

# Antitrust Primer and Developments

September 13, 2022



Presented by Jon Heyl  
and Sarah Traynor

# Antitrust Refresher

- What is Antitrust law?
- What is it designed to prevent?
- How judge competitive harm?
  - Raise prices
  - Reduce output
  - Diminish quality
  - Limit choice
  - Preserve market power
- What remedies are available?



# The Sherman Act

## Section 1 (15 U.S.C. § 1)

Prohibits contracts, combinations, and conspiracies in restraint of trade or commerce.

- 1+ actors
- Violations: Per Se
  - Horizontal price fixing
  - Bid rigging
  - Market or customer allocation
  - Group boycott
- Violations: Rule of Reason
  - Multiple nuances / levels of scrutiny
  - Economic analysis / relevant markets



## Section 2 (15 U.S.C. § 2)

Prohibits monopolization, attempts to monopolize, and conspiracies to monopolize any part of trade or commerce.

- 1 actor (usually)
- Violations:
  - Monopolization
  - Attempts to monopolize
- Note (Clayton Act § 3)
  - Exclusive dealing (possibly)
  - Tying (per se)



# The Clayton Act

## Section 7 (15 U.S.C. § 18)

Prohibits any merger or acquisition of stock or assets where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

- Hart Scott Rodino
  - Pre-merger notification and waiting period
- Private right of action

# State Antitrust Laws

## Unfair and Deceptive Trade Practices

### (N.C. Gen. Stat. § 75-1.1)

Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are unlawful.

- Immoral, oppressive, unscrupulous
- Court-imposed limitations over time
- Attorney fees, 3x damages



# *House v. NCAA et al.*

- “NIL” case
- Plaintiffs: Grant House, Sedona Prince (putative class)
- Defendants: NCAA + “Power 5”
- Claims: Section 1
  - Unreasonable restraint of trade
  - Group boycott
- Remedies sought



# House v. NCAA et al.

- History of “sports” Antitrust cases

- *Board of Regents* (1984)

- Sports “latitude”
- Rule of Reason

- *O’Bannon* (2015)

- NIL
- Remedy

- *Alston* (2021)

- Educational benefits
- Amateurism
- Not NIL
- Supreme Court





# House v. NCAA et al.

- Factual landscape of NIL
  - Legislation
  - Rapid change
- Status of *House*
  - Class discovery
  - Class certification motion due October 21



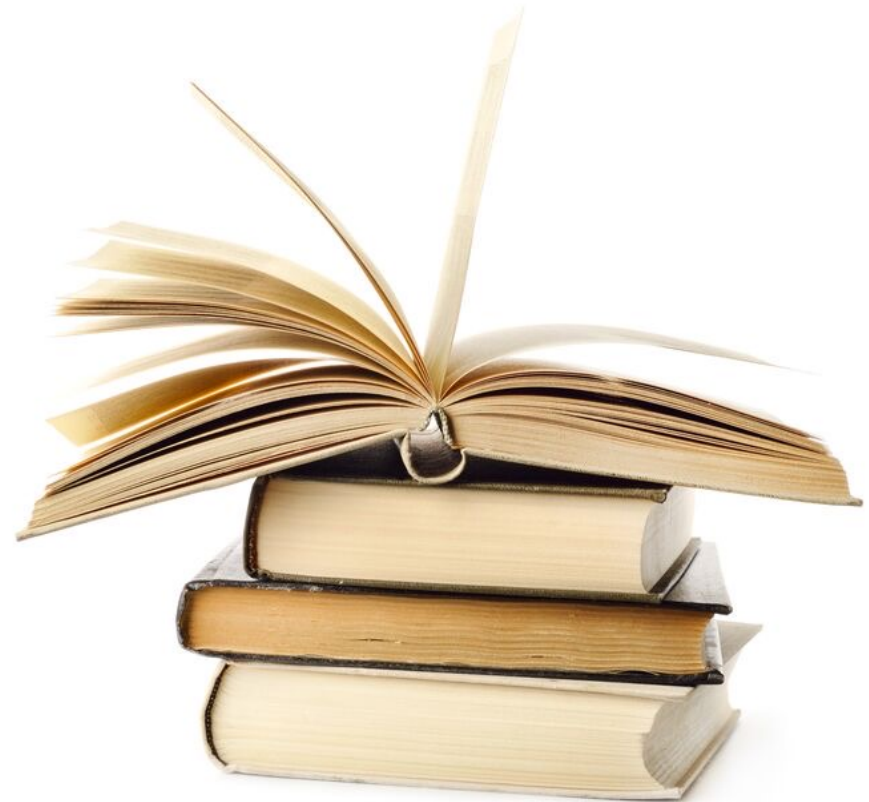
# Penguin Random House / Simon & Schuster Merger Litigation



- Penguin Random House announced merger Simon & Schuster
- Section 7 case: substantially lessen competition
- Challenged by DOJ (D.D.C.)
  - Third challenged merger under Biden / Garland DOJ

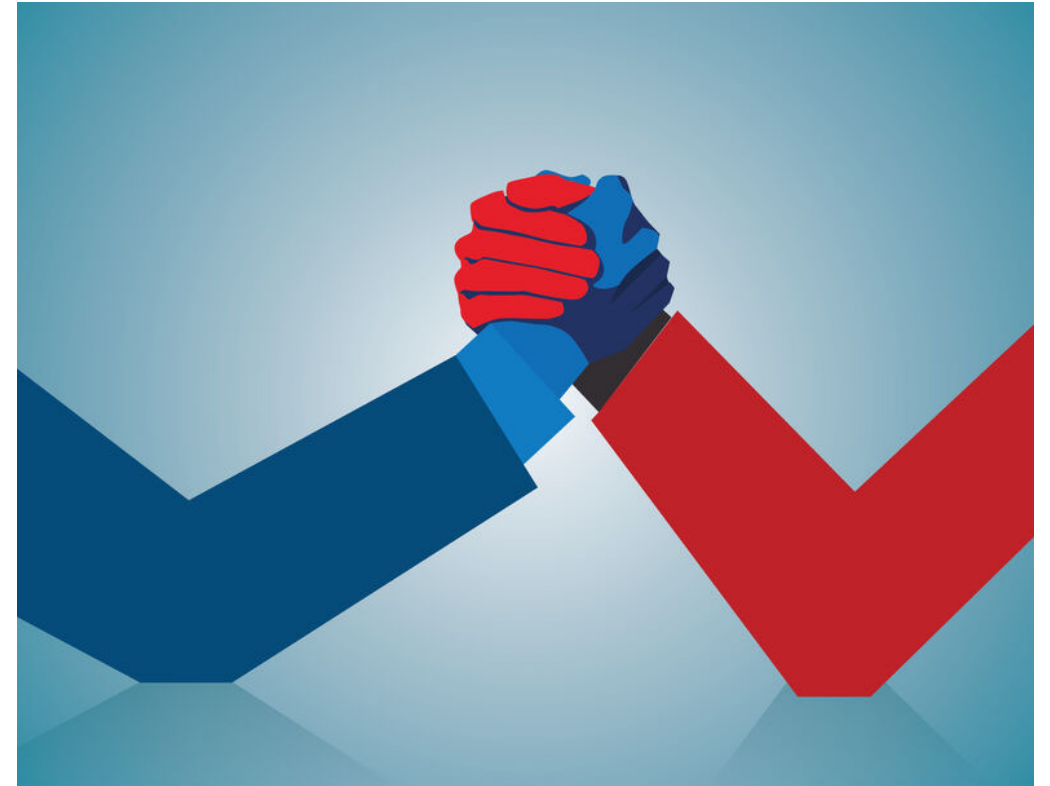
# PRH merger Simon Schuster

- Big Five publishing houses
  - Penguin Random House (1<sup>st</sup>)
  - Simon & Schuster (4<sup>th</sup>)
  - Macmillan
  - HarperCollins
  - Hachette Book Group
- Merger considerations generally
  - Concentration / HHI
- PRH/SS combination almost half of market (market power)



# PRH merger Simon & Schuster

- Government claims
  - Eliminate head-to-head competition
    - = Reduces author pay for “top selling” books
    - = Reduces output
  - Facilitate coordination among remaining competitors
    - Fewer competitors = easier to coordinate / collude



# PRH merger Simon & Schuster

- Defendants' positions:
  - No substantial lessening of competition
    - Not allege consumer harm
    - “Upstream” market instead (purchase book contracts > \$\$\$)
      - For “top selling” books
      - And very small market as defined
      - (Note: Monopsony vs. Monopoly; DOJ trend protecting sellers)
  - Upshot:
    - Not a cognizable market (price-defined)
    - Cannot prove advances will be reduced (authors choose editors)
    - Cannot prove likely coordination among remaining competitors
  - Also: Will still compete

# PRH merger Simon & Schuster

- Case status
  - Trial held August 1-19, 2022 (D.D.C.)
  - Stephen King
  - Pending
    - Commentators' predictions
    - Some skepticism on still competing
  - Larger “counterweight” argument?





# Meat-Packing Industry Litigation

- Multiple federal actions in multi-district litigation
- Most or all putative or certified classes
- Beef, Pork, Chicken, Turkey
- Common types of allegations (Section 1):
  - Price fixing / market manipulation
  - Conspiracy to suppress supply / increase prices
  - \*Mechanism: Sharing of competitive information
    - Often through third-party industry data compiler
- Note: Criminal exposure



# LIV Golf Litigation

- LIV Golf
  - New Saudi-backed tour
  - Different financial model than PGA
    - Multi-year contracts
    - Longer off-season
    - Larger purses
- PGA player departures
- PGA suspensions



# LIV Golf v. PGA

- Procedural and factual history
  - Complaint filed August 3 (eleven golfers)
  - TRO sought (to play in Fedex Cup)
    - Denied August 9
    - Foreknowledge
    - No irreparable harm
  - Players meeting / PGA announcement of substantial changes
  - Amended Complaint filed August 26 (seven golfers)
    - Added LIV as plaintiff (questions of standing of players raised)



# LIV Golf v. PGA



- Plaintiffs' allegations:
  - PGA as monopsonist
    - Only buyer in the market
  - Market = services of professional golfers for elite events
  - No other tour can compete
  - Other tours (e.g., European) have agreed not to compete



# LIV Golf v. PGA

- Plaintiffs' Claims: Section 2 (single actor)
  - Preventing competition
  - Threats/impositions of bans
  - Suspensions
  - Decreasing output of opportunities
  - Interference with contract
- Note: Must prove monopoly power
  - Prove that PGA suppressing wages in market



# LIV Golf v. PGA

- Plaintiffs' Claims: Section 1 (Conspiracy / 2 +)
  - Second actor: European Tour
  - Agreement not to compete with each other for player services
    - Horizontal market division
    - Alleged to have evolved into . . .
  - Group boycott of LIV
    - Implementation of group boycott through PGA Regulations
      - Conflicting Events Regulation (discretionary exemptions denied)
      - Media Rights Regulation
- Note: Only need to show (combined) market power



# LIV Golf v. PGA

- PGA defenses?
  - [None filed yet]
- Commentators' predictions:
  - Relevant market broader?
  - Defections prove competition?
  - Not a monopsony? (the four majors)
  - Sports industry deference? (*Alston?* *House?*)
- Status
  - DOJ investigation (prior FTC 1990s)
  - Summary judgment July 2023
  - Trial January 2024



# Key Takeaways

- Remember blocking and tackling
- Caution with data sharing
- Trends?
  - Decreasing deference (sports)?
  - Increasing merger challenges
  - Protection of sellers (including labor)





Jonathan Heyl

704.384.2625

[jhey1@foxrothschild.com](mailto:jhey1@foxrothschild.com)



Sarah Traynor

704.384.2604

[straynor@foxrothschild.com](mailto:straynor@foxrothschild.com)



Fox Rothschild LLP  
ATTORNEYS AT LAW