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TARGET ACQUIRED: PROMISES AND PITFALLS FOR PRIVATE EQUITY IN AN ERA OF REGULATORY SCRUTINY

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The foundational principle of limited liability forms the bedrock of the American capital system. For decades, it has shielded private equity firms from tenuous claims of vicarious liability, enabling them to acquire and develop portfolio companies with aims of growing the economy through new ideas, new services, and new jobs. But increasingly, regulators and private litigants have been testing the limits of these protections, trying to hold private equity firms liable even when they do little more than hold an ownership interest and provide oversight and support typical of investors.

This article examines a recent case involving private equity firm Welsh, Carson, Anderson & Stowe and U.S. Anesthesia Partners (USAP), a Welsh Carson investment. The FTC and private plaintiffs brought antitrust claims against Welsh Carson based on an allegedly anticompetitive roll-up acquisition strategy. The claims against Welsh Carson were dismissed, however, because the firm retained only a minority stake and did not independently engage in anticompetitive conduct. This case study offers important insights into how courts will evaluate the degree of ownership and control sufficient to hold parent companies liable for portfolio company conduct, the risks of overlapping board membership, and the regulatory outlook for private equity.

Case Study: Welsh Carson & U.S. Anesthesia Partners

In 2023, the FTC, followed soon after by a putative class of employee benefit plans, sued private equity firm Welsh Carson and its portfolio company USAP based on a series of acquisitions of hospital-only anesthesia practices dating back to USAP's founding over a decade earlier.[1] The suits allege that the companies engaged in an anticompetitive scheme to consolidate anesthesiology practices in Texas to drive up prices by leveraging increased market share.

Welsh Carson invested in USAP at the outset, with one of its funds providing start-up capital and acquiring a 50.2% interest. Welsh Carson then exercised control and oversight typical of private equity in the early stages of an investment: recruiting officers, advising on strategy, and assisting with due diligence on prospective acquisitions. Welsh Carson also received dividends from USAP. In the five years after USAP's formation in 2012, Welsh Carson's majority interest was diluted to just under 45%. In 2017, the initial investing fund sold its equity, and another Welsh Carson fund acquired a 23% interest. USAP acquired over a dozen practices during this time.

Based on Welsh Carson's early actions in support of a portfolio company, as well as Welsh Carson's majority-turned-minority ownership interest, the FTC and plaintiffs sought to hold Welsh Carson funds and other entities liable for USAP's conduct. They did so despite Welsh Carson and USAP having separate corporate statuses.

But as the trial court concluded in dismissing the class claims against Welsh Carson (ten months after they were filed), this liability theory ran counter to established principles of corporate law and separateness.[2] Plaintiffs had only cited actions by the portfolio company and Welsh Carson conduct incidental to its investment. They therefore could not allege any independent anticompetitive conduct by Welsh Carson within the limitations period, and the claims were dismissed.[3]

Because Welsh Carson held only a minority ownership interest during the limitations period, plaintiffs faced an uphill battle. They struggled to show actionable USAP conduct that could be attributed to Welsh Carson consistent with the presumption that distinct corporate entities are truly separate. To that end, plaintiffs alleged that a Welsh Carson partner, while serving as a USAP director, made statements in furtherance of the supposed conspiracy.

But that effort also fell short, as the court reaffirmed that even a director serving simultaneously on the parent's and subsidiary's boards is insufficient to impose liability on the parent. The Supreme Court established that principle in *United States v. Bestfoods*, explaining that directors often "change hats" and are nevertheless presumed to act on behalf of the company on whose board they sit when involved in that company's business. To defeat that presumption and hold a parent company liable, a plaintiff must show that such a dual-hatted director "departed so far from the norms of parental influence exercised through dual officeholding as to serve the parent."[4] Plaintiffs were unable to make that showing.

In refusing to hold Welsh Carson vicariously liable for USAP's alleged actions, the court enforced long-standing jurisprudence on the corporate form and limited liability. While the result is not surprising, the case nonetheless offers insights into the factors courts will consider when assessing an investor's liability for a portfolio company's conduct, potential pitfalls for private equity firms to be mindful of when developing investments, and the FTC's priorities.

A particularly salient factor is the degree of the parent company's ownership or control of the portfolio company. A decisive factor for Welsh Carson was its minority- investor status. Because Welsh Carson held only a minority interest when the limitations period began, the court did not need to analyze whether other allegations—like its earlier controlling stake, tangential involvement in certain acquisitions, and receipt of dividends from USAP's allegedly ill-gotten gains—would be actionable. But relatively passive ownership and profit, combined with conventional investor conduct, still should not have been sufficient to impose liability. Even a parent's knowledge of a subsidiary's collusion with competitors has been found insufficient to establish a conspiracy.[5] Instead, courts generally look for more direct parental involvement. For example, the FTC's case against SynGenta survived a motion to dismiss because the parent company actually signed the allegedly unlawful agreement and managed the relationship with the alleged co-conspirator.[6]

Also relevant is whether any dual-hatted directors or agents of both companies are acting solely for the benefit of the portfolio company, rather than for the benefit of a parent entity for which he or she is currently serving as a fiduciary. The presumption is that directors can and do act as proper fiduciaries. Per the *Bestfoods* Court, this presumption is "strongest when the act is perfectly consistent with the norms of corporate behavior, but wanes [when] . . . plainly contrary to the interests of the subsidiary yet nonetheless advantageous to the parent."[7] The allegations against Welsh Carson evinced no such conflicting interests. But the presumption has been defeated in cases where plaintiffs alleged a dual agent assured the portfolio company's co-conspirators "owner to owner" that the investor would support the collusive pricing agreements, and where dual agents worked with parent company resources and personnel to develop a product using misappropriated technology.[8]

Still, there are reasons for private equity to be cautious when appointing board members. As a Fall 2024 *Preferred Returns* article explains, even non-voting observer board members can present antitrust risks, given their access to sensitive competitive information. And in January 2025, the DOJ and FTC signaled a renewed interest in targeting interlocking directorates (including observer board members) as an unfair method of competition under Section 5 of the FTC Act and Section 8 of the Clayton Act, sub- mitting a statement of interest in litigation involving defendants who simultaneously served on OpenAI's and Microsoft's boards.

There is also a risk of regulatory scrutiny and enforcement actions—even in cases like Welsh Carson, where the parent company's conduct did not support civil claims. After the FTC's claims against Welsh Carson were dismissed, the FTC continued down the path of administrative enforcement and obtained a consent order. Among other things, the order bars Welsh Carson from increasing its minority-ownership interest in USAP, limits its representation on USAP's board to a single non-chair seat, and prevents it from gaining management rights over USAP.

Conclusion: The Road Ahead

With the new administration, the FTC is in a period of change and upheaval. Nevertheless, there are strong reasons to believe new FTC Chair Andrew Ferguson will continue to scrutinize serial acquisitions —which often involve private equity. While previous FTC Chair Lina Khan portrayed the FTC as keeping pace with the new roll-up strategies of private equity, big tech, and others, then -Commissioner Ferguson is- sued a concurring statement to reject any "antipathy toward private equity" and noted that the FTC was simply pursuing a "run-of-the - mill enforcement" action to combat acquisitions that substantially less- en competition in violation of Section 7.

Though this provides some reassurance, private equity firms should still be wary of the risks highlighted by the Welsh Carson case. Firms could be subject to regulatory scrutiny and litigation, especially when they retain majority ownership or if there are indicators of dual agents prioritizing the parent's interests to the detriment of the portfolio company.

End notes [Target Acquired]:

1. *Fed. Trade Comm'n v. U.S. Anesthesia Partners*, No. 4:23-cv-03560 (S.D. Tex.); Elec. Med. Tr. v. U.S. Anesthesia Partners, No. 4:23 -cv- 04398 (S.D. Tex.). Yetter Coleman, as co-counsel with Ropes & Gray, represented Welsh Carson in these cases.

2. The FTC's parallel claims were dismissed on statutory grounds related to the scope of the FTC's authority. Fed. Trade Comm'n v. U.S. Anesthesia Partners, Inc., 2024 WL 2137649, at *4-6 (S.D. Tex. May 13, 2024), appeal dis- missed, 2024 WL 5003580 (5th Cir. Aug. 15, 2024).

3. *Elec. Med. Tr. v. U.S. Anesthesia Partners, Inc.* , 2024 WL 5274650, at *3 -6 (S.D. Tex. Sept. 27, 2024).

4. *United States v. Bestfoods, 524 U.S. 51, 69-71*, 70 n.13 (1998).

5. *In re Pressure Sensitive Labelstock Antitrust Litig.,* 566 F. Supp. 2d 363, 376 (M.D. Pa. 2008).

6. Fed. Trade Comm'n v. Syngenta, 2024 WL 149552, at *24 (M.D.N.C. Jan. 12, 2024).

7. *Id.* at 70 n.13.

8. *In re Packaged Seafood Antitrust Litig.*, 2022 WL 836951, at *3, *10 (S.D. Cal. Mar. 21, 2022); *Financialapps, LLC v. Envestnet, Inc.*, 2023 WL 4975373, at *11 (D. Del. July 31, 2023).