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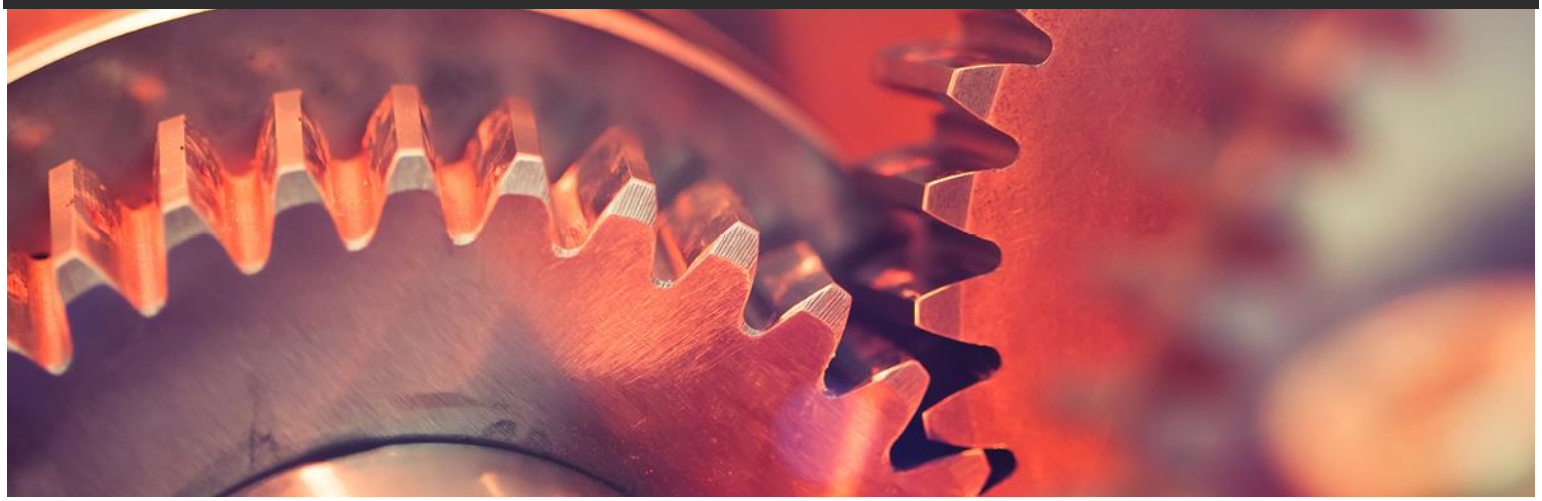

**February 2023**

# Consumer-Facing Algorithmic Pricing Cases

**Go-To Guide:**

- Algorithmic pricing software cases on the rise
- Consumer class actions allege hub and spoke conspiracies

Algorithmic pricing software in consumer-facing industries recently has generated a proliferation of class action lawsuits in the United States. Algorithmic pricing software relies on historic patterns and current data within a set market to make recommendations on pricing based on the end user's preferences and goals. The cases filed allege competitors' use of algorithmic pricing software in a given market violates Section 1 of the Sherman Act, claiming the competitors and software provider are engaged in a "hub and spoke" conspiracy to fix prices. Several cases have been filed, all of which are at the very early stages of litigation in federal courts around the United States.

Both EU and U.S. regulatory bodies have addressed algorithmic pricing models. The U.S. Federal Trade Commission and Department of Justice previously stated in a paper to the Organisation for Economic Co-operation and Development (OECD) that without an agreement with a competitor over the use or purpose of algorithmic pricing software, there can be no Section 1 violation. However, the agencies gave an example of an enforcement action against competitors that used algorithm-based pricing software with the express agreement to match prices. The agencies also noted:

> If competing firms each entered into separate agreements with a single firm (for instance a platform) to use a particular pricing algorithm, and the evidence showed they did so with the common understanding that all of the other competitors would use the identical algorithm, that

> evidence could be used to prove an agreement among the competitors that violates U.S. antitrust law. The lack of direct communication among the competitors would not be a bar to finding an unlawful conspiracy.

In 2017, the European Union also provided the OECD with two general principles for the treatment of pricing algorithms under EU competition law:

> First, if pricing practices are illegal when implemented offline, there is a strong chance that they will be illegal as well when implemented online. Second, firms involved in illegal pricing practices cannot avoid liability on the grounds that their prices were determined by algorithms. Like an employee or an outside consultant working under a firm's "direction or control", an algorithm remains under the firm's control, and therefore the firm is liable for its actions.

The use of algorithmic pricing software is growing in both the United States and Europe across numerous industries. With the expansion of several plaintiff-oriented U.S. law firms in the UK and EU, industries in these regions may face suits similar to those filed in the United States.

Moreover, given the EU's Representative Actions Directive (RAD), which set a deadline of Dec. 25, 2022, for EU member states to have a mechanism in place for representative actions to allow consumers to litigate their collective interests, and the fact that these regulations are now coming into effect, more collective actions related to the use of algorithmic pricing software may be filed in the future.

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