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Insuring Against Recent Trend of Antitrust Actions Targeting Pricing Algorithms

Client Alerts

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Following a 2022 ProPublica article reporting on the use of a third-party software to inflate rents in "a new kind of cartel," a new wave of antitrust enforcement and class actions targets companies using pricing algorithms, including those in the real estate and hospitality industries. Huiyi Chen discusses the latest development in those lawsuits and how companies can mitigate risks through insurance coverage. This client alert was also published by the American Bar Association Litigation Section's Insurance Coverage Litigation Committee.

Recent Antitrust Class Actions

In 2022, a ProPublica article reported on how residential landlords and property managers across the country were using a third-party software sold by RealPage to inflate rents in "a new kind of cartel." Dozens of class action lawsuits have since been filed against RealPage and the nation's largest landlords alleging antitrust violations. At the same time, state attorneys general have embarked on investigations and enforcement actions against the same companies. The private lawsuits were consolidated in a multidistrict litigation (MDL) pending before the US District Court for the Middle District of Tennessee. *In re: RealPage, Rental Software Antitrust Litig. (No. II)*, Case No. 3:23-MD-3071 (M.D. Tenn.).

Although the Department of Justice (DOJ) has not filed an enforcement action, it issued a Statement of Interest and Memorandum of Law in Support in the MDL, stating that "[a]s technology has developed in the 133 years since the Sherman Act created a federal prohibition on price fixing, firms have evolved the mechanisms they use for reaching unlawful price-fixing agreements. … Algorithms are the new frontier," and that "[a]lgorithmic price fixing must therefore be subject to the same condemnation as other price-fixing schemes."

This new wave of antitrust lawsuits is not confined to the real estate industry—as the DOJ Statement of Interest makes clear, any industry that uses a common third-party software and algorithm for pricing may be targeted. Another recent example is the Las Vegas Strip hotel class action pending before the US District Court for the District of Nevada, which was filed in January 2023. *See Gibson v. MGM Resorts Int'l*, Case No. 2:23-cv-00140-MMD-DJA (D. Nev.). There, as in *RealPage*, the Las Vegas Strip hotel owners and operators were accused of using third-party software provided by

Rainmaker to inflate hotel room prices. According to the first amended complaint filed in November 2023, one of the algorithms used by RealPage was developed by Rainmaker and sold to RealPage for $300 million in 2017. *See* 1st Am. Compl. ¶ 23, *MGM Resorts Int'l*, Case No. 2:23-cv-00140-MMD-DJA (D. Nev. Nov. 27, 2023), ECF No. 144.

In both *RealPage* and *MGM Resorts International*, the class action plaintiffs allege that the defendants engaged the same pricing vendor who used the same or similar algorithms to calculate recommended pricing for each defendant based on competitively sensitive information in violation of Section 1 of the Sherman Act. Specifically, the operative complaints allege that each defendant would feed its own pricing and inventory data (among other proprietary data) to the third-party vendor, who would then use this information as well as other public or non-public information to which it had access to feed its proprietary software. The software would in turn use algorithms to generate pricing recommendations based on these inputs, aiming to maximize the defendant user's revenues. With the advancing technology of artificial intelligence, the lawsuits allege that the massive, granular data fed into the proprietary software enables training of machine learning and algorithms and results in anticompetitive effects. *See generally* 2nd Am. Consol. Compl., *RealPage*, Case No. 3:23-MD-3071 (M.D. Tenn. Feb. 5, 2024), ECF No. 156; 1st Am. Compl., *MGM Resorts Int'l*, Case No. 2:23-cv-00140-MMD-DJA (D. Nev. Nov. 27, 2023), ECF No. 144.

Contrary to the plaintiffs' efforts in *MGM Resorts International* to analogize their case to *RealPage*, which survived a motion to dismiss against the putative class of multifamily tenants, the hotel owners/operators in *MGM Resorts International* distinguished their case from *RealPage* by pointing out that while RealPage allegedly collected and fed *confidential* competitor information into its pricing algorithm(s), Rainmaker (the third-party vendor engaged by the Las Vagas Strip hotels) allegedly only relied on *public* pricing information, such as pricing available on the hotels' websites. *See* Defs. Joint Mot. to Dismiss 1st Am. Compl. with Prejudice at 25, *MGM Resorts Int'l*, Case No. 2:23-cv-00140-MMD-DJA (D. Nev. Feb. 14, 2024), ECF No. 160. The court in *MGM Resorts International* granted the defendants' motion to dismiss without prejudice, and the defendants have recently filed their motion to dismiss the plaintiffs' first amended complaint with prejudice.

Potentially Significant Exposure in Antitrust Class Actions

Antitrust class actions, especially those consolidated as MDLs, are notoriously complex and expensive to defend, and could result in very substantial financial exposure.

Section 1 of the Sherman Act declares as illegal "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 1. Section 4 of the Clayton Act allows private parties to recover "threefold the damages" sustained from defendants' violation of Section 1 of the Sherman Act, as well as "reasonable attorney's fee." 15 U.S.C. § 15. In addition, the US Supreme Court has held that defendants in violation of the Sherman Act and the Clayton Act are subject to joint and several

liability without a right to seek contribution from co-conspirators. *See Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 646 (1981). The combination of treble damages, attorneys' fees, and joint and several liability under the federal antitrust law could lead to damages awards in the hundreds of millions— or even billions—against one defendant.

However, winning price-fixing cases under the federal antitrust law is no easy feat for class action plaintiffs. Courts and antitrust/economics scholars have long recognized that there may be procompetitive justifications for agreements among competitors. They are therefore hesitant to impose a categorical conclusion of "per se" violation over them—save for a handful of well-established anticompetitive behaviors that have no procompetitive justifications, such as price-fixing and bid- rigging. For other behaviors, courts generally apply a more nuanced approach called the "rule of reason" analysis, under which anticompetitive effects need to be proven and measured against procompetitive justifications.

In addition, an agreement or conspiracy to fix price among competitors must exist before the plaintiffs can prevail under a per se claim; mere parallel conduct by competitors (such as raising price at the same time) is not sufficient to establish a per se price-fixing claim without proof that the parallel conduct is a result of an agreement or conspiracy among the competitors.

The plaintiffs in the *RealPage* and *MGM Resorts International* cases discussed above allege a per se price-fixing claim in violation of Section 1 of the Sherman Act and plead a rule of reason claim in the alternative, and both ask for treble damages. In addition, both allege that, despite the use of the new technology of artificial intelligence and algorithms, the defendants engaged in an old-fashioned "hub and spoke" conspiracy—*i.e.*, using the third-party pricing vendor as a "hub," the defendants (the "spokes") each entered into an agreement with the third-party vendor in furtherance of the conspiracy. *See* 2nd Am. Consol. Compl. ¶ 229, *RealPage*, Case No. 3:23-MD-3071 (M.D. Tenn. Feb. 5, 2024), ECF No. 156; 1st Am. Compl. ¶ 19, *MGM Resorts Int'l*, Case No. 2:23-cv-00140-MMD-DJA (D. Nev. Nov. 27, 2023), ECF No. 144.

However, even in a "hub and spoke" case, the plaintiffs need to prove there is a price-fixing agreement or conspiracy *among the horizontal competitors* (*i.e.*, a "rim" connecting the "spokes"), and the parallel conduct of entering into a vertical agreement with the same third-party vendor alone does not suffice. *See, e.g.*, *Marion Healthcare, LLC v. Becton Dickinson & Co.*, 952 F.3d 832, 842 (7th Cir. 2020); *Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 436 (6th Cir. 2008); *Dickson v. Microsoft Corp.*, 309 F.3d 193, 203 (4th Cir. 2002).

Another issue in both cases is whether the defendants delegated their pricing decisions to the common third-party vendor, and evidence regarding whether the defendants have a right to override the pricing recommendations and how frequently the defendants exercise that right is key to resolving this issue. *See, e.g.*, Defs. Joint Mot. to Dismiss 1st Am. Compl. with Prejudice at 11 (arguing plaintiffs failed to allege defendants "are required to accept the recommendations provided

by a particular software pricing algorithm"), *MGM Resorts Int'l*, Case No. 2:23-cv- 00140-MMD-DJA (D. Nev. Feb. 14, 2024), ECF No. 160.

If the plaintiffs in the pricing algorithm antitrust cases are unable to allege and prove an agreement among the competitors to fix price, and the court decides to apply the rule of reason analysis instead, the line of applicable case law is the so-called "exchange of information" cases. These involve allegations of competitors sharing competitively sensitive information directly or indirectly with each other, resulting in anticompetitive effects. The seminal case is *Todd v. Exxon Corp.*, 275 F.3d 191 (2d Cir. 2001), written by then Judge Sonia Sotomayor. Specifically, *Todd* held that there are four relevant factors in analyzing whether the information exchange has an anticompetitive effect on the relevant market: "time frame of the data" (*i.e.*, whether the data exchanged is past, current, or future), "the specificity of the information" (*i.e.*, whether the shared information is granular or in the aggregate), whether the data is publicly available, and whether competitors participated in meetings to discuss the information exchanged. *Id.* at 211–13. A recent decision in the "broiler chicken" antitrust class action—one that involves allegations of chicken producers sharing competitively sensitive information through a third-party vendor Agri Stats resulting in supply reductions—applied the *Todd* factors and granted summary judgment in favor of the producers on the rule of reason claim. *In re Broiler Chicken Antitrust Litig.*, 16 C 8637, 63–66 (N.D. Ill. Nov. 2, 2023).

In short, the plaintiffs in the pricing algorithm antitrust class actions face uncertainties and difficulties in satisfying their burden of proof, but if they prevail, the defendants will potentially face significant financial exposure. And regardless of the ultimate result of these cases, the defendants are likely to spend a significant amount of time and money defending against the claims in upcoming years.

Antitrust Insurance Coverage Availability and Limitations

In light of the DOJ and state AGs' continued interest in antitrust violations through pricing algorithms (which President Biden highlighted in his State of the Union Address this year), cases such as *RealPage* and *MGM Resorts International* are only the beginning. We anticipate additional enforcement actions and private class actions involving many different industries to be filed across the country.

Antitrust case law on this issue is still developing, and there are obvious, legitimate business justifications for using new technology like artificial intelligence. For example, companies may decide on their own to use it to maximize revenues or monitor competitors' behavior. Thus, landlords and hotel operators may well have a legitimate need for inventory or revenue management tools of the kind that RealPage and Rainmaker are providing. They cannot simply refrain from using pricing algorithms developed by third-party vendors and expect to compete as effectively.

Businesses that use pricing algorithms and inventory management tools should consider protecting themselves through insurance coverage. Specifically, policy forms that might provide coverage for antitrust lawsuits include commercial general liability (CGL) policies, errors and omissions (E&O)/professional liability policies, and directors and officers (D&O) policies. *See, e.g.*, *Atl. Specialty Ins. Co. v. Blue Cross & Blue Shield of Kansas, Inc.*, 664 F. Supp. 3d 1246 (D. Kan. 2023) (the insurer accepted claim and agreed to advance defense costs for underlying market allocation MDL under an E&O policy, but invoked exclusions to deny coverage under a D&O policy that also provided antitrust coverage).

Even when the base form policy does not provide antitrust coverage, it is possible for businesses to negotiate and purchase antitrust coverage endorsements. Although these endorsements may be expensive or have limited availability, it is still worth consulting insurance professionals about availability and costs in light of the significant antitrust risks companies are facing. In addition, even if complete coverage over antitrust action damages and settlements is not available or prohibitively expensive, it is possible to seek at least coverage with a sublimit or defense-only coverage. Increasing demand for antitrust coverage may also prompt carriers to develop new insurance products to cover these risks in the future.

Companies that already have silent or express antitrust coverage should also look at exclusions in the policies that might prompt carriers to deny coverage. Prior to the relatively recent development of express and specific antitrust exclusions, courts held that the traditional exclusions did not unambiguously cover antitrust claims. *See Jefferson-Pilot Fire & Cas. Co. v. Boothe, Prichard & Dudley*, 638 F.2d 670, 674– 75 (4th Cir. 1980) (holding that the exclusion of "any dishonest, fraudulent, criminal or malicious act or omission of the insured" in the professional liability policy did not unambiguously cover antitrust violations and that the insurer had a duty to defend the underlying antitrust action). And another candidate—the intentional acts exclusion—generally does not apply until there is a final, non-appealable adjudication on the policyholder's conduct, and it cannot shield the insurer from its obligation to provide a defense during the course of the underlying litigation or if the underlying litigation settles.

Even for policies that have express and specific antitrust exclusions, not all antitrust exclusions are created equal—some are more specific while others are vaguer. For example, one landlord defendant in *RealPage* brought an insurance coverage lawsuit against its insurer who refused to provide a defense and indemnification in *RealPage* under the professional liability policy and lost in summary judgment. *See Avenue5 Partners LLC v. Endurance Am. Specialty Ins. Co.*, Case No. 23-2-11110-9 SEA (Wash. Super. Ct. Feb. 12, 2024).

There, the policy has an "Unfair Business Practices and Antitrust" exclusion that precludes coverage for "price fixing, restraint of trade, monopolization, or any violation of the Federal Trade Commission Act, the Sherman Anti-Trust Act, the Clayton Act, each as amended, or any other federal, state, local, or foreign laws, regulations, or common law pertaining to antitrust, monopoly, price fixing, price discrimination, predatory pricing, or restraint of trade, or that otherwise protect competition." Def.'s

Mot. Summ. J. at 18, *Avenue5 Partners*, Case No. 23-2-11110-9 SEA (Wash. Super. Ct. Oct. 20, 2023).

Contrast that with the exclusion at issue in an insurance coverage lawsuit recently filed by another landlord defendant in *RealPage*: "any Claim for, based upon, arising from, or in any way related to unfair trade practices or violation of consumer protection laws." *See* 1st Am. Compl. ¶ 5, *Willow Bridge Property Co. v. Arch Specialty Ins. Co.*, No. 3:24-cv-00029-D (N.D. Tex. Feb. 7, 2024), ECF No. 12. There is certainly a much stronger argument here in favor of coverage.

Policyholders should negotiate for the narrowest exclusionary language possible when purchasing insurance policies. Finally, for companies that have already been sued for antitrust violations, insurers might seek to exclude specific prior matters (and matters similar to those prior matters) from coverage in new policy placement or renewal. Policyholders should carefully examine the exclusionary language to avoid overbroad and unintentional exclusion of similar matters filed in the future. *See Foster Farms, LLC v. Everest Nat'l Ins. Co.*, 670 F. Supp. 3d 953, 975 (N.D. Cal. 2023) (holding that newly filed turkey antitrust suits did not fall under exclusion covering prior chicken antitrust suits under the D&O policy).

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