NOVEMBER 2026

Competition Matters

Competition Matters is a recurring newsletter for clients and friends of Cohen & Gresser analyzing in depth an issue of current focus and summarizing recent public developments in the antitrust and competition areas at the Federal Trade Commission and the Department of Justice. Our goal is to highlight issues of significant recent practice interest in an informative and readable manner.

C&G ANTITRUST IN-DEPTH

The Third Circuit's Algorithmic Pricing Decision: A New Roadmap for Hub-and-Spoke Conspiracy Claims

On July 29, 2026, the U.S. Court of Appeals for the Third Circuit issued a critical decision addressing antitrust liability for algorithmic pricing tools. In *Cornish-Adebiyi v. Caesars Entertainment, Inc.*,[1] the court revived claims that Atlantic City casino-hotels conspired to fix room rates through a shared AI-driven pricing platform, holding that the plaintiffs plausibly alleged a horizontal hub-and-spoke conspiracy in violation of Section 1 of the Sherman Act.

The decision did not hold that the use by competitors of shared algorithmic pricing software is itself unlawful. Rather, the court concluded that allegations involving competitors' shared use of a pricing algorithm, combined with allegations regarding their input of non-public information into that algorithm and a high degree of adherence to the algorithmic recommendations, were sufficient to survive a motion to dismiss.[2]

The ruling reinforces the need for businesses using third-party algorithmic pricing tools, including those incorporating AI-driven pricing, to consider whether their use of those tools poses antitrust risk. The Third Circuit's decision points to important risk factors that should be considered, including: (i) whether the pricing tool uses non-public data provided by you (and, potentially, your competitors) as an input; and (ii) the degree of adherence to the recommendations of those pricing tools in setting ultimate prices.

What Were the Allegations?

The plaintiffs alleged that several Atlantic City casino-hotels used Cendyn Group's "Rainmaker" revenue-management software to set hotel room prices.[3] According to the complaint, participating hotels supplied the platform with current, non-public pricing and occupancy information.[4] The software allegedly used this information to generate pricing recommendations that participating hotels followed approximately 90 percent of the time.[5]

The plaintiffs claimed that the arrangement functioned as a classic hub-and-spoke conspiracy. Under that theory, Cendyn's Rainmaker software served as the "hub," while the competing hotels were the "spokes."
The district court dismissed the complaint, finding that the plaintiffs had failed to plead sufficient facts showing the existence of a "rim" (i.e., a horizontal agreement connecting the competitors).[6] The district court specifically pointed to the lack of allegations that Cendyn "pooled or otherwise commingled" the information submitted by the competitors.[7]

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[1] 184 F.4th 172 (3d Cir. 2026).
[2] *Id.* at 185-91.
[3] *Id.* at 177.
[4] *Id.*
[5] *Id.*
[6] *Id.* at 185.
[7] *Id.*

What Did the Third Circuit Hold?

In reversing the district court, the Third Circuit emphasized that plaintiffs need not plead direct evidence of an agreement at the motion-to-dismiss stage.[8] Instead, allegations of parallel conduct coupled with traditional antitrust "plus factors" may support an inference of concerted action.[9]

The court identified several allegations that, taken together, plausibly suggested parallel conduct:

- The hotels allegedly used the same pricing platform during the relevant period.
- Participating hotels allegedly provided non-public pricing and occupancy data to the platform, with the knowledge that competitors would benefit from it.
- The pricing platform used the non-public data to generate recommended room rates.
- Hotels allegedly followed the pricing recommendations generated by the software approximately 90 percent of the time.
- Room rates allegedly increased even while occupancy rates declined, an outcome that plaintiffs alleged would be inconsistent with independent competitive behavior.[10]

In addition to these allegations of parallel conduct, the court found that plaintiffs had sufficiently alleged several plus factors, including motive to conspire, actions contrary to economic self-interest, and non-economic evidence of a conspiracy. The court held that, taken together, these allegations plausibly suggested more than merely independent firms using similar software tools. Instead, they supported an inference that the firms were acting interdependently, with the algorithm serving as the mechanism through which competitors effectively coordinated pricing decisions (i.e., the "rim" of this hub-and-spoke conspiracy).

Why Was the Use of Non-Public Data Important?

Perhaps the most significant aspect of the decision is its focus on non-public information exchange.

The Third Circuit repeatedly distinguished the allegations before it from scenarios in which companies independently rely on publicly available market information or use common software providers without sharing competitively sensitive data. The court emphasized that the complaint alleged that participating hotels contributed current, non-public commercial information and received pricing recommendations *derived* from competitors' confidential data.

This emphasis may explain why the Third Circuit reached a different result from the Ninth Circuit's 2025 decision in *Gibson v. Cendyn Group, LLC*, which affirmed a dismissal of similar claims involving the same defendants and the same pricing platform.[11] In *Gibson*, while the plaintiffs had also alleged that the hotels provided the software with non-public data, there was no allegation that the software had actually used that data to generate recommended pricing sent to a competitor.[12] The Ninth Circuit noted in a footnote that "[t]his analysis might change if Plaintiffs had alleged that Cendyn shared the confidential information of each competing hotel among the licensees."[13]

The decision therefore suggests that antitrust risk may depend less on the use of algorithms or AI-based pricing tools themselves and more on the nature of the information used to train the model or to generate algorithmic pricing recommendations.

What Does This Mean for Businesses Using AI Pricing Tools?

The Third Circuit did not hold that dynamic pricing algorithms violate the Sherman Act. Nor did it suggest that companies cannot use AI tools to optimize prices or respond to market conditions. Instead, the court reaffirmed a longstanding antitrust principle: competitors may not coordinate pricing decisions, regardless of whether that coordination occurs through direct communications, trade associations, consultants, or increasingly sophisticated AI-based algorithms.

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[8] *Id.* at 180.
[9] *Id.* at 181.
[10] *Id.* at 185-87.
[11] *Gibson v. Cendyn Grp., LLC*, 148 F.4th 1069 (9th Cir. 2025).
[12] *Id.* at 1078.
[13] *Id.* at 1083, n.8.

The decision arrives amid increasing enforcement attention to algorithmic coordination. Both the DOJ and private plaintiffs have challenged arrangements in which competitors allegedly share competitively sensitive information through common software platforms.

Companies using AI-enabled pricing tools should therefore carefully examine:

- Whether pricing recommendations rely on non-public information obtained from competitors;
- Whether the software provider pools, aggregates, or otherwise uses that confidential competitor data to formulate pricing recommendations;
- The extent to which pricing recommendations are automatically implemented or routinely followed
- Whether employees maintain independent pricing discretion; and
- Whether contracts, marketing materials, or internal communications characterize the software as coordinating industry pricing or reducing competitive rivalry.

Federal Trade Commission Round Up

PlayPower Abandons BCI Burke Acquisition
On October 27, Federal Trade Commission Bureau of Competition Director Daniel Guarnera announced that Platinum Equity and its portfolio company, PlayPower, had abandoned the proposed acquisition of BCI Burke following the filing by the FTC and a dozen states on October 19 challenging the proposed merger. The FTC characterized the proposed merger as the latest in a series of acquisitions by PlayPower and alleged that the top five manufacturers—including PlayPower and BCI Burke—controlled 85%–90% of the market for commercial outdoor playground equipment. According to the complaint, the proposed merger would have reduced the number of major competitors from five to four and would have given PlayPower's owners control over more than 30% of the relevant market. The remaining small manufacturers allegedly lacked the distribution channels, sales representatives, safety certifications, manufacturing capacity and product portfolios needed to replace the competition that would have been lost from the proposed merger.

FTC Accepts Publicis/LiveRamp Consent Order
On October 19, the FTC accepted a consent order requiring Publicis Groupe S.A. to continue providing neutral and nondiscriminatory access to LiveRamp Holdings Inc.'s products and services, and to establish firewalls to prevent Publicis from accessing LiveRamp's customer data, as a condition to Publicis's proposed $2.2 billion acquisition of 100% of LiveRamp. The proposed consent order would address the FTC's concerns that Publicis's acquisition of LiveRamp, which provides data connectivity services that help facilitate the secure and confidential movement of data used for digital advertising, would harm competition in the markets for media agency services and audience data services. The FTC concluded that the acquisition would likely result in Publicis having the ability and incentive to foreclose customers of competing media agency service providers by using its control of LiveRamp to push customers to switch their media agency business to Publicis even if those customers otherwise prefer competing media agencies. According to the FTC, LiveRamp is the leading data connectivity provider in the U.S. media marketing ecosystem and the only provider with a full spectrum of data connectivity services. Publicis is the largest among the five major advertising agencies in the United States and also provides audience data services through its Epsilon subsidiary, which helps companies target their advertising to particular audiences. The FTC alleged that Publicis would deny or degrade access to LiveRamp services on which competitors rely, which would lead to higher costs and lower quality services for customers of competing digital advertising services. In addition, the FTC alleged that under the proposed acquisition, Publicis would gain access to competitively sensitive data of non-Publicis clients serviced by LiveRamp, which Publicis would leverage to pressure those clients to switch to Publicis. Under the five-year consent order, Publicis and LiveRamp are required to:

- Provide nondiscriminatory access and support on fair and reasonable terms to LiveRamp's standalone products and services and refrain from denying, degrading, delaying or impairing LiveRamp customers' continued access to LiveRamp's standalone products and services.
- Establish firewalls to ensure that Publicis does not access or use LiveRamp customer data and confidential business information that it receives from a customer's use of LiveRamp's standalone products and services.
- Appoint an independent auditor to audit the company's compliance with the proposed contractual commitments every six months for the first two years after the date that the proposed transaction closes, and then once a year thereafter for the following three years.

FTC/U.S. Department of Agriculture Launch Joint Public Inquiry
On October 7, the FTC and the U.S. Department of Agriculture launched a joint public inquiry regarding issues affecting agricultural equipment manufacturing and distribution markets, including potential anticompetitive conduct, as a part of the FTC's ongoing work to preserve competition in the agricultural sector. The joint Request for Information seeks to address the growing number of complaints received by USDA that farmers across the country face other barriers to acquiring agricultural equipment and the services required to keep equipment operating. The FTC announcement also encouraged the public to submit specific comments relating to any relevant business models, policies, agreements or contractual terms; any firsthand experiences or documented cases of restrictions, penalties or retaliation; and any broader competitive implications (i.e., how these practices may impact pricing, market entry, innovation, farmer welfare or rural economic resilience).

Federal Trade Commission Round Up

FTC Secures Settlement in Southern Glazer's Robinson-Patman Act Enforcement Action
On October 2, the FTC secured a settlement agreement with Southern Glazer's Wine and Spirits LLC ("Southern"), the nation's largest distributor of wine and spirits, that redresses allegedly illegal price discrimination practices involving nearly all of Southern's wine and spirits sales to the five largest chain retailers in 26 states. The settlement will also provide direct cash payments to harmed small businesses if an independent monitor finds that Southern violates the settlement order going forward. The FTC's settlement with Southern represents the first enforcement action under the Robinson-Patman Act by the FTC in over 25 years. The settlement resolves a complaint filed by the FTC in 2024 alleging that Southern violated the Robinson-Patman Act by depriving small, independent businesses access to discounts and rebates that were made available to large competitors, which reduced the ability of independent retailers to compete against large national and regional chains and big box stores. According to the FTC's complaint, Southern charged significantly higher prices for sales of identical bottles of wine and spirits during the same time period to independent retailers as compared to competing large chains, like Total Wine, Walmart, and Kroger, via a variety of mechanisms, such as by offering discounts and rebates to large buyers that were inaccessible to smaller retailers.

Department of Justice Antitrust Division Round Up

DOJ Closes Vistra/Cogentrix Investigation Following Power Plant Divestitures
On October 30, the Department of Justice announced that in connection with the Antitrust Division's investigation into the acquisition of Cogentrix Energy by Vistra Corp. and Vistra's voluntary sale of two of its generation facilities, it would not challenge that acquisition. Both firms are electricity generation companies that compete in wholesale electricity and electric capacity auctions run by Regional Transmission Organizations (RTOs) or Independent System Operators (ISOs). Vistra's acquisition of Cogentrix combines overlapping electricity generation asset portfolios in three different RTO/ISOs: PJM Interconnection LLC (which covers portions of the Midwest and Mid-Atlantic); ISO New England Inc. (ISO-NE); and the Electric Reliability Council of Texas.

As required by federal law, Vistra and Cogentrix filed an application with the Federal Energy Regulatory Commission (FERC) for approval of the transaction. While the parties' FERC application was pending, Vistra unilaterally decided to sell its Casco Bay Energy facility (Casco Bay) in ISO-NE. Following FERC's approval, the Division continued its investigation to assess whether Vistra would have the ability and incentive to withhold electricity from the ISO-NE market after acquiring Cogentrix, notwithstanding the Casco Bay facility divestiture. The Division was concerned that the portfolio of electricity generation units that would be combined in ISO-NE may result in a substantial lessening of competition, even with the sale of the Casco Bay facility.

Vistra and Cogentrix then unilaterally decided to sell Cogentrix's gas-fired combined-cycle power plant in Rumford, Maine, which the Division concluded would reduce the combined firm's ability and incentive to withhold electricity and raise prices in ISO-NE.

DOJ Closes Two Asphalt Merger Investigations Following State-Level Divestiture Agreements
On October 29, the Antitrust Division announced the closing of its investigations into two transactions that presented competition issues in local asphalt markets following referrals of its investigations to state attorneys general for further action: the acquisition of Suit-Kote Corporation by Colas Inc., a subsidiary of Bouygues S.A.; and the acquisition of Arcosa Inc. by CRH plc.

In August 2025, Bouygues (Colas) announced its intention to acquire Suit-Kote. Both companies sell asphalt pavement products and services to commercial and government customers in New York and Pennsylvania.

After the parties offered the Division a divestiture of certain facilities serving those areas, the Division referred the matter to the states to permit the states to engage with the parties regarding potential remedies. The parties and states subsequently agreed to a settlement that included divestiture of four facilities in New York and Pennsylvania.

In June 2026, CRH, an Irish building materials provider, announced its intention to acquire Arcosa, a U.S.-based infrastructure-related materials provider, for approximately $8.5 billion.

The Division's preliminary investigation identified and narrowed potential competition concerns to those in a local market for the sale of hot-mix asphalt in a region within New Jersey, and the Division referred the matter to the New Jersey Attorney General. Following that referral, the parties agreed with the New Jersey Attorney General to divest certain facilities in New Jersey.

Department of Justice Antitrust Division Round Up

Former Civilian U.S. Army Official Pleads Guilty to Bribery/Fraud Scheme
On October 28, the Department of Justice announced that a former civilian U.S. Army official had pleaded guilty to participating in a bribery and major fraud scheme that corrupted the competitive process for a U.S. Army technology innovation lab in the Pacific. According to the plea agreement, from January 2021 to October 2022, Carlos Duque conspired with two defense contractors — Brian Kent and Leonard Pick — to accept a bribe of approximately $1.25 million over five years. In return, Duque told prime contractors to award subcontracts to Kent and Pick's company and facilitated their fraudulent inflation of government contracting costs to include Duque's bribe payments. Duque ultimately received approximately $55,000 in bribes from his coconspirators, and the United States Army paid over $3 million to Kent and Pick's company. Under the conspiracy charge, Duque faces a maximum penalty of five years in prison and a fine of up to $250,000. Under the bribery charge, Duque faces a maximum penalty of 15 years in prison, a fine of up to $250,000 or not more than three times the monetary equivalent of the bribe, whichever is greater, and disqualification from holding any office of honor, trust, or profit under the United States. Under the major fraud charge, Duque faces a maximum penalty of 10 years' imprisonment and a fine of up to $5,000,000. In addition, Duque agreed to forfeit $55,166.70 as part of the plea agreement.

Contractor Pleads Guilty to Kickback Scheme Involving the U.S. Postal Service
On October 27, the Department of Justice announced that a contractor had pleaded guilty to conspiring to commit an offense against the United States by paying over $465,000 in kickbacks. The defendant, Ilya Zagaryuk, 40, of Damascus, Oregon, owned a company that contracted and subcontracted to perform facilities repairs on dozens of U.S. Postal Service facilities in Oregon, Idaho, Wyoming, Montana, and Washington. From May 2022 to February 2024, Zagaryuk paid his co-conspirator, who was an employee of a prime contractor on U.S. Postal Service projects, over $465,000 in illegal kickbacks as a reward for the co-conspirator directing additional work to Zagaryuk and his company. The DOJ alleged that the co-conspirators intentionally inflated contracting documents, including estimates and invoices, to build in funds for the kickbacks that were not based on legitimate repair work costs. Zagaryuk faces a maximum penalty of five years in prison and a fine of up to $250,000, and has agreed to pay restitution of $465,347.75 to the U.S. Postal Service, for which he is jointly and severally liable with co-defendants.

DOJ Closes Antitrust Investigation into Arrive's Proposed Acquisition of Passport
On October 8, the Department of Justice announced that it had closed the Antitrust Division's investigation of Arrive AS's proposed acquisition of Passport Labs Inc., both of which offer mobile parking payment solutions, among other products and services. Municipalities across the United States procure one or more of these payment solutions to allow their citizens to pay for municipal parking, particularly on-street parking, using their phones rather than meters or kiosks. The Antitrust Division concluded that a substantial reduction in competition was unlikely given current competitive dynamics in the mobile parking payments industry. For example, the Division found that smaller vendors, outside of Arrive, Passport, and PayByPhone, had recently won municipal contracts, and that Passport had declined to bid for or had lost some recent notable contracts. Based on these findings, the Antitrust Division concluded that municipalities would be likely to continue to have meaningful alternatives, including PayByPhone, in the event that Arrive attempts, post-acquisition, to exercise market power.

DOJ and Department of Agriculture Agree on Memorandum of Understanding to Strengthen Agricultural Competition
On October 6, the Department of Justice announced that it and the Department of Agriculture had agreed to a Memorandum of Understanding to enhance their joint efforts to strengthen competition for agricultural inputs. Under the Memorandum of Understanding, the DOJ and the Agriculture Department will expand their cooperation with respect to food and agricultural inputs, such as feed, fertilizer, fuel, seed, equipment, and pesticides, among other essential goods.

Contributing Authors



Melissa H. Maxman
Partner, Washington, D.C.
mmaxman@cohengresser.com
+1 202 851 2071

Melissa Maxman is the Managing Partner of the firm's Washington, D.C. office and leads the firm's Antitrust & Competition practice. She has decades of litigation experience at both the trial and appellate levels, primarily in the areas of antitrust, RICO, complex commercial disputes, and white collar defense. She has extensive experience advising domestic and foreign corporations on global antitrust issues. She has represented clients in complex civil and criminal matters before the FTC, the DOJ, and in private civil matters. Melissa has been recognized in *The Legal 500*'s U.S. guide in the antitrust: civil litigation/class actions: defense category and by *Chambers USA* in the antitrust litigation specialists category.



Andrew G. Berg
Senior Counsel, Washington, D.C.
aberg@cohengresser.com
+1 202 851 2073

Andrew Berg brings more than four decades of experience advising clients on complex antitrust, competition, and consumer protection matters. He has represented clients before the FTC, the Antitrust Division of the U.S. DOJ, state attorneys general, and in private litigation, offering strategic counsel on merger reviews, regulatory investigations, enforcement actions, and litigation. Andrew's practice focuses on antitrust and competition law, including merger control, competitor collaborations, monopolization, and pricing practices under the Sherman, Clayton, and Robinson-Patman Acts. He also advises on unfair and deceptive trade practices involving advertising, marketing, financial services, and data privacy, with extensive experience in regulatory compliance, investigations, and enforcement actions under the Federal Trade Commission Act and state analogues. His work spans both transactional and litigation contexts, including self-regulatory proceedings and Lanham Act disputes. Prior to joining Cohen & Gresser, Andrew served as Chair of the Global Antitrust Litigation & Competition Regulation Practice at Greenberg Traurig and held senior roles at several other prominent law firms. He also served as Senior Attorney Advisor to a Federal Trade Commissioner.



Derek Jackson
Associate, Washington, D.C.
djackson@cohengresser.com
+1 202 851 2075

Derek Jackson is an associate in Cohen & Gresser's Washington, D.C. office and a member of the firm's Antitrust & Competition and Litigation & Arbitration groups. Derek represents clients in significant antitrust litigations and investigations by federal and state antitrust enforcers. He has represented both plaintiffs and defendants in large antitrust class actions, as well as in private arbitration involving antitrust claims. Derek has experience at every stage of litigation, from complaint to trial. He has also represented clients in both merger and conduct investigations before the FTC, DOJ, and state attorneys general. In addition, he maintains a robust commercial litigation practice across multiple federal and state courts.



Kathryn T. Mueller
Admin Editor, Competition Matters
Associate, New York
kmueller@cohengresser.com
+1 212 957 7069

Kathryn Mueller is an associate in Cohen & Gresser's New York office and a member of the firm's Litigation & Arbitration group. Her practice focuses on complex commercial litigation in federal and state courts, as well as arbitration proceedings. Kathryn has experience representing clients across a range of industries, including financial services, technology, and insurance, and throughout all stages of litigation. Prior to joining the firm, Kathryn was an associate at Debevoise & Plimpton.