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Algorithm Price-Fixing Ruling May Lower Antitrust Claims Bar

By **Joshua Goodman, Minna Lo Naranjo and Geoffrey Holtz** (January 23, 2025, 4:19 PM EST)

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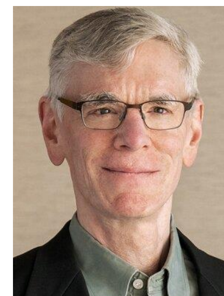
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On Dec. 4, the U.S. District Court for the Western District of Washington in Duffy v. Yardi Systems Inc. denied the defendants' motion to dismiss, paving the way for the case to move forward to discovery, and held that the plaintiffs' allegations were sufficient to allege a per se unlawful antitrust conspiracy.

The ruling is in tension with other recent district court decisions involving algorithmic revenue management tools and creates an apparent split in the lower courts over how to assess such claims under Section 1 of the Sherman Act.

As compared to other decisions, Yardi would expose users of algorithmic pricing tools to increased antitrust liability risks.

Complaint and Decision

The plaintiff tenants in the case allege that lessors of multifamily residential units agreed to share nonpublic pricing, inventory and market data with Yardi Systems Inc. "to establish supracompetitive rental rates in the multifamily housing market in violation of Section 1 of the Sherman Act."

According to the plaintiffs, the lessors provided sensitive, nonpublic information to Yardi, which, in turn, entered that information into RENTmaximizer, Yardi's revenue management software.

RENTmaximizer's algorithm then provided rental pricing recommendations to each of the lessors, which the plaintiffs alleged the lessors had used to establish the so-called supracompetitive rates.

The defendants moved to dismiss the complaint arguing that plaintiffs failed to state a Section 1 claim because defendants were not alleged "to implement or adhere to RENTmaximizer's suggestions and thereby abdicate their independent decision-making over rental rates."

The district court denied the defendants' motion to dismiss, finding that the plaintiffs plausibly alleged a horizontal agreement based on Yardi's invitation for lessors to use RENTmaximizer and "trade their commercially sensitive information for the ability to charge increased rental rates without fear of being

undercut by competitors."

According to the court, the mere acceptance of this invitation was sufficient to support the inference of an antitrust agreement.

The Yardi court further held that the alleged violation should be evaluated under antitrust's per se rule, with no assessment of potential procompetitive effects, because the alleged conspiracy was horizontal in form.

The court added that "[f]or over a century, courts have found that horizontal agreements among competitors with regards to pricing structures have predictable and pernicious anticompetitive effects and are therefore a classic example of a per se antitrust violation."

Divergence From Recent Rulings

The Yardi decision diverges from three other recent district court cases in which algorithmic pricing tools were alleged to have functioned as the hub in a hub-and-spoke type antitrust conspiracy.

In two cases involving hotels' use of software to recommend room prices — the U.S. District Court for the District of Nevada's May 8 decision in Gibson v. Cendyn Group LLC and the U.S. District Court for the District of New Jersey's Sept. 30 decision in Cornish-Adebiyi v. Caesars Entertainment Inc. — district courts dismissed the plaintiffs' complaints for a failure to adequately allege a horizontal agreement among the hotels — i.e., among the software user spokes.

These courts concluded that plaintiffs failed to allege that the hotels started to use the software around the same time, that they agreed to be bound by price recommendations, or that they agreed to charge the same prices.

The courts also found the plaintiffs failed to allege that the algorithm shared or pooled proprietary nonpublic information. Therefore, the courts found that plaintiffs had failed to plausibly allege facts sufficient to support an inference of any agreement among the defendant hotels based on their common use of the software.

In a third instance, the 2023 decision in In re: RealPage Rental Software Antitrust Litigation No. II, the U.S. District Court for the Middle District of Tennessee denied the defendants' motion to dismiss, finding sufficient alleged facts to infer an agreement among defendants based on the common use of RealPage's software for multifamily residential rent price recommendations.

However, unlike the Yardi court, the RealPage court rejected the plaintiffs' per se theory, concluding that the rule of reason was more appropriate for analyzing the alleged use of that software.

Per Se Versus Rule of Reason

The split between RealPage and Yardi on the proper antitrust mode of analysis — per se versus rule of reason — is notable given the similarity of the allegations in the two cases.

The RealPage court rejected applying the per se rule, finding that plaintiffs had not alleged "any direct agreement or communications between [defendants]," nor that there was an alleged "absolute delegation of their price-setting to RealPage."

The court explained that the "conspiracy alleged is not the straightforward form of horizontal price-fixing conspiracy for which courts apply the per se standard," particularly where the alleged agreement involved the novelty of computerized algorithmic price recommendations.

The Western District of Washington, in applying the per se rule in Yardi, said it respectfully disagreed with the RealPage district court. In so doing, the Yardi court said that "if plaintiffs have raised a plausible inference of an unlawful agreement to restrain trade, the court presumes the existence of the alleged agreement when determining whether it is of the type that always or almost always tends to restrict competition and decrease output."

The court concluded that the alleged anticompetitive restraint resulted from an alleged horizontal agreement among competitors with regards to pricing structures.

The Yardi court further stated that it was aware of no "legal authority supporting the conclusion that an adequately alleged horizontal price fixing agreement could be a reasonable restraint on trade" simply because the technology used to achieve that agreement is new.

The Yardi court thus applied the per se rule. But insofar as there are meaningful differences between the allegations about Yardi's service and classic horizontal price-fixing agreements, it arguably did so presumptively and based on a formalistic approach without grounding in an analysis of demonstrable economic effects.

This application poses a potential conflict with U.S. Supreme Court precedent concerning the circumstances in which courts can depart from the rule of reason.

Notably, the Yardi decision aligns with the U.S. Department of Justice and Federal Trade Commission's statement of interest in the case supporting the plaintiffs.

The DOJ and FTC advocated applying the per se rule, placing significant reliance on the Supreme Court's 1939 decision in Interstate Circuit v. U.S., and 1940 decision in U.S. v. Socony-Vacuum Oil Co.

In their statement of interest, the antitrust agencies cited Interstate Circuit for the proposition that "competitors' acceptance, through conduct, of an invitation to act together suffices to establish concerted action" in violation of Section 1 of the Sherman Act, and Socony-Vacuum for the proposition that "the Supreme Court has long condemned as per se unlawful agreements to use the same 'formula underlying price policies.'"

However, the Yardi court did not examine how the facts alleged in Yardi differed from those in Interstate Circuit and Socony-Vacuum, or more recent appellate cases applying those decisions.

Nor did the Yardi district court unpack how antitrust cases more recent than Interstate Circuit and Socony-Vacuum may have affected the interpretation of these older authorities as applied to the alleged facts in Yardi.

For instance, in Interstate Circuit, eight movie distributors received identical letters from movie theaters that (1) asked them to impose identical restrictions on screenings of certain films, and (2) mentioned that each distributor received the same letter. After receiving the letters, the distributors uniformly imposed the requested restrictions.

In contrast, Yardi allegedly publicly marketed its service to many lessors nationwide and provided unique pricing recommendations to each lessor.

Moreover, the defendant lessors were not alleged to have known which other lessors used RENTmaximizer, or what pricing recommendations were provided to other lessors, including to what extent the recommendations may have been to lower rent prices, or to raise them by a smaller increase than the lessor may otherwise have proposed. Finally, plaintiffs did not allege that the defendant lessors uniformly implemented RENTmaximizer's pricing recommendations.

Conclusion

While the Yardi court denied the defendants' motion to dismiss and found that a per se antitrust claim had been alleged, it commented that the defendants may still prevail by demonstrating that "Yardi's services were advertised differently than as alleged, that they provided no commercially sensitive, non-public information, and/or that they ignored Yardi's pricing recommendations to such an extent as to make the allegations of concerted action unlikely."

Furthermore, the court observed that the defendants may show they "lacked a common motive to conspire" based on their geographic remoteness from each other and their lack of control over enough housing units to affect rental prices. Such a showing would, of course, result after what is likely to be extensive and costly discovery.

The Yardi court's order is arguably the most favorable to date for plaintiffs in antitrust algorithmic pricing cases. In contrast to other recent cases involving similar alleged conduct, the Yardi decision may increase litigation and liability risks for companies using some algorithmic pricing tools and may encourage new cases that assert per se theories of liability in the hope of surviving motions to dismiss at the pleading stage and driving potential settlements.

To mitigate such risks, businesses using or considering using algorithmic pricing tools might keep the following points in mind.

Pricing decisions based on algorithmic inputs should be made unilaterally.

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

Pricing recommendation algorithms that use confidential, nonpublic information from multiple businesses present antitrust risk.

According to the Yardi court, a key allegation was that Yardi advertised that clients of its algorithmic pricing system input confidential and commercially sensitive price, inventory, and market data to allow Yardi's algorithm to propose rent recommendations, and that clients allegedly agreed to share their commercially sensitive information with the system to be able to increase rents without fear of being undercut by their competitors.

As such, companies using algorithmic pricing tools should consider whether to limit vendors from using nonpublic information obtained from other companies in making price recommendations and consider whether to limit vendors from using their own nonpublic information as an input for algorithmic

recommendations provided to others.

Document procompetitive reasons for using a pricing algorithm.

Despite the Yardi decision potentially making it easier at the pleading stage for plaintiffs to allege that multiple businesses using the same algorithmic pricing tool is per se unlawful, its decision is not binding on other district courts, which may instead follow the RealPage court's lead and apply the rule of reason.

Business documents accurately identifying the intent and procompetitive reasons for using an algorithmic pricing tool are likely to be informative under a rule of reason analysis, including documentation as to how the algorithm may enable the user to compete more effectively, lower prices faster or otherwise benefit consumers.

Closely track the rapidly evolving law on this topic.

There are several pending algorithmic pricing cases in various jurisdictions and industries, so the case law is evolving. With increased risk of litigation, it is important to track the rapid evolution of the law in this area.

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