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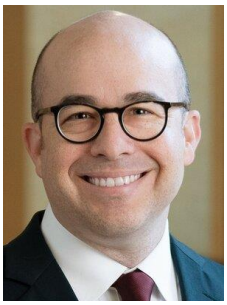
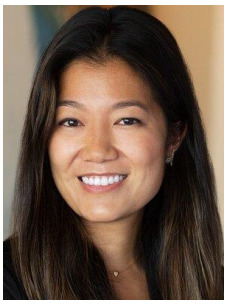
Addressing Antitrust Scrutiny Over AI-Powered Pricing Tools


Josh Goodman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By **Josh Goodman, Minna Lo Naranjo and Amir Ali** (April 17, 2025, 6:56 PM EDT)

While algorithmic pricing has been used in many industries for decades, the rapid development of artificial intelligence technology has led antitrust enforcers — including federal agencies and state attorneys general, legislators, and private plaintiffs — to begin actively scrutinizing potential anticompetitive practices related to the use of algorithmic pricing tools, particularly such tools that may involve systems considered to be AI.

These developments have continued apace throughout 2024 and into 2025.

There have been multiple civil antitrust complaints filed in federal and state courts in recent years alleging that certain providers of algorithmic pricing tools and their users have violated antitrust laws, including the following:

Case and Court	Type of Algorithmic Service	Case Status
In re RealPage Rental Software Antitrust Litigation (M.D. Tenn.)	Real property rental price recommendations	This class action litigation is currently in the discovery phase.
United States v. RealPage (M.D.N.C)	Real property rental price recommendations	Motions to dismiss are pending in this civil case brought by the US Department of Justice Antitrust Division (DOJ) and 9 co-plaintiff states.
RealPage State Attorney General Actions (Arizona, Maryland, DC, Washington)	Real property rental price recommendations	The Arizona, Maryland, District of Columbia, and Washington attorneys general have brought their own independent actions against RealPage in their courts and under state/district laws. The Arizona and DC actions are headed into the discovery

		phase while Maryland's action is at an early stage having been filed in January 2025. Washington withdrew from the DOJ's action and brought its own action which is at an early stage having been filed in April 2025.
In re Yardi Revenue Management Antitrust Litigation (W.D. Wa.)	Real property rental price recommendations	After the court denied a motion to dismiss, plaintiffs filed an amended complaint consolidating multiple actions and adding new defendants in March 2025, and this consolidated class action is now in the pleadings phase. Defendants' responsive pleadings are due between April 21, 2025 and April 28, 2025.
Cornish-Adebiyi v. Caesar's Entertainment, Inc. (D.N.J.)	Hotel rate recommendations	This class action litigation was dismissed for failure to state a claim. Plaintiffs are appealing.
Gibson v. MGM Resorts International (D. Nev.)	Hotel rate recommendations	This class action litigation was dismissed for failure to state a claim. Plaintiffs are appealing.
In re Multiplan Health Insurance Provider Litigation (N.D. Ill.)	Healthcare reimbursement rate recommendations	Motions to dismiss are pending.
Dennis C. Ayer, DDS v. Zelis Healthcare, LLC (D. Kan.)	Healthcare reimbursement rate recommendations	This class action litigation is at an early stage having been filed in March 2025.
Pacific Inpatient Medical Group, Inc. v. Zelis Healthcare, LLC (D. Mass.)	Healthcare reimbursement rate recommendations	This class action litigation is at an early stage having been filed in March 2025.

Take, for example, the In re: RealPage Inc. class action, the In re: Yardi Revenue Management Antitrust Litigation and the dismissed Cornish-Adebiyi v. Caesar's Entertainment Inc. case, all noted above.

There, under the Biden administration, either the U.S. Department of Justice, the Federal Trade Commission or both also filed statements of interest — in the U.S. District Court for the Middle District of Tennessee, the U.S. District the Court for the Western District of Washington, and the U.S. District Court for the District of New Jersey, respectively — supporting the plaintiffs and outlining the agencies' opinions on the legal frameworks they believe the courts should apply.

These statements advocated that competitors' use of the same algorithmic pricing tool can constitute a form of price-fixing in violation of Section 1 of the Sherman Act and that, with respect to the allegations

in those cases, the alleged conduct should be deemed per se unlawful rather than subject to the antitrust rule of reason.

More recently under the Trump administration, the DOJ filed a statement of interest on March 26 in the Multiplan Health Insurance Provider Litigation pending in the U.S. District Court for the Northern District of Illinois, confirming its stance on two points of law related to the use of pricing algorithms.

First, the DOJ continues to assert that competitors' use of pricing algorithms to create starting-point prices or maximum prices can constitute a violation of Section 1 of the Sherman Act even if the prices ultimately charged by those competitors do not reflect an algorithm's initial price recommendations.

According to the DOJ, the Sherman Act covers "concerted action by competitors on any formula underlying price policies," including algorithmic pricing tools.

As a result, the DOJ continues to argue that "[c]ourts assessing the presence of concerted action should look not just to parallel final prices — reflecting one form of conspiracy — but parallel behavior in determining prices — reflecting coordination in the approaches to determining prices."

Consequently, even when there are "differences in the application of a pricing algorithm," competitors may still violate Section 1 through their initial joint use of a pricing algorithm.

Second, the DOJ argued that the exchange of competitively sensitive information through an intermediary "can create the same anticompetitive effects as a direct exchange between competitors" and therefore may violate Section 1.

With respect to the joint use of a pricing algorithm, the DOJ continues to argue that the algorithm provider, acting as intermediary, can use the confidential pricing information submitted by competitors "to program its algorithm to maximize industrywide pricing even if the firms themselves don't directly share their pricing strategies."

Notably, unlike previous statements of interest filed under the Biden administration, the DOJ's statement of interest in Multiplan does not explicitly argue that use of a pricing algorithm should be treated as per se illegal, possibly signaling that the DOJ is taking a step back on that argument.

As **we wrote** in a previous Law360 guest article, courts ruling on motions to dismiss in these cases have so far reached different outcomes on questions such as whether to apply the per se rule or rule of reason analysis, or whether an anticompetitive agreement has been adequately alleged.

Local and Federal Legislative Activity

In addition to litigation under existing state and federal laws, several jurisdictions have adopted or are contemplating legislation to directly address algorithmic pricing concerns. San Francisco and Philadelphia both passed local laws in 2024 banning certain rental revenue management software involving the use of nonpublic information.

Various other states or localities have considered or are considering similar proposals. In March, Minneapolis passed a city ordinance prohibiting landlords from using algorithms based on nonpublic competitor data to set rent and vacancy rates.

On March 25, the City of Berkeley, California, passed a more sweeping ordinance prohibiting the sale, licensure or provision of pricing algorithms to landlords within the city and the use of those algorithms by Berkeley landlords.

Importantly, Berkeley's ordinance is not limited algorithms that use nonpublic competitor data but encompasses "any analytical or computation processes that use data to recommend or predict the price of consumer goods or services."

On April 2, RealPage **sued** the City of Berkeley in the U.S. District Court for the Northern District of California to invalidate Berkeley's ordinance as a violation of the First Amendment.

At the federal level, Sen. Amy Klobuchar, D.-Minn, and several other senate Democrats introduced the Preventing Algorithmic Collusion Act, in February 2024, to bar companies from using algorithms to collude to set higher prices. While this legislation did not advance in the U.S. Congress in 2024, Klobuchar and other senators have reintroduced it in 2025.

Compliance Considerations and Monitoring Developments

Scrutiny from federal antitrust enforcers, state attorneys general and private plaintiffs counsel seeking opportunities to litigate these AI issues has clearly increased.

Therefore, it would be prudent for companies using or considering adopting algorithmic pricing tools to monitor the ongoing developments in this space and weigh the benefits of designing and implementing an antitrust compliance program that is attentive to potential antitrust concerns involving AI, algorithms and information exchange activity in the digital era.

While each company will have to tailor guidance for its own particular circumstances, the following are some high-level considerations from a U.S. federal antitrust law perspective that companies may want to consider.

Avoid traditional unlawful agreements.

Express agreements between horizontal competitors to fix prices or output, rig bids or allocate markets are traditionally treated as per se unlawful. The use of an algorithm to monitor or enforce such an agreement does not change that.

Make pricing decisions unilaterally.

Companies should act independently and unilaterally in making their own ultimate pricing decisions. Consider adopting appropriate policies and procedures to align any use of algorithmic tools with this principle.

Understand your algorithms and vendors.

Court decisions and legislative initiatives have focused particular attention on pricing recommendation algorithms that use confidential, nonpublic information from multiple businesses. Work with your vendors or engineers to understand the data and techniques used in algorithms or in the training of AI models.

Companies should exercise caution in working with a vendor to develop or implement pricing tools if the same vendor also works with other companies that could be deemed competitors. Similarly, exercise caution if working directly with other companies in the industry to develop AI applications that may not be pricing tools but could still be deemed to facilitate other types of information exchange.

Document pro-competitive benefits.

Court rulings in algorithmic pricing antitrust cases have to date reached differing conclusions as to the appropriate standard for analyzing claims about price recommendation algorithms under antitrust law. Because courts applying the antitrust rule of reason will consider pro-competitive benefits, make sure that the applicable pro-competitive benefits of the algorithm, such as lowering prices for consumers or expanding the level of output sold, are well documented.

Train business personnel.

Train business personnel appropriately on the risks of using pricing algorithms and exchanging competitively sensitive information with intermediaries that may then use or distribute that data.

Evaluate design criteria.

Consider how different types and sources of data and information affect the overall design and antitrust risk associated with an algorithmic tool. While publicly sourced data is generally lower risk, confidential information shared among competitors can have a larger range of risk based on the type of information and how it is shared.

Monitor ongoing deployment and analyze information sharing agreements.

It may be beneficial to periodically assess how your algorithmic tools are performing. Consider the risks associated with agreements that involve disclosing competitively sensitive information in light of the most recent legal and technological developments.

Keep humans in the loop.

Consider whether processes that include independent human oversight or assessment regarding algorithmic pricing or output recommendations are appropriate.

Consider disclosures.

Another factor that may be relevant as a compliance consideration is understanding which other companies you communicate to about your algorithmic tools or that otherwise know what tools your company is using.

Conclusion

As regulatory, legislative and litigation developments continue to evolve in 2025, companies leveraging algorithmic pricing, particularly those involving AI, should stay alert to emerging legal risks and shifting enforcement priorities.

Ongoing scrutiny at the federal, state and local levels signals that algorithmic pricing will remain a key

area of antitrust focus. Implementing proactive compliance strategies now can help mitigate legal exposure and position businesses to adapt more effectively to future regulatory change.

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