



Antitrust Claims: The Next Battleground For Gig Employers

Insights

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As we have discussed previously, Uber has been caught up in a number of public legal disputes. At the forefront of Uber's legal issues are ongoing disputes over whether Uber drivers will be considered employees or independent contractors under federal and state wage and hour laws. But another issue is primed to take the spotlight: Does Uber's pricing model violate antitrust law?

Those who use the Uber app are likely familiar with its surge pricing practice, which can raise fares up to ten times the regular rate according to a secret algorithm. Uber's pricing algorithm automatically detects high demand and low supply and hikes the price in increments, depending on the scale of the shortage. The resulting higher prices are intended to entice drivers to take the bait and hit the road. As a consequence, angry passengers have taken to social media to protest surge fares that seem more appropriate for an airfare than a ride across town.

In January, one disgruntled passenger decided to take a stand against Uber founder Travis Kalanick by filing a complaint in the Southern District of New York. The complaint describes Kalanick as the "proud architect" of a pricing system designed to encourage illicit price fixing among Uber drivers at the expense of their passengers. Because Uber currently classifies its drivers as independent contractors, the complaint stresses that they should be forced to compete with each other for passengers by charging lower rates. Instead, the surge pricing algorithm sets uniformly higher prices for all drivers in the same area at the same time. In response, attorneys representing Mr. Kalanick responded that the pricing arrangement between Uber and its drivers is comparable to legal efforts by a manufacturer to control prices charged by distributors.

U.S. District Judge Jed Rakoff recently denied Kalanick's motion to dismiss the suit. In his decision, Judge Rakoff held that that plaintiffs reasonably argued that Uber drivers participated in a conspiracy to raise prices, and that the resulting economic benefit to Uber drivers could give rise to a common motive to conspire.

In his decision, Judge Rakoff noted that antitrust law distinguishes between vertical and horizontal price restraints. Horizontal restraints are created by agreement between competitors, like the individual Uber drivers in this case. The lawsuit claims that Uber drivers created a horizontal conspiracy when they agreed to Uber's pricing terms with an awareness that other drivers would agree to the same terms. On the other hand, vertical restraints are created by agreement between entities at different levels of distribution, like agreements between Uber and each of its drivers.

Importantly, the law treats horizontal and vertical restraints differently. Horizontal restraints are presumptively illegal whereas vertical restraints are only considered illegal when their effect is to unreasonably restrain trade. In this case, Judge Rakoff determined that the plaintiff adequately pled both horizontal and vertical conspiracies.

In coming to this decision, Judge Rakoff noted that “the advancement of technological means for the orchestration of large-scale price-fixing conspiracies need not leave antitrust law behind.”

Ultimately, Judge Rakoff’s decision may be an early warning sign to gig economy employers. Even if companies like Uber are able to defend or settle suits challenging workers’ employment status, antitrust law could pose an even greater challenge to companies that control prices for those workers.

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