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Federal Court Blocks Book Publishing Merger

The U.S. District Court for the District of Columbia has enjoined the proposed $2.2 billion merger of Penguin Random House ("PRH") and Simon & Schuster ("S&S"), nearly two years after it was first announced.

In November 2021, the Antitrust Division of the Department of Justice challenged the proposed merger between PRH and S&S, alleging that the tie-up of two of the "Big Five" book publishers would harm authors of "anticipated top-selling books" and result in lower upfront book advances and a decline in quality editorial, production, and marketing services. The suit was notable as it focused on potential monopsony harm to authors, rather than price increases to consumers. The government further alleged that the merger would increase the likelihood of tacit coordination among publishers, pointing to a 2015 Second Circuit opinion which upheld a finding of e-book collusion among Apple and major book publishers, including Penguin and S&S.

The parties took issue with the government's market definition, which they argued "erase[d] 98% of the market, shriveling it down to . . . a price segment, not a cognizable 'market.'" With respect to the government's coordinated effects claim, the parties argued that the *Apple* e-books case was of little relevance as it related to downstream e-book prices, not competition to contract with authors.

In granting the Antitrust Division's motion to enjoin the proposed merger, Judge Florence Pan confirmed the government's market definition, pointing to the higher shares held by the "Big Five" for books demanding advances over $250,000, as compared to shares for all books. The court relied on evidence of head-to-head competition in the parties' bidding data to conclude that the merger would likely result in lower advances to top-selling authors. The court also agreed with the government with respect to coordinated effects, noting that "[t]he *Apple* case provides the backdrop" for its conclusion that "the Big Five publishers have engaged in tacit coordination" for certain contract terms offered to authors and that the proposed acquisition would strengthen a market structure "where coordinated conduct already appears to be rampant." PRH has publicly announced its desire to appeal the District Court decision, but anything other than an expedited appeal would require S&S's consent under the terms of the purchase agreement.

The government's victory comes on the heels of three losses in other recent merger challenges: UnitedHealth/Change, U.S. Sugar/Imperial Sugar, and Booz Allen/EverWatch. We have previously written about the UnitedHealth/Change decision. In U.S. Sugar/Imperial Sugar, the parties prevailed in arguing that the government's geographic market definition was too narrow and did not reflect the commercial realities of the sugar industry. In Booz Allen/EverWatch, the court rejected the government's contention that competition for a single government contract constitutes an appropriate antitrust market.

These decisions highlight the federal antitrust agencies' increased willingness to challenge proposed mergers and acquisitions, including lawsuits pursuing less traditional

theories of harm. The PRH/S&S decision, in particular, serves as a reminder to transacting parties that the current Administration is eager to explore merger effects on stakeholders other than consumers, including on labor, which both the Antitrust Division and the FTC have identified as a priority.

Strategic deals may face intense scrutiny in the current regulatory and political environment. Parties should engage counsel early in the deal process to best position a transaction for success in this era of heightened antitrust review.

Ilene Knable Gotts
Nelson O. Fitts
Damian G. Didden
Christina C. Ma