



The Wonderful World of AI:  
**Antitrust, AI Washing  
and Greenwashing, Oh My!**  
6/06/2024




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## Today's Speakers



**Gretchen Jankowski**  
Shareholder & Co-Chair, Litigation



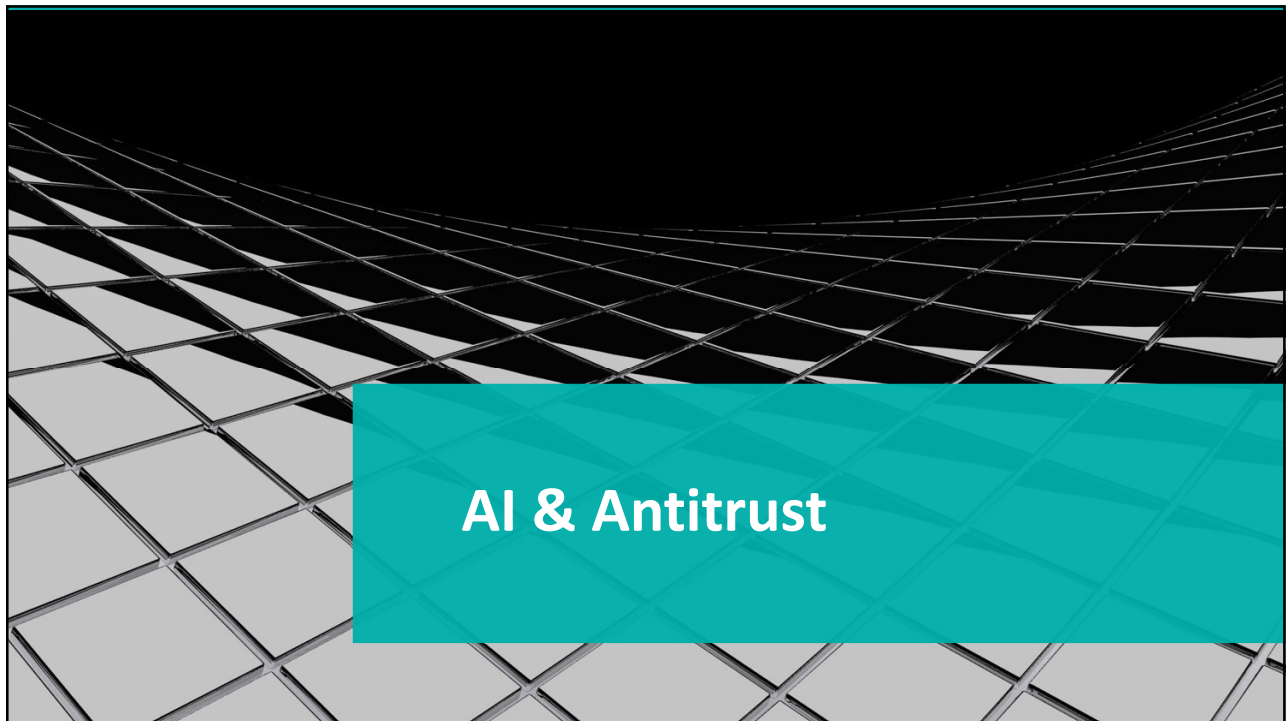
**Jennifer Oliver**  
Counsel, Litigation



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## What is Generative AI?

Generative artificial intelligence (AI) describes algorithms (such as ChatGPT) that can be used to create new content, including audio, code, images, text, simulations, and videos.

It can be trained to learn human language, programming languages, art, chemistry, biology, or any complex subject matter.

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## Competition Risks in the Market for Generative AI

- **Section 2** Sherman Act claims for monopolization
- **Section 7** Clayton Act where M&A harms competition or tends to create a monopoly
- Large firms buying nascent competitors is a focus of the FTC
- Data is a key input to these tools, but also a barrier to entry
- Open-source models promote competition by decreasing the start-up resources required for AI applications, but these models may amplify disinformation and security risks
- Requires large amount of computing power, meaning access is available to only large firms and not nascent competitors

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## What are Pricing Algorithms?



Intended to help companies determine optimal prices on a near real-time basis

- Rideshare price surging

Used for decades, sometimes face customer backlash

- Coca Cola's experiment to increase prices at vending machines when temps increased in the 90s

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## Competition Risks in the Use of Pricing Algorithms

- **Section 1** of the Sherman Act
- Competitors using the same pricing algorithms can easily fix prices
  - Especially where identical software is offered by third parties
- Disclosing pricing to the market through the algorithm can signal pricing plans to competitors
  - In 2015, the DOJ criminally prosecuted online sellers who were using the same pricing algorithm to fix the prices of posters sold online

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**2024  
Trend**



**Increased  
Antitrust  
Enforcement,  
Legislation and  
Litigation**

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## Alphabet, Amazon and Microsoft

**Alphabet**

On **01/25**, received inquiries from FTC on their investments and partnerships with AI startups Anthropic and OpenAI

- Part of a study on how AI is impacting competition in the technology industry

**amazon**

Probe focuses on more than \$19 billion in investments by the companies, a series of transactions that cemented alliances between the world's cloud-services giants and the leading developers of AI software

**Microsoft**

Antitrust enforcers become concerned as many of the most promising AI startups now depend heavily on the old guard of dominant tech companies for financing and infrastructure needs

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## *In re Realpage, Inc., Rental Software Antitrust Litig. (M.D. Tenn.)*

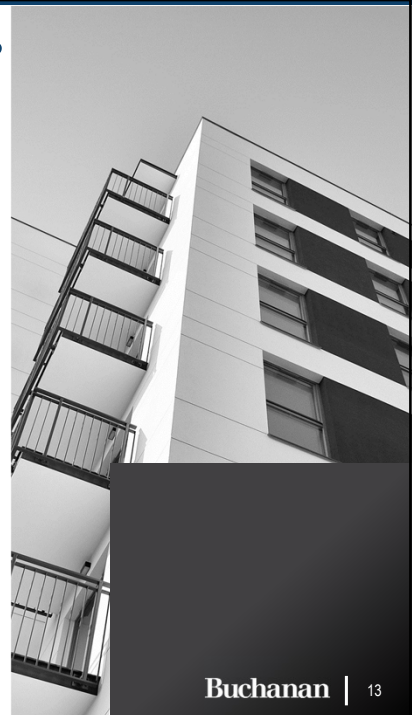
- Multi District Litigation (MDL) alleging Defendants engaged in a nationwide conspiracy to fix and inflate the price of multifamily rental housing across the country
- RealPage offered software that would use a database of rental prices in the area (including competitors' prices) and provide the optimal price to charge prospective tenants, with both short-and-long-term goals of increasing revenues by raising rents.
- RMS used non-public data from other RealPage clients. In fact, RealPage touted its use of non-public data as a competitive differentiator from other revenue management service providers in its marketing material.



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## ***In re Realpage, Inc., Rental Software Antitrust Litig. (M.D. Tenn.)***

- Software updates “tracked not only a client’s acceptance rate, but also the identity of the client’s staff that requested a deviation from RealPage’s price.” Additionally, they discouraged any “temptation to override the [RealPage pricing] algorithm if rents appear too aggressive.”
- “Vacancy rates rose because each Owner, Owner-Operator, and Managing Defendant could (and did) allow a larger share of their units to remain vacant, thereby artificially restricting supply, while maintaining higher rental prices across their properties. This behavior is only rational if Defendants know that their competitors are setting rental prices using RealPage’s RMS and thus would not attempt to undercut them.”



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## **DOJ and FTC Statements of Interest**



- ***In re Realpage, Inc., Rental Software Antitrust Litig. (M.D. Tenn.)***  
(statement from 11/15/23)  
  
(pricing algorithms used to fix multifamily rental housing)
- ***Duffy v. Yardi Systems, Inc. (W.D. Wa.)***  
(statement from 3/01/2024)  
  
(pricing algorithms used to fix rental prices)
- ***Cornish-Adebiyi v. Caesar’s Entertainment, Inc. (D.N.J.)***  
(statement from 3/28/2024)  
  
(pricing algorithms used to set hotel room prices)



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## Federal Legislative Efforts

- **1/30/24 S.3686** – Preventing Algorithmic Collusion Act of 2024 (Sen. Amy Klobuchar (D-MN))
- **1/30/24 S.3692** – Preventing the Algorithmic Facilitation of Rental Housing Cartels Act of 2024 (Sen. Ron Wyden (D-Or.))

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## ***Gibson v. Cendyn Group, LLC (D. Nev.)***

- Plaintiffs brought suit on behalf of the proposed class alleging that defendants (a software company, Cendyn, and other hotel operation companies in Las Vegas) violated the Sherman Act by agreeing to use pricing algorithms.
- Plaintiffs alleged that the defendants engaged in a “hub and spoke” conspiracy whereby all hotel defendants tacitly agreed with each other to set prices using Cendyn.
- Allegedly, the hub was Cendyn, the spokes were each of the hotel operators, and the rim was the implicit agreement to contract with Cendyn.
- **5/8/24:** Chief Judge Miranda Du dismissed Plaintiffs’ FAC with prejudice as to their alleged rim because their allegations that the hotel defendants entered into a tacit agreement to fix prices did not “cross the line from conceivable to plausible.”

**What is AI Washing?**

## Federal Landscape

- **2/27/23** FTC Division of Advertising Practices warns companies about ensuring that AI statements are truthful in advertising
- **10/30/23** President Biden signed an Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence
- **1/17/24** SEC Commission Chair Gary Gensler warns companies making false claims about using the technology, a nefarious practice known as “AI Washing”
- **1/25/24** SEC issues an Investor Alert warning investors that “bad actors are using the growing popularity and complexity of AI to lure victims into scams”
- **2/13/24** Gary Gensler delivers remarks on AI washing at Yale Law School

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## Federal Landscape

- **2/27/24:** The FTC’s Business Blog warns against AI washing
- **3/6/24:** Presenters from the DOJ, SEC, and FTC warn against AI misuse at the ABA’s National Institute on White Collar Crime
- **4/15/24:** SEC Director Gurbir S. Grewal warns against making false claims about AI to entice investors at the Spring Program on Corporate Compliance and Enforcement
- **5/30/24:** The DOJ and the Stanford Graduate School of Business co-host a one-day workshop on Promoting Competition in AI

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## Enforcement Actions

- Sewell
  - SEC found that Sewell induced students to invest in a fictitious hedge fund by touting a “unique ability to predict price behavior in crypto asset markets” with the use of machine algorithms and AI.
  - **2/2/24**: Settlement announced and civil penalty of \$223,229.
- Delphia
  - **3/18/24**: SEC fined Delphia for making false claims about having developed an AI capable of predicting upcoming companies and industry trends, despite lacking such capabilities in the amount of \$225,000.
- Global Predictions
  - **3/18/24**: SEC fined Global Predictions because it labeled itself as the “first regulated AI financial advisor” and boasted that its platform provided “AI-driven forecasts” in the amount of \$175,000.
  - SEC also found that it made other misleading statements regarding its AI-related practices.

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## Pre-IPO False Advertising Targeted in Silicon Valley

- Tech start-ups may be taking a “fake it ‘til you make it” approach with technology to attract investors
  - Prominent examples are Theranos, uBiome, Inc., Amazon “Just Walk Out”
- Startups that mention AI attract 15-50% more investment than those that do not
- U.S. Attorney Ismail Ramsey in San Francisco claims his office is “uniquely positioned” to scrutinize tech start-ups that defraud investors as the start-ups approach public status (IPOs)

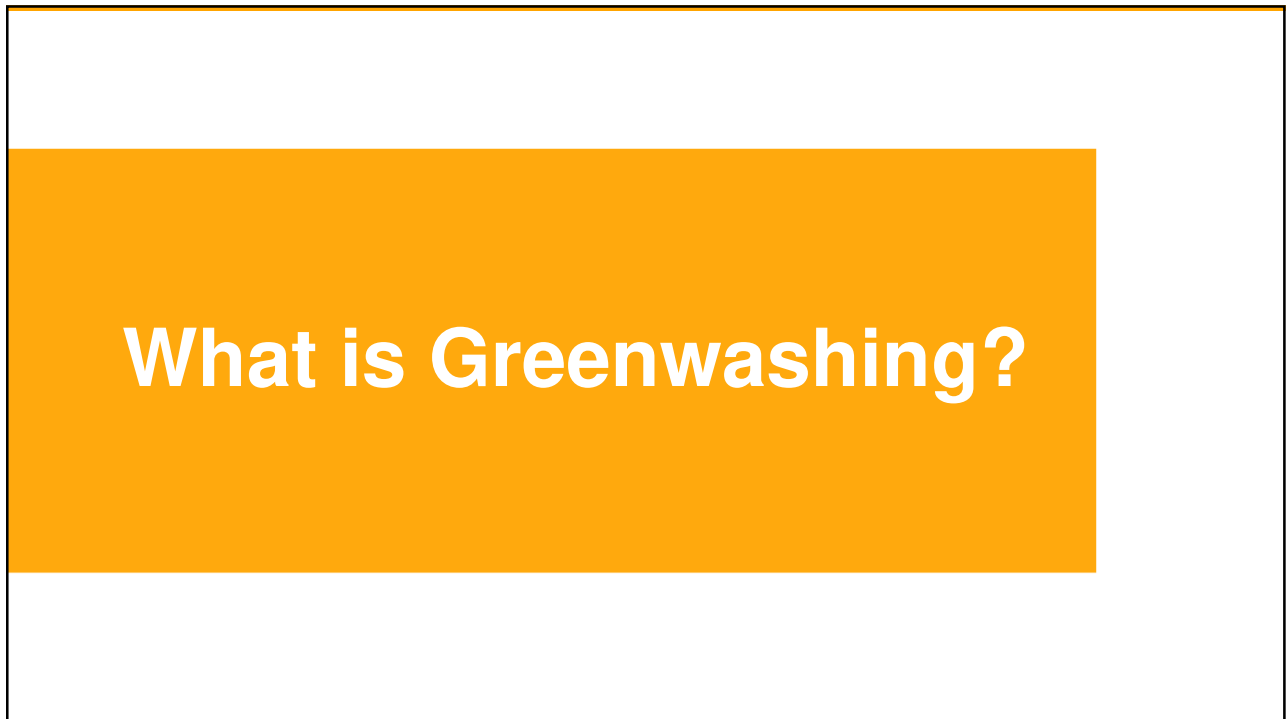
“As with any such emerging technologies, AI is fertile ground for fraudsters to make false and exaggerated claims.”

– Ismail Ramsey, U.S. Attorney

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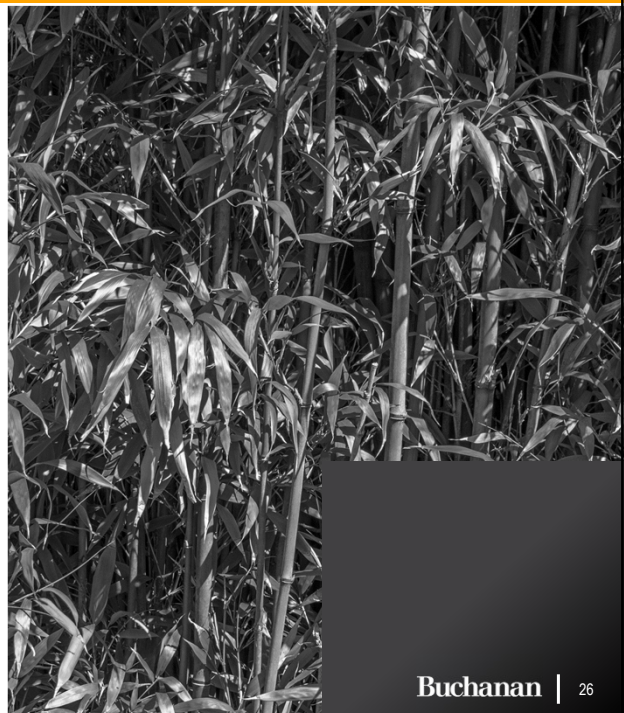
## Federal Landscape

- FTC first issued the “Green Guides” in 1992
- Guidance has been revised over the years in 1996, 1998 and 2012
- 12/20/22: FTC sought public comment on the Green Guides with comment period ending 2/21/23, which was extended to 4/24/23
- 5/23/23: FTC also hosted a workshop to discuss current Green Guides’ recommendations
- It is anticipated that FTC will release revised Green Guides later this year

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## Enforcement Actions

- Last ten years, FTC has filed numerous lawsuits aimed at environmental marketing claims
- They have covered everything from clothing and bedsheets touted as “ecofriendly” bamboo textiles
- Haircare products, body washes, lotions, baby products, personal lubricants, and cleaning sprays sold as “100% organic” or “vegan”
- Companies targeted have paid millions of dollars in penalties



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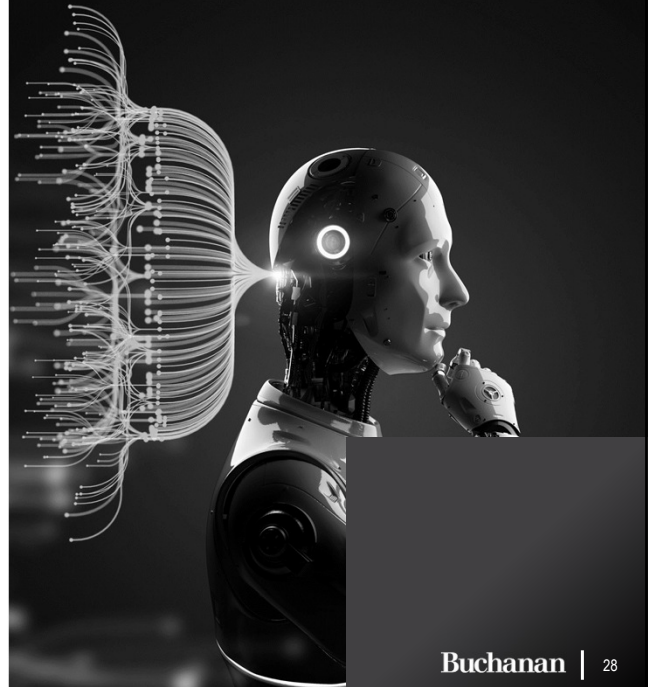
## Private Lawsuits

- False advertising cases are on the rise.
- Some have pegged the figure at nearly a threefold increase in the last few years compared to a decade ago, while in New York alone, consumer class actions alleging deceptive marketing practices tripled between 2017 and 2020, according to a recent study.
- This sort of litigation does not appear to be slowing down either: a search of the federal dockets shows that hundreds of new false advertising lawsuits were filed in just the last twelve months.
- It is anticipated that FTC will release revised Green Guides later this year.

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## Can AI Uncover Greenwashing?

- Several articles claim that AI is the solution to uncovering Greenwashing.
- Different companies claim to utilize this technology already.
- Beware of a “double-edged sword.”
  - Intersection between AI Washing and Greenwashing could mislead consumers and investors



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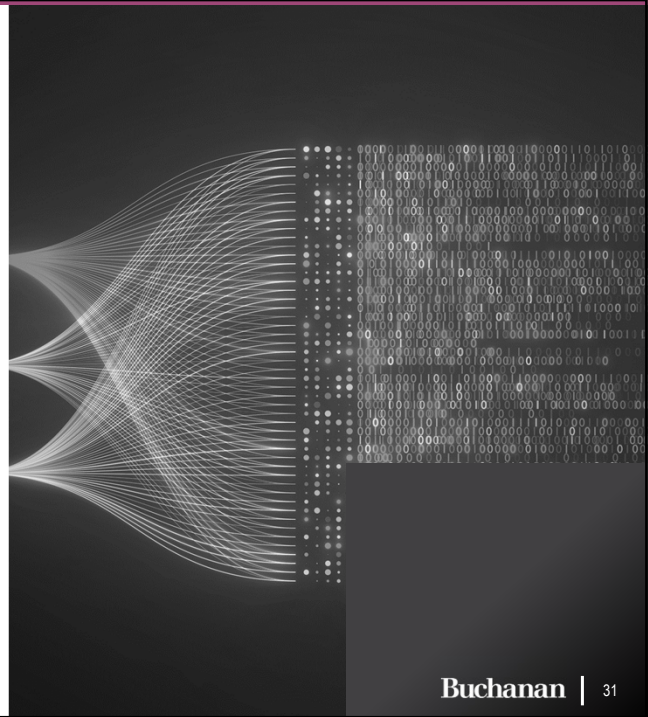
## Mitigating AI Risk - Antitrust

- Legal team must be involved in use of AI and algorithms to assess and mitigate risk
- Catalogue and understand implication of pricing data disclosed to the market
- AI developers must consider antitrust risk at the design phase
- Understand limits of anonymized data and risk of re-identification
- Implement transparency and explainability mechanisms to enhance understanding and accountability for AI-generated pricing decisions
- Foster collaboration and communication among legal, technical, and business teams to ensure a comprehensive understanding of AI risks and mitigation strategies

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## Mitigating AI Risk – AI Washing

- Understand and train on the Green Guides
- Follow SEC enforcement activity
- Ensure claims are not made without valid data and scientific proof
- Evaluate the level of AI experience and education internally and externally
- Assess current AI capabilities and maintain awareness of weaknesses



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## Thank you



**Gretchen Jankowski**  
[gretchen.jankowski@bjpc.com](mailto:gretchen.jankowski@bjpc.com)



**Jennifer Oliver**  
[jennifer.oliver@bjpc.com](mailto:jennifer.oliver@bjpc.com)

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