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Price fixing in the age of artificial intelligence: *United States v. RealPage*

By Bernard M. Resser

I started my professional career as a Trial Attorney with the Antitrust Division of the United States Department of Justice (DOJ). Our number one priority was the prosecution of price fixing – agreements between direct competitors to suppress price competition and divide up markets. That was our priority because of its clear damage to consumers and competition – the twin pillars of antitrust law and policy .

When I was at the DOJ, we were engaged in investigating and prosecuting bid rigging conspiracies involving massive public and private works projects across the country including roads, bridges, and nuclear power facilities. The conspiracies increased the cost of these projects to taxpayers and customers and even indirectly threatened public safety. A bid rigging co-conspirator in one of the cases I handled was asked to inspect the work of another co-conspirator because there were only a handful of companies in the business of constructing nuclear containment vessels. An electric utility that owned a nuclear power plant commissioned this inspection amidst concerns that work on its plant had not met safety specifications. By successfully prosecuting the co-conspirators, we not only exposed and stopped the bid rigging scheme, but the electric utility was also alerted that the safety inspection they commissioned could not be trusted.



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In those classic bid rigging cases, the co-conspirators often met in person to divide projects and suppress competition, thereby minimizing a paper trail.

The electrical equipment conspiracy involving Westinghouse, General Electric, and other companies that concluded in 1961 was the most famous and shocking example in its time. Companies divided winning bids by a rotation system based on the phases of the moon. The conspiracy cost taxpayers an estimated \$175 million each year in 1950's dollars (almost \$2.3 billion annually in today's dollars). That system divided business and fixed prices in a way that minimized communications and meetings, thereby evading prosecutors for years.

To uncover these clandestine meetings and artifices, antitrust prosecutors often depended on whistleblowers—such as disgruntled former employees of companies involved in the illegal conduct—to come forward with evidence that was then confirmed through civil and grand jury investigations.

But in the digital age, new means of fixing prices present new challenges and have even been addressed this election season.

During remarks in Raleigh, North Carolina on Aug. 16, 2024, Vice President Kamala Harris stated:

“Some corporate landlords collude with each other to set artificially high rental prices, often using algorithms and price-fixing software to do it. It’s anticompetitive, and it drives

up costs. I will fight for a law that cracks down on these practices.”

(<https://www.whitehouse.gov/briefing-room/speeches-remarks/2024/08/16/remarks-by-vice-president-harris-at-a-campaign-event-in-raleigh-nc/>)

It turns out, there already is a law—the Sherman Antitrust Act of 1890, and the DOJ was already on it. One week after VP Harris’ remarks, on August 23, 2024, the DOJ filed a 115 page, 254 paragraph, four-count Complaint against RealPage, Inc. in the United States District Court for the Middle District of North Carolina (Case No. 1:24-cv-00710). (<https://www.justice.gov/opa/media/1364976/dl?inline>).

The DOJ is joined as plaintiff by eight attorneys general, including California’s, North Carolina’s, and Tennessee’s. The markets affected include areas in 17 states and the District of Columbia. The Complaint alleges:

“RealPage sells software to landlords that collects nonpublic information from competing landlords and uses that combined information to make pricing recommendations. (Complaint, ¶ 1.)

* * *

RealPage provides daily, near real-time pricing ‘recommendations’ back to competing landlords. These recommendations are based on the sensitive information of their rivals. * * * RealPage monitors compliance by landlords to its recommendations. * * * A significant number of landlords then effectively agree to outsource their pricing function to RealPage with auto acceptance

or other settings such that RealPage as a middleman, and not the free market, determines the price that a renter will pay. Competing landlords choose to share their information with RealPage to ‘eliminate the guessing game’ about what their competitors are doing and ultimately take instructions from RealPage on how to make business decisions to ‘optimize’ or in reality, maximize rents.” (Complaint, ¶6.)

Is this price fixing? It does not take the classic form of past decades, but it sure looks like it. While competitors do not meet, communicate, or use a clever rotation system, their prices can now be manipulated by machines that tell them the prices to charge.

Artificial Intelligence now does the work of price fixing.

Antitrust enforcement agencies have addressed and offered guidance on lawful and unlawful information exchange between competitors for decades. (See, e.g., “Information exchange: be reasonable,” Federal Trade Commission Bureau of Competition (2014) [<https://www.ftc.gov/enforcement/competition-matters/2014/12/information-exchange-be-reasonable>]; Antitrust Guidelines for Collaborations Among Competitors, Federal Trade Commission and the U.S. Department of Justice (2000) [https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdo-guidelines-2.pdf].

The 2018 settlement in the “Nexstar” case enjoined sharing of ad time pricing information between broadcast television stations through an intermediary. This was an indicator that the DOJ would be aggressive in pursuing anti-competitive information sharing strategies. The stipulated judgment in that case prohibits sharing information that is less than 18 months old. (*United States v. Sinclair Broadcasting Group, Inc., et al.* United States District Court for the District Of Columbia Case 1:18-cv-02609-TSC, Final Judgment filed 12/13/2018. [<https://www.justice.gov/opa/press-release/file/1120116/dl>].)

The RealPage enforcement action is the DOJ’s most recent effort to address the problem of an-

ticompetitive information sharing as the latest technologies facilitate new ways to stifle competition.

Competitors have long tried to share information lawfully by using intermediaries. However, the RealPage case shows that the use of a third party to gather and manage competitor information may be insufficient to make it legal where the third party heightens rather than mitigates anticompetitive effects.

Determinative factors in evaluating whether information sharing is an antitrust violation include:

1. Recency and frequency of the information, such as through direct downloads of data and reports from competitors.
2. Commercial sensitivity and privacy of the information.
3. Comprehensiveness and detail of the information.
4. Near complete industry participation.
5. Converting data to allow apples-to-apples comparisons.
6. Information shared and available exclusively to companies who compete at the same level (and not customers, employees, or suppliers).
7. Use of algorithms or other methods to predict competitors’ pricing or output strategies.
8. Advising use of information to raise prices/profits.
9. Intent to reduce price competition.

[Antitrust Guidelines for Collaborations Among Competitors, Federal Trade Commission and the U.S. Department of Justice] (2000).

In the case of RealPage, it appears they check every one of these boxes. RealPage collects comprehensive and detailed rental data, which is private, sensitive and is uploaded daily and automatically, with wide industry participation. It then converts the data for apples-to-apples comparison and uses algorithms to make pricing recommendations to competitors based on information shared by competitors. In RealPage’s own words, “a rising tide raises all ships,” and “our tool [] ensures that [landlords] are driving every possible opportunity to increase price even in the most downward trending or unexpected conditions.” (Complaint, ¶ 1.)

RealPage also drives compliance with its pricing recommendations.

“[RealPage] provide[s] daily price recommendations. RealPage has

taken multiple steps to increase compliance with [its] price recommendations. It designed [its software] to make it much easier to accept recommendations than to decline them. It built an auto-accept function and pushes clients to adopt it and increase its role. And its pricing advisors encourage landlords to follow [RealPage’s] pricing recommendations. Among their duties, pricing advisors review any request to override a price recommendation.” (Complaint, ¶ 60.)

This is essentially a policing function typical of most price fixing schemes to uphold compliance.

The Complaint alleges that RealPage’s software products have both the purpose and effect of suppressing competition among landlords, inflating rents that already consume an outsized and increasing percentage of people’s disposable income:

“[RealPage’s] use of nonpublic, competitively sensitive data is likely to harm, and has harmed, the competitive process and renters. [RealPage’s software products] distort the competitive process by using nonpublic data to maximize pricing increases and minimize pricing decreases. [RealPage’s software products] incorporate special rules, called ‘guardrails,’ that override the ordinary functioning of the algorithms in ways that tend to push rival landlords’ rental prices higher than would occur in a competitive market.” (Complaint, ¶ 110.)

Unlike past price fixing schemes, RealPage has made no secret of the intent of its software services to raise rents for landlords. As the Complaint alleges:

“In fact, as RealPage’s Vice President of Revenue Management Advisory Services described, ‘there is greater good’ in everybody succeeding versus essentially trying to compete against one another in a way that actually keeps the entire industry down.’ As he put it, if enough landlords used RealPage’s software, they would ‘likely move in unison versus against each other.’ To RealPage, the ‘greater good’ is served by ensuring that otherwise competing landlords rob Americans of the fruits of competition—lower rental prices, better leasing terms, more concessions. At the same time, the landlords enjoy the benefits of coordinated pricing among competitors.” (Complaint, ¶ 2.)

The plaintiffs therefore ask the Court to “[a]djudge and decree that RealPage has acted unlawfully to restrain trade in conventional multifamily rental housing markets across the United States in violation of Section 1 of the Sherman Act,” and to stop RealPage from engaging in the rent data collection and pricing recommendations described in the Complaint. (Complaint, ¶ 254. sub ¶¶ a. and c.)

The Complaint also alleges that by offering this illegal advantage to landlords, RealPage has monopolized the market for property management software:

“RealPage’s scheme not only distorts competition to the detriment of renters, but also allows it to reinforce its dominant position in the market for commercial revenue management software. By its own account, RealPage controls at least 80 percent of that market. Its dominant position is protected by substantial data advantages due to its massive reservoir of ill-gotten competitively sensitive information from competing landlords.” (Complaint, ¶ 11.)

In this digital, post-pandemic age when people live and increasingly work remotely from home, algorithms are apparently jacking up their rents making it even harder to make ends meet.

Antitrust prosecutors and politicians are taking notice. I will be watching to see if and when that makes a difference. As we know, both the legal and political processes can be slow.

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