



The American Consumer Institute
Center for Citizen Research

Determined to Sue: Novel Legal Theories Are Failing

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Executive Summary

Much ink has been spilled regarding the shift in antitrust enforcement during the Administration of President Biden and under the leadership of Chair Lina Kahn at the Federal Trade Commission (FTC) and Jonathan Kanter at the Department of Justice (DoJ). Using data from merger complaints filed by the agency, this report finds the current administration has shifted merger enforcement by moving away from collaboration and remedy-based solutions and towards an increasingly hostile strategy focused on pushing novel legal theories in court.

Key Take Aways

- Settled mergers have plummeted under the Biden administration, from 84.7 percent of total merger complaints to 59.6 percent.
- The Biden administration holds the record for the highest post-complaint merger abandonment rate at 23.1 percent. This figure is more than triple the pre-Biden average of seven percent.
- During the Biden administration, the rate at which complaints culminate in litigation jumped from 7.7 percent to 17.3 percent.
- This strategy hasn't been successful in court, as the success rate dropped to 44.4 percent from the pre-Biden average of 70.7 percent. This marks the only administration examined where losses outnumbered wins.



Introduction

As both agencies rack up notable losses, commentators and lawmakers are taking notice. [1] During a House Judicial Committee hearing on July 13, 2023, Rep. Kevin Kiley (R-CA) made the statement to FTC Chair Lina Khan, “You’re now 0-4 in merger trials. The average win rate for the FTC in the modern antitrust era is around 75 percent.[2] So, I have to ask, why are you losing so much?” Rep. Kiley is not alone. Perceptions that the FTC and DoJ are not performing adequately have even led to calls by some to reform the antitrust agencies.[3]

To determine whether these concerns are well-founded or political theatre, this study looks at merger filings to see what, if any, changes have occurred in merger enforcement. Using data acquired from Logan Billman and Professor Steve C. Salop’s Merger Enforcement Statistics: 2001-2020,[4] as well as more recent statistics from the FTC legal library[5] and DoJ case library.[6] Outcomes following a complaint between October 1999 and August 2023 were documented.[7] For more information regarding methodology see Appendix A.

Background

Speculation on complaint outcomes during the Biden administration is rooted in observations about changes in antitrust enforcement from the prior administration.

An example of this is the FTC’s announcement in 2022 that they planned to reinterpret Section 5, which prohibits “unfair or deceptive acts or practices in or affecting commerce,”[8] differently than previous administrations.[9] In practice, this means they plan to bring complaints solely under Section 5. Previously, actions would only be brought under Section 5 if the behavior was also illegal under other antitrust laws.

[1] Ankush Khardori, “The Justice Department Controversy You Might Have Missed,” Politico, September 18, 2023, <https://www.politico.com/news/magazine/2023/09/18/merrick-garland-antitrust-playbook-00116285>.

[2] “Oversight of the Federal Trade Commission,” House of Representatives Judiciary Committee, July 13, 2023, <https://judiciary.house.gov/committee-activity/hearings/oversight-federal-trade-commission>.

[3] “Overhauling the Federal Trade Commission,” Josh Hawley U.S. Senator For Missouri, <https://www.hawley.senate.gov/overhauling-federal-trade-commission>.

[4] Logan Billman and Steven C. Salop, “Merger Enforcement Statistics: 2001-2020,” *Antitrust Law Journal*, Vol. 85, pp. 1-66, February 1, 2023., Available at <https://ssrn.com/abstract=4274304>.

[5] “Legal Library,” Federal Trade Commission, <https://www.ftc.gov/legal-library/browse>.

[6] “Antitrust Case Filings,” Antitrust Division U.S. Department of Justice, https://www.justice.gov/atr/antitrust-case-filings?f%5B0%5D=cases_index_list_case_type%3Acivil_merger&page=0.

[7] Outcomes include: 1) Settlements and resolutions, in which an agreement is reached between regulators and the merging firms to allow consummation, usually with remedies such as divestments from certain businesses; 2) Merger abandonment, where the firms decide to forgo consummation or divest post-complaint, thus making agency complaints moot; 3) Government wins and government losses, only occurring if the complaint ends in litigation in the courts, a government win signifies that the courts sided with the agency, while a loss signifies the courts sided with the merging firms; 4) Finally, there are complaint withdrawals which occur when an agency removes its complaint which allows for a merger to continue. Outcomes will only be classified as withdrawals if they occurred without another listed outcome occurring first.

[8] “A brief Overview of the Federal Trade Commission’s Investigative, Law Enforcement, and Rulemaking Authority,” The Federal Trade Commission, May 2021, <https://www.ftc.gov/about-ftc/mission/enforcement-authority>.

[9] Ted Bolema, “What Does the New Federal Trade Commission Policy Statement Mean for Antitrust,” The Center for Growth and Opportunity at Utah State University, September 5, 2023,

Additionally, the FTC would no longer be upholding the consumer welfare standard[10] that had been used by every previous administration since the 1982 Merger Guidelines. [11] To date, this agency decision is not reflected in the courts, which continue to embrace the consumer welfare standard.

In its stead, both the FTC and DoJ have set about creating new tools largely based on market concentration and structural presumptions, culminating in the release of the 2023 Merger Guidelines.[12] To create a precedent that supports the theories of competition outlined in the guidelines, the value of resolving cases by requiring merger preconditions (referred to as remedies) has been questioned. The result has led to outcomes with fewer remedies and increased abandonments.[13]

As post-complaint settlements have dropped, litigations have increased, and more firms are choosing to abandon their merger to avoid costly litigation. Despite this, the agencies have largely failed to implement their legal theories through precedent-setting court wins. These notable losses have resulted in this administration losing more cases than it wins, as shown by the following data analysis.

Hostility to Remedies Has Pushed Firms Toward Merger Abandonment

Merger and Acquisition remedies have long been a key part of antitrust enforcement. A 2017 study by the FTC's Bureau of Competition and Economics found that most merger remedies between 2006 and 2007 resulted in "maintaining or restoring competition in the relevant market." [14] Remedies – labeled resolutions or settlements in the dataset – refer to restrictions placed on merging parties to correct supposed harm to competition and are agreed upon between the merging firms and the antitrust agency.[15]

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<https://www.thecgo.org/research/what-does-the-new-federal-trade-commission-policy-statement-mean-for-antitrust/#:~:text=With%20the%202022%20Policy%20Statement,framework%20and%20consumer%20welfare%20standar>d.

[10] Ted Bolema, "What Does the New Federal Trade Commission Policy Statement Mean for Antitrust?" Institute for the Study of Economic Growth, September 5, 2023, <https://www.thecgo.org/research/what-does-the-new-federal-trade-commission-policy-statement-mean-for-antitrust/#:~:text=The%20Statement%20also%20explicitly%20abandons,a%20case%20by%20case%20basis>.

[11] "1982 Merger Guidelines," Antitrust Division U.S. Department of Justice, <https://www.justice.gov/archives/atr/1982-merger-guidelines>.

[12] U.S. Department of Justice and the Federal Trade Commission, "Merger Guidelines," December 18, 2023, https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf.

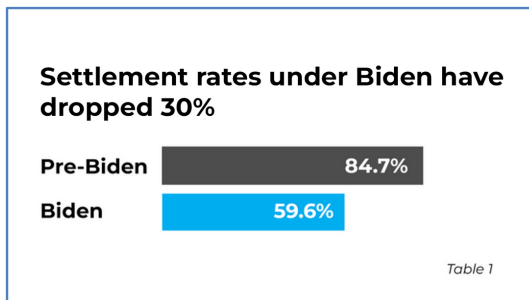
[13] Fred Ashton, "Despite Success, Merger Remedies Face Increased Skepticism at Antitrust Agencies," American Action Forum, February 14, 2023, <https://www.americanactionforum.org/insight/despite-success-merger-remedies-face-increased-skepticism-at-antitrust-agencies/>.

[14] "The FTC's Merger Remedies 2006-2012: A Report of the Bureaus of Competition and Economics," Federal Trade Commission, January 2017, https://www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics/p143100_ftc_merger_remedies_2006-2012.pdf.

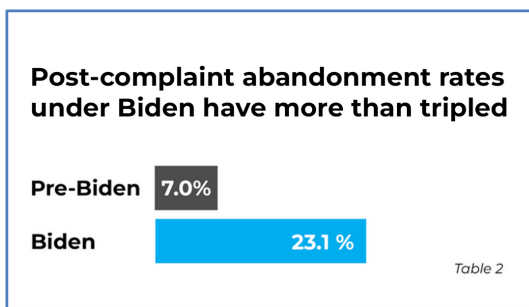
[15] Michal Halperin, "Remedies (Antitrust)," Global Dictionary of Competition Law, <https://www.concurrences.com/en/dictionary/Remedies#:~:text=Author%20Definition-,Definition,means%20to%20eliminate%20competition%20concerns>.



Under the current administration, settled or resolved complaints still comprise most outcomes, though there is a significant drop that is unique to Biden. Previous administrations settled 84.7 percent of merger complaints; under Biden, this dropped to 59.6 percent.



As fewer firms reach a resolution or settlement, more are turning towards abandonment. At 23.1 percent, the Biden administration has the highest post-complaint merger abandonment rate of any other administration. The increase is over three times the pre-Biden average. The only alternative to firms outside of settlement or abandonment is litigation, which can be lengthy and quite costly.



Rather Than Settle, Agencies Are More Litigious

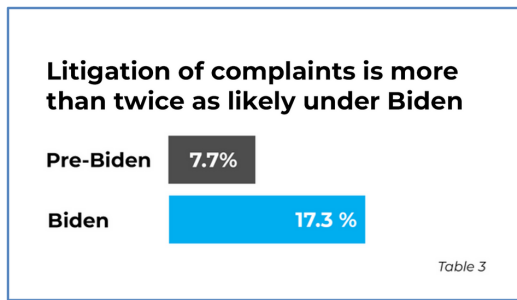
The desire to create new precedents has resulted in more complaints being played out in court. Under the Biden administration, the rate at which complaints end in litigation has more than doubled, from an average pre-Biden rate of 7.7 percent to 17.3 percent. Only litigation can create new legal precedents, solidifying many of the desired changes that are reflected in the decision to forgo the use of the consumer welfare standard, while also invigorating Section 5 enforcement and 2023 Merger Guidelines. This explains the desire of antitrust regulators to present novel antitrust arguments to the courts.[16]

However, the hostility towards remedies and preference for litigation has backfired, as shown by a review of three merger cases in 2022, which the FTC lost.[17] The defendants won, in part, due to the agencies' rejection of the merging firms' suggested remedies that the courts deemed reasonable.[18]

[16] Saul Zimet, "What Makes Lina Khan's Antitrust Vision so Radical-and Why It Will Strangle Tech Startups," FEE, October 3, 2022, <https://fee.org/articles/what-makes-lina-khans-antitrust-vision-so-radical-and-why-it-will-strangle-tech-startups/>.

[17] Brian Rafkin and Gorav Jindal, "Lessons from Three Antitrust Agency Losses in Three Merger Trials," Akin, October 3, 2022, [aaa](#).

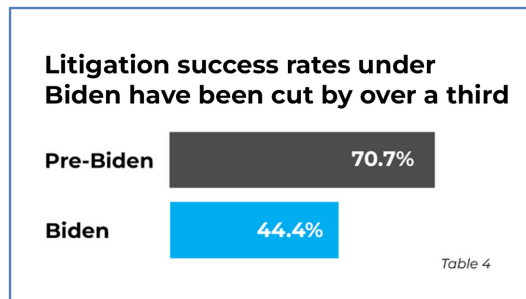
[18] "Memorandum Opinion," United States District Court for the District of Columbia, September 21, 2022, <https://www.justice.gov/d9/2023-08/415418.pdf>.



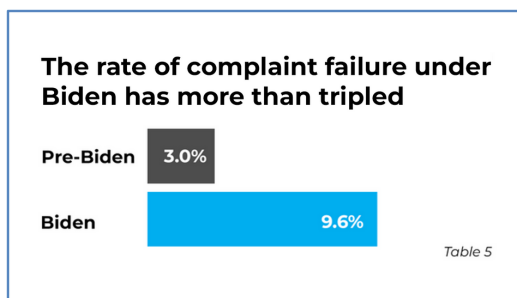
Despite Focusing on Litigation, the Government is Still Losing

Perhaps most troubling for the taxpaying consumer is that this strategy has resulted in misappropriating agency resources towards losing cases. It is important to note that as a percentage of total complaint outcomes, the Biden administration has the highest total number of government litigation successes. However, this is not indicative of a successful strategy, as the rate of complaints resulting in litigation has also been highest under the Biden administration.

When examining the successful litigation outcomes as a percent of the total complaints leading to litigation, the Biden administration has the lowest success rate. Compared with the pre-Biden litigation outcomes success rate, there has been a 37 percent drop, making Biden the only administration in the study with more court losses than successes.



The failure rate measures these litigation losses and includes instances of agencies withdrawing their complaints. Under the Biden administration, this failure rate is over three times the average rate pre-Biden.



Conclusion

High post-complaint merger abandonments, coupled with low settlement/resolution rates, and high litigation, support the notion that the DoJ and FTC are avoiding remedial solutions to merger proposals and proposing novel argumentation. Both Lina Khan's FTC[19] and Jonathan Kanter's DoJ[20] have indicated a change in agency strategy away from seeking settlements with merging firms and towards litigation. This is to promote novel argumentation, which abandons the consumer welfare standard.

Merging parties are less able to find a suitable remedy and many decide to abandon their acquisition instead of pursuing a lengthy court battle. Post-complaint merger abandonment has increased by 173 percent from the previous administrations' averages. Once in court, agencies have been utilizing novel argumentation, officially abandoning the consumer welfare standard in 2022.

Despite the higher rates of litigated complaint outcomes, the antitrust success rate at court has been the lowest in the dataset, losing more cases than winning. The high proportion of lost litigation is indicative of an agency that has moved out of step with the legal status quo, in its effort to create a new precedent that can be utilized in further promoting successful litigation down the line.

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[19] Margaret Harding McGill, "FTC's New Stance: Litigate, Don't Negotiate," Axios, June 8, 2022, <https://www.axios.com/2022/06/09/ftcs-new-stance-litigate-dont-negotiate-lina-khan>.

[20] Jonathan Kanter, "Assistant Attorney General Jonathan Kanter of the Antitrust Division Delivers Remarks to the New York State Bar Association Antitrust Section," Office of Public Affairs U.S. Department of Justice, January 24, 2022, <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-remarks-new-york>.



Appendix A

Methodology

The FTC and DoJ consider the administrative year to begin in October, meaning October 1999 was the first month of the agencies' actions for the year 2000. As such, years are delineated according to the agencies' definition. The dataset of cases is pulled from the FTC legal library and the DoJ case library, respectively. Furthermore, the antitrust complaints under the Clinton administration are not complete in the dataset, something that should be kept in mind when reviewing. The dataset also ends in August 2023 and may include several cases with pending outcomes, changing the final yearly evaluation upon future case conclusions.

The outcome of a complaint will be the responsibility of the administration at the time of issuance, not resolution. Though the case may be decided under a later administration, the initial arguments of the case are more determinant in its outcome than later revisions in action. It is also true that the heads of an agency may have been picked by previous administrations with different ideological goals when complaints were filed. For simplicity's sake, the heads of agencies were not considered in evaluating agency actions; only the Executive administration was weighed at the time of consideration.

Six different outcomes could result from an FTC and DoJ complaint:

Resolved: After filing a second request the accused firms can “resolve” the issue without, before, or simultaneously with a complaint from regulators. Examples of this include abandoning the merger before a complaint or settling with regulators amid a complaint.

Settled: If a settlement is reached after the issuance of a complaint, then the case has been “settled” and it is presumed that initial anticompetitive issues were resolved. Both Resolved and Settled complaint outcomes will be considered together. Both outcomes are similar in resolution and only differ in the order by which the complaint was issued and remedies agreed upon.

Abandoned: A merger transaction discontinued after the issuance of a complaint and not simultaneously with it, will be considered “abandoned.” These outcomes occur under a variety of circumstances, including when regulators fail to provide adequate criteria for a remedy, such as divestments from areas with the potential for anticompetitive post-merger effects.

Withdrawn: Agencies may decide to withdraw their complaint entirely, for example, if they believe they are unlikely to win litigation against the complaint's subject firms. This classification is not designated if another outcome is also reached, such as a withdrawal after a failure in the courts.

Government Win and Government Loss: If no settlement is reached and the merger transaction is not abandoned, then regulators may choose to enter litigation against the accused acquisition. The courts will then examine the arguments made by regulators and rebuttals made by the merging firms. After deliberation, a decision will be made to either order firm divestment and merger abandonment (a “Government Win”) or allow the merger to proceed (a “Government Loss”).

The FTC and DoJ’s success and failure rates, both from the standpoint of the agencies and from that of the consumer, are visualized in multiple graphs. The outcomes of both agencies combined are discussed in the findings.

