ASSOCIATION OF BUSINESS TRIAL LAWYERS

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The Properties of Fraud Part I

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A. Introduction

The United States Criminal Code is littered with fraud statutes. There are statutes devoted to computer fraud, bankruptcy fraud, and insurance fraud; statutes that cover securities fraud, tax fraud, and healthcare fraud; and other statutes specific to fraud in connection with credit cards, HUD transactions, and access devices. But by far the fraud statutes most beloved, or at least most used, by federal prosecutors are the mail and wire fraud statutes.[1] With their

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Also in This Issue

Supreme Court Expands Damages Available in Copyright Claims

Joshua A. Baskin

The Copyright Act requires a plaintiff to bring a claim for infringement within three years of its accrual. 17 USC § 507(b). However, under current law, the discovery rule may toll the date of accrual of a claim under the Copyright Act. That means a plaintiff has three years from the date he discovers or should have discovered the infringement to file a claim. Therefore, it is possible for plaintiffs to bring claims for infringement older than three years.

But, until May, there was another trap for plaintiffs bringing dated copyright claims. Some courts, including the Second Circuit, had held that notwithstanding the discovery rule, the Copyright Act caps damages to the period three years prior to the filing of the action. *Sohm v. Scholastic, Inc.*, 959 F.3d 39, 51 (2d Cir. 2020). Other Courts, including the Ninth Circuit, did not cap damages to three years in cases where the discovery rule applies. *Starz Entertainment v. MGM Domestic Television Distribution, LLC*, 39 F.4th 1236 (9th Cir. 2022).

In its recent decision in *Warner Chappell Music, Inc. v. Nealy*, No. 22-1078 (U.S. May 9, 2024), the

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John Goheen
and Nicholas Pellow

Algorithms On Trial: The Continuing Legal Battle Over Pricing Tools

John Goheen

Nicholas Pellow

Revenue management tools (RMT) are ubiquitous across sectors, but many in the real estate and hotel industry use such tools on a daily basis. As these products have improved, many have incorporated algorithms enabling businesses to set dynamic prices based on market conditions. However, these tools are now at the center of a legal storm, and a series of antitrust lawsuits allege that the common use of the same RMT enables price fixing. As a result, any company that is already using, or considering using, RMT should be aware of the potential legal risks and challenges it may face.

RealPage Faces Major Legal Challenges

The largest and most significant of these RMT lawsuits involves RealPage. In April 2023, over thirty class action lawsuits filed by renters were consolidated in Tennessee. Plaintiffs claim that RealPage and property managers conspired to manipulate the rental market, using YieldStar and its AI Revenue Management (AIRM) tool to artificially increase rents.

In December 2023, the court denied the defendants' motion to dismiss, stating that the plaintiffs' allegations showed that RealPage's software integrated confidential competitor information to create private pricing recommendations.[1] The judge emphasized that this case differs from other related cases because RealPage's tool uses non-public data from one property manager to recommend prices to others.[2] This distinction may prove to be a central factor in whether the plaintiffs' antitrust allegations will hold up in court.

Not to be left out, the federal government joined the fray in August 2024 when the Department of Justice (DOJ), along with eight state attorneys general,[3] filed its own lawsuit against RealPage in North Carolina.[4] The suit alleges that RealPage facilitated agreements among landlords to share sensitive non-public data and engaged in exclusionary practices to dominate the commercial market. RealPage moved to dismiss in December.[5] Then on January 7, 2025, the DOJ amended its complaint to add additional claims (a horizontal price fixing claim) as well as adding six major landlords. This amendment is noteworthy not just for the additional claim and new defendants, but also for its emphasis on communications between the landlord defendants outside of direct discussions of RealPage's products, with a focus on broader communications and market checks.

In a parallel case in Washington, plaintiffs accused Yardi Systems of inflating rents through its RENTmaximizer software.[6] In December 2024, the judge denied Yardi's motion to dismiss, finding that its conduct could be considered a "per se" violation of antitrust law—a severe label indicating

[1] *In re RealPage, No. 3:23-md-03071, ECF 690 "Opinion Denying Defendants' Motion to Dismiss Student Plaintiffs' First Amended Complaint" (M.D. Tenn. Dec. 28, 2023) at 34.*
[2] *Id. at 33-34.*
[3] *Those states are California, Colorado, Connecticut, Minnesota, North Carolina, Oregon, Tennessee and Washington.*
[4] *U.S. et al., v. RealPage, Inc., No. 1:24-cv-00710, ECF 1 (M.D.N.C.).*
[5] *U.S. v. RealPage, ECF. 44.*
[6] *Duffy et al. v. Yardi Systems, Inc., et al., (W.D. Wash.).*

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Victor Yu

Is there a UCL exemption to Section 16600 of California's Business and Professions Code?

Victor H. Yu

Consider the following: An employee signs a contract agreeing not to disclose proprietary information belonging to his California employer. The employee leaves and is later accused of using the former employer's confidential information at their new job. The employer is contemplating litigation. In these situations, section 16600 of California's Business and Professions Code ("Section 16600") may restrict the employer from fully enforcing its confidentiality agreement. That statute—which voids contractual restraints on any "lawful profession, trade, or business"—has often be used to void confidentiality agreements as *de facto* non-compete provisions. To avoid Section 16600, employers can attempt to mount a trade secret claim against the employee. Courts have long recognized that trade secret claims are exempt from Section 16600's reach. *See K.T.I. Hydraulics, Inc. v. Palmersheim*, 2022 WL 17100470, at *6 (C.D. Cal. Aug. 11, 2022). While this "trade secret exception" has often been invoked, it is not the only option. California courts have also allowed employers to advance claims for the "misuse" of confidential information under the state's Unfair Competition Law ("UCL"). Importantly, these unfair competition claims may be brought without running afoul of Section 16600, and thus may provide an alternative avenue to consider for litigators in this scenario.

While "a former employee has the right to compete with his former employer," the former employee's "misuse of confidential information" can be an "act[]of unfair competition that may be enjoined." *Robert L. Cloud & Assocs., Inc. v. Mikesell*, 69 Cal. App. 4th 1141, 1150 (1999). For example, an employee may be precluded from using his old employer's staffing information to recruit employees at his new company. *See ReadyLink Healthcare v. Cotton*, 126 Cal. App. 4th 1006, 1026 (2005). While such conduct may separately give rise to a trade secret claim, it is also a type of unfair competition in violation of the UCL. *See id.* These claims, and other similar ones based on the misuse of confidential information, have long been recognized by California courts. *See Courtesy Temp. Serv., Inc. v. Camacho*, 222 Cal. App. 3d 1278, 1292 (1990) ("[T]he cases are legion holding that a former employee's use of confidential information obtained from his former employer to compete with him . . . is regarded as unfair competition [under the UCL].").

Importantly, a misuse of information UCL claim may be brought without running afoul of Section 16600. By its nature, Section 16600 is focused on regulating contractual restrictions. It does not immunize employees who engage in other "unlawful means" or "engage in acts of unfair competition." *Metro Traffic Control, Inc. v. Shadow Traffic Network*, 22 Cal App. 4th 853, 859–60 (1994). For this reason, trade secret claims are exempt from Section 16600, as trade secret misappropriation qualifies one type of "unfair competition." Yet, a trade secret claim is not the only form of "unfair competition" outside of Section 16600's reach. Indeed, California's UCL also generally regulates unlawful, unfair, or fraudulent forms of "unfair competition." As a result, a misuse of information UCL claim may also be exempt from Section 16600. Such claims are "wrongful independent" of any contractual provision. *See The Ret. Grp. v. Galante*, 176 Cal. App. 4th 1226, 1238 (2009) (concluding that

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Daniel Asimow

Letter from the President

Daniel Asimow

On behalf of ABTL, a slightly belated Happy New Year.

I'm pleased to report that our chapter had an excellent 2024. Our goal was to bring back our regular dinner programs and we succeeded with five well-attended programs on a wide variety of topics:

- The Ethos of Trial
- The Trust Busters: Insights on Competition from FTC Officials
- The Challenges of Cryptocurrency/ Blockchain Litigation
- U.S. Supreme Court: 2023-2024 Term in Review
- Meet Our Fives Newest Federal District Court Judges

Our chapter was also responsible in 2024 for hosting the Joint Board Retreat and the Annual Seminar for all five ABTL chapters. These events were both quite successful. We were particularly pleased to see so many members from our chapter at the Annual Seminar in Napa—the highlight of which was a performance by The Recusals, the Northern District of California's very own cover band.

As we look forward to 2025 we have another full year planned for ABTL programming. Our first program of the year will be February 26 at the Hyatt and will feature Prof. David McGowan speaking on implicit bias and post-judgment review. We expect to announce dates for the remainder of the dinner programs shortly. And if you haven't already please mark your calendar for the 2025 Annual Seminar, which will be back at the Wailea Beach Resort in Maui, October 8-12, 2025. Registration should open approximately April 1.

Thank you for your membership in ABTL, and I look forward to seeing you at our upcoming events.

Best,

Daniel Asimow

Daniel Asimow is a partner at Arnold & Partner and ABTL – Northern California Chapter President.

Hannah Jiam

Leadership Development Committee Update

Hannah Jiam

What is the Leadership Development Committee?

The Leadership Development Committee (LDC) is an initiative of the Association of Business Trial Lawyers (ABTL) aimed at fostering growth, community, and professional development among lawyers with 10 years of experience or less. Recognizing the unique challenges and opportunities faced by early-career attorneys, the LDC curates events and programs specifically tailored to support the next generation of legal professionals. By offering access to engaging networking opportunities, practical skills training, and interactions with seasoned leaders in the legal field, the LDC empowers younger lawyers to build meaningful connections and advance their careers with confidence.

Highlights from 2024

The LDC had a dynamic year. In March, we hosted a speed networking event, allowing younger lawyers to connect with peers in a lively, fast-paced setting. June featured a conversation with Justice Therese Stewart, who shared insights from her experience as an Associate Justice on the California 1st District Court of Appeal and San Francisco's former Chief Deputy City Attorney, and offered practical advice for navigating the legal profession. In addition, LDC hosted a social event at Harborview in September, where attendees enjoyed stunning views, great food, and even better conversation. These events exemplify the LDC's commitment to cultivating a vibrant and supportive community for early-career lawyers.

The LDC looks forward to another engaging year in 2025. If you are interested to learn more about the LDC and get involved please reach out to Michele Silva at abtl-ncal@comcast.net.

Hannah Jiam is an associate at Morrison & Foerster LLP and the immediate past Chair of the Leadership Development Committee.

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versatility and simplicity, these charges are regularly tacked on "just in case," even when the government charges some species of specialty fraud. *See, e.g, United States v. Blaszczak*, 56 F.4th 230, 243 (2d Cir. 2022) (in a case that "at its core" was about insider trading, defendants were acquitted of Title 15 securities fraud but convicted of wire fraud). As one prominent jurist, himself a former federal prosecutor, put it: "To federal prosecutors of white-collar crime, the mail fraud statute is our Stradivarius, our Colt .45, our Louisville Slugger, our Cuisinart—and our true love." Jed S. Rakoff, The Federal Mail Fraud Statute (Part 1), 18 Duq. L. Rev. 771 (1980).

That breadth and adaptability, however, also raise concerns about due process and government overreach. The mail and wire fraud statutes "have an open-ended quality that makes it possible for prosecutors to believe ... that a crime has occurred," but the statutory "[h]aziness designed to avoid loopholes through which bad persons can wriggle can impose high costs on people the statute was not designed to catch." *United States v. Thompson*, 484 F.3d 877, 884 (7th Cir. 2007); *see also United States v. Martin*, 195 F.3d 961, 965 (7th Cir. 1999) (Posner, J.) ("[c]oncern has long been expressed that the failure of the mail fraud statute to define "fraud" invites prosecutorial overreaching"). While these laws "encompass a broad range of behavior" and "[t]heir limits can be difficult to draw with certainty," still "there are limits nonetheless, and they must be defined by more than just prosecutorial discretion." *United States v. Weimert*, 819 F.3d 351, 370 (7th Cir. 2016). Increasingly, courts are focusing on the statutes' lack of clarity in defining the prohibited conduct and on the potential for prosecutors to pursue cases that Congress never intended to be covered by these laws. Recent Supreme Court cases have raised important questions—if not provided the answers —about what is required to prove mail and wire fraud, particularly when intangible property is involved.

This is the first part of a two-part series that looks at the development of these fraud statutes, some of their nuances, and where the courts might be headed in applying them. We begin with a little history.

B. Property and the Fraud Statutes: A Brief History

When enacted in 1872, the mail fraud statute prohibited the use of the mails to further "any scheme or artifice to defraud." 18 U.S.C. § 1341. In 1909, section 1341 was amended to prohibit—as it and the wire fraud statute both do today—"any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises."[2] The syntax makes it unclear exactly what conduct is prohibited. Does mere lying or deceit constitute a scheme to defraud sufficient to break the law? Or must that conduct be part of an effort to acquire money or property?

For many years the Courts of Appeals, "one after another," read this language disjunctively, meaning that federal prosecutors could pursue fraudulent schemes even if the aim of that conduct was not to obtain money or property. *Skilling v. United States*, 561 U.S. 358 (2010). As a result, courts broadly applied the fraud statutes to conduct that "include[d] deprivations not only of money or property, but also of intangible rights." *Skilling v. United States*, 561 U.S. 358 (2010). These rights, such as the right of privacy or the right of citizens to an honest election, were "unconnected to traditional property rights." *Ciminelli v. United States*, 598 U.S. 306 (2023). One of the more frequent prosecutions of this sort concerned the so-called right to honest services, which cases generally arose in situations when "one tampers with [the employer-employee] relationship for the purpose of causing the employee

[1] 18 U.S.C. § 1343 and 18 U.S.C. § 1341. Because their elements are almost identical, courts generally apply the same analysis when reviewing the two statutes. See Carpenter v. United States, 484 U.S. 19, 25 n. 6 (1987).

[2] Many other federal fraud statutes employ the same "money or property" language. See, e.g., 18 U.S.C. §§ 1031 (procurement fraud); 1344 (bank fraud), 1347 (healthcare fraud), 1348 (securities fraud).

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to breach his duty [to his employer, and] he in effect is defrauding the employer of a lawful right." *United States v. Procter & Gamble Co.*, 47 F. Supp. 676, 678 (1942). A typical example involved, say, a defendant contractor paying off a municipal employee to expedite a building permit. The municipality is not paid any less for the building permit, nor does it pay any more to its employee, but it is deprived of that employee's honest services. While honest-services cases arise more frequently in cases involving public officials, the theory has also been applied in situations involving only private-sector players. *Skilling*, 561 U.S. at 401.

C. The Supreme Court Speaks

The Supreme Court put a stop to these non-property, intangible rights-related fraud prosecutions – at least for a time – in 1987. In *McNally v. United States*, 483 U.S. 350 (1987), a section 1341 case based on an honest-services fraud theory, the Court rejected the lower courts' decades-long expansive reading of the mail fraud statute. It observed that the disjunctive language added by the 1909 amendment created an argument—adopted by the lower courts—that the statute's two phrases should be construed independently "and that the money-or-property requirement of the latter phrase does not limit schemes to defraud to those aimed at causing deprivation of money or property." Id. at 358. But the Court rejected that argument and determined that the 1909 revision "simply made it unmistakable that the statute reached false promises and misrepresentations as to the future as well as other frauds involving money or property." Id. at 359. Looking to the statute's history and prior Supreme Court decisions, the Court determined that section 1341 "had its origin in the desire to protect individual property rights" and thus the reach of the statute was "limited in scope to the protection of property rights. If Congress desires to go further, it must speak more clearly than it has." Id. at 359 n. 8, 360. In doing so the Court "put an end to federal courts' use of mail and wire fraud to protect an ever-growing swath of intangible interests unconnected to property." *Ciminelli v. United States*, 598 U.S. 306, 315 (2023).

In 2000 the government took another run at applying the fraud statutes' language disjunctively. In *Cleveland v. United States*, 531 U.S. 12 (2000), the defendant was convicted under section 1341 of making false statements to the Louisiana State Police in applying for a license to operate video poker machines. The Court overturned the defendant's conviction because, as discussed below, those licenses were not "property" in the hands of the victimized state agency. It also rejected the government's alternate argument that the disjunctive language of section 1341 created an independent offense that did not require that the defendant plan to obtain money or property. In doing so the Court reiterated the contextual and historical bases it had cited in McNally, but it added that the government's proposed construction "would appear to arm federal prosecutors with power to police false statements in an enormous range of submissions to state and local authorities." *Id*. at 26. (As the Court noted, Louisiana law already imposed criminal penalties for making false statements on license applications.) Such a reading "invites us to approve a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress." *Id*. at 24, 26. The Court emphasized that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance in the prosecution of crimes."

D. Honest Services Resurrected – Sort Of

A year after McNally, Congress took up the Supreme Court's invitation and passed 18 U.S.C. § 1346, which defined a "scheme to defraud" to include one that "deprive[s] another of the intangible right of honest services." This expansion removed the need for prosecutors to prove that a purpose of the fraud was to divest the victim of money or property, at least for honest-services fraud. *Kelly* at 1571.

But this expansion was relatively short-lived. In *Skilling v. United States*, 561 U.S. 358, 403 (2010), the Supreme Court determined that section 1346's

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The Properties of Fraud (Part I)

"right to intangible honest services" was a phrase too vague either to inform ordinary people of the conduct prohibited by that statute or to prevent "opportunistic and arbitrary prosecutions." The entire body of pre-McNally honest-services law that the government tried to cram into section 1346 was simply too broad, inconsistent, and unclear for that provision to withstand due process review, and so the Court applied "the familiar principle that ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Id*. Nevertheless, the Court preserved some of that provision, permitting section 1346 to survive to the extent that it covered conduct that involved the "bribe-and-kickback core of the pre-McNally case law." *Id*. at 409.

Because honest-services prosecutions often feature salacious allegations involving corrupt politicians, they tend to grab the headlines. But it turns out that section 1346 does not get much use these days. According to a very informal Westlaw survey of district court filings, since 2017 only 29 cases have been filed nationwide charging defendants with violations of section 1346. In that same period, over 1,200 cases have charged violations of section 1341 and over 4,000 cases have charged violations of section 1343. As a result, money and "property" remain an important element for most fraud prosecutions.

* * * * *

In Part II we will take a closer look at what constitutes "property" for purposes of the fraud statutes (spoiler: it's not entirely clear) and how defendants might use the lack of clarity to their benefit.

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Supreme Court Expands...

Supreme Court resolved this split and held that if a copyright owner brings a timely claim for copyright infringement, there is no separate time limit on the damages the copyright owner may recover.

The facts of the case exemplify its potential import. Plaintiff Sherman Nealy formed a short-lived music venture with Tony Butler in 1983. The venture recorded an album and several singles, which were the works at issue. But it dissolved a few years later and Nealy subsequently went to prison for unrelated conduct from 1989 to 2008 and again from 2012 to 2015.

Meanwhile, unbeknownst to Nealy, Butler entered into an agreement to license the works at issue to Warner Chappel Music, Inc. The works have been valuable to Warner. One was interpolated into a hit Flo Rida song released in 2008 that sold millions of copies and was licensed to "Dancing with the Stars." Others found their way into recordings by the Black Eyed Peas and Kid Sister.

The alleged infringement began in 2008, but Nealy did not sue until 2018, within three years of when he discovered the infringement after getting out of prison. If Nealy's damages were nevertheless capped to the previous three years, that would gut his remedy for copyright infringement that occurred before 2015, which given the 2008 release date for the Flo Rida song, may be a substantial portion of his damages. If the Second Circuit law applies, Nealy would have been out of luck.

The Supreme Court's decision clarifies that there is no time limit on recoverable damages under the Copyright Act. This ruling expands available copyright damages, especially in the Second Circuit, where the law previously capped damages to the three years before the filing of the lawsuit.

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Supreme Court Expands...

However, the overall import of the decision is in question. It rests on the assumption that the discovery rule applies to copyright infringement claims. All of the courts of appeals that have addressed the issue have held that the discovery rules applies to the Copyright Act's three-year state of limitations. But Justices Gorsuch, Alito, and Thomas dissented, suggesting that they would find that the discovery rule does not apply to the Copyright Act, and would instead apply a narrower rule that Copyright Act claims not filed within three years are barred unless equitably tolled because of fraud or concealment. Such a rule would effectively limit damages in copyright cases to three years before the date the action is filed, because it would require all actions to be filed within three years of the date of first infringement.

Thus, at the time of this decision, there was some trepidation as to whether it would matter very much. Indeed, the Court was then considering a petition for certiorari in *Hearst Newspapers, LLC v. Martinelli*, No. 23-474 (U.S. petition for cert. filed Nov. 2, 2023) that squarely presented the question of "[w]hether the 'discovery rule' applies to the Copyright Act's statute of limitations for civil claims." However, the Court subsequently denied cert in that case, making clear that it does not wish to disturb current case law that the discovery rule applies to Copyright Act claims, and removal of the three year cap on damages will be the law, at least for now.

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Is there a UCL exemption...

Section 16600 did not invalidate plaintiff's UCL and trade secret claims).

Thus, regardless of whether you represent the employee or the employer, lawyers should carefully weigh the impact of a misuse of information UCL claim. Notably, while such claims can avoid Section 16600 and other procedural hurdles found in trade secret cases, they can have their own hurdles. Indeed, a misuse of information UCL claim may be preempted if it is found to hew too closely to a trade secret claim. California's Uniform Trade Secret Act provides the exclusive civil remedy for trade secret misappropriation. Cal. Civ. Code § 3426.7. And if a misuse of information UCL claim merely "rests squarely on [] factual allegations of trade secret misappropriation", it may be preempted as derivative of a trade secret claim. *K.C. Multimedia, Inc. v. Bank of Am. Tech. & Operations, Inc.*, 171 Cal. App. 4th 939, 962 (2009). In contrast, a UCL claim that alleges the misuse of confidential information—but is also premised on "facts distinct from the facts that support the misappropriation claim"—may escape preemption. *Angelica Textile Servs., Inc. v. Park*, 220 Cal. App. 4th 495, 506 (2013). Going forward, attorneys should continue to monitor case law surrounding preemption and other issues affecting the viability of a misuse of information UCL claim.

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inherently illegal behavior.[7] A *per se* violation requires no further inquiry into the practice's actual effect on the market or the intentions of those individuals who engaged in the practice.[8]

There are now split decisions on the algorithmic pricing theory and how such claims should be analyzed at the district court level (*per se* in *Yardi* versus "rule of reason" in *RealPage*), so a lot remains to be seen.

Hotel Defendants Pick up Several Wins

In contrast, several lawsuits against hotels alleging similar theories have been dismissed. In *Gibson v. Cendyn Group LLC* (Nevada) and *Cornish-Adebiyi v. Caesars Entertainment* (New Jersey), plaintiffs alleged that major hotel chains conspired to fix prices using Cendyn's GuestRev product.

In both cases, federal judges ruled that the plaintiffs failed to show an agreement among competitors, noting that the software only used public data and did not share confidential information between the hotel defendants.[9] The courts found that the mere use of similar algorithms does not prove collusion.[10] These rulings offer some comfort to companies that RMT may be lawful when it avoids sharing private data and lacks coercive practices. The plaintiffs in the *Gibson* matter have appealed to the Ninth Circuit, with a decision expected later in 2025. The outcome of this appeal will be closely watched, particularly given the posture of the rental cases and various outstanding hotel litigations across the country.

Lessons for Businesses

The outcome of these cases, as well as multiple other lawsuits bringing similar claims across the country,[11] will shape the future of revenue management tools and their legal boundaries.

With high-stakes litigation unfolding, the debate over RMT will continue to draw attention. For businesses, the message is clear: understanding the legal risks associated with pricing algorithms is essential to avoid becoming the next target in the antitrust crosshairs. Companies using RMT should carefully evaluate whether these tools incorporate private competitor data and avoid practices that could be seen as anticompetitive.

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[7] *Yardi, ECF 187 "Order Denying Defendants' Joint Motion to Dismiss" at 14-15.*

[8] *The alternative, more lenient standard is the "rule of reason," which gives defendants an opportunity to offer an exculpatory procompetitive justification for their actions.*

[9] *Gibson v. Cendyn Group LLC, 2:23-cv-00140, ECF. 183 (D. Nev. May 8, 2024); Cornish-Adebiyi et al. v. Caesars et al., No. 1:23-CV-02536 (D.N.J.).*

[10] *See, e.g., Gibson, First Amended Complaint, ECF 144.*

[11] *In addition to those mentioned, see also Portillo et al., v. CoStar Group, Inc., et al. (W.D. Wash.) and Dai et al v. SAS Institute Inc. et al. (N.D. Cal.).*

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