

What Does AI Have to Do With Your Pricing? Cautionary Antitrust Considerations

By Abby L. Risner, UB Greensfelder LLP

We hear about the boundless possibilities offered by Artificial Intelligence (“AI”). But for franchisors and franchisees alike, AI tools in franchise systems present, among other considerations, potential antitrust risks associated with the use of generative AI (“GenAI”) in setting prices, usually through use of algorithmic pricing. Use of such tools sits at the intersection of the rapidly developing world of AI and the government’s increased antitrust scrutiny.

Perhaps a trap for the unknowing, the following hypothetical presents a potential scenario: Your company decides it wants to take advantage of a new GenAI pricing software option for determining how to price products or services, and with it the potential for decreased reliance on humans (including errors and costs associated with personnel), better opportunity for real time price adjustments, increased integration of available data, and established algorithmic offerings from vendors that automatically recommend price changes.

Yet with this potential opportunity comes at least two critical variables that may have antitrust implications:

1. What happens to the confidential data that you input?
2. What non-public data does the algorithm use?

Franchise systems considering the use of industry information, pricing software, and GenAI ought to carefully explore what antitrust risks exist and how those risks may increase when using common GenAI pricing tools.

Antitrust Laws to Consider

The Sherman Act, Section 1, prohibits collusion in the form of price fixing: “[e]very contract, combination in the form of trust or otherwise, or conspiracy” that unreasonably restrains trade. 15 U.S.C. § 1; *NCAA v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85, 98 (1984). Under the Sherman Act, competitors may not join their independent

decision-making power to fix or establish prices—in other words, they cannot eliminate their independence in setting prices. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223-24 & n.59 (1940); *Am. Needle, Inc. v. NFL*, 560 U.S. 183, 186, 195 (2010). This presents risks associated with both horizontal (competitors at the same level) and vertical (different levels in supply chain, e.g., manufacturer and retailer) price-fixing allegations. Horizontal price fixing among competitors is generally per se unlawful. *FTC v. Superior Ct. Trial Lawyers Ass’n*, 493 U.S. 411, 434 (1990); *Socony-Vacuum*, 310 U.S. at 218, 224 n.59. Vertical agreements, however, are analyzed under the rule of reason. Agreements to conspire that contain both vertical and horizontal elements are referred to as “hub and spoke” agreements and are generally analyzed under the rule of reason.

Under the standards set by the Supreme Court of the United States, Section 1 claims focus on two elements: (1) a “contract, combination, or conspiracy”; (2) that “unreasonably restrains trade.” *Am. Needle*, 560 U.S. at 186, 190 & 195. Perhaps most pertinent to the use of GenAI in pricing is the first element: an agreement between two or more competitors—concerted action or the joining together of “independent centers” of decision-making. *Id.* Such an illegal “agreement” can occur through a tacit or explicit agreement. *Meyer v. Kalanick*, 174 F. Supp. 3d 817, 825 (S.D.N.Y. 2016) (“Sophisticated conspirators often reach their agreements as much by the wink and the nod as by explicit agreement, and the implicit agreement may be far more potent, and sinister, just by virtue of being implicit.”).

Recent challenges by both private litigants and the government to the use of GenAI for pricing highlight that “the machinery employed by a combination for price-fixing is immaterial.” *Socony-Vacuum Oil Co.*, 310 U.S. at 223. Instead, the below discussion shows that regulators, government agencies, and litigants focus on whether the alleged arrangement “joins together separate decisionmakers” that “deprive[]



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the marketplace of independent centers of decision making” *Am. Needle*, 560 U.S. at 195.

Antitrust Laws Apply to GenAI Pricing Tools

Although antitrust laws have long condemned concerted action in setting pricing, the use of GenAI through an algorithm brings new considerations. Courts now face questions about whether—and, more importantly, in what circumstances—competitors’ common use of an algorithm amounts to an “agreement.”

The most closely watched litigation pertaining to price fixing claims arising out of algorithms is RealPage Inc.’s alleged use of data, including non-public data, to estimate demand for housing and generate rent prices for landlords. RealPage now faces a series of suits and claims brought by the DOJ, state attorneys general, and private litigants (with the DOJ Antitrust Division filing statements of interest in the private litigation with several important takeaways).

The DOJ argues that RealPage’s delegation of decision making to a common entity (such as the algorithm provider) affects actual or potential competition, even without any additional subsequent agreement or coordination among the competitors. It argues that this kind of delegation represents the joining together of separate actors with separate economic interests characteristic of the concerted action covered by the Sherman Act. See Statement of Interest of the United States, U.S. Dep’t of Justice Antitrust Div., <https://www.justice.gov/d9/2023-11/418053a.pdf> (Nov. 15, 2023) (citing *Relevant Sports, LLC v. United States Soccer Fed’n, Inc.*, 61 F.4th 299, 309 (2d Cir. 2023) (concluding that allegations that competing entities “have ‘surrendered [their] freedom of action . . . and agreed to abide by the will of the association[]’” are “enough” for concerted action” (citing *Anderson v. Shipowners’ Ass’n of Pac. Coast*, 272 U.S. 359, 364-65 (1926))).

In *RealPage*, the district court denied RealPage’s motion to dismiss, ruling that because the Sherman Act “proscribes only concerted action, not independent conduct,” the Complaint plausibly alleged that each RealPage RMS client defendant “began prioritizing raising rent prices over decreasing vacancy rates” and that “each RMS Client Defendant provided RealPage its proprietary commercial data, knowing that RealPage would require the same from its horizontal competitors and use all of that data to recommend rental prices to its competitors.” *In re RealPage, Inc., Rental Software Antitrust Litig.* (No. II), 709 F. Supp. 3d 478, 510 (M.D. Tenn. 2023).

Explaining the rationale for denying the motion to dismiss, the court quoted Maureen Ohlhausen, a former Chair of the FTC:

Everywhere the word ‘algorithm’ appears, please just insert the words ‘a guy named Bob.’ Is it ok for a guy named Bob to collect confidential price strategy information from all the participants in a market, and then tell everybody how they should price? If it isn’t ok for a guy named Bob to do it, then it probably isn’t ok for an algorithm to do it either.

Id. at *17.

Another federal court denied a motion to dismiss in a similar case. That court concluded that the plaintiff alleged plausible allegations that competitors entered into an agreement to provide commercially sensitive data to a vendor, knowing the vendor was collecting similar data from competitors and would use it to generate rental rate recommendations to clients. *Duffy v. Yardi Sys.*, No. 2:23-cv-01391, 2024 U.S. Dist. LEXIS 219629, at *11-12 (W.D. Wash. Dec. 4, 2024); *Duffy v. Yardi Sys., Inc.*, No. 2:23-CV-01391, 2024 WL 4980771, at *1 (W.D. Wash. Dec. 4, 2024); *Duffy v. Yardi Sys., Inc.*, No. 2:23-CV-01391, 2024 WL 5049074, at *3 (W.D. Wash. Dec. 5, 2024).

In contrast, a different court dismissed a similar case brought against a software company providing services to hotel industry clients operating on the Las Vegas Strip. *Gibson v. Cendyn Grp., LLC*, No. 2:23-CV-00140, 2024 WL 2060260, at *3 (D. Nev. May 8, 2024) (involving both a hub and spoke claim and a vertical claim). The case alleged that the hotels artificially inflated the price of hotel rooms after all agreeing to use software marketed by the same software company. The court dismissed the case after concluding that the plaintiffs failed to “plausibly allege a tacit agreement between Defendants or a restraint on trade in part because Hotel Defendants are not required to and often do not accept the pricing recommendations generated.” *Id.* at *1.

The court considered several factors in rejecting the claims. The hotel defendants did not start using the software around the same time, and the hotel defendants did not agree to be bound by the pricing recommendations, much less agree to charge the same prices. *Id.* at *3-4. Critically, the court noted that the plaintiff did not allege that the hotel competitors exchanged non-public information, stating that “consulting public sources to see your competitors’ rates in reaching decisions about how to price hotel rooms does not violate the Sherman Act.” *Id.* at *4. The court also rejected the theory that unlawful collusion occurs simply because the algorithms get “better at predicting optimal hotel room pricing with the benefit of information

provided by each customer.” *Id.* at *6. See also *Gibson v. MGM Resorts Int’l*, No. 223CV00140MMDDJA, 2023 WL 7025996, at *6 (D. Nev. Oct. 24, 2023) (granting motion to dismiss original complaint because it failed to contain any allegation that, even if same algorithmic pricing software were used, that “Hotel Operators exchange nonpublic information with each other through their use of that same software”).

The critical distinction in the outcome of these cases: the courts focused on the Sherman Act’s “agreement” element and evaluated whether the facts included “allegations of the exchange of otherwise confidential information between competitors through the algorithm.” *Gibson v. Cendyn Grp., LLC*, No. 2:23-CV-00140-MMD-DJA, 2024 WL 2060260, at *4 (D. Nev. May 8, 2024); see also *In re RealPage, Inc., Rental Software Antitrust Litig.* (No. II), 709 F. Supp. 3d 478, 512 (M.D. Tenn. 2023) (contrasting allegations “that RealPage’s revenue management software inputs a melting pot of confidential competitor information through its algorithm and spits out price recommendations based on that private competitor data”). In other words, the courts focused on the use and exchange of confidential or proprietary data in connection with the common source or vendor—the prices were public, but the apartment leasing data was not generally public.

Of course, these issues remain pending in the courts and subject to further developments. Additionally, in August 2024, the DOJ and several state attorneys general filed their own case against RealPage based on the activity discussed above. As another example, the DOJ and FTC filed a Statement of Interest in another case pending in New Jersey involving casino hotels using pricing algorithms, in which the court then granted a motion to dismiss. See U.S. Dep’t of Justice, *Statement of Interest of the United States, Cornish-Adebiyi v. Caesars Enter., Inc.*, <https://www.justice.gov/opa/media/1345721/dl?inline>; *Cornish-Adebiyi v. Caesars Ent., Inc.*, No. 1:23-CV-02536, 2024 WL 4356188, at *1 (D.N.J. Sept. 30, 2024).

Finally, companies should monitor legislative and regulatory developments. For example, in 2024, Senator Amy Klobuchar (D-MN) introduced the Preventing Algorithmic Collusion Act of 2024 (S. 3686, 118th Cong.), which has now been introduced again (S. 232, 119th Cong. (2025)). Additionally, the former Chair of the FTC announced priorities to regulate AI and enforce antitrust pricing laws—a direction that remains unknown under the current Administration—and personnel at the DOJ and

FTC have written and spoken on the need to ensure AI does not result in fixing prices. See, e.g., FTC Staff, *Price Fixing By Algorithm is Still Price Fixing*, Fed. Trade Comm’n (Mar. 1, 2024), <https://www.ftc.gov/business-guidance/blog/2024/03/price-fixing-algorithm-still-price-fixing>.

Best Practices on Evaluating the Use of GenAI for Pricing or Pricing Algorithms

The following outlines the key considerations highlighted by the court decisions issued to date and the statements issued by the government on the use of GenAI or pricing algorithms for setting prices:

- *Are competitors using the same algorithm?* Based on the decisions rendered to date, the use of the same algorithm vendor or service by competitors may not necessarily amount to an agreement, or it may do so only in limited circumstances depending on how competitors use the service. Violations require an allegation of a “conscious commitment to a common scheme designed to achieve an unlawful objective.” *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984). Companies should assess whether potential competitors utilize the same algorithm and evaluate integration of their own customization and preferences to the algorithm’s design to ensure that their use does not amount to a simplistic cookie-cutter of competitor use.
- *Will the algorithm incorporate non-public data?* If so, will the algorithm share it outside of your company, either directly or indirectly through learning? In other words, will your non-public data be shared with the algorithm in a way that potential competitors will use it? RealPage allegedly incorporated customers’ non-public data and then integrated that data into algorithms used by competitors. On the other hand, the MGM Resorts court held that the lack of allegations of sharing non-public information weighed against an “agreement” that could amount to price fixing. *Gibson v. MGM Resorts Int’l*, No. 223CV00140MMDDJA, 2023 WL 7025996 (D. Nev. Oct. 24, 2023). Avoid—and construct any vendor contracts to avoid—sharing your confidential information beyond your own environment, and use of the algorithm in your own environment. Include provisions that limit a vendor’s use of your non-public data beyond your own environment and address potential liability for any violation.

- Consider the reverse: Will the algorithm you access include others' non-public data? The DOJ phrased the inquiry this way: are you "knowingly combining [your] sensitive, nonpublic pricing and supply information in an algorithm that [you] rely upon in making pricing decisions, with the knowledge and expectation that the other competitors will do the same"? See U.S. Dep't of Justice, *Memorandum of Law in Support of the Statement of Interest of the United States: In Re: RealPage, Rental Software Antitrust Litigation* (No. II), at 15, <https://www.justice.gov/d9/2023-11/418053a.pdf>. Ask questions to potential vendors about whether the algorithm incorporates any confidential, non-public information. Keep in mind that generally, "[t]here is nothing unreasonable about consulting public sources to determine how to price your product." Gibson, 2024 WL 2060260, at *5. Consider incorporating terms in any vendor agreement to prohibit the incorporation of non-public data into the algorithm.
- Avoid any mandatory adoption of pricing recommendations. In the private *RealPage* litigation, the complaint alleges that RealPage developed the technology to ensure the landlords actually used the "recommendations" from the program and put pressure on them to implement

the recommended prices, which they allegedly did around 80-90% of the time. In *re RealPage, Inc., Rental Software Antitrust Litig.* (No. II), 709 F. Supp. 3d 478, 493 (M.D.Tenn. 2023). RealPage allegedly required clients to submit requests to the corporate office if they wanted to deviate from the recommended prices, and they tracked who requested deviations. Do not surrender independent decision-making and become beholden to the algorithm's recommendation; do not let the business treat use of GenAI as a full outsource; and be willing to override—and in fact demonstrate a practice of frequently overriding—the recommendations.

Although many questions related to using GenAI to set prices remain unanswered, the litigation alleging "algorithmic price fixing" provides warning of the risks of competitors feeding non-public data into the same system as a tool to determine pricing. Franchisors and franchisees should be aware of the potential risks and evaluate any GenAI pricing options with the above factors in mind. This developing area of the law will turn not only on the specific facts of how potential competitors use GenAI pricing algorithms, but also on continued evaluation of the legal issues in the courts and potential legislation. ■

Message from the Editor-in-Chief

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Another wonderful Annual Forum on Franchising is in the books. I left the meeting feeling informed, rejuvenated, appreciative to have such great colleagues, and a little

dizzy from a couple of theme park rides. With the exception of the latter, I trust that those of you who attended feel the same. For that, great thanks to Caroline Fichter and Dan Oates, the Meeting's co-chairs, the planning committee, and the many authors and speakers!

As Jason mentioned in the Chair's message, work to plan the next Annual Forum on Franchising has already begun. Between now and then, there are several ways to get and

stay involved with the Forum. Among other things, consider writing for the *The Franchise Lawyer* or *The Franchise Law Journal*; peruse the Forum website's vast franchise law resources; register for an upcoming webinar; look into joining a committee, division or caucus; or simply reach out to a Forum colleague for a coffee. Your enthusiasm, engagement, and contributions keep our terrific community thriving.

Speaking of terrific, this issue of *The Franchise Lawyer* has four excellent articles that are sure to educate readers on various legal considerations in the use of artificial intelligence tools for price setting and franchise sales, franchising in the Gulf Cooperation Council region, and approaching mediation with, maybe, a different mindset. Be the next to contribute to the publication by reaching out to me at Justin. Sallis@Lathropgpm.com! ■