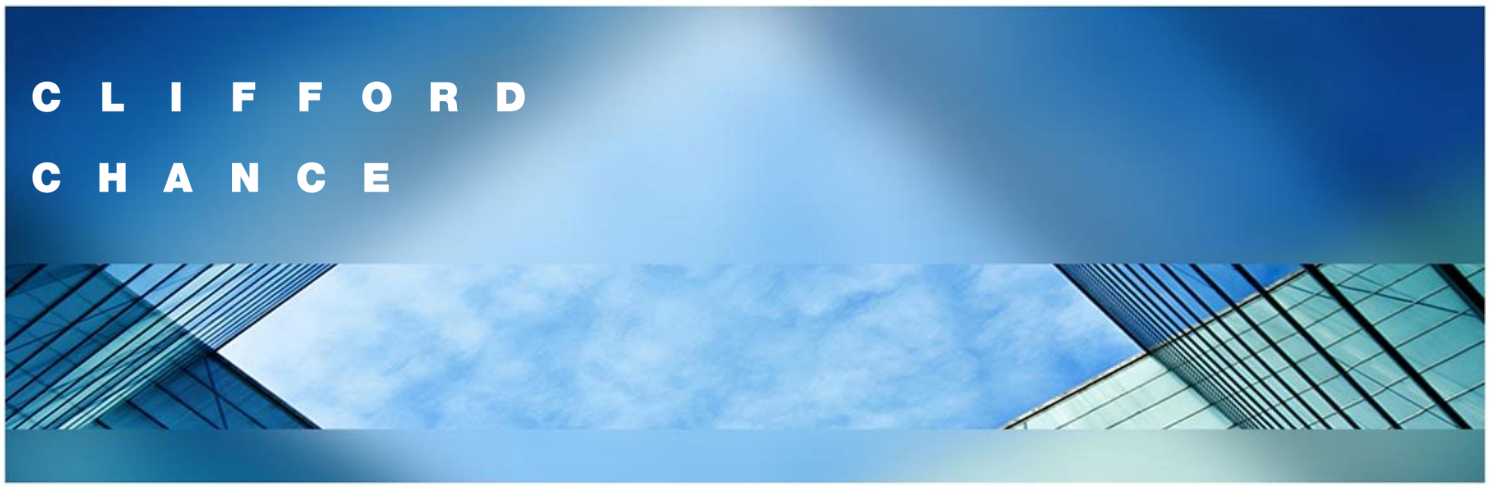

DOJ MUST OVERCOME HURDLES IN REALPAGE ANTITRUST CASE

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The U.S. Department of Justice's civil antitrust lawsuit against RealPage Inc. in the U.S. District Court for the Middle District of North Carolina, alleging that its use of algorithmic pricing software violated Sections 1 and 2 of the Sherman Act, marks a shift in the agency's approach to algorithmic price-fixing.

Instead of bringing a per se price-fixing claim — alleging RealPage and its property owner subscribers agreed to fix rental rates — the DOJ opted for a rule-of-reason theory, targeting agreed-upon information sharing as the unlawful conduct. This shift is likely strategic, and perhaps a reaction to the U.S. District Court for the Middle District of Tennessee's December 2023 opinion in the private RealPage litigation rejecting the plaintiffs' per se theories.[1]

To bolster its case, the DOJ has brought creative Section 2 claims, but to many this seems self-defeating and perhaps shows the case's inherent weakness. On one hand, the DOJ claims that RealPage has a monopoly in a purported market, but on the other, it suggests, contradictorily, that the entire market is illegal. How can RealPage have a monopoly in a market that the DOJ says is inherently illegal?

This article addresses those nuances as well as a number of difficulties the DOJ will need to overcome, such as:

- By conceding property managers have the opportunity to decide price on a daily basis, there is a suitable defense to the DOJ's allegations.'
- Being big isn't illegal.
- A hub-and-spoke conspiracy requires a rim, in that the property owners all agreed to set prices, which the DOJ doesn't seem to expound upon in its complaint.

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1 In re RealPage, Inc., 2023 U.S. Dist. LEXIS 230197, at **47-48 (M.D. Tenn. Dec. 28, 2023).

This article will also touch on the difficulty in the private litigation of sustaining a class across hundreds of localized markets.

IS AN AGREEMENT TO SHARE INFORMATION ILLEGAL WHEN EACH RECIPIENT IS ALLEGEDLY FREE TO MAKE ITS OWN PRICING DECISIONS?

The DOJ's lawsuit follows private cases consolidated in a multidistrict litigation. A key question there is whether a vertical hub, RealPage, can be liable for conspiring with the spokes or whether a rim of agreement must be established between the competitor spokes.

In the MDL, the DOJ advocated for a per se standard in a statement of interest.[2] The court, however, found that because of the vertical aspects of the conspiracy, i.e., RealPage's involvement, the plaintiffs' allegations should be analyzed under the rule of reason.

The DOJ's complaint appears to acknowledge that this vertical arrangement likely fails to support a hub-and-spoke horizontal conspiracy, implicitly recognizing that the mere sharing of data is not necessarily an unlawful conspiracy. This may explain why the DOJ decided against a criminal case with a higher burden of proof.

The DOJ's complaint does not expressly allege an agreement on price between RealPage and any landlord, nor an overarching agreement among the many landlords. This omission is a central flaw in the Section 1 claim. Indeed, the complaint acknowledges that RealPage provides only "recommendations" — a term, or a variant, used more than 125 times — and that "every morning" each landlord's property manager "chooses whether to accept the price floor recommendations, keep the previous day's rent, or override the recommendation."[3]

The only "agreement" alleged is the bilateral agreement between RealPage and each of its subscribers to provide non-public data and, to some extent, to "use" that data when making its rental decisions. But without an explicit agreement to fix prices and, instead, with each property owner making independent daily decisions on how to price its properties, the DOJ has created room for a significant defense on the merits.[4]

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2 Statement of Interest of the United States, In re: RealPage, Rental Software Antitrust Litigation (No. II), Case No. 3:23-MD-3071 (M.D. Tenn. Nov. 15, 2023), ECF No. 627.

3 Compl. ¶ 61, United States v. RealPage, Inc., Case No. 1:24-cv-00710 (M.D.N.C. Aug. 23, 2024), ECF No. 1.

4 In re Citric Acid Litigation, 191 F.3d 1090, 1097-98 (9th Cir. 1999) (""Gathering information about pricing and competition in the industry is standard fare for trade associations. If we allowed conspiracy to be inferred from such activities alone, we would have to allow an inference of conspiracy whenever a trade association took almost any action.""); Williamson Oil Co. v. Philip Morris USA, 346 F.3d 1287, 1313 (11th Cir. 2003) (""Preliminarily (and quite significantly), we note that the evidence establishes that appellees exchanged only sales, not pricing . . . it is far less indicative of a price fixing conspiracy to exchange information relating to sales as opposed to prices. Moreover, it plainly was economically beneficial for each individual appellee to keep tabs on the commercial activities of its competitors, so the receipt of information concerning their sales does not tend to exclude the possibility of independent action or to establish anticompetitive collusion."").

BEING BIG ISN'T ILLEGAL UNDER SECTION 2.

The DOJ's complaint takes the allegations a step further than the MDL by alleging monopolization and attempted monopolization under Section 2. These novel claims raise several important questions: Notably, what willful and wrongful conduct did RealPage undertake that allowed it to acquire or maintain its monopoly, or gave it a dangerous probability of doing so?

The complaint seems to fall short of alleging the required willful and wrongful conduct. More precisely, the DOJ fails to identify any clear exclusionary or predatory behavior that foreclosed other companies from offering meaningful alternative revenue management software, or severely hampered their ability to participate in the market, such as predatorily low prices that drive others out of the market or hamstring them or locking up key customers or raw materials in long-term exclusive contracts.

As a result, RealPage's purported dominance looks a lot more like they just have a superior product — falling short of the anticompetitive conduct the DOJ needs to prove.

The DOJ alleges that RealPage has acquired 80% of the alleged market and "amassed a reservoir of competitively sensitive data" from landlords that rivals cannot easily match. But simply having an 80% share isn't illegal, and alleging that RealPage has a reservoir of data is simply restating its size. Instead, there must be some willful or wrongful conduct, the "why" and "how" that got them there to cross the line.[5]

As the late U.S. Supreme Court Justice Antonin Scalia stated in Verizon Communications Inc. v. Law Offices of Curtis V. Trinko LLP in 2004: "The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system."[6]

The DOJ seems to have slapped on these claims to emphasize that RealPage is a big, bad actor. Deviating from Section 2 precedent, it does not allege:

- A boycott;
- That RealPage is an essential facility as established in the Supreme Court's 1951 decision in Lorain Journal Co. v. U.S.;[7] or
- That RealPage worked with certain landlords and then decided not to do so.[8]

Further, the DOJ does not allege predatory low pricing — which is rare and almost never successful — nor exclusive dealing.

Additionally, the DOJ effectively argues that RealPage's entire business is illegal because of the nature of its software — an odd, potentially self-defeating allegation if the market is interpreted as illegal algorithmic pricing software. A company cannot monopolize a market that is illegal.[9] If the product market itself is illegal, the Section 2 claim collapses.

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5 Verizon Communs., Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004).
6 Id.
7 Lorain Journal Co. v. United States, 342 U.S. 143 (1951).
8 Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985).
9 See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977) (""Plaintiffs

There is also a causation issue here because it is unclear who, if anyone, is harmed, as RealPage is allegedly the only player in this niche market. Critically, the DOJ seems to assume a Section 1 violation to support its Section 2 claim — effectively alleging that RealPage has a monopoly in an illegal market, which is why an equally efficient competitor cannot challenge them. This conclusory allegation must be ignored.[10]

THE DOJ AND PRIVATE LITIGANTS WILL LIKELY STRUGGLE TO SHOW INJURY AND CLASSWIDE INJURY.

The DOJ will also face hurdles in proving injury, especially in the fragmented and localized real estate market.

For example, Landlord A may have had communications with Landlord B about what minimum prices to charge tenants. Therefore, Tenant C, who lives within a 5-mile radius of Landlord A and Landlord B, may be able to prove injury because of the elevated rental prices. However, Tenant C would not be able to implicate Landlord D, who could be 150 miles away, or Landlord E, who is 1,500 miles away.

Further, the conditions within each market are unique. The rental conditions in New York City likely would be drastically different than rental conditions in rural Alabama. Further, the frequency and use of RealPage is almost certain to vary based on location.

To prove this injury, the DOJ would need to meet the elements of a hub-and-spoke conspiracy. To prove a hub-and-spoke conspiracy, there must be a hub (RealPage), spokes (agreements between RealPage and each landlord), and a rim (agreements between the landlords).[11]

Because RealPage provides only recommendations to landlords, the only agreement alleged is the bilateral agreement between RealPage and each subscriber to provide nonpublic data, with the subscribers knowing that its competitors also did so. And again, without more, this vertical arrangement seems insufficient, and the DOJ's claim starts to look like a stretch.

Even if there is some evidence of communications between landlords, the evidence of a widespread conspiracy appears thin at best.[12] The rim is missing.

Using the example above, there is no evidence that Landlord A and Landlord B had any agreements, or even discussions, with Landlord D and Landlord E.

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must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful."").

10 Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007); Ashcroft v. Iqbal, 556 U.S. 662 (2009).

11 Kotteakos v. United States, 328 U.S. 750 (1946).

12 E.g., Toys ""R"" US, Inc. v. Fed. Trade Comm'n, 221 F.3d 928 (7th Cir. 2000) (""The evidence on which the Commission relied showed that, at a minimum, Mattel, Hasbro, Fisher Price, Tyco, Little Tikes, Today's Kids, and Tiger Electronics agreed to join in the boycott 'on the condition that their competitors would do the same.' . . . Second, the Commission cited evidence that the manufacturers were unwilling to limit sales to the clubs without assurances that their competitors would do likewise."").

In the MDL, it seems there are many small, localized conspiracies between local landlords.[13] As a result, the plaintiffs' burden of proving Rule 23's requirements by a preponderance of the evidence will be difficult, at best.

In particular, it seems likely that individualized issues of proof will predominate under Rule 23(b)(3), as the participants in each localized conspiracy will vary, and each class member will likely have to offer its own proof to show it suffered antitrust injury as a result of the cartel and that its rent would have been lower but-for the defendants' agreement to simply submit data to RealPage and receive its recommendations regardless of whether or not it followed those recommendations each day.

In any event, the defense will undoubtedly argue that these complexities prevent a finding of classwide harm.

[13] Comcast Corp. v. Behrend, 569 U.S. 27 (2013) (""Respondents sought to certify a class under Federal Rule of Civil Procedure 23(b)(3). That provision permits certification only if 'the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members.' The District Court held, and it is uncontested here, that to meet the predominance requirement respondents had to show (1) that the existence of individual injury resulting from the alleged antitrust violation (referred to as 'antitrust impact') was 'capable of proof at trial through evidence that [was] common to the class rather than individual to its members'; and (2) that the damages resulting from that injury were measurable 'on a class-wide basis' through use of a 'common methodology.'").

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