

The Quick Look



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A LATE SUMMER BUMPER-CROP OF MERGER LITIGATION

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UNITEDHEALTH-CHANGE MERGER TRIAL STARTS

The trial started last Monday, August 1, 2022, in the Department of Justice's challenge to the merger of UnitedHealth Group and Change Healthcare, the largest litigated merger challenge of the Biden administration. UnitedHealth Group encompasses UnitedHealthcare, a health insurance provider, and Optum, a pharmacy benefit manager, healthcare provider, and healthcare information and technology provider. Change Healthcare is a healthcare revenue and payments-technology provider. The parties claim that the merger will dramatically cut the cost of validating insurance claims. The DOJ's suit highlights the horizontal overlap between Optum and Change's claims-editing system, with an alleged at least 75% market share for the combined companies. It claims that the deal also poses vertical concerns, giving United "access to a vast amount of its rival health insurers' competitively sensitive information," which it could use to disadvantage rival insurers.

Common to mergers with a vertical component, the DOJ's concerns highlight a tension between the merging parties' claim of significant potential efficiency gains and the claim that the merged entity has no incentive to use its upstream market power to disadvantage its downstream rivals. The merging parties highlighted that Optum would not want to risk

losing its downstream customers, but Judge Nichols took an interest in the temptation posed by Change's access to data from UnitedHealthcare's rival insurers. The 12-day bench trial continues.

BOOZ ALLEN AND EVERWATCH FIRE BACK AT DOJ'S MOVE FOR A PRELIMINARY INJUNCTION

On August 1, 2022, Booz Allen Hamilton and EverWatch filed a response to the Department of Justice's July 8, 2022 motion for a preliminary injunction against their proposed merger.¹ Booz Allen has approximately 30,000 employees and over \$8 billion in annual revenue. EverWatch is a recent startup company specializing in cloud computing, migration, and software development.

The preliminary injunction had claimed that Booz Allen planned to buy EverWatch in order to eliminate competition for the National Security Agency's forthcoming procurement, a national security project referred to as Optimal Decision.² The project would provide the NSA with modeling and simulation services related to signals-intelligence networks. According to the DOJ, the proposed agreement reduces the parties' incentives to prepare competitive proposals to the NSA for Optimal Decision. In particular, the DOJ argues that the imminent RFP for an NSA project that is vital to the country's security presents a unique situation.³ The post-merger entity, according to the DOJ, would not have an incentive to offer its most-talented personnel, its highest-quality service, or offer its best terms for Optimal Decision. According to the DOJ, the relevant product market consists of the sale of signals intelligence modeling and simulation services to NSA through the Optimal Decision contract.

In response, the Defendants state that the proposed relevant market is limited to the NSA, a single transaction, and a single point in time (the final bidding stage), further arguing that courts have rejected single-transaction markets as impermissibly narrow.⁴ The Defendants also argue that the proposed agreement will allow the new entity to compete against incumbents for more than a dozen government contracts that are potentially worth billions of dollars. According to the Defendants, those revenue opportunities exceed by far the revenue opportunity associated with Optimal Decision. Furthermore, the Defendants claim that the proposed agreement will be beneficial for national security and will result in enhanced competition and quickened innovation. In addition, the Defendants state that anticipated future interactions with the NSA or another agency incentivize the parties to make a competitive offer for the forthcoming Optimal Decision procurement.

¹ Wilson, Daniel, "Booz Allen, EverWatch Say Injunction Would End Merger Case," *Law360*, August 1, 2022.

² Plaintiff's Emergency Motion for a Preliminary Injunction, *United States of America v. Booz Allen Hamilton Holding Corporation, et al.*, Case No. 1:22-cv-01603-CCB, July 8, 2022.

³ Complaint, *United States of America v. Booz Allen Hamilton Holding Corporation, et al.*, Case No. 1:22-cv-01603-CCB, June 29, 2022.

⁴ Defendant's Response to Plaintiff's Motion for a Preliminary Injunction, *United States of America v. Booz Allen Hamilton Holding Corporation, et al.*, Case No. 1:22-cv-01603-CCB, August 1, 2022.

The Defendants also characterize the two companies' skills and assets as complementary.

DOJ FOCUS ON AUTHOR PAY IN PENGUIN/SIMON & SCHUSTER MERGER TRIAL'S FIRST WEEK

The Penguin Random House and Simon & Schuster merger trial began on August 1, 2022. The trial is expected to last for three weeks and a decision is expected in November.⁵ The merger challenge was launched in November 2021.

Last Monday, attorneys for the DOJ argued that the merger would lead to a decline in author compensation and “cement” the dominance of Penguin Random House.⁶ In particular, The DOJ claimed that the combined company will cause a reduction in pay received by writers for their work because it will have too much leverage over anticipated bestselling authors, or those who earn an advance of \$250,000 or more.⁷ Counsel for Penguin Random House argued that Penguin Random House has been losing shares of the consumer market to the other so-called Big 5 U.S. publishers for years (Simon & Schuster, HarperCollins Publishers, Hachette Book Group, and Macmillan Publishing Group). On Tuesday, August 2, author Stephen King testified that consolidation is bad for competition, comparing the search for a publisher to an artisan selling goods through consignment shops.⁸ He stated that most of the hundreds of imprints that existed when he began in the business have been absorbed by larger publishing houses or no longer exist.

Simon & Schuster President and CEO Jonathan Karp testified that Simon & Schuster also faces competition from smaller publishers outside of the so-called Big 5 as well as Amazon.⁹ On Thursday, August 4, Penguin Random House CEO Markus Dohle also pushed back against the DOJ's focus on the Big 5, stating that Scholastic Corp. (an education-focused publisher), for example, is bigger than some of the Big 5.¹⁰ He also argued that a publishing house that was recently launched by a pair of former longtime Penguin Random House publishers, Spiegel & Grau, is already beginning to compete for major book titles. Moreover, according to Dohle, authors care more about the reputations of individual editors rather than the publishing house, stating that authors often move with editors when the editors switch publishers. In Dohle's opinion, “all access” subscription services, which he characterized as subscription services for books similar to Netflix or Spotify, represent the biggest threat to the publishing industry because they would reduce the pool of revenue from book sales.

⁵ Perlman, Matthew, “DOJ Set to Pitch Book Publisher Merger Challenge to Judge,” *Law360*, July 29, 2022.

⁶ Perlman, Matthew, “DOJ Tells Judge Book Merger Would Reduce Author Pay,” *Law360*, August 1, 2022.

⁷ Perlman, Matthew, “Penguin CEO Says Simon & Schuster Deal is for Market Share,” *Law360*, August 4, 2022.

⁸ Perlman, Matthew, “Stephen King Testifies the More Publishers, the Better,” *Law360*, August 2, 2022.

⁹ Perlman, Matthew, “Judge Queries Simon & Schuster CEO On Bidding For Books,” *Law360*, August 3, 2022.

¹⁰ Perlman, Matthew, “Penguin CEO Says Simon & Schuster Deal is for Market Share,” *Law360*, August 4, 2022.

FTC CHAIR KHAN OVERRULES STAFF IN CHALLENGE TO META/WITHIN TIE-UP

In the wake of the Federal Trade Commission's 3-2 party-line vote to challenge Meta's acquisition of popular virtual reality fitness app-maker Within, there is some suggestion that FTC Chair Khan had pushed through the challenge over the recommendation of staff.¹¹ Agency leadership decisions to overrule the recommendations of staff closest to the facts of an investigation are rare, suggesting the decision in this case is being driven by known skepticism by Chair Khan towards Big Tech. Former FTC Chairman Bill Kovacic characterized the case to the Financial Times as an "experimental" pursuit of a "relatively novel theory of harm." Meta was even more blunt, suggesting the "[t]he FTC's case is based on ideology and speculation, not evidence."

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¹¹ Nylen, Leah, "FTC's Khan Overruled Staff to Sue Meta Over VR App Deal," *Bloomberg*, July 29, 2022.