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# What Happens in Vegas Stays in Vegas: Third Circuit Parts Ways with Ninth Circuit and Reinstates Atlantic City Algorithmic-Pricing Claim

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The Third Circuit (*Cornish-Adebiyi v. Caesars Entertainment, Inc.*) has now joined the Ninth Circuit (*Gibson v. Cendyn Group, LLC*) in evaluating dismissal of claims by casino hotel guests alleging that casino hotels' common use of the same algorithmic pricing software violates Section 1 of the Sherman Act. But whereas the Vegas hotel guests lost on appeal when the Ninth Circuit affirmed dismissal, the Atlantic City hotel guests beat the odds and won the Third Circuit's reversal. This difference in outcomes may on the surface appear inconsistent but, on closer examination, can be explained by the different claims and different allegations at issue in each appeal. And the Third Circuit's identification of (what the court viewed as) suspect features of the hotels' alleged use of the same software gives businesses some guidance on the types of business-enhancing tools and practices that create antitrust risk.

**Key Takeaways from the Third Circuit's Decision**

- Apply the Bob Test: If it would be anticompetitive for a person named Bob to engage in a practice, it would probably be anticompetitive for a tool (such as AI-powered algorithmic software) to do so.
- Businesses should proceed with caution when sharing any non-public, competitively sensitive information with a third party or tool, particularly when the business knows that the information will be used to the benefit of competitors. Heightened risk applies to information

that is granular, current or predictive, or relating to pricing, quality, or quantity of input or output.

- Businesses should proceed with particular caution when using any third party or tool that makes recommendations or eliminates uncertainty about competitors' future behavior based on competitors' non-public, competitively sensitive information. The same cautions from above about information with heightened risk apply here.
- Courts may conclude that businesses are exchanging information with each other even when the information is not itself shared among the businesses but is instead used by a third party or tool to generate granular, individualized recommendations for each of the businesses.
- Courts may conclude that competitors' common use of a third party or tool for granular, individualized business recommendations based on the competitors' non-public, competitively sensitive information allows a plausible inference of conspiracy among the competitors even when a plaintiff does not allege that the information was commingled or explain how the information was used to generate recommendations.

**Background of Case and Third Circuit Decision**

Guests of Atlantic City casino hotels brought suit against those hotels and Cendyn, an AI-powered dynamic pricing software provider, alleging violation of Section 1 of the Sherman Act, which prohibits agreements that unreasonably restrain trade. The plaintiffs claim that the competing hotels conspired to fix prices of Atlantic City casino hotel rooms and that Cendyn facilitated the conspiracy through its software, Rainmaker. They describe this alleged scheme as a hub-and-spoke conspiracy, with Cendyn as the enabling hub and the casino hotels as the spokes whose agreement with each other constitutes the rim of the conspiracy wheel.

According to the plaintiffs, the hotels all use Rainmaker. They each send their granular, real-time, non-public room pricing and occupancy data to Rainmaker. Rainmaker then processes each hotel's data—along with competing hotels' similar data—and uses an AI-powered algorithm to recommend room rates for each hotel. Rainmaker automatically uploads its recommended rates to each hotel's sales platform. Each hotel retains authority to reject those rates, but that authority is limited to select employees with difficult-to-use override powers. According to the complaint, hotels tend to follow Rainmaker's recommendation 90 percent of the time. The complaint alleges that the hotels agreed among themselves to use the Rainmaker-recommended rates and, as a result of this conspiracy, Atlantic City casino hotel room rates are artificially inflated.

A New Jersey district court dismissed the complaint, concluding that the plaintiffs had not plausibly pleaded the rim of the conspiracy—agreement among the hotels—because they alleged little more than that the hotels use the same pricing software. The Third Circuit disagreed and reversed. The appellate court concluded that the complaint's allegations cross the line from "software programs used separately and independently to help businesses compete against one another" to software used collusively by competitors "as a *single* decision-maker or hub, coordinating pricing for a majority of the market."

According to the Third Circuit, the complaint plausibly pleaded "an exchange of non-public commercial information from the spokes [i.e., the hotels] that is consolidated in the hub [i.e., Rainmaker] and then shared back to the spokes in the form of price recommendations which automatically determine room rates under circumstances where each spoke is confident that the resulting rate will not be undercut by the competing spokes." Those circumstances were plausibly pleaded through, for instance, allegations that "even when it would have been in the casino-hotels' economic interests to reduce room rates to increase occupancy so as to capture more guests and thereby generate more casino revenue when occupancy was declining, the casino-hotels overwhelmingly adhered to Cendyn's price recommendation." And their plausibility was further supported through allegations that a Cendyn official encouraged hotels to "avoid the infamous 'race to the bottom' when competition inevitably becomes fierce within a market" and "avoid[] price wars, including through use of the Rainmaker platform."

The Third Circuit disagreed with the district court that the absence of pleadings about how specifically Rainmaker commingled or jointly used the hotels' non-public information rendered the allegations of conspiracy deficient. It was enough for the Third Circuit that the complaint pleaded that "each casino-hotel knew and 'understood' that 'the recommended room rates they were receiving from [Cendyn's software] were based on real-time, non-public pricing and occupancy data [that] they and their co-defendants all were providing to the platform.'" (Alterations in original.)

The Third Circuit concluded by explaining that use of an AI tool does not render otherwise collusive behavior non-collusive. The court quoted (what has come to be known as) the Bob Test described by former acting chair of the U.S. Federal Trade Commission, Maureen Ohlhausen: "If it isn't ok for a guy named Bob to do it, then it probably isn't ok for an algorithm to do it either."

**Same Software Provider, Different Outcomes**

The facts of the Third Circuit case might sound familiar. Guests of casino hotel rooms in Vegas also brought a Section 1 lawsuit against casino hotels and Cendyn, and a Nevada district court dismissed the complaint. But in that case, the Ninth Circuit affirmed, as discussed here.

There are a few common features of the two cases. Both cases involve Cendyn's AI-powered dynamic pricing software. Both cases involve allegations that competing casino hotels share their current, non-public data with the software and receive room rate recommendations from the software. And both cases involve allegations that the software limits the ability of hotels to depart from recommended rates to employees with override permissions and that the casino hotels follow the software's recommendations 90 percent of the time.

But that is where the similarities end. The claims in the two appeals are different. The Third Circuit reviewed dismissal of a hub-and-spoke conspiracy claim alleging agreement among the competing hotels facilitated by Cendyn. The Ninth Circuit, by contrast, reviewed dismissal of a claim that the agreements between Cendyn and each individual hotel, when aggregated, were anticompetitive. The Ninth Circuit distinguished the type of claim that was later reviewed by the Third Circuit, recognizing that "[i]t would undoubtedly violate Section 1 were those competing hotels to agree among themselves to abide by a third party's pricing recommendations when pricing their own hotel rooms."

In addition, the allegations in the two cases are different. For instance: As noted above, the Third Circuit found that the Atlantic City hotel guests had plausibly pleaded that Rainmaker uses competitor information in making its recommendations by alleging those recommendations were "based on" such information. The Ninth Circuit, by contrast, found that the Vegas hotel guests did "not allege that Cendyn pools, shares, or uses the confidential information provided by a given Hotel Defendant into the pricing recommendations it generates for any *other* Hotel Defendant." And the Ninth Circuit again distinguished the type of allegations that were later reviewed by the Third Circuit, noting there was no allegation before it that Cendyn directly or effectively "shared the confidential information of each competing hotel among the licensees."

The Supreme Court declined to review the Ninth Circuit's *Gibson* decision. We will watch with interest whether the defendants in *Cornish-Adebiyi* seek additional review from the Third Circuit or the Supreme Court.

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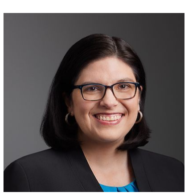

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