ML STRATEGIES

DOJ Reaffirms Stance on Algorithmic Price Fixing, While Federal Judge Dismisses Price Fixing Complaint Against Software Company — AI: The Washington Report

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VIEWPOINT TOPICS

- Artificial Intelligence

- On March 27, the Department of Justice Antitrust Division submitted a Statement of Interest (SOI) in a pricing algorithm case, in which it continues to argue that the use of third-party algorithmic price devices may constitute a violation of Section 1 of the Sherman Act.
- The SOI is notable because it is the first judicial filing on the issue by the Antitrust Division since AAG Slater, whose name appears on the filing, came on board. The SOI indicates that the Trump administration will continue the previous administration's scrutiny of algorithmic pricing.
- In contrast, the week before, a different federal district court judge dismissed without prejudice a private damage action challenge to a pricing algorithm. The court granted a motion to dismiss by a software company whose algorithm was allegedly used in an algorithm-based price-fixing conspiracy.

On March 27, the Department of Justice submitted a **Statement of Interest** (SOI) in a pricing algorithm case, in which it argues that algorithmic price fixing may violate Section 1 of the Sherman Act. The SOI indicates that the Trump administration's Antitrust Division will continue to seek jurisprudence that finds algorithmic pricing activity to be price fixing in certain circumstances. In contrast, the week before, a federal district court judge dismissed without prejudice a complaint alleging illegal Section 1 price fixing. The court granted a motion to dismiss by a software company whose algorithm was allegedly used in an algorithm-based hub-and-spoke conspiracy.

These activities highlight the continued attention that the antitrust status of pricing algorithms is receiving from law enforcers and courts. Interested stakeholders should also pay close attention to the cases, as courts have not yet endorsed the DOJ's theories on algorithmic price fixing, and congressional efforts to explicitly prohibit algorithmic price-fixing laws have not gained traction.

DOJ files SOI in Health Care Algorithmic Pricing Case

On March 27, the DOJ submitted an SOI in an algorithmic pricing case reaffirming the Antitrust Division's view that algorithmic price fixing can violate Section 1 of the Sherman Act. This is not a new position asserted by the Antitrust Division, but importantly, it is the first such filing since Gail Slater assumed the position of Assistant Attorney General for Antitrust. The DOJ is no stranger to algorithmic pricing. As **we've written about**, the DOJ under the Biden administration brought its first algorithmic price-fixing case in August 2024 and has previously submitted SOIs in other algorithmic collusion cases.

This time, DOJ intervened in a case, brought by individual health systems, involving allegations that a preferred provider organization (PPO) used a pricing algorithm with information from competing insurers to set out-of-network prices and depress payments for out-of-network care.

DOJ is not a party in the case, but the SOI sets forth its views as to how the complaint should be analyzed: "Competitors' use of algorithmic technologies to coordinate their decision-making poses a growing threat to the free market competition on which our economic system is premised. The United States therefore has a strong interest in the correct application of the antitrust laws to claims alleging algorithmic collusion and information exchange under Section 1 of the Sherman Act."

The DOJ's SOI makes two points addressing "errors of law in the defendant's arguments for dismissal of the complaint:"

1. "**Competitors' Joint Use of a Common Pricing Algorithm to Set Starting-Point or Maximum Prices Can Be Concerted Action Under Section 1**." The defendants argued against the plaintiff's price-fixing allegations by pointing out that plaintiffs do not claim that the insurers use the PPO's pricing algorithm "in the same way to determine individual reimbursements." The DOJ, however, argues that "under well-established precedent, there can be concerted action subject to Section 1 in setting the starting points of prices even if the conspirators have some discretion in choosing how often to follow them."
2. "**Information Exchange Through a Common Pricing Algorithm Can Violate Section 1**." The defendants also argued against the plaintiff's information sharing claims by noting that the plaintiffs do not contend that the insurers "exchanged competitively sensitive information with each other." According to the DOJ, "To the extent Defendants suggest that competitors' exchange of information through an intermediary cannot violate Section 1, this argument is contrary to law. Courts have recognized that sharing information through an algorithm provider can create the same anticompetitive effects as a direct exchange between competitors because the algorithm provider 'has confidential price strategy information from multiple competitors, [and] it can program its algorithm to maximize industry-wide pricing' even if 'the firms themselves don't directly share their pricing strategies.'"

Judge Grant's Motion to Dismiss in Hotel Algorithmic Pricing Case

In a different algorithmic pricing case, on March 21, a federal district court judge granted a defendant software company's motion to dismiss without prejudice. The software company was alleged to be part of an algorithm-based hub-and-spoke conspiracy, whereby the company's pricing algorithm was used by a revenue management company to set prices for five competing hotels.

The judge found that there were "insufficient" allegations brought by the plaintiffs, who were hotel customers, about the software company's role in the alleged conspiracy. "Plaintiffs do not include allegations that the [software company] did more than provide one aspect of the [revenue management] product and do not suggest it has continued involvement with providing the Hotel Defendants the [revenue management] products," according to the 3-page order.

The judge's decision to grant the motion to dismiss highlights the challenges that algorithmic price fixing cases may face, but the decision is narrow. It does not address whether the revenue management company and the five hotels were part of a hub-and-spoke conspiracy. The court also granted plaintiffs leave to amend their complaint.

Algorithmic Price Fixing Sparks Debate in Congress

During an April 2 House Judiciary Subcommittee on the Administrative State, Regulatory Reform, and Antitrust **hearing** on "Artificial Intelligence: Examining Trends in Innovation and Competition," Democratic lawmakers inquired about algorithmic price-fixing, while the witnesses appeared unified in their concerns about the topic.

In response to Rep. Jerry Nadler's (D-NY) question about how algorithmic pricing is "being deployed to violate the antitrust laws," Democratic FTC commissioner Alvaro Bedoya, recently fired by President Trump, described algorithmic price fixing as "a core concern" and "something I think we need to continue to track closely." Joseph Coniglio, the director of antitrust at a technology foundation, noted that the Antitrust Division "has already brought AI related algorithmic collusion cases using its existing tools, which in the future could even be enhanced by AI technologies that make it easier to detect cartels."

In the Senate, Democratic lawmakers have re-introduced the **Preventing Algorithmic Collusion Act**, which would "[prohibit] the use of pricing algorithms that can facilitate collusion through the use of nonpublic competitor data." According to a **press release** from bill sponsor Amy Klobuchar (D-MN), "Price fixing is illegal under our antitrust laws, but the development of price-setting algorithms can exploit loopholes that could be used to unfairly raise prices on everything from rent to rideshares." The bill has eight Democratic cosponsors, but its passage will likely face an uphill battle due to its lack of bipartisan support in the Republican-controlled Congress.

We will continue to monitor, analyze, and issue reports on these developments. Please feel free to contact us if you have questions as to current practices or how to proceed.

Authors

Bruce Sokler

Bruce D. Sokler is a Mintz antitrust attorney. His antitrust experience includes litigation, class actions, government merger reviews and investigations, and cartel-related issues. Bruce focuses on the health care, communications, and retail industries, from start-ups to Fortune 100 companies.

Alexander Hecht, Executive Vice President & Director of Operations

Alexander Hecht is Executive Vice President & Director of Operations of ML Strategies, Washington, DC. He's an attorney with over a decade of senior-level experience in Congress and trade associations. Alex helps clients with regulatory and legislative issues, including health care and technology.

Christian Tamotsu Fjeld, Senior Vice President

Christian Tamotsu Fjeld is a Senior Vice President of ML Strategies in the firm's Washington, DC office. He assists a variety of clients in their interactions with the federal government.

Matthew Tikhonovsky

Matthew is a Mintz Senior Project Analyst based in Washington, DC.