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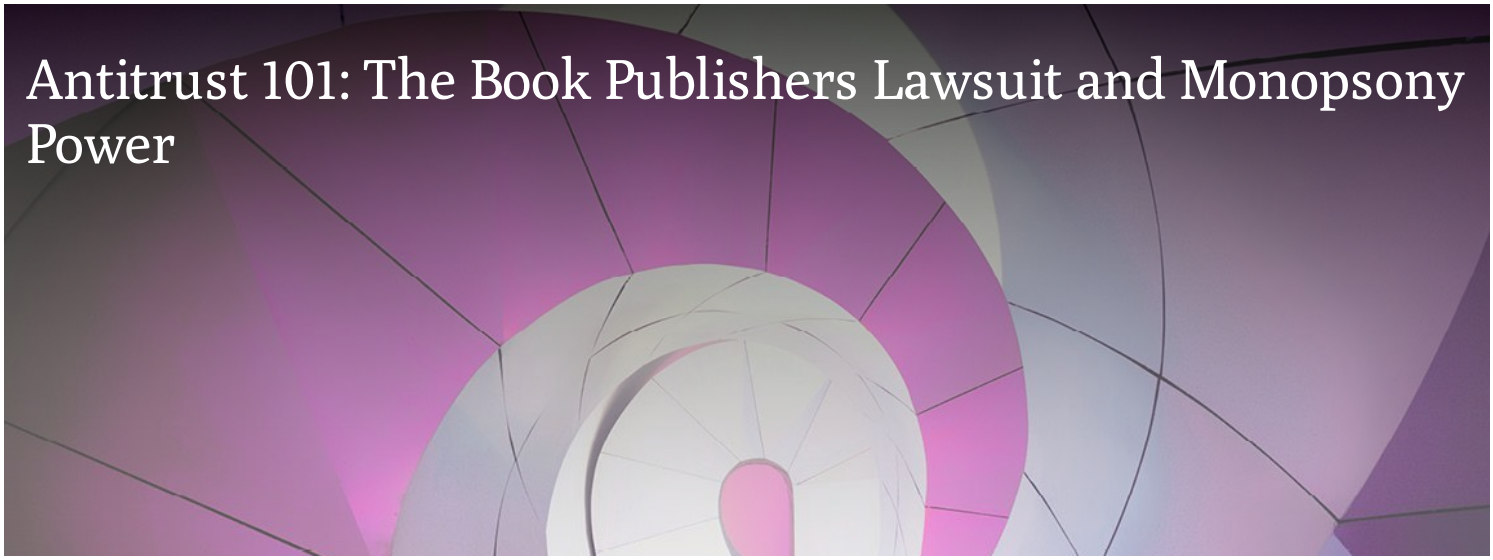

# Antitrust 101: The Book Publishers Lawsuit and Monopsony Power

DECEMBER 6, 2021

On November 2, the U.S. Department of Justice (DOJ) filed a civil antitrust lawsuit in the U.S. District Court for the District of Columbia, seeking to halt the world's largest book publisher, Penguin Random House, from acquiring its competitor, Simon & Schuster. The case represents the most recent and high-profile example of the DOJ's focus on monopsony theories of competitive harm.

The Antitrust Division's complaint alleges that as two of the "Big Five" U.S. publishers, Penguin Random House and Simon & Schuster currently "compete vigorously to acquire publishing rights from authors and provide publishing services to those authors. This competition has resulted in authors earning more for their publishing rights in the form of advances (i.e., upfront payments made to authors for the rights to publish their works), and receiving better editorial, marketing, and other services that are critical to the success of their books." Complaint ¶ 2. The DOJ argues that "[i]f consummated, this merger would likely result in substantial harm to authors of anticipated top-selling books and ultimately, consumers" by making Penguin Random House double the size of its next-closest competitor, "leaving authors with fewer alternatives and less leverage." *Id.* at 7.

Both the complaint and the DOJ press release announcing the lawsuit explicitly argue that the merger will harm authors via buyer consolidation, creating a monopsony. "The Antitrust Division's Horizontal Merger Guidelines lay out a straightforward framework to analyze monopsony cases, and under those guidelines this transaction is presumptively anticompetitive," the release says.

This blog post provides an overview of monopsonies, with a focus on how they have been historically treated under the antitrust laws.

## Overview of Monopsonies

A monopsony, according to Black's Law Dictionary, is at its core "a market with only one buyer," or at least one dominant buyer. Unlike a monopoly, where a single seller controls a marketplace, a monopsonized market is typically dominated by a single purchaser. The monopsonist is therefore able to buy fewer goods than would otherwise be the case in a competitive marketplace—in turn reducing prices for the seller's product to sub-competitive levels and leaving sellers with little-to-no market power—or to reduce the quality of the goods it purchases and thereby

decrease innovation in an otherwise-competitive marketplace. The lessened output can ultimately increase the price consumers pay for the product. *See* Roger D. Blair and Kelsey A. Clemons, Is Monopsony the New Monopoly? Yes!, 34-Fall Antitrust 84, 88 (2019).

For this reason, "[t]he economic effects of monopsony on the input purchasing market are the mirror image of the economic effects of monopoly on the output market: fewer goods are transacted, wealth is transferred from the party without market power to the party with market power, and there is a loss of social welfare." Laura Alexander, Monopsony and the Consumer Harm Standard, 95 Geo. L.J. 1611, 1614 (2007) (Alexander now serves as Vice President of Policy at the American Antitrust Institute). "As such, a monopsony is to the buy side of the market what a monopoly is to the sell side and is sometimes colloquially called a 'buyer's monopoly.'" *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc.*, 549 U.S. 312, 320 (2007).

Mergers between competing buyers can have monopsonistic effects in both the input and output markets. As C. Scott Hemphill and Nancy L. Rose explained in their article "Mergers That Harm Sellers":

> Some mergers of competing buyers harm sellers by increasing the merged firm's incentive to cut back on its purchases of an important input in order to drive down input prices--a classical exercise of *monopsony power*. A buyer that faces small, interchangeable sellers--for example, a hospital in a small city hiring skilled nurses--has monopsony power that is analogous to a seller's monopoly power. A merger of competing buyers can exacerbate the merged firm's incentive to buy less in order to drive down input prices. Increased monopsony power can have adverse economic effects not only in input markets, but output markets as well.

127 Yale L.J. 2078, 2079 (2018).

The FTC-DOJ Horizontal Merger Guidelines recognize the potential for monopsonistic conduct, noting that monopsony power "has adverse effects comparable to enhancement of market power by sellers." Guidelines at 2. Therefore, "[t]o evaluate whether a merger is likely to enhance market power on the buying side of the market, the Agencies employ essentially the framework…for evaluating whether a merger is likely to enhance market power on the selling side of the market." *Id*. at 32. The Guidelines state that the Agencies will not "evaluate the competitive effects of mergers between competing buyers strictly, or even primarily, on the basis of effects in the downstream markets in which the merger firms sell." *Id.* at 33. As an example, they consider a merger between two buyers in a relevant market for agricultural product. The Guidelines state that such a merger would "enhance buyer power and depress the price paid to farmers for this product, causing a transfer of wealth from farmers to the merged firm and inefficiently reducing supply"—an effect that can arise even if the merger would not lead to a price increase in the output market. *Id.*

# Monopsonies and the Courts

The Supreme Court has held that monopsonistic conduct should be treated similarly to monopolistic conduct under the law. In *Weyerhaeuser*, the most notable monopsony case, Justice Thomas, writing for a unanimous Court, determined that "[t]he kinship between monopoly and monopsony suggests that similar legal standards should apply to claims of monopolization and to claims of monopsonization." 549 U.S. at 322 (citing Roger Noll, "Buyer Power" and Economic Policy, 72 Antitrust L.J. 589, 591 (2005) ("[A]symmetric treatment of monopoly and monopsony has no basis in economic analysis.")). Given the "economic similarity between monopoly and monopsony," the Court held that the same test it had applied to predatory-pricing claims in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp*., 509 U.S. 209 (1993) also applied to the predatory-bidding claims at issue in *Weyerhaeuser*. As the Tenth Circuit has noted, "[t]he Supreme Court's treatment of monopsony cases strongly suggests that suppliers…are protected by antitrust laws even when the anticompetitive activity does not harm end-users." *Telecor Commc'ns, Inc. v. Sw. Bell Tel. Co.,* 305 F.3d 1124, 1133-34 (10th Cir. 2002).

The Court has also shown an openness to condemn buyer cartels or horizontal mergers that could result in monopsonistic outcomes. In *Mandeville Island Farms v. American Crystal Sugar Company*, the Court reversed and remanded a decision dismissing a complaint against an alleged buyer cartel in the sugar beet market, noting that "[i]t is clear that the agreement is the sort of combination condemned by the Act, even though the price-fixing was by

purchasers, and the persons specially injured under the treble damage claim are sellers, not customers and consumers." 334 U.S. 219, 235 (1948). On the merger side, in *FTC v. Consolidated Foods Corp*., the Court upheld the FTC's conclusion that a wholesale and resale grocery network's acquisition of a food products corporation would result in a lessening of competition. 380 U.S. 592 (1965).

Notwithstanding these cases, there are limited examples of lower courts considering the monopsonistic impact of mergers between horizontal competitors. For a long time, "the larger jurisdictions…challenged few mergers or conduct cases that target monopsony or buyer power." Maurice E. Stucke, Looking at Monopsony in the Mirror, 62 Emory L.J. 1509, 1512 (2013). However, that has recently begun to change. Over the last couple of decades, the DOJ has "challenged mergers that threatened to increase monopsony power, frequently among competing buyers of agricultural products including beef buyers, pig buyers, organic milk buyers, chicken processors, grain traders, and rice millers." Hemphill and Rose, 127 Y.L.J. at 2085-86 (citations omitted). "Other markets in which there have been allegations of unlawful monopsony include raw milk, hospital nurses, leaf tobacco, and mixed martial arts." Blair and Clemons, 34-Fall Antitr. at 84 (citations omitted).

Recent anti-monopsonistic enforcement has also focused on the health care industry. In 2016, DOJ challenged the proposed Anthem-Cigna merger because it allegedly would create monopsony power in the market for buying health care services, limit price competition, and reduce the quality of services provided. *See U.S. v. Anthem*, 855 F.3d 345 (D.C. Cir. 2017) (the court did not end up ruling on the monopsony claims, and the merger did not proceed). Two years later, the FTC required health care company Grifols S.A. to divest its blood plasma collection centers in three cities as part of a merger settlement. The FTC determined that because there were only two buyers of plasma in those cities, "absent the divestiture, Grifols likely would be able to exercise market power by unilaterally decreasing donor fees at one or both of the plasma donor centers" while leading to diminished services for both donors and plasma recipients. Shortly after the announcement, the then-FTC Commissioner tweeted that the FTC had acted "to ensure a merger in this industry will not lead to monopsony power that lowers payments for plasma donors."

# Looking Forward

Continuing the recent trend, it is clear that monopsonistic power will be a focus of the Biden Administration. President Biden's July 9 Executive Order on Promoting Competition in the American Economy stated that it was the policy of his Administration "to enforce the antitrust laws to combat the excessive concentration of industry, the abuses of market power, and the harmful effects of monopoly and monopsony — especially as these issues arise in labor markets, agricultural markets, Internet platform industries, healthcare markets (including insurance, hospital, and prescription drug markets), repair markets, and United States markets directly affected by foreign cartel activity." Likewise, Jonathan Kanter—Biden's pick as Assistant Attorney General for the Antitrust Division, who was confirmed on November 16—stated in his responses to questioning from the Senate Judiciary Committee that "[a] merger that creates or enhances monopsony power in a labor market violates Section 7" of the Clayton Act. That aligned with public comments made in October by Acting Assistant Attorney General Richard Powers that the DOJ Antitrust Division was "committed to using its civil authority to direct, investigate, and challenge anticompetitive non-compete agreements, mergers that create or enhance monopsony power in labor markets, the unilateral exercise of monopsony power, and information sharing by employers." The DOJ's lawsuit seeking to quash the publishers' merger marked a strong step towards attempting to walk the walk on anti-monopsony enforcement.

This focus could have wide-ranging implications for antitrust law, especially as it applies to labor markets. As *The Hollywood Reporter* noted, the focus on labor rather than consumers is "a move labor guilds have been advocating for decades, and one that signals Hollywood mergers will have a tough time getting past these regulators." The DOJ and FTC are hosting a joint public workshop "to discuss efforts to promote competitive labor markets and worker mobility," including panels on labor monopsony. And the Supreme Court has also recently signaled a willingness to consider the impact of monopsonistic conduct on labor markets. *See Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S.Ct. 2141, 2168 (2021) (Kavanaugh, J., concurring) ("a monopsony cannot launder its price-fixing of labor by calling it product definition.") (Disclaimer: Winston & Strawn represented Plaintiffs in the *Alston* litigation).

With this increased attention to monopsony power from the executive and judicial branches, the book publishers lawsuit could be the first in a long series, with more enforcement potentially right around the page.

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[1] In a statement, counsel for Penguin Random House argued that the lawsuit was "wrong on the facts, the law, and public policy." Focusing on lack of harm in the output market, the publisher's defense counsel claimed that "DOJ has not alleged that the acquisition would harm competition in the sale of books."

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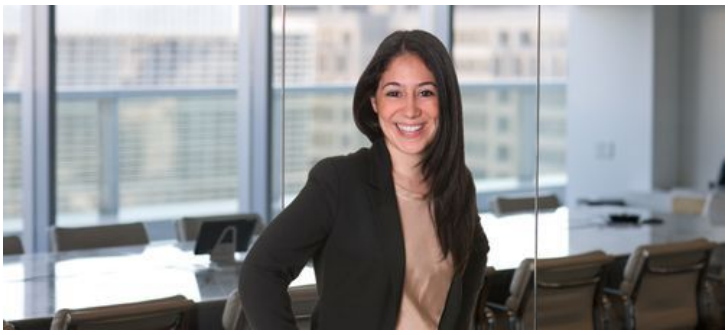

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