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ANTITRUST

Expert Analysis

Uber Algorithm Alleged To Constitute Price-Fixing

By
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A class action complaint sufficiently alleged that Uber's pricing algorithm amounted to price-fixing among drivers, according to a district court in Manhattan. The Department of Justice persuaded a district court to block a bankruptcy proceeding bid by the publisher of the Los Angeles Times to purchase rival local daily newspapers, arguing that the combination would lead to a monopoly.

Other recent antitrust developments of note include the U.S. Court of Appeals for the Sixth Circuit's ruling that a network of hospitals was not a single entity for antitrust purposes, as the district court decided, but rather separate entities capable of conspiring in violation of the Sherman Act and a district court decision that a plaintiff could not pursue claims of a patent licensing conspiracy once the patent was found not to have been infringed.

Uber Pricing Algorithm

Spencer Meyer, an Uber rider, filed a class action complaint alleging that Travis Kalanick, the CEO and co-founder of Uber Technologies Inc., orchestrated and facilitated an illegal price-fixing scheme among Uber drivers. Meyer did not sue Uber, the company, possibly to avoid the arbitration provision in Uber's user agreement with its customers. Meyer alleged both a horizontal restraint, which is an agreement between competitors, and a vertical restraint, which is typically an agreement between suppliers and distributors. Meyer alleged a horizontal agreement among all Uber drivers, including Kalanick who was also an occasional Uber driver in competition with other drivers, and a series of parallel vertical agreements between each individual driver and Kalanick, as Uber's CEO, to set prices using Uber's pricing algorithm.

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Meyer alleged that Uber's pricing algorithm yields supra-competitive prices, and but for the conspiracy, drivers would deviate from the set algorithm and charge lower prices to compete for customers. Judge Jed S. Rakoff of the Southern District of New York denied the Uber CEO's motion to dismiss the conspiracy claims in *Meyer v. Kalanick*, No. 15-cv-09796, 2016 WL 1266801 (S.D.N.Y. March 31, 2016).

Kalanick argued that the contracts between each individual driver and Uber represent independent action on behalf of each driver, and are insufficient to support a per se horizontal conspiracy claim that all drivers entered into an agreement with one another not to compete on price. Drivers derive many benefits from their agreements with Uber other than from the alleged price-fixing scheme, such as being matched with Uber customers and enjoying easy payment processing. Kalanick contended that agreeing to use the pricing algorithm does not change the fact that each driver's decision to join Uber was an independent decision. The court disagreed, reasoning that drivers agreed to use

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the pricing algorithm "with the clear understanding that all other Uber drivers are agreeing to charge the same fares."

Kalanick claimed that Meyer's alleged conspiracy was "physically impossible" as it involves an agreement among hundreds of thousands of independent drivers all across the United States. However, the court stated that Meyer alleged a plausible horizontal conspiracy sufficient to survive challenge at the motion to dismiss stage. Meyer alleged that Uber drivers agreed to participate in the scheme at the time they assented to the application's user agreement. The complaint includes assertions that Uber organizes meetings and events for drivers; the complaint also includes discussion of a September 2014 instance where Kalanick allegedly agreed to raise fares following drivers' efforts to negotiate higher rates, as additional support that a horizontal conspiracy existed.

The court decided that Meyer also sufficiently alleged a vertical price-fixing agreement under a rule of reason analysis, and sufficiently pleaded that the challenged conduct had an actual adverse effect on competition in a properly pleaded relevant market. The court found Meyer's market definition, the "relatively new mobile app-generated ride-share service market," to be plausible. This definition contains only two major companies, Uber and Lyft, with the former alleged to control 80 percent of the market. The definition excludes taxis and other traditional cars for hire services, as well as public transportation, personal vehicles, and walking. The court stated that taxis and other traditional car services are not reasonable substitutes, because, among other things, they cannot be hailed at the push of a button or otherwise reserved in advance.

While the court agreed that arriving at the exact market definition would involve more detailed analysis, plaintiff's proposed market definition was sufficient to survive a challenge at the pleading stage. While Judge Rakoff had some fun with the defense counsel's suggestion that walking is a reasonable substitute for an Uber ride, writing that "defendant's attorneys are encouraged to…walk from their offices to the courthouse to put their theory to the test," the argument that taxis and car services should be included in the relevant market warrants further exploration, seeing that taxis can now be hailed using smartphone apps very much like Uber.

The per se price-fixing paradigm asserted by Meyer (and deemed sufficient at the pleading stage by the court), while convenient for plaintiffs, may not be an appropriate vehicle to evaluate the legality of Uber's innovative business model under the antitrust laws. The standards developed by courts over the years to examine joint ventures would be a far better fit (even if Uber does not consider itself a joint venture), as they ask whether the venture involves a meaningful integration of economic assets and whether the challenged restraints constitute a core activity of the venture or are reasonably necessary to achieve the venture's procompetitive objectives.

The court granted Kalanick's motion to join Uber as a necessary party to the litigation because the relief necessary to remedy Meyer's claims requires Uber's presence and Uber has an interest in defending its practices. (June 20, 2016). The court has not yet ruled on Uber and Kalanick's motions to compel arbitration. A similar suit, naming both Kalanick and Uber, was filed in Texas. *Swink v. Uber Technologies*, No. 16-cv-01092 (S.D. Texas April 22, 2016).

Newspaper Merger

The Department of Justice (DOJ) blocked Tribune Publishing Company's bid to purchase Freedom Communications, publisher of the Orange County Register and other Southern California publications, which had filed for bankruptcy in November 2015. The Tribune won a $56 million bid to purchase Freedom's assets during a bankruptcy auction held on March 16, 2016, beating out two other bidders. The sale was subject to final approval by the presiding bankruptcy judge, for which a hearing was scheduled the following week. However, the morning after Tribune won the bid, the DOJ sued to block the sale in federal district court. The court granted the DOJ's application for a temporary restraining order (TRO), enjoining Tribune from finalizing its acquisition of Freedom's assets. *U.S. v. Tribune Publishing Co.*, 16-cv-01822 (March 18, 2016, C.D. Cal.).

The DOJ alleged that Tribune, which publishes the L.A. Times, would acquire a monopoly over local daily newspapers in two Southern Californian counties in violation of §7 of the Clayton Act. The DOJ alleged harm to competition for readers and advertisers in English-language local daily newspapers in Orange and Riverside counties. According to the government, over 200,000 residents of these counties purchase daily newspapers. The proposed acquisition would result in Tribune owning 98 percent of local

daily newspaper circulation in Orange County, and 81 percent in Riverside County.

Tribune argued that the DOJ's market definition failed to account for Internet-based sources of local news and advertising, which provide competition for daily newspapers. However, the court reasoned, Tribune did not identify any internet sources that generate local news content. Although Tribune pointed to search engines such as Google News and Apple News, these are news aggregator sites that primarily provide links to stories on the websites of other content generators—including the local newspapers that are the subject of this dispute.

The court stated that this only serves to bolster the unique market function served by local newspapers. While the court agreed that sources other than local newspapers, such as bloggers, could be considered creators of local news and therefore part of the relevant market definition, Tribune did not argue or demonstrate that readers and advertisers consider these sources to be "reasonably interchangeable" with local newspapers.

Tribune accused the DOJ of objecting at the eleventh-hour, as Tribune's interest in the deal was well-publicized and the government could have intervened at an earlier date. Likewise, the court reasoned, Tribune could have voluntarily sought DOJ approval, as Tribune hired antitrust counsel for the deal and had anticipated potential antitrust issues. Ultimately the court stated that "perhaps both sides could have anticipated antitrust problems sooner and dealt with them on some basis other than on an application for a TRO resolved in a matter of hours."

After the Tribune deal was enjoined, Freedom had little choice but to accept the second-highest bid it had received in the bankruptcy auction, a bid from Digital First Media for $4.2 million less than Tribune's offer.

Hospital Network

The Sixth Circuit reversed a district court's dismissal of antitrust claims brought against a network of hospitals in *Medical Center at Elizabeth Place v. Atrium Health Sys.,* No. 14-4166, 817 F.3d 934 (6th Cir. March 22, 2016). The Medical Center at Elizabeth Place brought suit against a network of four hospitals and the network's operator, Premier Health Partners, for allegedly conspiring to drive the plaintiff out of the Dayton, Ohio, market by coercing health insurers and physicians into refusing to do business with plaintiff's hospital in violation of §1 of the Sherman Act. Because §1 does not proscribe unilateral conduct (not involving an agreement between two or more parties), a threshold inquiry involves demonstrating that defendants are separate entities capable of conspiring. The district court, on summary judgment, held that defendants comprised a single entity and dismissed the case. A Sixth Circuit panel, in a 2-1 decision, reversed and remanded.

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The four hospitals in the instant case were all parties to a joint operating agreement with Premier Health Partners. Premier is a separate corporate entity with its own management structure, and does not own any assets or provide health care services. The hospitals share revenues and losses, determined by a formula set forth in the joint operating agreement. Each hospital maintains separate ownership of its assets, separately files tax returns and other corporate documents, and maintains separate corporate identities with distinct CEOs and boards of directors.

The majority panel relied on *American Needle v. National Football League*, 560 U.S. 183 (2010), where the Supreme Court instructed that "concerted action under §1 does not turn simply on whether the parties involved are legally distinct entities," but instead on whether the parties remain "independent centers of decision making" that still compete in some areas. The majority stated that the joint operating agreement in the instant case "brings together independent centers of decision-making that remain separately controlled, potential competitors with economic interests that are distinct and thus are capable of concerted action." The hospitals maintain their own assets and therefore, the court reasoned, maintain their own economic interests at least to some degree.

The court also relied on evidence of defendants' coercive behavior, evidence demonstrating that defendants intended to keep plaintiff from

competing in the relevant market, and evidence that defendants themselves believed they still competed with each other. Ultimately the majority panel held there was a genuine issue of material fact as to whether the defendant entities had "separate corporate consciences or whether they should be considered a single entity for purposes of the antitrust laws," and therefore the district court's grant of summary judgment was not warranted.

Circuit Judge Allen Griffin dissented, criticizing the majority's focus on "defendants' intent to avoid competition" and disagreeing with the majority's reading of *American Needle* to include an analysis of defendants' intent in the threshold determination of whether defendants constitute separate entities. Judge Griffin reasoned that because defendants share revenues and losses, based on a set formula not linked to any individual hospital's profits, the hospitals do not compete with one another for patients. The fact that hospitals maintain ownership of their own assets is insignificant because they share all profits derived from those assets.

Judge Griffin noted that once defendants formed their joint network, they ceased pursuing independent economic interests, ceased competing with one another for patients, and no longer had incentive to become more profitable than one another. Judge Griffin also observed that Premiere functioned as a parent company and, according to the terms of the joint operating agreement, took "significant operational authority over each defendant hospital." Judge Griffin wrote that the majority misinterpreted *American Needle*, and prematurely considered evidence of defendants' intent before determining the threshold inquiry of whether defendants operate as a single entity incapable of conspiring under §1 of the Sherman Act.

Patents and Antitrust

The outcomes of claims at the intersection of antitrust law and patent law often turn on whether the underlying patent was valid or was infringed. Courts adjudicating these antitrust cases face the difficult task of deciding whether, and to what depth, to delve into the patent-validity/infringement question. In *Cascades Computer Innovation v. RPX Corp.*, 12-cv-01143, 2016 WL 705982 (N.D. Cal. Feb. 23, 2016), the court did not need to guess how the underlying patent issue would have been decided, because a jury decided the matter in a separate, contemporaneous case.

Cascades Computer Innovation is a "non-practicing entity"—a type of firm that acquires patents for the purpose of licensing rather than practicing them (sometimes pejoratively called "patent trolls"). Cascades owns the exclusive right to license and enforce a portfolio of patents that includes a patent for software used in Android phones. RPX Corporation is a defensive patent aggregator (or "anti troll") that obtains patent licensing rights for companies in exchange for a membership fee. Its members include Samsung, Motorola, and the other Android manufacturers named as defendants in this case.

RPX sought to obtain a license for the patent for its Android manufacturing members and entered negotiations with Cascades to do so. However, the parties were unable to reach a deal, and Cascades brought the instant case shortly thereafter, alleging that RPX and the manufacturing defendants engaged in an illegal horizontal agreement to drive down the price of the patent portfolio.

In a separate lawsuit in Illinois federal court, Cascades had brought suit against Samsung and Motorola for infringement of the patent. While Motorola settled, Samsung's claims went to trial, and in September 2015 a jury entered a verdict finding that Samsung did not infringe the patent. Samsung and RPX then moved for a judgment on the pleadings in the antitrust case, arguing that the jury verdict of non-infringement in the patent case means that plaintiff lacks antitrust standing. The court agreed, holding that a failure to license a non-infringed patent typically cannot serve as the basis for a cognizable antitrust injury. The court also explained that even if antitrust injury were established plaintiff could not plausibly state a claim given the intervening jury verdict: "if the complaint were amended to insert the word 'non-infringed' before each of its more than seventy references to the '750 Patent, then the lack of plausibility would shine through acutely."

The court decided that the remaining state law claims should also be dismissed with prejudice, rejecting plaintiff's contention that it should be permitted to pursue those claims in state court. (2016 WL 2993094, March 25, 2016).

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