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# A new home court for the FTC in pre-merger challenges?

**Whatever the reason, the FTC seems intent - at least for now - on pursuing merger challenges in the federal courts of California. This strategy has several implications for businesses considering a merger or acquisition that may be subject to FTC scrutiny.**

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In prior administrations, when the FTC pursued federal litigation in order to obtain a preliminary injunction against a proposed merger, it nearly always filed in the United States District Court for the District of Columbia. That trend has shifted dramatically in recent years as the FTC now appears to be favoring other venues, most notably the Northern District of California and other federal district courts in California. There are several possible explanations for this trend, although the most obvious one - to gain a litigation advantage - may be misplaced. Regardless, businesses seeking to engage in transactions where an FTC challenge is possible should be prepared to potentially litigate in California.

## The FTC's changing strategy

Since March 2021, the FTC has filed three pre-merger challenges in the Northern District of California (*FTC v. Meta Platforms, Inc*., *FTC v. Intercontinental Exchange, Inc*., and *FTC v. Microsoft*), and one in the Southern District of California (*FTC v. Illumina, Inc*.). Prior to that and since 2002, the FTC had filed *zero* merger challenges in any federal court in California. By contrast, the FTC has filed no fewer than ten merger challenges in the District Court for the District of Columbia since 2002 - though none of those cases were brought by the Biden administration.

This trend raises the question of *why* the FTC appears to be favoring the California federal courts as its preferred forum. There are a few possible explanations.

*First*, as a practical matter, the FTC has focused in recent years on mergers in the technology sector, and most of the major technology companies are based out of the Northern District of California. FTC Chair Lina Khan has made no secret of her intent to deter mergers in the technology sectors through aggressive enforcement action. Shortly before joining the FTC, as a member of the 2020 House Judiciary Committee, she helped draft a 449-page report that proposed limiting the power of Big Tech, stating that "companies that once were scrappy, underdog startups that challenged the status quo have become the kinds of monopolies we last saw in the era of oil barons and railroad tycoons .... Although these firms have delivered clear benefits to society, the dominance of Amazon, Apple, Facebook, and Google has come at a price." The Northern District of California, at first glance, might seem like a natural venue for that effort.

That explanation, however, is incomplete. Not all of the cases filed in California involve a party based there. For instance, neither ICE nor Black Knight is incorporated or headquartered in California (though ICE does have a Mortgage Technology business unit located in Pleasanton, CA). And although Activision Blizzard is headquartered in southern California and Microsoft is headquartered and incorporated in Washington State, the FTC went out of its way to litigate in the Northern District of California. Moreover, when the FTC pursued merger challenges in the District Court for the District of Columbia, the parties were virtually *never* incorporated or based out of the District of Columbia, and cases filed in the merging parties' home venues were few and far between.

Additionally, the government has continued filing cases against large tech companies in the District of Columbia when the claims at issue do not challenge a *proposed merger*. For instance, the FTC sued Meta there in 2020 to undo its already-consummated acquisitions of Instagram and WhatsApp. And as recently as 2023, the DOJ sued Google in the District of Columbia for allegedly using its dominant position in the advertising technology market to harm its competitors.

*Second*, the FTC may perceive some litigation advantage arising out of either Ninth Circuit law regarding pre-merger challenges or, more generally, the law or judges of the Northern District of California. In its challenge to the Meta-Within merger, for example, the FTC's theory of the case hinged on Meta's potential (or perceived potential) competition in the relevant market. The Central District of California's decision in *United States v. Phillips Petroleum* from 1973 - shortly before the Supreme Court's 1974 seminal decision on potential competition in *United States v. Marine Bancorporation* - offered some support for that theory. Notably, in Meta, the judge denied the FTC's request for a preliminary injunction by holding that the FTC had not shown a likelihood of success on the merits, but the way the FTC tells it, "[t]he judge sided with the FTC on basically every question of law and laid out a very clear opinion that said the way we were interpreting the law was correct." Thus, despite its loss and the modest scope of the court's holdings, the FTC appears to be reading the judge's opinion as offering a foothold in the California district courts, which it could attempt to leverage in FTC merger challenges in the future. Likewise, in its challenge to the Microsoft-Activision Blizzard merger, the FTC may have been trying to avoid the developed body of precedent in the D.C. Circuit imposing a high standard for challenges to vertical mergers.

But whether any such litigation advantage exists in California is an open question. The FTC was remarkably successful in the merger challenges it brought in the District Court for the District of

Columbia: Of the ten cases it brought there since 2002, nine of them ended in a preliminary injunction against the merger, a settlement requiring divestments by the acquiring party, or abandonment of the merger altogether. Only one - *FTC v. Rag-Stiftung* - resulted in a loss for the FTC. Meanwhile, the FTC has so far found no success with preliminary injunctions in the Northern District of California, having been denied its most recent request for a preliminary injunction against Microsoft's acquisition of Activision Blizzard.

On the other hand, winning on a pure legal issue - even if the FTC loses on the facts - may also be valuable to the FTC, which has made it clear that it is seeking to move the law and deter mergers by the mere threat of litigation regardless of the merits. If the FTC believes it can build better law in the Northern District of California, it may also believe that companies will think twice before pursuing mergers altogether, even if, as the FTC's record in California suggests, the mergers are likely to prevail.

Following its recent losses in California district courts, the FTC has since filed suit in the Southern District of New York to enjoin the merger between IQVIA and Propel Media, continuing the FTC's trend of avoiding the District of Columbia. But given Chair Khan's public platform to rein in the Big Tech companies in Silicon Valley, it is unlikely that the FTC has moved on from California completely.

## Responding and adapting

Whatever the reason, the FTC seems intent - at least for now - on pursuing merger challenges in the federal courts of California. This strategy has several implications for businesses considering a merger or acquisition that may be subject to FTC scrutiny.

At the highest level, businesses should understand how key antitrust and procedural issues are being developed in California courts and how those rulings may affect the likelihood of a proposed merger or acquisition surviving an FTC injunction action. The *Meta* and *Microsoft* litigations are emblematic of such a development, but as more cases are filed and reach the merits, there are certain to be more decisions that likewise alter the legal landscape.