

CLIENT ALERT

DOJ's RealPage Case Highlights Potential Antitrust Risks for Owners of Multi-Family Residential Real Estate

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I. Introduction

On August 23, 2024, the Antitrust Division of the U.S. Department of Justice (“DOJ”) filed a civil lawsuit against RealPage, Inc. (“RealPage”) in the U.S. District Court for the Middle District of North Carolina, accusing the property management software company of illegally sharing sensitive and confidential pricing data between landlords, facilitating landlords’ coordination to raise rental prices and harming millions of renters.¹

This lawsuit highlights the antitrust agencies’ focus on the use of artificial intelligence (“AI”) and algorithmic pricing tools. This new enforcement trend presents issues not only in the rental real estate market, but other industries where these technologies are increasingly being adopted for pricing of consumer products and services, including health insurance, hospitality, transportation, and e-commerce.

Landlords and property managers who use (or are considering using) algorithmic pricing tools should be aware of the potential legal risks associated with relying on such tools to set rental prices, manage inventory, and determine other

¹ See *United States v. RealPage, Inc.*, No. 1:24-cv-00710 (M.D.N.C. Aug. 23, 2024).

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lease terms. Additionally, property managers and landlords should understand the risks associated with certain kinds of communications or information sharing with their competitors.

II. Increased Scrutiny in Real Estate and Rental Housing Industry

The DOJ's lawsuit against RealPage has been widely anticipated as federal antitrust enforcers, both the DOJ and the Federal Trade Commission (the "Agencies"), have stepped up their public warnings around the use of AI and algorithmic pricing tools.

Within the past year alone, the Agencies have repeatedly weighed in on private cases in real estate and hospitality industries. In November 2023, the DOJ filed a Statement of Interest in a consolidated class action suit involving RealPage in Tennessee federal court. In their Statement of Interest, DOJ argued that the use of an algorithmic pricing tool can violate Section 1 of the Sherman Act.² In March 2024, the Agencies filed a joint Statement of Interest taking a similar position in *Duffy v. Yardi Systems Inc., et al.*,³ a case challenging the use of a different pricing tool. The Agencies argued that Section 1 of the Sherman Act "applies with full force to schemes involving pricing algorithms."⁴

These steps align with increasing attention from the Biden-Harris Administration on the issue of rising rent costs and the importance of antitrust enforcement in this area. In March 2024, President Biden released a statement announcing steps the administration would take to combat "unfair practices that are driving up rental costs." In his statement, President Biden specifically called for federal agencies to stop "inflated rents caused by algorithmic use of sensitive nonpublic pricing and supply information" which "violate antitrust laws."⁵ Vice President Kamala Harris, in her first major economic speech since becoming the Democratic presidential nominee, promised to continue the work set out by the Biden Administration to "crack down" on collusion and the use of algorithms and price-fixing software that contribute to increasing rental prices.⁶

² Department of Justice, Statement of Interest of the United States, *In re: RealPage, Rental Software Antitrust Litigation*, Case No. 3:23-MD-3071 (Nov. 15, 2023), available at: <https://www.justice.gov/atr/media/1325336/dl>.

³ The case of *Duffy v. Yardi Systems Inc. et al.* concerns the question of whether competing landlords violated Section 1 of the Sherman Act by "unlawfully agreeing to use Yardi's pricing algorithms to artificially inflate multifamily rental prices."

⁴ Department of Justice, Statement of Interest of the United States, *Duffy v. Yardi Systems Inc. et al.*, Case No. 2:23-cv-01391-RSL (Mar. 1, 2024), available at https://www.ftc.gov/system/files/ftc_gov/pdf/YardiSOI-filed%28withattachments%29_0.pdf.

⁵ *FACT SHEET: President Biden Announces Plan to Lower Housing Costs for Working Families*, The White House (Mar. 7, 2024), <https://www.whitehouse.gov/briefing-room/statements-releases/2024/03/07/fact-sheet-president-biden-announces-plan-to-lower-housing-costs-for-working-families>.

⁶ *Remarks by Vice President Harris at a Campaign Event in Raleigh, NC*, The White House (Aug. 16, 2024), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2024/08/16/remarks-by-vice-president-harris-at-a-campaign-event-in-raleigh-nc>.

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III. DOJ's Allegations Against RealPage

The DOJ, joined by eight states,⁷ alleges that RealPage's revenue management software inappropriately uses nonpublic, competitively sensitive information that has been shared by and between competing landlords to recommend inflated rental prices for multifamily properties.⁸

The complaint spotlights the three revenue management systems that RealPage offers: YieldStar, AI Revenue Management ("AIRM"), and Lease Rent Options ("LRO"). However, the lawsuit centers on YieldStar and AIRM, both of which use competitors' nonpublic, transactional data to generate daily floor-plan price recommendations and suggest unit-level prices.⁹ DOJ implies that LRO may be less problematic than the other two products, because it requires landlords to manually input competitor data, and thus could be populated solely with information obtained from public websites.¹⁰

According to the DOJ, YieldStar and AIRM are designed to "raise the tide" for all landlords, particularly YieldStar- and AIRM-using landlords, as these revenue management systems have the "likely effect" of aligning the landlords' pricing processes and strategies.¹¹ By linking landlords' pricing decisions to RealPage's software, the DOJ argues that RealPage deprives the market of fully independent, competitive decision-making and replaces it with collective action or "interdependent decision-making."¹²

IV. Information Sharing Allegations

Also important to the DOJ's complaint are the claims of information sharing between competing landlords. According to the DOJ, the apartment rental market is "replete with competitively sensitive discussions among ostensible competitors."¹³ According to the complaint, landlords regularly discussed competitively sensitive topics with competitors, including by:

- a. Soliciting non-public information from competing properties about rental rates, inquiries by prospective renters, and occupancy rates via "call arounds," emails, and/or in-person visits.
- b. Sharing non-public price and occupancy information about local geographic market conditions through channels such as shared Google Drive documents.

⁷ The DOJ is joined by the states of California, Colorado, Connecticut, Minnesota, North Carolina, Oregon, Tennessee, and Washington.

⁸ The complaint also alleges that RealPage leverages the competitively sensitive data shared by landlords to exclude rivals and maintain its monopoly over commercial revenue management software for conventional multifamily housing rentals. Complaint at 56-62, *United States v. RealPage, Inc.*, No. 1:24-cv-00710 (Aug. 16, 2024).

⁹ *Id.* at 15-22.

¹⁰ *Id.* at 22-23.

¹¹ *Id.* at 84.

¹² *Id.* at 47, 53.

¹³ *Id.* at 29.

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- c. Conducting or participating in “market surveys” to collect or provide insight into specific competitors close to a subject property.
- d. Using industry events, monthly meetings, and sponsored cocktail hours as an opportunity to share information and build relationships with competitors.
- e. Engaging in conversations at the corporate revenue management level about competitive strategies and approaches to different market conditions.

Additionally, the DOJ alleges that landlords used monthly RealPage user group meetings to discuss topics like product enhancement, managing lease expirations, pricing of amenities, trends in rent payments, renewals, strategies for collections, and market outlooks.¹⁴ DOJ's complaint does not directly challenge these practices, but the complaint makes clear that DOJ is concerned about this activity. The complaint cites testimony regarding this conduct from several anonymous landlords, indicating that DOJ may have deposed landlords that DOJ believed may have been engaging in problematic conduct.

The civil lawsuit comes in the midst of reports of a DOJ criminal investigation of at least certain landlords or property managers. Earlier this year, the DOJ reportedly expanded its probe by issuing subpoenas on behalf of a federal grand jury in Washington.¹⁵ On May 22, 2024, the Federal Bureau of Investigation conducted a surprise raid on the Atlanta-based multifamily landlord Cortland Management (“Cortland”).¹⁶ Although the exact conduct that is the subject of the criminal investigation is unknown, Cortland is a RealPage client, so this or any other ongoing criminal investigations may be related to conduct uncovered during the DOJ's civil investigation of RealPage.

V. Conclusion

The DOJ lawsuit against RealPage marks one of the first government enforcement actions in the area of algorithmic pricing tools. We expect more investigations and enforcement actions in this area moving forward. This will also continue to be an active area of private litigation, particularly if the DOJ's case is successful. Additionally, the Agencies are also on the lookout for coordination activities and allegedly inappropriate information exchanges involving competitively sensitive information.

¹⁴ See *id.* at 28-40.

¹⁵ Josh Sisco, *DOJ Escalates Price-Fixing Probe on Housing Market*, POLITICO (Mar. 20, 2024), <https://www.politico.com/news/2024/03/20/rental-housing-market-doj-investigation-00147333>.

¹⁶ According to a blog post on RealPage's website, Cortland—which owns nearly 85,000 apartment units across “high-growth” markets across the Sunbelt—uses RealPage to “maximize [its] purchasing power and ensure consistent vendor pricing for [its] communities from Arizona to Georgia.” *RealPage Spend Management Boosts Bottom Line for Multifamily with Catalogs, PEPP and More*, REALPAGE VIDEOS, <https://www.realpage.com/videos/spend-management-boosts-bottom-line>.

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Multi-family residential property owners and managers should be mindful of increased scrutiny at this time and should review and consider their pricing and information sharing practices. The RealPage litigation should also be closely watched by companies in other industries considering the use of algorithmic pricing tools.

Willkie antitrust attorneys will continue to monitor, analyze, and report on the developments in this area. If you have any questions about potential antitrust risk arising from sharing information between competitors or using algorithmic pricing tools, please contact a Willkie attorney.

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

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