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BLOG

Federal Court Closes the Book on Publishers' Attempted Merger

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Last year, we previewed the Department of Justice's antitrust lawsuit seeking to block Penguin Random House's purchase of its competitor, Simon & Schuster, as a prominent example of the DOJ's recent increased focus on monopsony theories of competitive harm. After a year of litigation, the case reached resolution in November, when U.S. District Court for the District of Columbia (now D.C. Circuit) Judge Florence Pan issued a decision enjoining the merger, determining it would lessen competition in the market to acquire publishing rights and therefore violated Section 7 of the Clayton Act. The decision has significant implications for American antitrust law and could bring about increased government enforcement and prosecutions of monopsonies across a variety of industries in the future.

Had the nation's largest publisher, Penguin Random House, been permitted to acquire Simon & Schuster, the third-biggest publisher in the country, the court found that it would have increased its retail market share to nearly three times that of its closest rival. *See United States v. Bertelsmannn SE & Co. KGaA*, No. 21-2886-FYP, 2022 WL 16949715, at *1 (D.D.C. Nov. 15, 2022). The DOJ argued that this consolidation would harm competition in the upstream market for publishing rights. As Judge Pan explained, "[t]he government's case sounds in 'monopsony,' a market condition where a buyer with too much market power can lower prices or otherwise harm sellers. Essentially, the government alleges that the merger will increase market concentration in the publishing industry, which will allow publishing companies to pay certain authors less money for the rights to publish their books." *Id.* The Justice Department's focus on author compensation represented a notable shift in the government's traditional approach to prosecuting antitrust cases, which has long been guided by an emphasis on consumer harm rather than on assessing the impact of allegedly anticompetitive conduct on suppliers or workers.

Following a 12-day trial, Judge Pan sided with the DOJ. Applying the same legal standard to the monopsony analysis as she would have to an alleged monopoly, *see id.* at n.13, the Judge concluded that the acquisition was likely to substantially lessen competition in the relevant market. "Contrary to the defendants' contentions," Judge Pan concluded, "the relevant market appropriately identifies a submarket of targeted sellers — the authors of anticipated top-selling books. Those authors have unique needs and preferences, have fewer outlets that can satisfy their requirements, and therefore are vulnerable to anticompetitive behavior." *Id.* at *37.

Random House disagreed with this analysis, saying that the government's "focus on advances to the world's best-paid authors instead of consumers or the intense competitiveness in the publishing sector runs contrary to its

mission to ensure fair competition." Of course, it was that very focus on the impact of the monopsonistic conduct on labor that makes this such a potentially significant precedent. As discussed previously on *Competition Corner*, the decision could have wide-ranging effects on industries ranging from Hollywood to health care, from big tech to college sports, as monopsonies are a major focus of the Biden Administration's antitrust enforcement. It is thus unsurprising that Assistant Attorney General Jonathan Kanter called Judge Pan's decision a "victory for authors, the marketplace of ideas, consumers, and competitive markets" that reaffirmed that "the antitrust laws protect competition for the acquisition of goods and services for workers."

Three weeks after the ruling, Penguin Random House decided not to appeal (which would have required Simon & Schuster's parent company to extend the purchase agreement) and instead terminated the deal. But although the acquisition is dead, its enjoinment should impact American antitrust jurisprudence for years to come.

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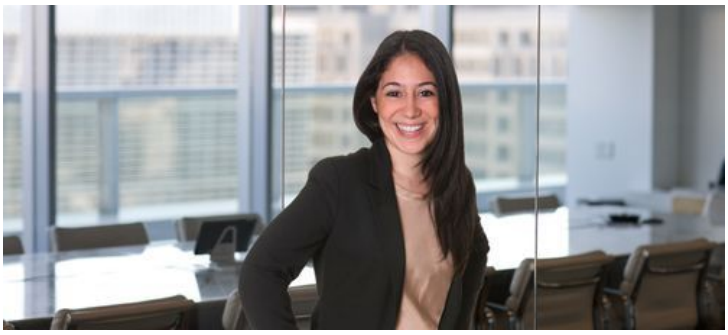

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