Federal Enforcers Signal Heightened Scrutiny of Algorithm Use to Inform Pricing Decisions

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FEDERAL ENFORCERS SIGNAL HEIGHTENED SCRUTINY OF ALGORITHM USE TO INFORM PRICING DECISIONS

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TABLE OF CONTENTS

I. SUMMARY ............................................................................................................... 175
II. HISTORICAL ENFORCEMENT ACTIONS ................................................................. 179
    A. United States v. Airline Tariff Publishing Co. ............................................. 179
    B. United States v. Topkins ................................................................. 181
III. MULTIDISTRICT LITIGATION INVOLVING REALPAGE, INC. ..................... 182
    A. Background ........................................................................................................ 182
    B. DOJ’s Statement of Interest and Court’s Hearing ............................. 183
    C. Court’s Decision .......................................................................................... 186
IV. CONCLUSION ............................................................................................................ 187

I. SUMMARY

Advances in technology have led to increasing use of algorithms by companies across industries, and companies continue to find new and innovative ways to incorporate algorithms into their businesses in order to streamline costs and improve efficiency and customer experience, among other positive benefits. For example, UPS uses algorithms in its On-Road Integrated Optimization and Navigation platform to plan and optimize driver routes,1 Netflix uses algorithms in its Recommendation Engine to suggest shows and movies to subscribers,2 Visa uses algorithms to manage transaction authorizations in the event of service

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disruptions, and Amazon uses algorithms in deciding which results are most relevant to a customer’s search.

Despite their many clear benefits, algorithms are not without some risk. Reliance on algorithms can create absurd results; in 2011, a book on evolutionary biology came to be priced on Amazon for almost $24 million due to algorithmic pricing between two sellers, who had set their prices based on one another. There have also been claims of discriminatory algorithms. And, in the context of antitrust, the United States federal enforcement agencies have taken an increasing interest in the use of algorithms, particularly algorithmic software that may be used by multiple companies in a particular industry to inform pricing decisions, like third-party revenue management software. Consistent with this increased scrutiny, Senator Amy Klobuchar (D-Minn.) has introduced a bill to the Senate that, if enacted, would entirely prevent companies from using algorithms to set prices.

In 2017, then-Chairman of the Federal Trade Commission, Maureen Ohlhausen, summarized her concerns about how algorithmic pricing software could be used in an anti-competitive way as follows:

What if algorithms are not used in such a clearly illegal way, but instead effectively become a clearing house for confidential pricing information? Imagine a group of competitors sub-contracting their pricing decisions to a common, outside agent that provides algorithmic

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4 Seamus Breslin, Everything You Need to Know About Amazon’s A9 Algorithm, REPRICEREXPRESS (Jan. 29, 2024), https://www.repricerexpress.com/amazons-algorithm-a9/.


pricing services. Each firm communicates its pricing strategy to the vendor, and the vendor then programs its algorithm to reflect the firm’s pricing strategy. But because the same outside vendor now has confidential price strategy information from multiple competitors, it can program its algorithm to maximize industry-wide pricing. In effect, the firms themselves don’t directly share their pricing strategies, but that information still ends up in common hands, and that shared information is then used to maximize market-wide prices. Again, this is fairly familiar territory for antitrust lawyers, and we even have an old-fashioned term for it, the hub-and-spoke conspiracy. Just as the antitrust laws do not allow competitors to exchange competitively sensitive information directly in an effort to stabilize or control industry pricing, they also prohibit using an intermediary to facilitate the exchange of confidential business information. Let’s just change the terms of the hypothetical slightly to understand why. Everywhere the word “algorithm” appears, please just insert the words “a guy named Bob”. Is it ok for a guy named Bob to collect confidential price strategy information from all the participants in a market, and then tell everybody how they should price? If it isn’t ok for a guy named Bob to do it, then it probably isn’t ok for an algorithm to do it either.9

Real-world uses of algorithmic software are rarely, if ever, as straight-forward as Ohlhausen’s exaggerated hypothetical, which rests on multiple conditions.

Revenue management is a core function of most businesses,10 and it makes sense that businesses want to leverage technology in this area. Revenue management software can help companies make better and more nimble pricing decisions (including decisions to lower prices) by synthesizing large volumes of data related to market conditions and historical supply and demand, at a speed and cost that is impossible for a human to recreate.11 Ultimately, such software can provide clear procompetitive benefits as well as lower prices for consumers by allowing companies to reduce administrative costs and more quickly react to market changes.12

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12 PADDLE, supra note 10.
Nevertheless, over the past several years, private plaintiffs have filed several antitrust lawsuits alleging that multiple companies’ use of algorithmic software to inform their pricing decisions amounts to unlawful price-fixing. One example is *Gibson v. Cendyn Group, LLC*, an antitrust class action lawsuit filed in the United States District Court for the District of Nevada against several Las Vegas hotels and a revenue management software developer. The plaintiffs in *Gibson* allege that the defendants engaged in a conspiracy to inflate room rates. While the Court granted the defendants’ motions to dismiss due to various pleading deficiencies in the complaint, it did not evaluate the merits of plaintiffs’ antitrust claims and gave plaintiffs the opportunity to file an amended complaint. Plaintiffs’ first amended complaint was filed on November 27, 2023, and motions to dismiss the first amended complaint remain pending as of the submission of this Article for publication.

In another proceeding brought by private plaintiffs, *In re RealPage, Inc. Rental Software Antitrust Litigation (No. II)* (“RealPage MDL”), the Department of Justice (“DOJ”) recently filed a Statement of Interest, described further below. Even though the Court in the RealPage MDL denied the motion to dismiss submitted by defendants who own, operate, or manage multifamily rental housing properties (“Multifamily Defendants”), it granted the motion to dismiss submitted by defendants who own, operate, or manage student housing

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15 Id. at 3-9.

16 See Order Granting MGM’s Motion to Discount, *Gibson*, ECF No. 140; see also Order Granting Defendants’ Motion to Discount, ECF No. 141; *US Judge Dismisses Las Vegas Hotel Price-Fixing Lawsuit, COMPETITION POL’Y INT’L* (Oct. 25, 2023), https://www.pymnts.com/ethnic_post/us-judge-dismisses-las-vegas-hotel-price-fixing-lawsuit/.

17 See Class Action Complaint, *Gibson*; supra note 14; Defendants’ Joint Motion to Discount the First Amended Class Complaint with Prejudice, *Gibson*, ECF No. 160; Defendants Blackstone Inc. & Blackstone Real Estate Partners VII L.P.’s Motion to Discount the Amended Complaint & Request for Oral Argument, *Gibson*, ECF No. 161.

properties ("Student Defendants"). In so doing, the Court impliedly rejected much of the DOJ’s argument by adopting a rule-of-reason analysis, even though the DOJ’s Statement of Interest focused entirely on the DOJ’s argument that the per se standard should apply to the RealPage MDL.

This Article provides a brief discussion of prior enforcement actions which involved the allegedly collusive use of algorithms. It then discusses in further detail the RealPage MDL, including the DOJ’s Statement of Interest filed in that proceeding and its implications.

II. HISTORICAL ENFORCEMENT ACTIONS

The most significant enforcement actions involving algorithms in the context of purported collusion are summarized below.


On December 21, 1992, the DOJ filed a complaint against Airline Tariff Publishing Company ("ATP") and eight separate U.S.-based airlines for purported violations of Section 1 of the Sherman Act. The DOJ alleged that ATP was wholly owned by a group of airlines, including the airline defendants named in the action. The DOJ further alleged that ATP, on behalf of the airline defendants, “maintained on their behalf a data base of airline fare information.” Additionally, the DOJ alleged that each airline defendant would supply ATP with the name of the fare, the dollar amount, and the “fare rules,” which “contain[ed] the conditions under which a fare can be used or sold,” as well as up to two “footnotes” on each fare, which “also contain[ed] conditions on the use of the fare,” such as “first ticket dates or last ticket dates” or “applicable travel periods.” At least once a day, the airline defendants then purportedly received this data back from ATP and then “employ[ed] sophisticated computer programs that sort the fare information received from ATP and produce detailed reports. These reports allow the airline defendants to monitor and analyze immediately each other’s fare changes, including ticketing dates and the ties or links among fare changes in various markets.”

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19 Id.
21 Id. ¶ 3.
22 Id. ¶ 20.
23 Id. 30–21.
24 Id. 25–26.
alleged that this conduct, which “increase[d] fares, eliminate[d] discounted fares, and set fare restrictions for tickets purchased[,]” violated Section 1 of the Sherman Act because it constituted an unreasonable restraint of interstate trade.\(^{25}\)

The allegations in the Airline Tariff Publishing case did not implicate any direct evidence of an agreement among the airlines to set prices based on the data shared by the airline defendants and disseminated by ATP.\(^{26}\) Instead, the DOJ’s theory was that, by monitoring each other’s prices and responding to pricing changes practically in real time, the defendants in the case had engaged in collusive conduct.\(^{27}\) Accordingly, by “[a]cting unilaterally, each firm recognizes that price cuts will be matched immediately, so cutting price makes sense only if the firm would prefer an equilibrium in which all firms charged the new lower price. This greatly reduces the incentive to compete on price.”\(^{28}\)

Final judgment was entered as to two of the airline defendants on November 1, 1993,\(^{29}\) who entered into a consent decree with the DOJ when the complaint was filed.\(^{30}\) As for the remaining airlines, the DOJ’s case against them settled in March 1994, after they agreed to changes in their pricing information system.\(^{31}\) The settlement reached eliminated “the information exchange features that let the airlines negotiate prices with each other.”\(^{32}\) For example, it prohibited airlines from filing fares with a “first ticket date” and required that all fares in the system “be available for immediate purchase by consumers.”\(^{33}\)

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25 Id. ¶¶ 27–28.
26 Id. ¶¶ 15–26.
28 Id.
31 Id.
32 Id.
33 Id.
B. United States v. Topkins

The DOJ’s first prosecution targeting Internet commerce specifically occurred in United States v. Topkins.\textsuperscript{34} The DOJ’s San Francisco Antitrust Division, with the assistance of the FBI’s field office in San Francisco, conducted a federal antitrust investigation into price fixing in the online wall décor industry.\textsuperscript{35} As a result of that investigation, on April 6, 2015, a one-count felony charge was filed against David Topkins in the United States District Court for the Northern District of California.\textsuperscript{36} The charge alleged that Mr. Topkins, who was employed by “Company A” as a “Director in its Trend Division,” conspired with other individuals “to fix the prices of certain posters sold in the United States on Amazon Marketplace.”\textsuperscript{37} Sellers on Amazon Marketplace “control[ed] all pricing and shipping decisions on the products they offer.”\textsuperscript{38} The charge claimed that Mr. Topkins carried out this scheme with his co-conspirators by “participat[ing] in conversations and communications with representatives of other poster-selling firms to discuss the prices of the agreed-upon posters” and “agree[ing] to adopt specific pricing algorithms for the agreed-upon posters with the goal of coordinating changes to their respective prices.”\textsuperscript{39} Mr. Topkins then “wrote computer code that instructed Company A’s algorithm-based software to set prices of the agreed-upon posters in conformity with this agreement,” and Mr. Topkins and his co-conspirators then “collected, exchanged, and discussed information on the prices and sales of the agreed-upon posters.”\textsuperscript{40}

At the time the DOJ’s charge was filed, the DOJ simultaneously announced that Mr. Topkins had “agreed to plead guilty” and “agreed to pay a $20,000 criminal fine and cooperate with the [DOJ’s] ongoing investigation.”\textsuperscript{41} As a result, the DOJ’s allegations were never tested in Court, and publicly available filings do not provide any details explaining the nuances of the allegedly collusive algorithm. However, various articles have proffered, presumably based on how Amazon Marketplace works, that the algorithm at issue “collected data


\textsuperscript{35} Id.


\textsuperscript{37} Id. ¶¶ 1, 6.

\textsuperscript{38} Id. ¶ 4.

\textsuperscript{39} Id. ¶ 8(a), (c).

\textsuperscript{40} Id. ¶ 8(d), (e); see also Plea Agreement at 4, Topkins, No. cr-15-201 (N.D. Cal. Apr. 30, 2015), https://www.justice.gov/atr/case-document/file/628891/dl?inline.

\textsuperscript{41} See Off. of Pub. Affs., U.S. Dep’t of Just., supra note 34.
to identify the lowest price in the market.\textsuperscript{42} The conspiring sellers set their selling price slightly below market price, which inflated prices and impeded real competition in the market.\textsuperscript{43}

### III. MULTIDISTRICT LITIGATION INVOLVING REALPAGE, INC.

#### A. Background

On April 12, 2023, dozens of lawsuits filed against RealPage, Inc. and a number of property management entities were consolidated into a multidistrict litigation proceeding (“MDL”) in the United States District Court for the Middle District of Tennessee (“RealPage MDL”).\textsuperscript{44} On September 7, 2023, plaintiffs filed their First Amended Consolidated Complaint against the Student Defendants, as well as their Second Amended Consolidated Class Action Complaint (“Complaint”) against the Multifamily Defendants.\textsuperscript{45} In the Complaints, the plaintiffs alleged that “Defendants engaged in a nationwide conspiracy to fix and inflate the price of multifamily rental housing across the country” through their use of RealPage’s “integrated technology platform that provides software solutions for the multifamily rental housing markets, including revenue management software solutions[.]{46}” Specifically, plaintiffs claimed that several separate RealPage products—including RealPage Revenue Management, Lease Rent Options, YieldStar, and AI Revenue Management—relied on and required the sharing of non-public data to generate rental price recommendations, which “promised growth even in a down market.”\textsuperscript{47} Users of these products allegedly then “delegate[d] their rental price and supply decisions to a common decision maker, RealPage” to eliminate competition and keep


\textsuperscript{43} Id.; see also Y. Frank Ren, Case Highlights DOJ Focus, Extradition Efforts in Ecommerce Price-Fixing Conspiracy, MORGAN LEWIS (Feb. 5, 2019), https://www.morganlewis.com/pubs/2019/02/case-highlights-doj-focus-extradition-efforts-in-ecommerce-price-fixing-conspiracy (discussing a subsequent criminal sentencing arising from the same investigation).

\textsuperscript{44} See Transfer Order, In re RealPage, Inc., Rental Software Antitrust Litig. (No. II), No. 3:23-md-03071, MDL No. 30701 (J.P.M.L. Apr. 12, 2023), ECF No. 1 [hereinafter Order Name, RealPage MDL, ECF No.]. The authors of this Article note that they, along with Jeffrey S. Cashdan and Emily S. Newton, are counsel of record to Defendant ECI Management, LLC in the RealPage MDL. See Order Granting Pro Hac Vice Admission, RealPage MDL, ECF No. 556; Order Granting Unopposed Motion to Deem ECI Mgmt., LLC Substituted for ECI Grp., Inc., RealPage MDL, ECF No. 609.

\textsuperscript{45} First Amended Consolidated Class Action Complaint, RealPage MDL, ECF No. 527; Second Amended Consolidated Class Action Complaint, RealPage MDL, ECF No. 530.

\textsuperscript{46} Second Amended Consolidated Class Action Complaint ¶¶ 1-2, RealPage MDL, ECF No. 530.

\textsuperscript{47} Id. ¶ 2-5.
rental prices as high as possible in markets across the country. Based on these allegations, plaintiffs seek to bring claims on behalf of a putative class for price fixing in violation of Section 1 of the Sherman Act and for violation of state antitrust statutes.

On October 9, 2023, the defendants filed motions to dismiss under a variety of different theories, as well as a motion to enforce certain class action waivers. As relevant to this Article, the Multifamily Defendants moved to dismiss the Complaint for failure to state a claim.

B. DOJ’s Statement of Interest and Court’s Hearing

On October 12, 2023, the DOJ filed a Notice of Potential Participation, alerting the Court and the parties that it was “considering filing a Statement of Interest” in the RealPage MDL. In its Notice, the DOJ claimed that “the government has a particularly substantial interest in addressing the proper application of Section 1 of the Sherman Act, 15 U.S.C. § 1, to the use of algorithms by competitors to help set pricing,” which have “become more prevalent in the modern economy.” On October 17, 2023, the Court approved the request to participate.

On November 15, 2023, for the first time in an antitrust case involving algorithms, the DOJ filed its Statement of Interest and brief in support. The DOJ argued that defendants’ motions to dismiss should be denied for several reasons. First, the DOJ argued that the Complaint had adequately demonstrated concerted action among the defendants because concerted action can be demonstrated through “an invitation proposing collective action followed by a course of conduct showing acceptance.” In advancing this argument, the DOJ alleged that “the nature of the invitation . . . and competitors’ responsive actions demonstrating acceptance of the invitation” should be considered rather than the

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48 See, e.g., id. ¶ 6.
49 Id. ¶¶ 681, 701-57.
50 See generally RealPage MDL, ECF Nos. 568-593.
51 Defendants’ Memorandum of Law in Support of Motion to Dismiss Multifamily Plaintiffs’ Second Amended Consolidated Class Action Complaint, RealPage MDL, ECF No. 592.
52 United States’ Notice of Potential Participation at 1, RealPage MDL, ECF No. 599.
53 Id.
54 Order Approving United States’ Request to Participate, RealPage MDL, ECF No. 602.
55 Statement of Interest of the United States, RealPage MDL, ECF No. 627; Memorandum of Law in Support of the Statement of Interest of the United States, RealPage MDL, ECF No. 628.
56 Memorandum of Law in Support of the Statement of Interest of the United States at 8, RealPage MDL, ECF No. 628.
57 Id. at 9.
traditional “factors that would be termed ‘plus factors’ today[].” The DOJ then offered the conclusion that the Complaint “point[ed] to evidence of an invitation to act in concert followed by acceptance,” which was “sufficient to plead concerted action[].” Specifically, the Statement of Interest purported to identify allegations that RealPage intended “to create coordination among users” and that “landlords ‘gave their adherence to the scheme and participated in it’” by sharing non-public, competitively sensitive data and delegating pricing decisions to RealPage. Second, the DOJ alleged that the Complaint had sufficiently demonstrated that “the alleged scheme meets the legal criteria for per se unlawful price fixing,” because the allegations concerned horizontal price fixing, which eliminates rivalry between direct competitors and is “a prototypical class of restraint that is per se unlawful.” The DOJ argued that the alleged scheme was per se unlawful because it involved a “common pricing formula” and “the collective delegation of pricing decisions to a common entity or agent[].”

In arguing that the conduct at issue in the RealPage MDL was per se unlawful, the DOJ did not address—even as an alternative argument—the “rule of reason” approach, which the DOJ itself has recognized will apply in “most [] antitrust offenses.” Under the “rule of reason” approach, courts are to “undertake an extensive evidentiary study” and must consider “(1) whether the practice in question in fact is likely to have a significant anticompetitive effect in a relevant market and (2) whether there are any procompetitive justifications relating to the restraint.” If the alleged anticompetitive harm is outweighed by the practice’s procompetitive effects, the practice cannot be considered unlawful. By addressing only the per se rule, the DOJ has impliedly taken the aggressive position that the alleged conduct in the RealPage MDL has no legitimate justification or competitive purpose and, therefore, should be considered unlawful without further analysis.

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58 Id. (emphasis omitted).
59 Id. at 13.
60 Id. (quoting Second Amended Consolidated Class Action Complaint ¶ 4, RealPage MDL, ECF No. 530).
61 Id. at 15–17.
62 Id. at 19.
64 Id.
65 Id.
On November 22, 2023, the defendants filed a response to the DOJ’s Statement of Interest, arguing that it should be disregarded. First, the defendants argued that the DOJ had relied on facts not alleged in the Complaint. While the DOJ claimed that landlords adopted RealPage’s pricing recommendations eighty to ninety percent of the time in support of its claim that the alleged scheme eliminated independent decision-making, the defendants noted that the allegations in the Complaint expressly stated that these recommendations were adopted “up to” eighty to ninety percent of the time, mischaracterizing plaintiffs’ allegations as minimum rather than maximum acceptance rate. Defendants also noted that the DOJ’s Statement of Interest failed to account for the fact that some defendants had a much lower acceptance rate of RealPage’s pricing recommendations. Accordingly, the fact that defendants accepted “pricing recommendations only sometimes does not support a plausible inference of horizontal conspiracy[].” Defendants also noted that the DOJ incorrectly argued that the goal of the alleged conspiracy was to “increase” prices, even though the marketing statements identified by the DOJ did not say anything about increasing prices and, in fact, RealPage’s software sometimes resulted in decreased prices. This fact negated the weight of much of the authority cited by the DOJ, which focused on uniform schemes to increase prices or adopt the same pricing recommendations.

Second, the defendants argued that the DOJ had misstated the controlling law of conspiracy. By arguing, in reliance on Interstate Circuit v. United States, that a mere “invitation proposing collective action followed by a course of conduct showing acceptance suffices to show concerted action,” the DOJ ignored the specific facts present in that case, which were markedly different.

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66 Defendant’s Response to the Department of Justice’s Memorandum of Law in Support of the Statement of Interest of the U.S., RealPage MDL, ECF No. 644.
67 Id. at 1.
68 Id.
69 Id. at 1-2.
70 Id. at 2.
71 Id.
72 Id. at 2-3.
73 Notice of Supplemental Authority in Support of Defendants’ Motion to Dismiss & Response to the Department of Justice’s Statement of Interest, RealPage MDL, ECF No. 663. On December 7, 2023, the defendants submitted a notice of supplemental authority regarding United States v. Brewbaker, in which the Fourth Circuit Court of Appeals reversed the defendant’s conviction under the Sherman Act because the district court erred in applying the per se rule. Id. The Fourth Circuit reasoned that “when an alleged agreement involves both a horizontal and vertical restraint on trade, . . . the rule of reason applies.” Id. at 1. The defendants averred that “[t]he Fourth Circuit’s decision confirms that Plaintiffs have not alleged a per se claim here” and that “the rule of reason” must apply to “hub-and-spoke conspiracies involving vertical restraints.” Id. at 2.
from the facts alleged in the Complaint. Additionally, by arguing that plaintiffs did not need to allege parallel conduct or plus factors to plead circumstantial evidence of conspiracy, the DOJ ignored clear case law establishing that plus factors are always required and again misinterpreted the Interstate Circuit, which “involved parallel, near-simultaneous, identical price increases,” which undisputedly did not occur here.

On December 11, 2023, the Court held a hearing on the defendants’ pending motions to dismiss and allowed the DOJ to make a few points towards the end of the hearing. The DOJ alleged that its primary interest in the case was with the defendants’ overly narrow definitions of concerted action and price fixing, which it argued were “inconsistent with settled law.” Regarding concerted action, the DOJ reiterated that “an invitation of concerted action and subsequent acceptance of that invitation” was sufficient, reiterating points made in its Statement of Interest and referencing allegations in the Complaint that landlords had stated that RealPage’s technology helps them to work together. The DOJ noted, in response to a question from the Court, that “direct communication among the landlords is not necessary for there to be a tacit agreement,” so long as the landlords understand that “they are part of a common scheme.” As for price fixing, the DOJ alleged that price fixing occurs “where multiple competitors give nonpublic data to a common agent so that the agent can use the data to tell competitors how they should price[,]” even if the “competitors retain some pricing authority and judgment.” The DOJ then reiterated its point that proving parallel conduct is not required in every case, if there is an invitation contemplating concerted action and subsequent conduct showing acceptance.

C. Court’s Decision

On December 28, 2023, the court issued opinions on the outstanding motions to dismiss. In relevant part, the court granted the motion to dismiss submitted by the Student Defendants and denied the Multifamily Defendants’ motion to
dismiss.82 Critically, the court analyzed both motions under the rule of reason standard rather than the per se standard after concluding that the allegations in the complaints did not demonstrate a straightforward price-fixing conspiracy.83 In doing so, the court impliedly rejected the arguments advanced by the DOJ that the per se standard should apply.84 Indeed, beyond a brief mention in the introduction of the fact that United States had submitted a Statement of Interest, the court’s opinion did not even refer to the DOJ’s argument.85

While it appears that the DOJ’s legal position on the issue is still developing—and, in fact, muddles existing case law—the DOJ’s decision to file a Statement of Interest in the RealPage MDL nevertheless demonstrates that the interplay between algorithms and potential antitrust concerns is of growing interest to federal officials.86

IV. CONCLUSION

With the growing presence of and reliance on algorithms and artificial intelligence in a variety of businesses, enforcement actions are likely to continue, as are suits filed by private plaintiffs. This is a continually and rapidly developing area of the law, and companies using algorithms in any aspect of their business, particularly to inform their pricing decisions, should keep current on these developments and consider consulting counsel.

82 Id. Memorandum Opinion, RealPage MDL, ECF No. 690.
83 Id. at 47-48.
84 Id.
85 Id. at 1.