AntitrustConnect Blog

The Reasons Some Courts Have Dismissed Antitrust Claims in the Latest Revenue Management Software Litigation

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Federal and state antitrust enforcers and the private plaintiffs' bar have revenue management software (RMS) squarely in their sights. In a string of recent antitrust cases, they have attacked software vendors and their clients, alleging that merely using RMS is evidence of unlawful coordination designed to elevate prices above competitive levels. Revenue management software typically utilizes clients' confidential data streams and public data sources to track current supply and demand in a particular market in near real time. The software uses algorithms and artificial intelligence to arrive at the most competitive pricing for a given client in order to maximize the client's revenue. These types of antitrust cases are novel, and while the courts have just begun to grapple with them, a number of pre-trial orders provide preliminary insight into how to reduce the antitrust risks associated with using RMS.

Although the RMS cases filed so far address different markets—including hotel rooms, extended-stay apartments, multifamily and student rental housing, and medical services—the allegations fit a general pattern. For example, in one of the hotel room cases, *Gibson v. Cendyn Group*, No. 2:23-cv-00140 (D. Nev. Jan. 25, 2023), plaintiffs allege that six competitors, operators of hotels on the Las Vegas Strip, used Cendyn's RMS to inflate room rates artificially. Plaintiffs allege the conspirators formed a "hub-and-spoke" structure in which the software vendor was the hub and the users were the spokes. A software license connected each user to the vendor, forming vertical supply relationships. The software allegedly coordinated an information exchange among its users on a give-to-get basis—it gathered confidential transaction-level data from the hotels in real time, including pricing (namely room rates) and volumes (in the form of occupancy levels), and provided each hotel with daily room rate recommendations for each type of room. In its marketing, Cendyn allegedly emphasized that its RMS would increase users' revenues and profitability. See First Amended Class Action Complaint, ECF No. 144. Each of the other RMS cases allege a similar set of core facts.

The key question in all of the RMS cases is whether the competitors around the "rim" were connected by an unlawful horizontal agreement to share confidential information and/or fix prices. The complaints in these cases offer scant direct evidence of a horizontal agreement along the rim, such as emails discussing the alleged scheme. Rather, plaintiffs rely on circumstantial evidence of agreement such as parallel conduct and "plus factors," including actions that would not serve an individual competitor's interests unless taken by the competitors collectively.

Plaintiffs cast their claim as one of a "*per se*" conspiracy. Under the *per se* standard, an agreement

among competitors is presumed to violate the antitrust laws without considering whether it harmed competition by actually raising prices or reducing output. To meet this standard, plaintiffs must allege more than just that many competitors were using the same RMS at the same time. One federal court, the Middle District of Tennessee, dismissed such a claim in *In re: RealPage, Inc. Rental Software Antitrust Litigation*, No. 3:23-md-03071 (M.D. Tenn. April 12, 2023), involving multifamily rental housing, i.e. large apartment buildings. As in the hotel cases, the RealPage RMS allegedly gathered confidential transaction-level data from apartment building management companies and provided each one with daily rent recommendations for each type of apartment. See Second Amended Consolidated Class Action Complaint, ECF No. 530. In the court's view, plaintiffs' allegations of a per se conspiracy were insufficient because they did not specify the dates each defendant joined the alleged conspiracy and admitted that some defendants began using the RealPage RMS years prior to the start of the alleged conspiracy. Plaintiffs also failed to allege that the conspirators ejected building management companies who did not follow the RMS's price recommendations or inflicted some other form of punishment on cheating coconspirators. These were the leading reasons the court dismissed plaintiffs' claim that the alleged conduct was per se unlawful. See Memorandum Opinion, ECF No. 690.

Instead, the court allowed plaintiffs to proceed only under the more onerous Rule of Reason standard, which not only requires proof of competitive harm but also weighs that harm against the procompetitive benefits of the software. In other words, the court or jury can take into account the actual effects, or lack thereof, of the RMS on the marketplace. And defendants can make the case that the RMS enhances competition by providing critical insight into the state of a market and its ongoing dynamics, and does so more efficiently and effectively than obsolete, unautomated methods of benchmarking.

Even under the Rule of Reason standard, plaintiffs still have to plead more than just concurrent use of an RMS. In the RealPage case, the court allowed plaintiffs to proceed with their Rule of Reason claim in large part because they alleged that the defendants did two other things suggestive of price fixing. First, all of the defendants allegedly switched collectively to an anticompetitive pricing strategy once a critical mass of building management companies had adopted the RMS. Second, each participant allegedly aided its competitors by contributing its confidential data to the RMS knowing its competitors were returning the favor, which the court concluded would otherwise not have been in the participant's interest. In substance, plaintiffs had to allege that the defendants not only used the same RMS, but took steps to implement a larger scheme to fix prices.

The recent civil case filed by the Justice Department against RealPage in the Middle District of North Carolina asserts only violations under the Rule of Reason standard. See *U.S. v. RealPage, Inc.*, 1:24-cv-00710 (M.D.N.C Aug. 23, 2024). The government may have chosen not to allege any per se violations given that the Middle District of Tennessee had dismissed per se claims against RealPage in the class action case despite a statement of interest filed by the Justice Department advocating that the court apply the per se standard. See Memorandum of Law in Support of the Statement of Interest of the United States, ECF No. 628.

Another obstacle to the attack on RMS is that RMS users have no obligation to follow the software's price recommendations. Plaintiffs struggle to reconcile that fact with their claim that users have surrendered their pricing independence to the software's pricing dictates. In fact, three courts have already dismissed claims because of this shortcoming. The District of Nevada dismissed with prejudice the case against Cendyn on this basis in the Las Vegas Strip hotel litigation, which is now on appeal. See Order, ECF No. 183. The issue was a factor in the Middle

District of Tennessee's dismissal of plaintiffs' *per se* claim in the RealPage multidistrict litigation, as discussed above. And in a parallel action regarding the RealPage RMS brought by the attorney general of the District of Columbia, the D.C. Superior Court dismissed the case against one user, AvalonBay Community, Inc. See Memorandum Opinion, *District of Columbia v. RealPage, Inc., et al*., No. 2023 CAB 6762 (D.C. Super. Ct. Nov. 1, 2023), filed July 2, 2024.

Plaintiffs in the RMS cases fail to assert a related aspect typical of price fixing conspiracies: a means of enforcing the scheme against cheaters, particularly through tit-for-tat price decreases or eviction from the conspiracy. Plaintiffs in the RMS cases have yet to allege that any RMS has been designed to start a price war against a user who rejects price recommendations. Nor have any plaintiffs alleged that an RMS vendor has retaliated by refusing to renew an RMS license, or even threatened to do so.

Plaintiffs in RMS cases are also vulnerable when an RMS does not base a user's price recommendations on the confidential information of the user's competitors. For example, the court in *Gibson v. Cendyn Group* dismissed the complaint because it failed to allege the RMS used competitors' confidential data to generate price recommendations, a fatal flaw in the court's view. Rather, plaintiffs alleged only that the RMS relied on competitors' published, publicly-available hotel room rates. See Order, ECF No. 183. This shortcoming was also an important factor in the dismissal of AvalonBay from *District of Columbia v. RealPage*. AvalonBay asserted that RealPage provided rent recommendations to it based only on its own confidential data and public data sources, not on its competitors' confidential data. Moreover, AvalonBay asserted that RealPage likewise agreed not to use AvalonBay's confidential data in generating rent recommendations for other users. These restrictions precluded competitors' mutual dependence on one another's confidential data that is at the heart of plaintiffs' claims in the RMS cases. (The district court in the related multidistrict litigation also dismissed Avalon Bay, on plaintiffs' motion.)

Further pre-trial orders are likely to provide additional insight into the circumstances that reduce the antitrust risks posed by revenue management software. Motions to dismiss are pending in three cases. See *Karen Cornish-Adebiyi v. Caesars Entertainment, Inc.*, No. 1:23-cv-02536 (D. N.J. May 9, 2023) (Atlantic City hotels); *Jeanette Portillo v. Costar Group, Inc.*, No. 2:24-cv-00229 (W.D. Wash. Feb. 20, 2024) (hotels in various U.S. cities); and *McKenna Duffy v. Yardi Systems, Inc.*, No. 2:23-cv-01391 (W.D. Wash. Sept. 8, 2023) (multifamily rental housing). Motions to dismiss are likely to be filed in three others. See *Steven Shattuck v. SAS Institute Inc.*, No. 3:24-cv-03424 (N.D. Cal. June 7, 2024) (extended stay apartments); *State of Arizona v. RealPage*, No. CV2024-003889 (Super. Ct. Ariz. Maricopa Cnty. Feb. 28, 2024) (multifamily rental housing); and *In re: MultiPlan Health Insurance Provider Litigation*, 1:24-cv-06795 (N.D. Ill. Aug. 1, 2024) (reimbursement rates paid by health insurers to out-of-network service providers).

This entry was posted on Thursday, September 12th, 2024 at 3:21 am and is filed under Price Fixing
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