

Assessing the state of affairs in FTC/DOJ merger enforcement

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JULY 10, 2023

As President Biden has made antitrust a priority for his administration, the Federal Trade Commission and Antitrust Division of the Department of Justice have challenged a number of high-profile transactions, drawing headlines in the press. When the FTC and DOJ sue to stop multibillion-dollar deals involving very well-known companies, people take notice.

In the past two years, these federal agencies have challenged transactions involving well-known industry leaders such as Microsoft, Meta, Amgen, American Airlines, JetBlue, and Penguin Random House.

These challenges and the strict scrutiny antitrust environment in Washington are having a deterrent effect on transactions. Corporate development teams, CEOs, and boards are viewing antitrust as a key element that must be factored into their acquisition strategies, rather than treating antitrust as an afterthought. Who wants a headline on a busted deal, especially if there is a meaningful termination fee involved?

Sellers are being more selective as they decide which potential buyers to allow to participate in a sale process, so they do not engage with any companies that could attract an antitrust investigation or challenge.

Regulators are making progress in their war on mergers when their public challenges not only block or hold up the deals they challenge, but also create a deterrent effect that tamps down merger and acquisition activity by other companies.

In terms of the types of cases the FTC and DOJ are bringing, and their success in those cases, the details in the story are not as dreary as the headlines would lead one to believe. Broadly speaking, agency challenges can be thought of in three categories.

The first class of transactions involves horizontal combinations of competitors with high market shares in well-defined product markets. These cases are the “bread and butter” of antitrust merger review, and the agencies have challenged them successfully for decades. There is no “news” here.

The second class of transactions is a variant of the first and involves a horizontal combination, but the parties have arranged for a divestiture of a robust package of assets to a strong divestiture buyer. Here, the Biden administration has a fundamentally different approach from its predecessors, taking the position that any such

remedies are highly suspect and likely to fail, thereby justifying the government seeking a full stop injunction rather than allowing the deal to proceed with the “fix.”

The third class of transactions involves more esoteric theories of harm such as vertical foreclosure or “conglomerate effects” when a company creates a broad portfolio of products that the government believes could enable conduct such as new bundled product offerings.

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In the “bread and butter” cases involving a well-defined product and geographic market, and merging parties with high shares in that market, the government is winning, as it has for decades. Examples of these matters include American / Jet Blue (Northeast Alliance quasi-merger for airline services in the Northeast), Penguin Random House / Simon & Schuster (publication of top selling books) and several hospital mergers.

But how is the government faring when it challenges deals where there is no such direct competitive overlap? Here, its batting average is very low. When parties have come up with strong divestiture packages to eliminate the direct competitive overlap and the government seeks to block a deal that ostensibly would be “fixed” by a proposed remedy, the parties have prevailed and completed their deals.

This has played out in UnitedHealth / Change Health (medical claims processing) as well as Assa Abloy / Spectrum Brands (door locks). When the government has taken an aggressive position

in defining a very narrow market, the courts have rejected the government’s case, as we saw in the DOJ’s failed challenges to the BoozAllen / Everwatch (signals intelligence modeling and simulation for a single customer) and US Sugar / Imperial Sugar transactions (sugar). *U.S. v. Booz Allen Hamilton Inc.* (D. Md.) (2022); *U.S. v. United States Sugar Corp.* (D. Del.) (2022).

In the Meta / Within transaction (virtual reality dedicated fitness applications), the FTC stretched to block a deal based on the potential for the acquiring party to enter a market, and the court rejected the challenge. *FTC v. Meta Platforms Inc.* (N.D. Cal.) (2023).

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And when the government has brought challenges to vertical transactions where the merging parties do not compete against each other but instead are in a buyer / seller relationship, it has failed to convince the judges. The court rejected DOJ’s vertical challenge to UnitedHealth’s acquisition of Change Health. The UnitedHealth case involved both a horizontal challenge with a fix-it-first remedy and also a vertical challenge. *U.S. v. UnitedHealth Group Inc.* (D.D.C.) (2022).

The trial judge rejected the FTC’s vertical challenge of Illumina’s acquisition of Grail involving multi-cancer early detection tests and DNA sequencing technologies used to create those tests (which the FTC reversed and is now on appeal). That said, these mounting losses have not dissuaded the agencies from continuing to bring cases under novel theories.

The following table summarizes the Biden administration’s record challenging these different types of merger cases. The table includes cases in which the FTC or DOJ brought a federal court or FTC administrative court challenge and the court ruled on the requested injunction, or the parties abandoned the matter during the litigation.

The table also includes matters in which parties abandoned transactions prior to suit when it was clear the agency would sue to block the transaction. The table below treats the Illumina / Grail case as an FTC loss because the parties prevailed in the administrative trial. The full Commission reversed on appeal, and that decision is now on appeal in federal court.

Likewise, the Altria / Juul case was a loss for the FTC at trial. The full Commission recently dismissed the case since Altria abandoned its investment in Juul, and it vacated the trial decision so it cannot be cited as precedent. That matter is treated as a loss in the summary below given the trial decision.

As a side note, the constitutionality of the FTC administrative trial process used in the Illumina and Altria cases is under significant attack in the courts because of the FTC commissioners’ role in both voting out the complaint and then reviewing the case on appeal from the initial decision issued by the administrative law judge who conducts the administrative trial. In June, the Supreme Court agreed to review a challenge to the constitutionality of a similar process employed at the Securities and Exchange Commission. *Jarkesy v. SEC* (5th Cir.) (2022).

Assa Abloy arranged for a divestiture of an overlapping business and litigated the case on the basis of that divestiture. DOJ rejected that proposed settlement and sought a full stop injunction, but ultimately settled the case during the trial on terms that largely mirrored the parties’ proposed divestiture, and so this case also is treated as a DOJ loss in the table below. *U.S. v. Assa Abloy* (D.D.C.) (2023).

The UnitedHealth case is unique in that it involved both a horizontal challenge with a fix-it-first remedy and also a vertical challenge, so it is noted in both categories below even though it was a single case.

The table shows that in the straight up horizontal cases, the government has a great winning percentage. Where the parties offered a substantial divestiture and “litigated the fix” or where the government challenged even though the parties were not actually competitors to each other, the government has lost five cases in court and won none. One might say the FTC and DOJ can hit the fastball, but not the curveball.

	FTC / DOJ Won	Merging Parties Won
Mergers of Direct Competitors / No Divestiture “Fix”	14 (11 abandonments and 3 court issued injunctions)	2 litigated cases
Mergers of Competitors / Parties Litigated on Basis of Proposed Divestiture “Fix”	0	2 litigated cases (including UnitedHealth / Change Health)
Other Theories (vertical, potential competition, partial acquisition etc.)	2 (2 abandonments; 0 court decisions)	4 litigated cases (including UnitedHealth / Change Health)

Source: Jon Dubrow

This record stands in stark contrast to the historical patterns. According to statistics gathered for a recent article, “Merger Enforcement Statistics: 2001-2020,” published by Logan Billman and Steven Salop in the Antitrust Law Journal in 2023, the agencies won approximately 65% of their litigated merger challenges between 2001 and 2020 (17 wins and 9 losses). While there is some subjectivity in how to count cases that remain under appeal, looking at the trial court decisions, under the Biden administration the government has won only 30% of its cases (three court wins and seven court losses (counting UnitedHealth as a single case)).

The change in results is clearly driven by the agencies’ case selection, with the courts disagreeing with the agencies’ more creative theories. We are likely to see more of that as multiple ongoing litigations proceed to trial and decision where the government has brought vertical or conglomerate theories or where

the parties are “litigating the fix” based on a planned divestiture to resolve the horizontal issues.

Unlike most other jurisdictions, in the United States system the antitrust agencies do not have the power to prohibit mergers and acquisitions on their own. They have to get a court to block the transaction if they want to stop a closing.

The cops on the beat at the FTC and DOJ may be seeking to block more deals, but parties have a good chance of closing their deals if they can eliminate direct overlaps through business divestitures

or by forcing the antitrust agencies to try to convince courts to go along with their more creative theories of harm. To date, the courts have not been willing to follow the agencies’ lead.

Despite the Beltway rhetoric and newspaper headlines, parties can complete transactions that run afoul of the current aggressive FTC and DOJ policies when those policies are at odds with the courts and legal precedent. To clear these transactions, parties should be prepared to defend them in court where they have a good chance of prevailing.

About the author



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This article was first published on Reuters Legal News and Westlaw Today on July 10, 2023.