payors for the anesthesia services rendered by both groups using USAP’s own provider or tax information, which price-setting arrangements made it appear to payors as if USAP were doing the work of the other group’s anesthesia providers. In addition to potential antitrust violations, arrangements such as that raise significant breach of insurance provider agreement issues, significant insurance fraud issues, as well as federal, and state antikickback statute concerns.
7. It’s also feasible that individual physicians in leadership roles in entities involved in antitrust violations who are later charged and convicted criminally, could lose their medical

licenses. Although, to my knowledge no trial court has found a criminal antitrust conviction to equate to a crime of moral turpitude, the U.S. Department of Justice's internal position, espoused in a Memorandum of Understanding involving immigration matters, is that criminal antitrust is a crime of moral turpitude. For example, newly enacted state law prevents doctors from practicing in Texas if they have been convicted of a crime involving moral turpitude.

8. The analysis of any deal involving business combinations, antitrust, and related antikickback concerns is highly fact-specific and requires significant analysis and planning prior to taking business action.



Wisdom. Applied. 178: The Rise of the Machines: Dr. Watson, AI and the Future of Your Medical Group

Will today's physicians soon be referred to as "human physicians" or "carbon-based docs" as opposed to the silicon-based kind? Paging Dr. Robot?

All Things Personal

I know that the people on the network news are assuring us that inflation's been beat. But that's only the case if you don't have to buy anything like food, whether it's steak for Freida or dog food for Fido.

Earlier this month, I went to reorder a 25 pound bag of dog food only to discover that the price had jumped nearly \$20 a bag. The same day, I stopped by Whole Foods and found that grass fed ribeyes had walked uphill in price per pound from around \$17 to the \$25 range.

But food's not my point. Price increases are, as in the cost of doing business. Similar expense-side cost increases have impacted medical group staffing, both professional and administrative, the cost of supplies, and so on.

And, at the same time, many medical groups don't have much control over the income side of their balance sheets. This is nowhere truer than for those medical groups which have entered into long term agreements with payors without built in cost of living adjustments, or at least terms that are short enough to permit termination and renegotiation.

No one, from Fed chair Powell to a popular economist-entertainer, to, well, me, knows where inflation, and the economy at large, are going. But with more than 20% of all U.S. dollars in existence having been created in the last few years and with the government spending like a zillion drunken sailors, it would be wise to at least hedge your bets on both the upside and the downside wherever and whenever possible.

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Books and Publications



We all hear, and most of us say, that the pace of change in healthcare is quickening. That means that the pace of required decision-making is increasing, too. Unless, that is, you want to take the “default” route. That’s the one in which you let someone else make the decisions that impact you; you’re just along for the ride. Of course, playing a bit part in scripting your own future isn’t the smart route to stardom. But despite your own best intentions, perhaps it’s your medical group’s governance structure that’s holding you back. In fact, it’s very likely that the problem is systemic. The Medical Group Governance Matrix introduces a simple four-quadrant diagnostic tool to help you find out. It then shows you how to use that tool to build your better, more profitable future. Get your free copy [here](#).



Whenever you're ready, here are 4 ways I can help you and your business:

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- 2. Be a guest on “Wisdom. Applied. Podcast.”** Although most of my podcasts involve me addressing an important point for your success, I’m always looking for guests who’d like to be interviewed about their personal and professional achievements and the lessons learned. [Email me](#) if you’re interested in participating.
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