

Morrison, Issar and Houghtlin in *Westlaw Today*: Collusion by Code? Understanding Algorithmic Pricing and Antitrust Enforcement

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PRACTICES Antitrust and Competition, Litigation

Haynes Boone attorneys [Bill Morrison](#), [Neil Issar](#) and [Morgan Houghtlin](#) authored an article for *Westlaw Today* discussing recent litigation, agency activity and legislative trends shaping antitrust risk for users and vendors of pricing algorithms and offer practical steps to reduce legal exposure.

Read an excerpt below.

For years, businesses have used algorithms to set prices across a variety of markets. Increased adoption and sophistication as a result of large data sets and advances in machine learning have seen a corresponding increase in antitrust scrutiny.

Enforcement agencies, private litigants, and lawmakers have targeted both users and vendors of price-setting tools — particularly where companies use the same pricing algorithms or price-related data as others within their industries. Such activity raises concerns of impermissible collusion and may suppress competition between competitors. Even in the absence of collusion, algorithms may cause consumers to pay higher average prices, thereby suppressing competition and violating antitrust laws.

This article surveys recent litigation, agency activity, and legislative trends shaping antitrust risk for users and vendors of pricing algorithms and offers practical steps to reduce legal exposure.

The legal framework: applying antitrust laws to algorithmic pricing

Algorithmic pricing refers to the use of software, including artificial intelligence, to guide the setting of prices of products or services. This can happen with pre-specified instructions or through machine learning, in which software "learns" from past data without requiring predefined instructions.

Algorithmic pricing is governed primarily by Section 1 of the Sherman Act, which prohibits unreasonable restraints of trade. Certain restraints are viewed as being so anticompetitive as to be deemed unlawful per se. These include price fixing, which covers competitors adopting common pricing formulas. Where a restraint is not per se unlawful, courts must determine whether there is an agreement and assess the reasonableness or impact of the restraint on competition.

An additional basis for liability may be Section 5 of the FTC Act, which prohibits "unfair methods of competition" and "unfair or deceptive acts or practices." Invitations to collude, facilitating practices that enable competitors to coordinate, and the exchange or use of competitively sensitive pricing information have, in certain cases, been deemed violations of Section 5. Common use of a pricing algorithm could be viewed as facilitating such conduct and therefore creating risk of liability under the FTC Act.

Private litigation: Examining the 'hub-and-spoke' conspiracy

Courts are increasingly analyzing whether use of a common price-setting algorithm software among competitors constitutes price fixing. Rather than alleging direct agreements between competitors, many plaintiffs argue a "hub-and-spoke" conspiracy exists. In this framework, there is an algorithm software provider (the hub), its competing clients (the spokes), and a horizontal meeting of the minds among the competitors (the rim), often a common understanding to use the same provider and align pricing.

Courts have allowed antitrust complaints to survive motions to dismiss where competitors knowingly coordinated around algorithmic software recommendations created from aggregated nonpublic, competitively sensitive information. In contrast, alleging mere use of common software and higher prices — absent allegations of pooled rival data or agreement to follow common outputs — is insufficient.

To read the full article from *Westlaw Today*, click [here](#).