

U.S. Department of Justice Sues to Stop Merger Based on Potential Harm to Workers

When the U.S. Department of Justice (DOJ) intervenes to prevent a merger between competitors, it is typically because the potential deal could harm consumer welfare — and is generally measured by whether prices will rise. But on November 2, the DOJ filed a lawsuit in federal district court in Washington D.C., claiming that a potential merger between two of the nation’s largest publishers violates U.S. antitrust law because the merger would harm the authors who sell rights to publish their books, rather than the consumers who purchase those books. The lawsuit is another example of the Biden administration’s use of antitrust law to remedy what it sees as anticompetitive practices that harm American workers.

Penguin Random House (Penguin), the largest publisher in the nation, wants to buy Simon & Schuster (Simon), one of its main rivals, for \$2.18 billion. According to the DOJ’s complaint, their successful merger would result in the combined company controlling roughly half of the market for publishing rights to top-selling books. After the merger, Penguin and its next largest competitor together would control more than two-thirds of the market. The DOJ claims the merger would harm the market for publishing rights by eliminating the head-to-head competition between Penguin and Simon.

The DOJ does not, however, claim that eliminating that competition will directly harm consumers of books by increasing prices. Rather, the DOJ claims the merger would harm authors, who sell the right to publish their books, by eliminating competition between companies that bid on those rights. In economic terms, the DOJ believes that after the merger Penguin would be a “monopsony” over the authors’ labor which, according to the complaint, would “enable[] the merged firm to pay less and extract more from authors who often work for years at their craft before producing a book.” In support, the DOJ cited alleged internal emails from Penguin executives noting that authors could be harmed by the acquisition. The case is important to watch because it will test the DOJ’s ability to prevent such deals based on how those deals impact the labor market.

The DOJ’s lawsuit is consistent with the Biden administration’s other recent worker-centric uses of U.S. antitrust law. For instance, since December 2020, the DOJ has filed three indictments against companies for entering into alleged “no

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poach” or “wage fixing” agreements with competitors, which it asserts are “per se” illegal and subject to criminal penalties under U.S. antitrust law. Additionally, in July 2021, President Biden issued an executive order encouraging the Federal Trade Commission, which also has enforcement authority of U.S. antitrust law, to curtail the use of non-compete agreements that limit worker mobility.

Penguin and Simon have indicated they intend to fight the DOJ’s complaint. The companies issued a collective statement on November 2, stating that “[t]his is a pro-consumer, pro-author, and pro-book seller transaction, which will allow increased investment in the publishing programs of both” companies.

Reinhart will continue to monitor this case and the Biden administration’s other efforts to address employee-related issues through U.S. antitrust law and will continue to provide important and time-sensitive updates. Please contact [Michael Gentry](#) or your Reinhart attorney with any questions.

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