

Latest Ruling Relating to Pricing Software Highlights Antitrust Risks

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ALERTS

December 9, 2024

Another court has allowed antitrust claims to proceed against competitors that use the same revenue management software. The case involves competitors in the real estate industry, but the takeaway is the same for any industry: companies should seek antitrust advice before using or supplying revenue management software, particularly when the software uses competitor pricing or supply data.

In this recent case (*Duffy, et al. v. Yardi Systems, Inc., et al.*), property renters brought an antitrust class action in federal court alleging that a group of multi-family property management companies used the same pricing software developed by Yardi Systems to illegally fix rental prices. The property management companies moved to dismiss the case, but the court denied the motion, allowing the litigation to proceed to discovery and expert work.¹

The federal court's ruling in *Yardi* is the latest in an increasing number of antitrust class actions filed against companies that use the same algorithmic pricing software for revenue management and the suppliers of that software. It also highlights the importance of companies thoroughly assessing the antitrust risk of using or supplying such software. This alert provides tips for companies on what to look for when assessing the antitrust risks of revenue management software.

Background of *Yardi*

In *Yardi*, the plaintiffs alleged that, beginning in 2011, the multi-family property management companies conspired to eliminate competition by providing detailed, competitively sensitive, nonpublic information to Yardi Systems for the purpose of setting rental rates in the multi-family housing market in violation of Section 1 of the Sherman Act.² The plaintiffs alleged that the property management companies effectively outsourced their independent pricing and supply decisions to Yardi System's algorithmic software and, by doing so, coordinated their pricing strategy to set rental rates.

In December 2023, the property management companies and Yardi Systems filed a motion to dismiss, arguing the allegations did not support improper coordination because each company made independent decisions to use the Yardi software and set prices. But on December 4, 2024, the federal court denied the defendants' motion. The court ruled that the allegations were sufficient to show the landlords entered into "a continuing horizontal agreement between and among the lessor defendants to provide their commercially sensitive information to Yardi, to use Yardi's revenue management software, and to implement the [pricing] recommendations generated."³ The court concluded that the allegations sufficiently established that the landlords had "a shared understanding that Yardi would use the information provided to recommend [sic] rental rates above what would be earned in a competitive market."⁴

In coming to this conclusion, the court pointed to several key facts alleged,⁵ such as:

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- Yardi Systems allegedly advertised its revenue management software “as a means of increasing rates above those available in a competitive market.”
- The property management companies touted Yardi System’s software as effective in raising rental prices and eliminating the guesswork of determining market conditions—implicitly inviting other property companies to join.
- “Yardi’s existing and new clients understood how the system worked and what it could do for them,” and decided to disclose confidential and sensitive pricing, inventory, and market data to Yardi such that Yardi could recommend specific lease pricing.
- Yardi System’s software “worked as intended, resulting in above-market pricing for units.”

Key Takeaways

While the court’s ruling in *Yardi* is based on the particular facts in that case, the court’s opinion, together with the statements of interest filed by the U.S. Department of Justice (DOJ) in this and other cases,⁶ shows the importance of companies vetting any algorithmic pricing or revenue management software that they seek to use or supply to manage revenues.⁷

In particular, companies should ask the following questions before using or supplying an algorithmic pricing or revenue management software product. If the answer to any of these questions is “yes,” companies might consider consulting antitrust counsel to mitigate any antitrust risks:

- Does the pricing software rely on confidential, nonpublic pricing data?
- Does the pricing software rely on current (“real time”) or future pricing data?
- Does the pricing software provide a “default” price or “recommended price” (even if only a “starting” price)?
- Is the pricing software available to only those who provide/input confidential pricing data into the software?
- Is the pricing software available to only “one side” of the market, e.g., only suppliers or only buyers?
- Is the pricing software marketed/advertised as “automating” pricing decisions?
- Is the pricing software’s recommended or default price accepted most (or all) of the time?
- Is adoption of the software’s recommended or default price encouraged or enforced?
- Is the software marketed/advertised to help raise price, stabilize/discipline price or revenue, or maximize profit?
- Is it known (or marketed/advertised) which other companies use the software or provide data to the software?
- Does the software in fact generate above-market prices?

For any questions about the implications of this case or the use of algorithmic pricing or revenue management software generally, please contact any member of Wilson Sonsini Goodrich & Rosati’s antitrust and competition practice, including Brent Snyder, Jeff VanHooreweghe, Jeffrey Bank, and Jindrich Kloub.

[1] Order Denying Defendants’ Joint Motion to Dismiss, *Duffy, et al. v. Yardi Systems, Inc., et al.*, No. 2:23-cf-01391 (W.D. Wash. Dec. 4, 2024), ECF 187.

[2] 15 U.S.C. § 1.

[3] *Id.* at 2.

[4] *Id.*

[5] *Id.* at 7.

[6] The DOJ has filed statements of interest in several class action lawsuits brought against companies using the same revenue management software in various industries. The DOJ also filed a civil complaint against revenue management software company RealPage alleging an anticompetitive use of pricing algorithms. See Wilson Sonsini Client Alert, “Department of Justice Signals Increased Scrutiny for Information Sharing” (Oct. 8, 2024), <https://www.wsgr.com/en/insights/departments-of-justice-signals-increased-scrutiny-for-information-sharing.html>.

[7] As the Federal Trade Commission (FTC) has advised, “Regardless of the industry you’re in, if your business uses an algorithm to determine prices, a brief filed by the FTC and the Department of Justice offers a helpful guideline for antitrust compliance: *your algorithm can’t do anything that would be illegal if done by a real person.*” Hannah Garden-Monheit and Ken Merber, *Price fixing by algorithm is still price fixing*, Federal Trade Commission Business Blog (March 1, 2024), <https://www.ftc.gov/business-guidance/blog/2024/03/price-fixing-algorithm-still-price-fixing>. [emphasis added].