DOJ AND EIGHT STATE ATTORNEYS GENERAL FILE CIVIL ANTITRUST LAWSUIT AGAINST REALPAGE INC. ALLEGING ITS ALGORITHMIC PRICING SOFTWARE AMOUNTS TO PRICE-FIXING AND MONOPOLIZATION

In a significant move signaling increased scrutiny of purported algorithmic collusion, the Department of Justice ("**DOJ**"), along with eight State Attorneys General ("**States**"), filed a Complaint on Friday, August 23, 2024, alleging that RealPage Inc. ("**RealPage**"), a property management software company known for its AI-powered pricing software, has violated both Sections 1 and 2 of the Sherman Act by serving as a conspiratorial hub connecting the spokes of competing property management companies.[1] The Complaint puts the agency's theories about algorithmic price-fixing to the test and comes on the heels of private antitrust suits involving RealPage's pricing algorithm.

DOJ's suit follows a number of private cases consolidated in the Middle District of Tennessee. Collectively, these cases will be a significant test of whether courts will view use and reliance on algorithmic pricing as the equivalent of an anticompetitive "agreement" for purposes of the Sherman Act or view this pricing practice as legal because each competitor is free to decide its own prices. An additional complexity may be whether a vertical hub, in this case RealPage, can be liable for conspiring with the spokes or whether, as the law currently requires, a rim of agreement must be established between the competitor-spokes.

It is worth noting, in this regard, that the Complaint does not expressly allege an agreement on price between RealPage and any landlord, nor an overarching agreement among the many landlords. Instead, the Complaint repeatedly acknowledges that RealPage provides only "recommendations"— the word, or a variant, is used more than 125 times in the 87-page Complaint—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." Compl. ¶ 61. 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 in making its rental decisions) with each subscriber knowing its competitors also did so. That vertical arrangement

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[1] United States et al. v. RealPage Inc., 1:24-cv-00710, ECF No. 1 (M.D.N.C. Aug. 23, 2024) , available at file:///C:/Users/631219/Downloads/u.s._et_al._v._realpage_inc._-_1_-_complaint_filed.pdf.

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seems unlikely, without more, to suffice as the basis for a hub and spoke horizontal conspiracy and may explain in part why DOJ chose to file this somewhat novel challenge as a civil, not criminal, case with a lower burden of proof.

The Complaint's Section 2 counts for monopolization and attempted monopolization also raise some 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 on its face alleges that RealPage has "amassed a reservoir of competitively sensitive data" from landlords that rivals cannot easily match. It will be interesting to see whether the court will consider that fact, which simply describes RealPage's market position, to be the wrongful *conduct* necessary to constitute monopolization or the benign result of a superior product, innovation, historic accident, or better business acumen.

DOJ has long made its position on these questions clear in speeches and other public statements. In the ongoing private litigation involving RealPage, the DOJ has already filed statements of interest outlining its views regarding whether the conduct alleged is *per se* unlawful under the antitrust laws. For example, DOJ has stated that "it is *per se* unlawful when … competitors knowingly combine 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."[2] The DOJ and States' Complaint reiterates these theories, but also includes detailed allegations of market power, geographic and product market definitions, and competitive effects in case the Court analyzes the alleged price-fixing under the lower rule of reason standard, which balance the pro-competitive justifications for the conduct against the purported harms.

Specifically, the Complaint alleges that the landlords using RealPage's software have agreed with RealPage and each other to share competitively sensitive information for use in competitors' pricing in violation of Section 1 of the Sherman Act. The Complaint also separately targets RealPage's vertical agreements with Landlords to align pricing. The DOJ and States allege that RealPage collects, uses, and shares "troves" of non-public, competitively sensitive information from landlords' transaction-level data about apartment rental rates, discounts, lease terms, and other characteristics such as amenities to align rental prices. RealPage's clients allegedly agree to share detailed and non-public lease-level data with RealPage. RealPage then uses this non-public data from these competing clients to train and run its algorithmic pricing software, AIRM and YieldStar, which generate rental pricing recommendations based on this shared data. These recommendations, created using competitors' non-public data, are fed back to all of RealPage's clients. RealPage also "pushes" landlord clients into an "auto-accept" feature to increase compliance with its recommendations. The Complaint alleges that the auto-accept option effectively allows RealPage itself to make pricing decisions for the landlords and determine the rent that will be paid.

While other pending cases against RealPage have brought similar price-fixing allegations, the DOJ and States' Complaint is the first to bring claims against

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[2]   Memorandum of Law in Support of the Statement of Interest of the United States, In re: RealPage, Rental Software Antitrust Litigation (No. II), 3:23-md-3071, ECF No. 628 (M.D. Tenn. Nov. 15, 2023) https://www.justice.gov/d9/2023-11/418053a.pdf

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RealPage under Section 2 of the Sherman Act. The third and fourth claims of the Complaint allege that RealPage monopolized and attempted to monopolize the commercial revenue management software market by using its trove of competitively sensitive competitor data to exclude rivals. The DOJ and States allege that RealPage has monopolized the market for commercial revenue management software. Not only is RealPage's algorithm facilitating price-fixing, but the Complaint alleges that RealPage is acting as a monopolist by collecting, combining, exploiting the competitively sensitive information of landlords. Because RealPage's agreements with landlords make it so powerful, other revenue management software firms cannot compete unless they too enter into these allegedly unlawful agreements to share competitively sensitive information. RealPage allegedly has 80% share of this market, which is only increasing "due to feedback effects." Compl. ¶¶ 161-68.

Attorney General Merrick Garland stated on Friday during a press conference that, "[e]verybody knows the rent is too damn high, and we allege this is one of the reasons why."[3] Through its two-year investigation of RealPage, which purportedly employed data scientists and other experts to analyze the code of the algorithms, the Assistant Attorney General Jonathan Kanter said that it "learned that the modern machinery of algorithms and AI can be even more effective than the smoke-filled rooms of the past."[4] The DOJ says that RealPage's use of these algorithms has distorted the market and harmed the competitive process in local rental markets for multi-family homes across the United States. The Complaint cites to a number of RealPage's documents showing how RealPage and others in the industry understand that RealPage's algorithm is effective at raising rental prices. For example, a RealPage internal document stated that "[o]ur tool [] ensures that [landlords] are driving every possible opportunity to increase price even in the most downward trending or unexpected conditions." Compl. ¶ 1. And a potential RealPage client is quoted as saying, "I always liked this product because your algorithm uses proprietary data from other subscribers to suggest rents and term. That's classic price fixing . . .." Compl. ¶ 129.

Overall, information sharing through algorithmic pricing technology is prevalent throughout many industries and is not unique to RealPage, landlords, and rental prices. It remains an open question whether and to what extent information sharing through pricing algorithms and other newly developed technologies violate the Sherman Act. Back in 2015, DOJ obtained a guilty plea in a prosecution for price fixing of posters sold online through Amazon Marketplace using an algorithmic-based computer code.[5] But this case against RealPage is the first civil antitrust action brought by the agency alleging price-fixing on such a large scale, affecting the entire apartment rental industry. DOJ and the States are likely hoping to send a message (and obtain legal precedent) that using artificial intelligence to set artificially high prices is illegal price-fixing under the antitrust laws.

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[3]   *DOJ Sues RealPage for Algorithmic Pricing Scheme that Harms Millions of American Renters*, Dept. of Justice (Aug. 23, 2024) https://youtu.be/0Z4ToglRsIU?si=cc4p7W5rdCk63X-U.

[4]   *Id.*

[5]   *Former E-Commerce Executive Charged with Price Fixing in the Antitrust Division's First Online Marketplace Prosecution*, Dept. of Justice (April 6, 2015) https://www.justice.gov/opa/pr/former-e-commerce-executive-charged-price-fixing-antitrust-divisions-first-online-marketplace.

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CONTACTS

Joseph Ostoyich
Partner

T +1 202 912 5533
E joseph.ostoyich
@cliffordchance.com

Brian Concklin
Partner

T +1 202 912 5060
E brian.concklin
@cliffordchance.com

Peter Mucchetti
Partner

T +1 202 912 5053
E peter.mucchetti
@cliffordchance.com

Leigh Oliver
Partner

T +1 202 912 5933
E leigh.oliver
@cliffordchance.com

Sharis Pozen
Regional Managing
Partner Americas

T +1 202 912 5226
E sharis.pozen
@cliffordchance.com

William Lavery
Partner

T +1 202 912 5018
E william.lavery
@cliffordchance.com

Danielle Morello
Counsel

T +1 202 912 5088
E danielle.morello
@cliffordchance.com

Lauren Rackow
Counsel

T +1 212 878 3194
E lauren.rackow
@cliffordchance.com

Michael Van Arsdall
Counsel

T +1 202 912 5072
E michael.vanarsdall
@cliffordchance.com

Dodi Allocca
Associate

T +1 202 912 5180
E dodi.allocca
@cliffordchance.com

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Clifford Chance, 2001 K Street NW, Washington, DC 20006-1001, USA

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