

MERGER ANTITRUST LAW

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Georgetown University Law Center
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Tuesdays and Thursdays, 3:30-5:30 pm
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READING GUIDANCE

Class 26 (December 1): Penguin Random House/Simon & Schuster (Unit 18)

For our last day of class, we will examine the DOJ's challenge to the then-proposed \$2.175 billion acquisition by Bertelsmann's Penguin Random House of Simon & Schuster from ViacomCBS. This is the first successful DOJ challenge on the merits since 2017. The case is interesting because it alleges anticompetitive harm in two input markets: (1) the acquisition of U.S. publishing rights to books from authors, and (2) more narrowly, the acquisition of U.S. publishing rights to anticipated "top-selling" books. Stephen King was the DOJ's lead industry witness at trial. Although Bertelsmann announced its intention to appeal, when the transaction reached the "drop-dead" date several days later ViacomCBS exercised its unilateral right to terminate the deal. The merger agreement provided a reverse antitrust termination fee of \$200 million, or about 9.2% of the transaction value (about twice the median percentage antitrust breakup fee). ViacomCBS is now in the process of finding another buyer.

Skim the introductory materials from Bertelsmann (pp. 3-11). Do a quick read of the DOJ's press release to set the stage (p.12), but you can skip the complaint (pp.13-39). Then, as always, read the opinion with care (pp. 58-137). You can skip the two Bertelsmann press releases at the end (pp. 140-43).

The materials end with two important loose ends that our case studies did not address: the power buyers defense and the failing company defense. I have included excerpts from two recent opinions and some notes to cover these defenses (pp. 145-62). Merging parties assert these defenses occasionally, but neither has been successful in modern antitrust history. Still, your merger antitrust education would not be complete without them.

Email me if you have any questions.

P.S. Do not forget that we have an optional review session on Friday, December 2, from 1:00 pm to 3:00 pm in McD 110. It will be recorded and available on Panopto if you cannot make it.

P.P.S. It is time for course evaluations. We can cover this unit reasonably quickly, so I will allocate the first 15 minutes of class to evaluations. Evaluations are important to me for improving the course and for future students considering taking the class. Please give some thought to what you would like to say.