U.S. Court of Appeals for the Ninth Circuit Clarifies Antitrust Implications of Algorithmic Pricing

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In this article, the authors examine a recent decision by the U.S. Court of Appeals for the Ninth Circuit addressing the antitrust implications of algorithmic and artificial intelligence pricing tools.

With the rapid expansion and adoption of artificial intelligence (AI) software to assist businesses, courts across the country are grappling with the question of whether the use of algorithmic pricing tools runs afoul of antitrust laws. The crux of the issue lies in whether competing companies have agreed with each other to use the same software program, the degree to which the companies rely on the program to make pricing decisions, and the extent of non-public information shared through these programs. The recent decision by the U.S. Court of Appeals for the Ninth Circuit in *Gibson v. Cendyn Group, LLC* is the only federal appellate opinion to address the issue amidst disparate district court decisions on the antitrust implications of algorithmic and AI pricing tools.[1]

DISTRICT COURT RULINGS

The *Gibson* case is only one of several cases alleging antitrust violations through the common use of algorithmic pricing software. Courts have grappled with how to apply Section 1 of the Sherman Act to the use of this new technology, and have reached varying results.

In *Gibson*, plaintiffs alleged that hotels on the Las Vegas Strip participated in a "hub-and-spoke" antitrust conspiracy where they agreed with each other to use the same pricing software and abide by the software's pricing recommendations. Plaintiffs also alleged that even absent an agreement among the hotels to use the same software, the hotels' separate license agreements with the software provider in the aggregate violated antitrust law by artificially raising prices.[2] Last fall, Judge Du in the U.S. District Court for the District of Nevada dismissed both claims, holding that plaintiffs did not sufficiently allege a tacit agreement among the hotels, and that there is no restraint on trade resulting from each hotel's license agreement where the hotel

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could reject the software's pricing recommendations.[3] Plaintiffs pursued only the latter claim on appeal.

In another algorithmic pricing decision, *In Re RealPage, Inc., Rental Software Antitrust Litigation* (No. II), Judge Crenshaw in the U.S. District Court for the Middle District of Tennessee denied a motion to dismiss a complaint alleging that apartment building owners and managers conspired to inflate prices for rental units by using algorithmic-pricing software that employed aggregated competitor data to recommend prices.[4] Judge Crenshaw explained that without allegations of direct agreement between competing apartment companies, or a complete delegation of price-setting authority to the software, the court should apply a rule of reason analysis.[5] Under this approach, the defendants will be able to proffer procompetitive justifications for the challenged conduct. Relatedly, state attorneys general and the U.S. Department of Justice, Antitrust Division (DOJ) also have brought their own lawsuits against RealPage and certain apartment companies alleging antitrust violations through the use of algorithmic pricing software.

Lastly, in a case also involving apartment rental pricing, *Duffy v. Yardi*, Judge Lasnik in the U.S. District Court for the Western District of Washington denied a motion to dismiss a complaint alleging a conspiracy to provide non-public information to a common software provider that in turn provided pricing recommendations.[6] Departing from the *RealPage* approach, Judge Lasnik found that the complaint sufficiently alleged a per se unlawful horizontal price-fixing agreement, because the competing apartment owners accepted an invitation from the software provider to "trade their commercially sensitive information for the ability to charge increased rental rates without fear of being undercut by competitors."[7]

Notably, consistent with the *Yardi* decision, DOJ and the Federal Trade Commission filed joint statements of interest in all three cases arguing that the common use of algorithmic pricing software in an industry can be per se unlawful under the Sherman Act.[8] The agencies asserted that competitors' use of a common algorithm that sets recommended or starting-point prices can violate Section 1 of the Sherman Act even where the competitors vary on their final pricing. Moreover, the agencies argued that an invitation proposing collective action, followed by conduct demonstrating acceptance of the invitation - such as contracting with a common software provider - can establish an antitrust violation even without a direct agreement among competitors. DOJ also filed an amicus brief in the Ninth Circuit advancing the same arguments.[9]

NINTH CIRCUIT OPINION

On August 15, 2025, the Ninth Circuit affirmed dismissal of the *Gibson* complaint and became the first appellate court to weigh in on the issue. According to the opinion, "plaintiffs push[ed] for a rule in which the choice of several competitors to contract with the same service-provider, when followed by higher prices, is sufficient to require antitrust scrutiny under the rule of reason."[10] The Ninth Circuit rejected this approach, insisting that Section 1 violations require "a causal link between the contested agreement and an anticompetitive restraint of trade in the relevant market."[11]

Because plaintiffs had abandoned their "hub and spoke" theory on appeal, the allegations at issue centered on separate individual

license agreements between each hotel and a common software provider, which the court described as "ordinary sales contract[s][.]"[12] The court found that these agreements did not restrain any party's ability to compete in the relevant market (hotel rooms on the Las Vegas Strip) because the terms of the agreements only imposed obligations on the software provider and the hotels "*as to each other*" but not with regard to other hotels on the Las Vegas Strip.[13] The court emphasized that the independent adoption of "similar policies around the same time in response to similar market conditions" is "parallel conduct" and is insufficient for a Section 1 claim.[14] Indeed, even "consciously parallel conduct" where competitors act similarly after observing the other's behavior and the circumstances of "an interdependent market[,]" is insufficient to state a claim.[15]

The court compared the license agreements with the software provider to competitors contracting with the same market research firm or tax adviser, which the court viewed to be an ordinary business practice and not necessarily an indicator of collusion.[16] And prohibiting competitors from using the same vendor "could ultimately *harm* competition, as it would take away a means by which competitors might compete."[17] The court explained:

> While antitrust law restricts *agreements* between competitors regarding how to compete, it does not require a business to turn a blind eye to information simply because its competitors are also aware of that same information. Nor does it require businesses to decline to take advantage of a service because its competitors already use that service.[18]

The court also noted that higher prices alone do not evidence anticompetitive conduct, because "pricing one's hotel rooms in a manner calculated to maximize profits is how one competes."[19] The court refused to adopt a rule essentially triggering antitrust scrutiny whenever ordinary business contracts result in higher prices, absent plausible allegations that the price increase resulted from a restraint of trade that caused an adverse effect on competition.[20] Ultimately, the license agreements at issue did not raise antitrust concerns because they did not restrain any hotel's ability to price its own rooms "in accordance with their own judgment."[21]

Notably, the court also described instances in which competitors' use of algorithmic pricing tools might result in a Section 1 violation.

First, if competitors agreed among themselves to use the same software and follow its pricing recommendations, this would be a horizontal agreement that "undoubtedly" harms competition by eliminating each competitor's motivation to compete on price.[22] This confirms the district court's observation that "[i]f they all agreed to outsource their pricing decisions to a third party, and all agreed to price according to the recommendations provided by that third party, it would be plausible to infer the existence of a collusive agreement to fix prices."[23] The Ninth Circuit, however, distinguished this agreement from a situation where individual companies make independent choices to use the same software product.[24]

Second, the court found that the antitrust implications may be different if the software allowed the sharing of confidential information among competitors.[25] The software in *Gibson* was not alleged to pool, share, or otherwise use any licensing hotel's confidential information to recommend pricing for other competitors.[26] Consider *RealPage*, where private plaintiffs alleged that the software is a

"melting pot of confidential competitor information," and the district court found that factor weighed in favor of antitrust scrutiny.[27]

TAKEAWAYS

The government's withdrawal of longstanding information-sharing safe harbors in early 2023 spawned a wave of litigation and investigations involving allegations of anticompetitive information sharing, particularly through the use of algorithmic pricing software.[28] The Ninth Circuit ruling thus provides welcome clarity on what types of algorithmic pricing conduct might give rise to antitrust liability.

The Ninth Circuit ruling provides the following guideposts for assessing antitrust risk:

- Are there communications or agreements with competitors about whether to use pricing software and which software to use?
- Are there communications or agreements with competitors about how to use the information provided by the software?
- Does the software incorporate non-public competitor data to make pricing recommendations to the user?
- Does the software or the license agreement limit the user's ability to set pricing?
- Does the software in any way limit the user's ability to compete in the market (such as its ability to contract with other vendors)?

In sum, under the Ninth Circuit's decision, what matters is whether the decision to use certain software was reached independently and whether there are any terms that restrict the software user's ability to make independent pricing decisions. Thus, although companies should still proceed carefully when using pricing software or consultants that are common in the industry, under the Ninth Circuit's approach, it is clear that simply using the same pricing software as competitors should not be a sufficient basis for antitrust liability, and that businesses need not "turn a blind eye to information simply because its competitors are also aware of that same information."[29]

Companies considering the use of algorithmic pricing software should bear in mind that the federal antitrust enforcers urged a different result and that other appellate courts may take a different approach, and should seek antitrust counsel to ensure that any software use is evaluated for potential antitrust traps.

NOTES:

[1]Gibson v. Cendyn Group, LLC, No. 24-3576, 148 F.4th 1069 (9th Cir. 2025) (Opn.).

[2]Opn. at *9.

[3]Similar antitrust lawsuits against hotels in California and New Jersey were also dismissed following the Nevada ruling's holding. Dai v. SAS Institute Inc., No. 24-cv-02537-JSW, 2025 WL 2078835 (N.D. Cal. 2025); Cornish-Adebiyi v. Caesars Entertainment, Inc., No. 1:23-cv-02536-KMW-EAP, 2024 WL 4356188 (D.N.J. 2024).

[4]In re RealPage, Inc., Rental Software Antitrust Litigation (No. II), 709 F. Supp. 3d 478 (M.D. Tenn. 2023).

[5]In a related case involving student apartments, Judge Crenshaw granted a separate motion to dismiss. Id.

[6]Order Denying Defendants' Joint Motion to Dismiss, Duffy v. Yardi Systems, Inc., No. 2:23-cv-01391-RSL, 758 F. Supp. 3d 1283 (W.D. Wash. 2024).

[7]Duffy v. Yardi Systems, Inc., 758 F. Supp. 3d 1283 (W.D. Wash. 2024)

[8]See e.g., Statement of Interest of the United States, Duffy v. Yardi Sys., Inc., No. 2:23-cv-1391, (W.D. Wash. Mar. 1, 2024), ECF No. 149, available at https://www.justice.gov/atr/media/1340686/dl?inline.

[9]Brief for the United States as Amicus Curiae in Support of Plaintiffs-Appellants, Gibson v. Cendyn Grp., LLC,

24-3576 (9th Cir. Oct. 24, 2024), ECF No. 28, available at https://www.justice.gov/atr/media/1376121/dl.

[10]Opn. at *2.

[11]Opn. at *2.

[12]Opn. at *6.

[13]Opn. at *7 (emphasis in original).

[14]Opn. at *7.

[15]Opn. at *7.

[16]Opn. at *8.

[17]Opn. at *8.

[18]Opn. at *8.

[19]Opn. at *7.

[20]Opn. at *10.

[21]Opn. at *9.

[22]Opn. at *1, *7.

[23]Gibson v. Cendyn Group, LLC, 2024 WL 2060260, *7 (D. Nev. 2024), aff'd, 148 F.4th 1069 (9th Cir. 2025).

[24]Opn. at *7.

[25]Opn. at *7 n. 8.

[26]Opn. at *3.

[27]In re RealPage, Inc., Rental Software Antitrust Litigation (No. II), 709 F. Supp. 3d 478 (M.D. Tenn. 2023).

[28]See, e.g., In re MultiPlan Health Insurance Provider Litigation, 743 F. Supp. 3d 1376 (U.S.J.P.M.L. 2024); In re Construction Equipment Rental Antitrust Litigation, 2025 WL 2326845 (U.S.J.P.M.L. 2025).

[29]Opn. at *8.