



The Daily Dish

Stretching the Boundaries in Antitrust

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In November 2021, the Department of Justice (DOJ) sued to block the merger between Penguin Random House and Simon & Schuster. If allowed to proceed, the merger would create a publishing behemoth, [twice the size](#) of its next closest competitor. As highlighted by AAF's Fred Ashton in his recent [analysis](#), the novel part of the suit is that it does *not* focus on the ability of the merged firm to raise prices or otherwise harm buyers. Instead, it contends that “the merger will result in monopsony power – where there is only one buyer – and negatively impact payments to authors.”

Author Stephen King is a high-profile witness in the case so, if successful, this strategy will probably be known as going “full Cujo,” but as Ashton notes, “like any King novel, this lawsuit promises to have an extensive cast of characters, plot twists, and an unpredictable ending.”

With the Stephen King jokes out of the way, let's turn to the substance. There are two key issues. The first is what market, exactly, the two firms are assumed to be dominating. The DOJ argued that the key market is “anticipated top-selling books,” which are those with an advance of \$250,000 or more. The defendants counter that this is far too narrow and would capture only 1,200 books or about 2 percent of all books published by commercial publishers.

The second issue is the impact of post-merger behavior. The DOJ insists that advances would diminish because both self-publishing and “work-for-hire” arrangements are not viable substitutes for those authors who receive advances. Without viable alternatives, these authors would receive less compensation for their works.

The trial will sort out these issues, but there is a lot more at stake than the merger. As Ashton argues: “The DOJ's Penguin Random House and Simon & Schuster lawsuit could have broad implications for how the Biden Administration approaches antitrust cases. If its lawsuit is successful, the DOJ could leverage the monopsony argument to broaden the number of potential targets subject to antitrust litigation. Additionally, the forthcoming rewrite of the *Horizontal Merger Guidelines*, jointly published by the DOJ and Federal Trade Commission, could include a more concrete framework for analyzing and measuring labor and wage effects in cases involving a merger of competing buyers.”