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Federal Court Applies Antitrust Standard of Per Se Illegality to "Algorithmic Pricing" Case

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A federal district court in Seattle recently issued an important antitrust decision on "algorithmic pricing." Algorithmic pricing refers to the practice in which companies use software to help set prices for their products or services. Sometimes this software will incorporate pricing information shared by companies that may compete in some way. In recent years, both private plaintiffs and the government have filed lawsuits against multifamily property owners, hotel operators, and others, claiming their use of such software to set prices for rentals and rooms is an illegal conspiracy under the antitrust laws. The plaintiffs argue that, even without directly communicating with each other, these companies are essentially engaging in price-fixing by sharing pricing information with the algorithm and knowing that others are doing the same, which allegedly has led to higher prices for consumers. So far, these cases have had mixed outcomes, with at least two being dismissed by courts.

Duffy v. Yardi Systems, Inc.

Previously, courts handling these cases have applied, at the pleadings stage, the "rule-of-reason" standard for reviewing the competitive effects of algorithmic pricing. Under the rule-of-reason standard, a court will examine the algorithm's actual effects before determining whether the use of the algorithm unreasonably restrains competition. In December, however, the U.S. District Court for the Western District of Washington in *Duffy v. Yardi Systems, Inc.*, No. 2:23-cv-01391-RSL (W.D. Wash.) held that antitrust claims premised on algorithmic pricing should be reviewed under the standard of per seillegality, meaning the practice is assumed to harm competition as a matter of law. Under the per sestandard, an antitrust plaintiff need only prove an unlawful agreement and the court will presume that the arrangement harmed competition. This ruling is significant because it departs from prior cases and could ease the burden on plaintiffs in future disputes.

In *Yardi*, the plaintiffs sued several large, multifamily property owners and their management company, Yardi Systems, Inc., claiming these defendants conspired to share sensitive pricing information and adopt the higher rental prices suggested by Yardi's software. The court refused to dismiss the case, finding the plaintiffs had plausibly shown an agreement based on the defendants' alleged "acceptance" of Yardi's "invitation" to trade sensitive information for the ability to charge

increased rents. *See Yardi*, No. 2:23-cv-01391-RSL, 2024 WL 4980771, at *4 (W.D. Wash. Dec. 4, 2024). The court also found the defendants' parallel conduct in contracting with Yardi, together with certain "plus factors," were enough to allege a conspiracy. The key "plus factor" was defendants' alleged exchange of nonpublic information. The court noted the defendants' behavior — sharing sensitive data with Yardi — was unusual and suggested they were acting together for mutual benefit.

The court decided the stricter per serule should apply to algorithmic pricing cases, rather than the rule-of-reason. The court emphasized that "[w]hen a conspiracy consists of a horizontal price-fixing agreement, no further testing or study is needed." *Id.* at *8. This decision diverged from an earlier case against a different rental-software company, where the court thought more analysis was needed because the use of algorithms is a "novel" business practice and thus not one that could be condemned as per seillegal without more judicial experience about the practice's competitive effect. The *Yardi* case also stands apart from others that have been dismissed, like a prior case involving hotel operators, where there was no claim that the companies pooled their confidential information in the dataset the algorithm used to suggest prices. The court in that case decided that simply using pricing software, without sharing confidential data, did not necessarily mean there was illegal collusion. Future cases may thus depend in part on whether the software uses competitors' confidential data to set or suggest prices.

It is unclear if other courts will adopt the same strict approach as the *Yardi* case when dealing with claims involving algorithmic pricing. It is clear, however, that more cases are on the horizon, likely spanning a variety of industries using pricing software.

Regulatory Efforts

Beyond private lawsuits, government agencies and lawmakers also are paying close attention to algorithmic pricing. Last year, for example, the U.S. Department of Justice (DOJ) and a number of state attorneys general sued a different rental-software company. The DOJ also has weighed in on several ongoing cases. Meanwhile Congress, along with various states and cities, has introduced laws to regulate algorithmic pricing, with San Francisco and Philadelphia banning the use of algorithms in setting rents. And just last month, the DOJ and Federal Trade Commission raised concerns about algorithmic pricing in a different context — exchanges of information about employee compensation — in the agencies' new *Antitrust Guidelines for Business Activities Affecting Workers*. The new guidelines note that "[i]nformation exchanges facilitated by or through a third party (including through an algorithm or other software) that are used to generate wage or other benefit recommendations can be unlawful even if the exchange does not require businesses to strictly adhere to those recommendations." Expect more legal and legislative action on this front in 2025 and beyond.

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