

# After Dismissal of Las Vegas Casino Antitrust Case, Algorithmic Pricing Dicey

By Amanda Bronstad

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## What You Need to Know

- The Nevada judge drew distinctions from a Dec. 28 order that refused to dismiss similar claims against software provider RealPage.
- On Monday, Caesars and other defendants in another antitrust case involving Atlantic City casino hotels wrote a letter informing U.S. District Judge Karen Williams of the Las Vegas ruling.
- The U.S. Justice Department and the Federal Trade Commission have increasingly spoken out about the use of algorithmic pricing as an antitrust conspiracy.

A federal judge's dismissal of a cutting-edge antitrust case over room prices at Las Vegas casino hotels has created a court split over the use of algorithmic pricing.

On May 8, U.S. District Chief Judge Miranda Du of the District of Nevada granted dismissal of the Las Vegas class action after concluding that the plaintiffs failed to plausibly allege a "tacit agreement" between the defendants. That is in part because they were not required to accept the pricing recommendations of Cendyn Group.

She also drew distinctions from a Dec. 28 order that refused to dismiss similar claims against software provider RealPage, noting "the complaint, in that case, included allegations of the exchange of otherwise confidential information between competitors through the algorithm, while this case did not."

"Thus, mere use of algorithmic pricing based on artificial intelligence by a commercial entity, without any allegations about any agreement between competitors—whether explicit or implicit—to accept the



## Caesars Palace in Las Vegas.

prices that the algorithm recommends does not plausibly allege an illegal agreement," Du wrote.

Cendyn, which is based in Boca Raton, Florida, was represented by **Latham & Watkins** partners **Sadik Huseny**, in Austin, Texas; **Brendan McShane**, in San Francisco; and **Anna Rathbun**, in Washington, D.C.

"We welcome Chief Judge Du's detailed decision to dismiss the lawsuit with prejudice," **Latham & Watkins** said in an emailed statement to Law.com. "Our client remains deeply committed to serving its hospitality customers by providing software solutions that help them individually perform to their goals and maximum potential."

Skadden, Arps, Slate, Meagher & Flom's New York partners Boris Bershteyn, Kenneth Schwartz and Michael Menitove represented Las Vegas-based Caesars Entertainment.

They declined to comment.

Mark Holscher, a Los Angeles partner at Kirkland & Ellis, declined to comment on behalf of Wynn Resorts Holdings, as did Goodwin & Procter

(Courtesy photo)



**U.S. District Judge  
Miranda M. Du of the  
District of Nevada.**

Washington, D.C., partner Armen Oruc, on behalf of the Rainmaker Group, later acquired by Cendyn.

Lawyers for the other defendants—Dan McNutt of Las Vegas-based McNutt Law Firm and Matthew McGinnis, of Ropes & Gray in Boston, for Blackstone Inc., which owned the Cosmopolitan of Las Vegas; and Patrick Reilly, a Las Vegas part-

ner at Brownstein Hyatt Farber Schreck, on behalf of Treasure Island—did not respond to requests for comment. Plaintiffs’ lawyers Steve Berman, of Seattle’s Hagens Berman Sobol Shapiro, and Brian Panish, of Los Angeles-based Panish Shea Ravi-pudi, also did not respond.

On Monday, Caesars and other defendants in another antitrust case in New Jersey involving Atlantic City casino hotels wrote a letter informing U.S. District Judge Karen Williams of the Las Vegas ruling.

“*Gibson* raises essentially the same claim regarding Cendyn’s software and an alleged conspiracy among casino-hotels to raise prices via that software, albeit casino-hotels in Las Vegas, rather than Atlantic City, as here,” Skadden’s Tansy Woan, in New York, wrote in the letter. “Mindful that this court has not authorized supplemental briefing, we have not presented here argument on or analysis of Chief Judge Du’s opinion. We stand ready to do so if the court would find it helpful.”

The New Jersey hotels have moved to dismiss the amended complaint. The U.S. Justice Department, which, along with the Federal Trade Commission, has increasingly spoken out about the use of algorithmic pricing as an antitrust conspiracy, filed a statement of interest in the New Jersey case. The March 28 statement clarified that “algorithmic

price fixing is a per se violation of Section 1” of the Sherman Act.

“Judicial treatment of the use of algorithms in price fixing has tremendous practical importance,” they said in the statement.

‘The Devil Is in the Details’

On Oct. 24, Du first granted dismissal in the Las Vegas case “because the complaint suffers from numerous pleading deficiencies.” She allowed plaintiffs to amend their complaint.

But, months later, U.S. District Chief Judge Waverly Crenshaw of the Middle District of Tennessee refused to dismiss similar claims in the RealPage case, in which the DOJ filed a statement of interest supporting the plaintiffs suing over apartment rental prices.

“While the allegations in that case, on their face, appear analogous to this case, the devil is in the details,” he wrote. “Here, the multifamily complaint clearly alleges that RealPage’s revenue management software inputs a melting pot of confidential competitor information through its algorithm and provides price recommendations based on that private competitor data.”

Plaintiffs filed a 222-page amended complaint against the Las Vegas casino hotels, adding more details about the alleged conspiracy, plus an additional antitrust claim that Cendyn and the hotels had established a vertical agreement. Their March 6 opposition against a renewed motion to dismiss liberally cited the *RealPage* decision.

The defendants said the RealPage ruling was not binding and irrelevant.

In this month’s ruling, Du agreed.

“Said otherwise, plaintiffs’ allegations that defendants entered into a tacit agreement to fix prices still have not crossed the line from conceivable to plausible despite the multitude of additional allegations in the FAC,” Du ruled, referring to the first amended complaint. “This case remains a relatively novel antitrust theory premised on algorithmic pricing going in search of factual allegations that could support it.”