

[McGraw Hill, Pearson Dodge Antitrust Suit Over Online Coursework](#)

By Mike Leonard 2021-06-15 12:29

- Suit alleged scheme to monopolize ‘inclusive access’ programs
- ‘A motive to innovate is different than a motive to conspire’

Leading textbook publishers and campus bookstores, including McGraw Hill LLC and Barnes & Noble Education Inc., dodged antitrust claims in a federal court in Manhattan over their alleged scheme to corner the market for online course materials.

Judge Denise L. Cote threw out the multidistrict case late Monday, rejecting allegations that the retailers and publishers must have colluded on their “inclusive access” programs. Their parallel switch to a digital learning model is better explained as a common response to similar forces, she said.

The lawsuit “describes a commercial environment that would motivate any textbook publisher to independently consider the advantages of adopting a digital textbook regime,” Cote wrote. “It does not describe an environment that encouraged or required them to conspire.”

“A motive to innovate is different than a motive to conspire,” she added.

In addition to McGraw Hill and B&N Education, the consolidated case targeted Cengage Learning Inc., Follett Higher Education Group Inc., and Person Education Inc. McGraw Hill, Pearson, and Cengage are publishers, while B&N and Follett are leading campus booksellers.

The suit, [centralized last year](#) in the U.S. District Court for the Southern District of New York, accuses them of reacting to price pressure from Amazon by coming up with inclusive access, which involves effectively renting digital course materials to students semester by semester.

The increasingly indispensable program is only available through B&N and Follett, according to parallel proposed class actions on behalf of [students](#) and [competing retailers](#).

Cote tossed those claims in a pair of companion rulings, saying none of the allegations provided strong circumstantial evidence of an agreement among the publishers or bookstores.

She dismissed the idea that they must have conspired on a “hard switch” to inclusive access because their earlier independent efforts to adopt digital textbook initiatives had failed.

That argument ignores the impact of a relatively new Department of Education policy allowing colleges and universities to include textbook costs in their tuition, which made inclusive access more economically feasible, the judge found.

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Nor did “a high level of interfirm communication” among the publishers raise an inference of collusion, Cote said. An opportunity to conspire isn’t, by itself, evidence of a conspiracy, she noted.

Moreover, “even if it is assumed that the defendants’ conduct is anti-competitive,” both the students and the competing bookstores lacked standing to bring some of their claims, the judge found.

The students’ claims against the publishers are doomed by the rule prohibiting federal antitrust damages for downstream “indirect” purchasers, while the retail plaintiffs showed at most harm to themselves, not to the wider competitive landscape, Cote said.

McGraw Hill is represented by Patterson Belknap Webb & Tyler LLP. Pearson is represented by Steptoe & Johnson LLP. Cengage is represented by Freshfields Bruckhaus Deringer US LLP. B&N is represented by Gibson, Dunn & Crutcher LLP. Follett is represented by Willkie Farr & Gallagher LLP.

Radice Law Firm PC and Hagens Berman Sobol Shapiro LLP are lead counsel for the plaintiffs.

The case is [In re Inclusive Access Course Materials Antitrust Litig.](#) , S.D.N.Y., No. 20-md-2946, 6/14/21 .

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