Software-Aided Price Fixing

A Discussion of Pending U.S. Antitrust Litigation

Copenhagen, June 27, 2024

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Agenda

- The Statute
- Two Key Precedents
- Two Different Outcomes on Motions to Dismiss
- Conclusion

Background

- Section 1 of the Sherman Act of 1890
  - Every 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, is hereby declared to be illegal.
- Elements:
  - “Agreement”
  - (Unreasonably) restrains trade in interstate commerce.

The Logic of the "Agreement" Element

- Section 1 is a prohibition against competitors engaging in joint profit maximization;
- Economic decisions made in the best interest of a group are not the same as decisions made by independent decision-makers in their own interest;
- "Agreement" = shorthand for concerted action, not an "agreement" as in contract law.

Applying § 1 to Software-Aided Price Fixing

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- Two key Section 1 precedents:
  - *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939) – Concerted or independent? (i.e., existence of agreement;
  - *American Needle v. National Football League*, 560 U.S. 183 (2010) – Nature of the agreement (its effect on decision-making in the market)

Interstate Circuit - facts

- *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939)
  - Defendants owned ~75% of movie theaters in markets in Texas and New Mexico
  - Defendants invited 8 movie distributors (in a single letter) to raise admission prices in second-run theaters to a set minimum, and
  - to discontinue double features in second-run theaters.

Interstate Circuit – Nature of the evidence

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- "In order to establish agreement [the government] is compelled to rely on inferences drawn from the course of conduct of the alleged conspirators."
- But … Is there any such as thing as *direct* evidence of agreement?
- Plaintiffs customarily rely on circumstantial evidence of agreement.

Interstate Circuit – Importance of intent

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- "There was … strong motive for concerted action, full advantage of which was taken by Interstate and Consolidated in presenting their demands to all [8 distributors] in a single document."
- *Knew* competitors received same proposal;
- *Aware* of the shared risk of no agreement and prospect of increased profits with agreement; and,
- *Motive* to engage in joint action.

Interstate Circuit – Proof by contradiction

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- Held: Evidence supported trial court's inference of agreement
  - "It taxes credulity to believe that the several distributors would, in the circumstances, have accepted and put into operation with substantial unanimity such far-reaching changes in their business methods without some understanding that all were to join, and we reject as beyond the range of probability that it was the result of mere chance."

- *American Needle*, 560 U.S. 183 (2010)

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- In the Supreme Court recognized the importance of independent decision-making to the competitive process.
- Does the “agreement” centralize decision-making in a way inconsistent with individual profit maximization?

- *American Needle* - facts

- NFL required teams to appoint it as the "licensing authority" for the central licensing of each team's fan merchandise;
- The delegation of each team's decision of to whom it would license its merch did not advance any legitimate league activity;
- Instead, it removed independent centers of decision-making (the teams) from the market without justification

In re: Real Page Rental Software Antitrust Litigation (No. II), No. 3:23-MD-3071 (M.D. Tenn)

- DOJ files Statement of Interest:
  - "The question in this case is whether the defendants have violated Section 1 of the Sherman Act by allegedly knowingly combining their sensitive, nonpublic pricing and supply information in an algorithm that they rely upon in making pricing decisions, with the knowledge and expectation that other competitors will do the same."

DOJ Relies on *Interstate Circuit*

- "Factual allegations … point to evidence of an invitation to act in concert followed by acceptance—evidence that is sufficient to plead concerted action under *Interstate Circuit*. *See* [Multifamily] Compl. ¶ 8"
- Under *Interstate Circuit*, it suffices to show that RealPage proposed the price-fixing scheme to competing landlords, who were each aware that its competitors were also being invited to participate in the scheme, and the competitors adhered to it—generating a common understanding among the competitors that they would increase prices collectively by using RealPage. *Id.* at 226-27

DOJ Relies of *American Needle*

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- Citing *American Needle* (2010):
  - "Section 1 applies to collaborations that eliminate independent decisionmaking—however they have been brought about."
  - As RealPage allegedly put it, it offered clients "the ability to 'outsource daily pricing and ongoing revenue oversight' to RealPage," allowing RealPage to "set prices for its clients' properties 'as though we [RealPage] own[ed] them ourselves.'" Multifamily Compl. ¶ 7.

RealPage Decision

- District court:
  - RealPage's RMS ("Revenue Management Solutions") Client Defendants "provide RealPage their independent commercially sensitive pricing and supply data and allow RealPage to use this data to set prices for not only their own properties, but also the properties of their horizontal competitors who use RMS."
  - "clients must also be willing to 'outsource [their] daily pricing and ongoing revenue oversight' by accepting price recommendations 80-90% of the time.'"

RealPage – Decision - Invitation to Collude

- *RealPage* court, citing *Interstate Circuit*:
  - "Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act."

RealPage Decision 1 – Role of Intent

- Awareness of Common Interest – Risks and Benefits
  - "RealPage discloses to its RMS clients exactly whose non-public data is being used";
  - Defendants could determine who among their competitors were also RealPage clients because RealPage provided them with the property addresses using RealPage's RMS.
  - Defendants' "*knowledge* that that information would be used to price each other's units is circumstantial evidence of a conspiracy."

GIBSON v. CENDYN GROUP, LLC, Case No. 2:23-cv-00140-MMD (D.Nev., 5/8/2024) - facts

- Defendant offers GuestRev and GroupRev, software to assist in the management of guest room and group bookings;
- "Caesars began using GuestRev around 2004, and the Cosmopolitan began using it in 2014; the other Hotel Defendants began using it at different times between those two points in time."

Gibson – decision: MTD granted on 3 grounds

- The gap in time between when they all began using GuestRev,
- missing allegations regarding the exchange of confidential, non-public information, and
- the lack of any allegations that Defendants were required to accept GuestRev's pricing recommendations

Gibson Court – improper focus on wrong "Agreement"

- Court focuses on the wrong "agreement"
  - Plaintiffs allege a hub-and-spoke conspiracy "with a rim made from the tacit agreements between Hotel Defendants to use Cendyn's GuestRev and GroupRev products knowing that their competitors were as well"
  - "Hotel Defendants' decisions to use these products evidence an agreement instead of independent conduct."
  - "The Court continues to find that the timing of when Hotel Defendants began to use GuestRev and GroupRev renders a tacit agreement among them implausible."

Gibson – Court focuses on the wrong agreement and timing issues

- DOJ Statement of Interest in *RealPage*
  - "Importantly, establishing concerted action under Section 1 does not require any showing of simultaneous action—or even action that is close in time."
  - If the agreement was 'let's use X,' that timing might be relevant, but that isn't the key agreement.

DOJ Statement of Interest in *RealPage*

- It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators." *Interstate Circuit*, at 227.

Gibson – Court improperly requires specific type of information

- *Gibson*: "a successful hub and spoke theory of Sherman Act liability based on the use of algorithmic pricing depends in part on the exchange of nonpublic information between competitors through the algorithm."
- "It is unclear whether the pricing recommendations generated to Hotel Operators include [competitors'] confidential information fed in; perhaps they only get their own confidential information back, mixed with public information from other sources."

Response to similar argument in other hotel cases

- The precise nature of the information (public/private) is not dispositive. The violation occurs when all or part of a hotel's pricing decision-making is off-loaded to a third party to which competitors have also delegated all or part of their pricing decision-making. So, the question is whether the information provided to the third party is sufficient in scope and regularity for the decision-making delegation to occur, not whether the information is strictly non-public. If so, and the hotel follows pricing recommendations most of the time and the hotel's rivals follow their most of the time, it is not plausible that the third party can promise (and achieve) an increase in its clients' revenue without recommending collusive prices. The' argument boils down to the contention that the software makes price recommendations for it independently without considering the information provided by other hotels, which would appear to contradict its business model.

Gibson – Court improperly requires total adherence to pricing recommendations

- "Plaintiffs do not allege that all Defendants agreed to be bound by GuestRev or GroupRev's pricing recommendations, much less that they all agreed to charge the same prices—and indeed allege to the contrary that Cendyn has difficulty getting its customers to accept the prices it recommends in GuestRev and GroupRev."

DOJ Statement of Interest in *RealPage*

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- Under Sec. 1, "it is per se unlawful for competitors to join together their independent decision-making power to raise, depress, fix, peg, or stabilize prices."

Conventional ‘Plus Factors’ in *RealPage*

(1) whether the defendants’ actions, if taken independently, would be contrary to their economic self-interest;

(2) whether defendants have been uniform in their actions;

(3) whether defendants have exchanged or have had the opportunity to exchange information relative to the alleged conspiracy; and

(4) whether defendants have a common motive to conspire.

In re Travel Agent Comm’n Antitrust Litig., 583 F.3d 896, 907 (6th Cir. 2009)

Conduct against self-interest

- *RealPage* court:
  - "… the contribution of sensitive pricing and supply data for use by RealPage to recommend prices for competitor units is in Defendants' economic self-interest *if and only if* Defendants know they are receiving in return the benefit of their competitors' data in pricing their own units."

Additional Factors

- Additional circumstantial empirical evidence:
  - “Compliance with the proposals involved a radical departure from the previous business practices of the industry, and
  - a drastic increase in admission prices of most of the subsequent-run theatres.”

Additional Factors

- A significant change in customary conduct by alleged conspirators:
  - In *Interstate Circuit*, a sudden change in pricing for 2d-run theaters and the elimination of the double-features that include 1st-run movies;
  - In *Real* Page, a clear change in pricing strategy by alleged conspirators from “heads in beds” to “price over volume

Additional Factors

- Susceptibility of the market to collusion
  - In *Real Page*: multifamily rental market "(i) is highly concentrated; (ii) has high barriers to entry for would-be competitors; (iii) has high switching costs for renters; (iv) has inelastic demand; and (v) offers a fungible product."
- Opportunities to Collude
  - Trade association meetings, chat rooms, other forms of inter-competitor communications. RealPage offers horizontal competitors to engage directly with one another through "webinars, screen-sharing training modules, frequent calls, in-person 'roundtables,' hosted happy hours, and annual conferences."

Conclusion

- “the machinery employed by a combination for price-fixing is immaterial.”
- Comments and Questions?
- Thank you!