

## Against the Grain

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Volume 24 | Issue 1

Article 27

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February 2012

# Legally Speaking -- eBooks Price-Fixing Lawsuits Skimming Along

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### Recommended Citation

Hannay, Bill and Carson, Bryan M. J.D., M.I.L.S. (2012) "Legally Speaking -- eBooks Price-Fixing Lawsuits Skimming Along," *Against the Grain*: Vol. 24: Iss. 1, Article 27.

DOI: <https://doi.org/10.7771/2380-176X.6097>

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# LEGAL ISSUES



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## Legally Speaking — eBooks Price-Fixing Lawsuits Skimming Along

by **Bill Hannay** (Schiff Hardin LLP, Chicago, IL) <whannay@schiffhardin.com>

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Class action lawsuits on behalf of eBook purchasers are skimming along in federal district court in New York City. The suits — the first of which was filed in August 2011 — claim that several major publishers conspired with **Apple** and **Barnes & Noble** to fix the price of eBooks. At the same time, government investigations of the same claims are being conducted by the **U.S. Department of Justice** and the **European Union's** competition authority.

More than a dozen class action lawsuits have been filed in California and New York by a number of different plaintiffs and their law firms. Plaintiffs in all the actions allege one or more conspiracies to fix prices in the market for electronic books. As set forth in the complaints, plaintiffs are purchasers of electronic books who allege that the defendants engaged in anti-competitive conspiracies in violation of federal antitrust laws and various states' laws, causing consumers to pay inflated prices for electronic books (or eBooks) for use on **Kindles**, **Nooks**, **iPads**, and other portable readers.

The defendants include **HarperCollins Publishers**, a subsidiary of **News Corporation**; **Hachette Book Group**; **Macmillan Publishers**, a sub of **Holtzbrinck Publishers, LLC**; **Penguin Group Inc.**, a subsidiary of **Pearson PLC**; and **Simon & Schuster Inc.**,

and **Random House, Inc.**, as well as **Barnes & Noble, Inc.**, and **Apple, Inc.**

In December 2011, the various lawsuits were ordered consolidated before U.S. **Judge Denise Cote** in Manhattan. A former career prosecutor, **Judge Cote** was appointed by **President Clinton** in 1994 and has developed a reputation for efficiently handling complex civil and criminal litigation, including the federal securities and ERISA class-action litigation brought by former employees and investors in **WorldCom**.

In the eBook suits, consumers claim that the publishers feared **Amazon's** low-ball \$9.99 pricing model to such a degree that they conspired with **Apple** and each other to force a new pricing model on the book industry which allowed publishers to set prices directly, effectively ending **Amazon's** ability to provide consumer-friendly pricing for eBooks. The new model is known as the "agency model," as opposed to the traditional wholesaler-retailer model.

After the publishers unanimously and simultaneously adopted the new pricing model, the price of eBooks shot up 30 percent, according to the complaint. (Most best-sellers now sell for \$12.95 to \$15.95.)

In December 2011, the **European Commission** announced that it had opened a price-fixing probe of **Apple** and five major publishers, including France's **Hachette Livre**, German-owned **Macmillan**, U.K. publisher **Penguin**,

and U.S.-based **Harper Collins** and **Simon & Schuster**. Two days later, the head of the **U.S. Department of Justice's** Antitrust Division confirmed in Congressional testimony that it was investigating the electronic book industry, along with the **European Commission** and the attorneys general of two states (Texas and Connecticut).

Plaintiffs' counsel in the federal litigation assert that the competitive threat posed by **Amazon** led the publishers to take joint (and illegal) actions in an attempt to avoid the sea change in the delivery of books and maintain profit margins.

One of the recent complaints quotes a statement made by the CEO of **Hachett Book Group** to *The New Yorker* magazine, "If it's allowed to take hold in the consumer's mind that a book is worth ten bucks, to my mind it's game over for this business." The complaint also quotes **Macmillan's** CEO as claiming that the market was previously "fundamentally unbalanced" but that thanks to the agency model, it would now be "stable and rational."

The lawsuits seek damages for the purchasers of eBooks, an injunction against pricing eBooks with the agency model, and forfeiture of the illegal profits received by the defendants as a result of their anticompetitive conduct, which could total tens of millions of dollars.

Given the high stakes (and the various pending government investigations), this case could last as long as the Google Books case. 🐻



## Cases of Note — Copyright — Nashville Squabbles — Declaratory Judgment

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*Severe Records, LLC; Chris Sevier v. John Rich; Shanna Crooks; Muzik Mafia, LLC; John D. Richfella Publishing, UNIT-*

*ED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, 658 F.3d 571; 2011 U.S. App. LEXIS 19430.*

It's Tennessee by golly — you know, Nashville? — so you get **Mark Sevier** who is

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