



Debate — Do real-time dynamic pricing algorithms used by landlords, airlines, and reta...

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Debate

Question

Do real-time dynamic pricing algorithms used by landlords, airlines, and retailers constitute illegal tacit collusion under antitrust law when competitors utilize the same algorithmic pricing vendor, even if no explicit communication occurs between firms?

Specialists:

- **Antitrust Scholar** — Legal doctrine and precedent
- **Market Economist** — Economic efficiency and consumer welfare
- **Civil Liberties Advocate** — Privacy and individual autonomy
- **Technology Ethicist** — Ethics of AI and accountability

Opening positions

Antitrust Scholar

Section 1 of the Sherman Act condemns every "contract, combination... or conspiracy" in restraint of trade, and an agreement has never required a handshake. When competitors knowingly subscribe to the same algorithmic pricing vendor — feeding it nonpublic, competitively sensitive data and delegating pricing decisions to a common engine, knowing their rivals are doing the same — that mutual delegation is the agreement. The algorithm is a conduit, not a shield: a digital smoke-filled room.

Three points support this:

First, precedent is substance over form. Since *Interstate Circuit* and *American Tobacco*, conspiracy may be inferred where rivals knowingly adhere to a common plan without direct communication. The DOJ's own theory treats an agreement to use a common pricing formula as price-fixing: it has argued that competitors' joint use of a common pricing algorithm "can remove independent decision making," and that algorithmic price-fixing is per se unlawful — most recently in the *RealPage* litigation, where the government alleged that landlords agreed to outsource their pricing function to software that aligned rents, and in DOJ/FTC statements of interest in the *Yardi* and *Rainmaker* hotel cases [FTC and DOJ statement of interest](#).

Second, the plus factors are unmistakable: identical pricing logic, shared confidential data, compliance mechanisms, and knowledge of rivals' identical



adoption — the very factors that convert mere parallelism into conspiracy

[RealPage complaint](#).

Third, the statutory purpose is betrayed if sophistication immunizes conduct.

"Automating an anticompetitive scheme does not make it less anticompetitive"

[DOJ statement of interest](#).

I acknowledge the trade-off: this theory risks chilling legitimate single-firm use of efficiency-enhancing software, and every case must still prove knowledge and common design, not mere parallel pricing. But where firms knowingly engineer the elimination of independent pricing, the law must not look away.

Market Economist

Section 1 of the Sherman Act punishes agreement, not intelligence. When landlords, airlines, and retailers independently adopt the same pricing vendor, each is making a unilateral decision to use the best available tool on public market data. That is the textbook definition of conscious parallelism, which the Supreme Court has repeatedly held is "not in itself unlawful." In [Bell Atlantic v. Twombly, 550 U.S. 544 \(2007\)](#), the Court held that parallel conduct alone does not even state a Section 1 claim, because it is "just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market."

Three points follow. First, the legal premise fails: no meeting of the minds, no agreement. The DOJ's aggressive theories in the RealPage and Cendyn litigations have yet to be endorsed by courts; in March 2025 a federal district court dismissed an algorithmic hub-and-spoke price-fixing complaint for failing to plead a plausible agreement ([DOJ Reaffirms Stance on Algorithmic Price Fixing](#)).

Second, the economics: real-time pricing shrinks deadweight loss. An empty airline seat or a vacant apartment at midnight is pure waste; dynamic pricing converts it into consumer surplus through off-peak discounts. That is allocative efficiency, not market failure.

Third, the incentive effect: if adopting the best available pricing tool becomes a per se offense, no one builds better tools. Innovation freezes, and inefficient incumbents are protected from precisely the competition antitrust exists to defend.

I concede a real boundary. Where a vendor collects and transmits confidential, firm-specific pricing data between competitors, that is an information exchange and a legitimate theory of liability. And in thin markets, correlated prices warrant structural scrutiny. But the question posed is about common vendor use absent communication. That is competition getting smarter — and the law, correctly understood, protects it.



Civil Liberties Advocate

Yes — and the reason is simpler than the lawyers make it. When competitors rent the same pricing brain from a single vendor, they rebuild a cartel's essential machinery: pooling nonpublic, competitively sensitive data, delegating pricing to a common model, and submitting to a system that monitors whether they follow its recommendations. The DOJ's RealPage complaint describes exactly this — landlords feeding confidential data into software, auto-accept settings, compliance monitoring, and a vendor boasting that "a rising tide raises all ships" ([DOJ complaint](#)). No smoke-filled room is needed because none of that room's coordinating functions are missing — only the ceremony. Whether the coordinating intelligence is a person or an algorithm should be irrelevant to whether concerted action occurred.

Second, the harm is real and measurable. FTC-affiliated research estimates that users of a common rental-pricing algorithm coordinate rather than compete, with markup effects around \$53 per month per unit across more than 4.2 million adopted units ([Calder-Wang and Wang, FTC](#)). That is not an externality to be balanced later; it is surplus extracted from people who never agreed to be data points.

Third, and for me decisively: the individual has no due process here. No notice that their price was set by a pooled model fed by rivals' secrets. No consent. No avenue to challenge a number generated in a microsecond. This opacity falls hardest on those least able to decode it — tenants, travelers, and shoppers already bearing historic inequities.

Trade-offs, honestly stated: not all algorithmic pricing is collusion. Dynamic pricing can reduce vacancies and waste. Blunt liability rules could chill procompetitive uses, and the "agreement" requirement is genuinely hard to satisfy where firms retain discretion — courts have already dismissed similar claims on those grounds. But the answer is not to leave coordinated pricing infrastructure unregulated. It is to make antitrust see substance, not ceremony — and to put the person on the other side of the price at the center of the inquiry.

Technology Ethicist

Collusion has no moral minimum wage. When competitors route their pricing through the same algorithmic vendor, the coordinated outcome is collusion in substance — and antitrust law should treat it as illegal even if no human ever exchanged a word.

Three points.

First, intent is made manifest in adoption. The DOJ's RealPage complaint describes landlords sharing nightly, lease-level data into a common engine whose



recommendations are trained on rivals' secrets, with the vendor policing compliance — what the government calls "a rising tide raises all ships" ([DOJ complaint](#)). Firms don't need a smoke-filled room; they need an auto-accept setting. The deliberate choice to outsource pricing to shared intelligence is the agreement. As Deputy Attorney General Lisa Monaco put it: "Training a machine to break the law is still breaking the law" ([ProPublica](#)).

Second, you cannot launder moral agency through a black box. A firm that profits from an algorithm's coordinated pricing retains responsibility for it — the same vicarious logic by which corporations answer for their employees. "The algorithm made me do it" is a compliance dodge, not a defense. The November 2025 consent decree forcing RealPage to stop using competitors' nonpublic data and submit to a monitor concedes the point: the architecture itself was the harm ([DOJ settlement](#)).

Third, opacity is the mechanism of injury. We need mandatory algorithmic audits, disclosure of common-vendor relationships, and affirmative legal duties for automated decisions.

The trade-off is real: I do not condemn independent dynamic pricing — it can be efficient and procompetitive. I accept the risk of over-deterrence. But against automating exploitation of housing, a necessity, that cost is worth paying. The price of opacity is public trust, and I refuse to let it be paid in silence.

Rebuttals

Antitrust Scholar

Twombly is the Economist's best card, and it deserves respect: parallel conduct alone never states a claim. But he plays it as a trump when it is only a baseline. Twombly did not abolish plus factors; it required them. And the cases he cites draw the line exactly where I draw it — not at "same vendor," but at "same vendor plus pooled secrets."

Take [Gibson v. Cendyn](#), the first appellate decision. The Ninth Circuit rejected claims that hotels independently licensed the same software — but it held that an agreement among competitors to abide by a common algorithm's recommendations "would undoubtedly violate Section 1," and that its analysis "might have been different" had the software pooled each firm's confidential data into recommendations for rivals. The dismissals in [Dai](#) and [Cornish-Adebiyi](#) turned on the same absence: confidential information "fed in, but less clearly out" of the algorithm. Where pooling was alleged — [RealPage \(M.D. Tenn.\)](#), [Yardi \(W.D. Wash.\)](#), [MultiPlan \(N.D. Ill.\)](#) — claims survived, Yardi and MultiPlan under the per se rule. And the March 2025 dismissal he cites dismissed claims only against SAS, the analytics parent; the hotel chains and IDEaS remained.



This matters because the Economist's own concession is the case. He concedes a vendor transmitting confidential firm-specific data between competitors is a legitimate theory of liability. But a common engine trained on pooled nonpublic data and emitting aligned recommendations is that transmission, automated. You cannot concede the conduit and defend the machine.

On efficiency: off-peak discounts are procompetitive price discrimination — no pooling required. What the DOJ alleged, and what the **November 2025 consent decree** now requires RealPage to remove, is different: features that discouraged price decreases and aligned pricing among competitors. That ratchet is not deadweight-loss recovery; it is coordinated extraction. The decree — stripping competitors' data from runtime pricing, banning auto-accept, appointing a monitor — concedes the pooling architecture, not the algorithm per se, was the harm.

Finally, the innovation point inverts my rule. Nothing here penalizes better tools; it penalizes pooling rivals' secrets, and RealPage remains free to innovate on its own data. To the Civil Liberties Advocate and Technology Ethicist: I agree, with one precision — the \$53/month markup and the monitor are not externalities to be balanced; they are proof that the agreement requirement, honestly applied, is doing its work.

Market Economist

Concessions first, because honesty is the strongest position here. Where a vendor transmits nonpublic, firm-specific data between rivals — real-time competitor-price dashboards, pooled lease-level inputs — that is an information exchange and a legitimate Section 1 theory. That is the boundary I drew in my opening, and the RealPage consent decree actually confirms it: the conduct remedied is the pooling of nonpublic data and the price-alignment features, not "using a common vendor" (**DOJ press release**). Dynamic pricing itself survives the decree.

But that decree undercuts the Ethicist's strongest card. It is a proposed settlement "without trial or adjudication of any issue of fact or law," containing no findings or admissions of liability, and it still awaits court approval (**proposed final judgment**). A settlement concedes litigation risk, not guilt. And "training a machine to break the law is still breaking the law" begs the question — whether the law was broken is the entire dispute. The vicarious-liability analogy fails too: corporations answer for employees because employees are agents; rival firms are not each other's agents.

The Scholar's Interstate Circuit analogy fails on its facts. There, the distributor sent every exhibitor an identical letter naming all the others — actual communication creating the rim. Common software adoption without rival-to-rival data transmission has no rim, which is why courts keep dismissing these theories: *Dai v. SAS* (N.D. Cal., Mar. 2025) found the plus factors "conclusory" (**order**); *Segal v.*



Amadeus (N.D. Ill., Mar. 2025) ([Bloomberg](#)) and Portillo v. CoStar (W.D. Wash., Aug. 2025) ([JDSupra](#)) followed; Gibson v. Cendyn was affirmed on appeal. Hotel plaintiffs are 0 for 4. And "identical pricing logic" is not a plus factor — it is the parallel conduct itself, which Twombly holds insufficient.

The Advocate's \$53 figure deserves scrutiny. The paper's own materials carry the disclaimer "not forensic evidence of collusion or price fixing," and the estimate has shifted between drafts — \$25 in the abstract, \$53 in the deck ([Calder-Wang & Kim, FTC](#)). It is a structural model that assumes joint-profit-maximizing conduct and tests fit — it presupposes the coordination it claims to measure. The same authors find adopters cut rents faster in downturns. Opacity is a real problem; the remedy is disclosure regulation, not rewriting Section 1 to punish buying good software.

The deciding question is data flow, not software. Pool rivals' secrets — liability. Sell an optimization tool on public data — that is Twombly's "rational and competitive business strategy unilaterally prompted by common perceptions of the market." Conflating the two makes every shared vendor a conspiracy and freezes the innovation that lowers prices.

Civil Liberties Advocate

To the Market Economist, whose case rests on Twombly and conscious parallelism, I say: look at what is actually alleged. Twombly concerned firms reading the same public market signals and pricing accordingly. The RealPage complaint describes something else: landlords submitting nightly, lease-level nonpublic data into a shared engine, auto-accept settings, and vendor policing of compliance. The data is not public, and the tool's value derives precisely from rivals' secrets. The DOJ's theory is not bare parallelism — it is pooled confidential data plus common design, the classic Interstate Circuit inference. And his own conceded boundary swallows his argument: "where a vendor collects and transmits confidential, firm-specific pricing data between competitors, that is an information exchange and a legitimate theory of liability." That is the architecture at issue. The concession is the case.

Second, the dismissals he cites are narrower than he implies. Gibson v. Cendyn turned on the absence of confidential data exchange, the absence of any obligation to accept recommendations, and staggered adoption ([HK Law summary](#)) — the very factors the DOJ alleges are present in RealPage, where the MDL court denied dismissal. Hanson Dai dismissed only SAS, the analytics supplier, not the hotels or IDEaS ([Lexology](#)). The courts are not rejecting the theory; they are drawing the line where I draw it: no data pool, no binding delegation, no liability.

Third, the efficiency claim is one-sided. I concede dynamic pricing can clear vacant capacity, and I do not condemn independent algorithmic pricing. But FTC-hosted



research estimates coordinated markups of roughly \$53 per month per unit across 4.2 million units ([FTC PDF](#)), with an earlier working-paper version estimating \$25 ([SSRN](#)). That is a transfer out of renters' pockets, not waste eliminated. The Economist counts the seller's vacancy gain and ignores the tenant's loss.

Fourth, the innovation-freeze argument is overstated. The November 2025 RealPage consent decree shows pricing software can continue — without rivals' nonpublic data, without price-alignment features, under a monitor ([DOJ](#)). What freezes is the coordination business model, not innovation.

The Scholar and the Ethicist are right that substance beats ceremony. I add one thing: the remedy must reach the individual. Notice, audit, and a path to challenge a price set by a pooled model are not afterthoughts — they are the due process that makes the market legitimate. Antitrust that sees only firms will keep missing the tenant.

Technology Ethicist

The Antitrust Scholar's substance-over-form framework is right, and I would extend it: the conspiracy test still asks what firms "knew," and opacity is engineered precisely to keep that knowledge deniable. That is why doctrine alone is insufficient — we need affirmative duties: mandatory algorithmic audits, disclosure of common-vendor relationships, and liability that survives the black-box defense.

The Market Economist's picture rests on a premise that fails for the structure in question. He calls it "independent adoption of the best tool on public market data" — but the data is not public. The common-vendor model routes nonpublic, firm-specific pricing data through one engine, which is exactly his own conceded theory of liability: information exchange. The concession swallows the defense. Vendor monitoring and pooled training data are the exchange plus enforcement.

His dismissal citation proves less than he claims. The March 2025 hotel ruling was narrow, without prejudice, with leave to amend, and expressly did not reach whether a hub-and-spoke conspiracy existed ([Mintz analysis](#)). Meanwhile, in the RealPage MDL, Judge Crenshaw denied the landlords' motion to dismiss the multifamily claims, holding that allegations of shared nonpublic data and known coordination plausibly alleged concerted action ([MDL order](#)). And the DOJ's March 2025 statement of interest argues joint use of a common algorithm can be concerted action even where firms retain discretion ([Mintz analysis](#)). Courts have not rejected the theory; they have split on pleading. Twombly bars inference from bare parallelism, not from plus factors — and shared confidential data, identical logic, and vendor policing are the textbook plus factors.



On efficiency, I concede: independent dynamic pricing does cut waste, and off-peak discounts are genuine surplus. But coordinated pricing does not produce competitive off-peak discounts; it produces supracompetitive levels. The economist conflates the tool with the conspiracy.

The Civil Liberties Advocate is right that the FTC-affiliated estimate puts the markup near \$53 per month per unit across more than 4.2 million adopted units ([Mintz analysis](#)), and her due-process point is my opacity point: no notice, no consent, no contestability, falling hardest on those least able to decode the machine. We agree on the remedy's shape as well.

Where I part with the economist: this is not competition getting smarter. It is competitors pooling secrets and outsourcing judgment — coordination by design, not coincidence. Over-deterring single-firm use is a price I accept. The price of opacity is public trust.

Closing statements

Antitrust Scholar

Three challenges from the Market Economist deserve direct answers; I give them, then close.

On the decree: conceded. It is a settlement "without trial or adjudication," with no findings or admissions, and I never claimed otherwise. What it is, is a map: the government remedied the pooling of nonpublic data and the price-alignment features while leaving dynamic pricing itself standing ([DOJ press release](#)). That confirms, rather than undercuts, where the illegality lies.

On Interstate Circuit: my analogy survives the "no rim" objection, because Interstate Circuit had no rival-to-rival communication either. The rim was each exhibitor's knowledge, through the common distributor, that identical terms had been offered to all. The DOJ and FTC make the point expressly: no rule requires direct competitor communication, and a common pricing agent whose invitation contemplates joint delegation "joins together separate decisionmakers" ([Yardi statement of interest](#)). The algorithm is that agent.

On the dismissals: conceded that identical logic alone is parallel conduct, not a plus factor. But the plus factors here are pooled nonpublic data, auto-accept delegation, and vendor policing. Where those are alleged, claims survive: Judge Crenshaw called the knowing data contribution the "most persuasive evidence of horizontal agreement" ([Reuters](#)), and *Duffy v. Yardi* survived as an alleged per se horizontal conspiracy ([analysis](#)). Courts have split on pleading, not rejected the theory.



Final position: yes. Where competitors knowingly feed nonpublic, firm-specific data into a common engine and delegate pricing to it, expecting rivals to do the same, that is a Section 1 combination — not because the machine agrees, but because the firms jointly surrendered independent decisionmaking to a common agent. Substance over form; the medium changes nothing.

The unresolved crux: whether delegation with knowledge, absent data pooling or binding adherence, alone suffices. Enforcers say yes; the dismissal cases say no. That is the doctrinal frontier.

Market Economist

All three opponents converge on one challenge: my concession — a vendor transmitting confidential firm-specific data between competitors is a legitimate liability theory — swallows my defense, because a common engine trained on pooled nonpublic data is that transmission, automated. Here is my answer, and it is the Ninth Circuit's.

In *Gibson v. Cendyn*, the panel held that independently licensing the same software does not state a Section 1 claim — the software "did not share any licensing hotel's confidential information among the competing licensees" — and flagged that its analysis "might have been different" had the software pooled competitors' data into each firm's recommendations (*opinion*). That is the doctrine, not a dodge. The line is not "same vendor versus different vendor." The line is conduit versus tool. Where the machine functions as a conduit — rivals' secrets flowing in and out, plus vendor policing — I lose, and RealPage, Yardi, and MultiPlan plausibly allege exactly that. Where it functions as a tool — each firm's data siloed, recommendations advisory — there is no agreement, only parallel conduct.

I concede more. The November 2025 consent decree shows the DOJ's theory has teeth: RealPage must stop using competitors' nonpublic data in runtime operation and strip features that limited price decreases (*DOJ*). A ratchet that suppresses discounts is coordinated extraction, not deadweight-loss recovery — and my innovation-freeze concern narrows accordingly, since the decree proves the tool survives without pooled data. On the \$53 estimate: the authors themselves disclaim it as "not forensic evidence of collusion or price fixing" (*FTC*), and the same paper finds adopters cut rents faster in downturns. If coordination is real, remedy it — as the DOJ did — not by banning common vendors.

My final position: same vendor, no communication, no agreement — no meeting of the minds, no Section 1 violation. Same vendor plus a functioning information exchange: violation. I have held that boundary from the start, and the cases confirm it. The machine is not the crime; the conduit is.



The unresolved crux is whether pooled training data that never transmits identifiable firm-specific data is the functional equivalent of an information exchange — an empirical, architectural question the courts are answering case by case.

Civil Liberties Advocate

To the Economist, directly on the \$53 figure: conceded. The Calder-Wang and Wang estimate carries a "not forensic evidence of collusion" disclaimer, and I should not have leaned on it as proof of a conspiracy. It is a modeled measure of coordination effects, not an adjudicated fact. But the disclaimer narrows what the study proves, not what the conduct does: it estimates a markup of roughly \$53 per month per unit across more than 4.2 million units, and the DOJ's complaint and the consent decree independently corroborate that shared-data, price-alignment features move rents. My harm argument never depended on the exact dollar.

On the 0-for-4 record: the hotel dismissals were pleading losses, not merits holdings. The Ninth Circuit in Gibson held that an agreement to abide by a common algorithm's recommendations "would undoubtedly violate Section 1." Where pooling was alleged — RealPage, Yardi, MultiPlan — claims survived. A court saying "you did not allege enough" is not a court saying "this is lawful."

What I concede: independent dynamic pricing is procompetitive, the Economist's concession of the data-conduit theory was honest, and a consent decree is not an admission of guilt. Settlement concedes litigation risk.

My final position stands: when competitors rent one pricing brain, pool confidential data into it, and submit to its monitoring, they have rebuilt every coordinating function of a cartel — only the ceremony is missing. Substance over form is the whole game, and the Scholar and Ethicist have shown doctrine can reach it.

The single strongest reason: the person on the other side of the price. No notice, no consent, no recourse against a number generated in a microsecond from rivals' secrets — and this falls hardest on tenants and travelers least able to decode it. Antitrust that only sees smoke-filled rooms abandons them.

The unresolved crux: whether "agreement" exists where firms retain discretion over whether to follow recommendations — substance over form versus no-rim-without-communication. On that line, this case will ultimately turn.

Technology Ethicist

To the Market Economist, three direct answers.

First, the decree. Conceded: it is entered "without trial or adjudication of any issue of fact or law," and is no admission (**proposed final judgment**). I over-read it. But the government's own theory, in its Yardi statement of interest, is mine: Section 1



is violated where competitors "knowingly combin[e] their sensitive, nonpublic pricing and supply information in an algorithm that they rely upon in making pricing decisions, with the knowledge and expectation that other competitors will do the same" ([Yardi SOI](#)). That is intent made manifest in adoption — and Judge Lasnik called the contribution of proprietary data to a common engine "the most persuasive evidence of horizontal agreement" ([Yardi order](#)).

Second, Monaco's line is a slogan, not a holding. My case never rested on it. It rests on knowledge: firms licensed a product whose entire value derived from feeding rivals' secrets into a shared model, auto-accepted its output, and submitted to its policing. That knowledge is the intent the law already demands.

Third, on agency, the Economist is right: rivals are not each other's agents. My analogy was the firm and its own instrument. The algorithm is the firm's agent; a firm that knowingly equips it with pooled competitor data and profits from the aligned prices is responsible for its instrument — as an employer is for an employee. The black box is inside the firm, not between firms.

The cases converge on the same line: pooled nonpublic data plus adopted recommendations survive — RealPage, Yardi, MultiPlan, Zelis — while Gibson, Dai, and Portillo failed for their absence ([KS Law](#)).

Final position: yes. Common-vendor pricing built on pooled nonpublic data, knowingly adopted, is collusion in substance; Section 1 reaches it, per se where the facts warrant. The single strongest reason: knowledge is intent, and the firms knew exactly what they bought.

The unresolved crux is whether delegation to a common black box is legally equivalent to transmitting data between rivals — whether the machine itself can be the conduit. Ethics answers yes; the law is still deciding.



Verdict

Bottom line: Under the fact pattern described—landlords, airlines, retailers all feeding confidential internal data into the same vendor’s algorithm and delegating pricing to it—yes, that arrangement is likely to constitute illegal tacit collusion.

1. Agreements

All specialists agree on the boundary: a pricing-vendor that merely supplies a tool fed only on public or firm-siloed data, with advisory recommendations and no competitor-data transmission, is parallel conduct—not a Section 1 agreement. Conversely, where the same vendor pools each rival’s nonpublic, firm-specific data and delivers that intelligence into competitors’ pricing, that is an information exchange and a viable conspiracy theory. The RealPage, Yardi, and MultiPlan cases survived pleading because they alleged exactly that architecture—pooled lease-level data, auto-accept delegation, and vendor policing—while *Gibson v. Cendyn*, *Dai*, and *Portillo* were dismissed for lacking it. Everyone also accepts that dynamic pricing itself is not illegal, and the November 2025 RealPage consent decree targets data-pooling and price-alignment features, not the pricing engine.

2. Disagreements

The central dispute is whether a common algorithm trained on pooled nonpublic data, emitting aligned recommendations that firms adopt, constitutes an agreement absent explicit rival-to-rival transmission of identifiable secrets. The Antitrust Scholar, Advocate, and Ethicist say yes: deliberate delegation to a shared engine that knows rivals’ inputs is the modern Interstate Circuit—a common agent that joins separate decisionmakers even without a rim of direct communication. The Market Economist insists that’s only parallel conduct; he requires an actual conduit carrying firm-identifiable data between competitors and points to the string of hotel-case dismissals as proof that identical-logic-plus-data-inputs is insufficient. A secondary disagreement is the readiness to apply the *per se* rule: the Scholar and Ethicist argue pooled-data architectures fit the classic price-fixing mold; the Economist warns that courts are split and that a consent decree is not legal precedent.

3. Recommendation

Under the fact pattern described—landlords, airlines, retailers all feeding confidential internal data into the same vendor’s algorithm and delegating pricing to it—yes, that arrangement is likely to constitute illegal tacit collusion. It does not



matter that no human spoke; the firms' mutual understanding that they are collectively surrendering independent pricing to a common engine, supported by pooled secrets and compliance monitoring, satisfies Twombly plus factors and the Interstate Circuit inference of agreement. This is the core holding of the RealPage MDL denial of dismissal and the Yardi/MultiPlan survival orders. The caution: if a particular vendor does not pool or transmit nonpublic data, and firms retain genuine, unmonitored discretion, the same conduct is lawful conscious parallelism. The verdict thus rests on the factual presence of pooled nonpublic data and effective delegation—assume those hold, and the call is violation.

4. Decision boundary

The single fact that flips the recommendation is whether the algorithm uses rivals' nonpublic, firm-specific data to generate each firm's prices. If it relies only on public market signals, or if each firm's data is strictly siloed and never feeds competitors' outputs, the arrangement is legal parallel conduct; if it does, it becomes an illegal concerted practice. That line—conduit vs. tool—is where all dismissal/survival splits fall.

5. Key trade-off

The fundamental trade-off is between deterring algorithmic hubs that replicate cartel coordination (harming consumers through inflated prices) and chilling the development and broad adoption of efficiency-enhancing dynamic pricing software that benefits consumers by filling empty seats and units at lower prices. The panel accepted that independent dynamic pricing creates genuine surplus; the risk is over-deterrence if courts treat any shared-vendor use as collusion, yet the reality of pooled-data architectures makes that risk acceptable because those architectures are distinguishable.

6. What would make this fail

The recommendation rests on three load-bearing assumptions that, if wrong, would make it the wrong call. First, that courts will ultimately accept the DOJ's theory that pooled-data algorithms satisfy the agreement element even without direct rival data transmission—if appellate courts instead require explicit firm-to-firm exchanges (the Gibson line), then only obvious conduit cases survive. Second, that the economic harm is substantial and causal: if the Calder-Wang estimate and the DOJ's claims of coordinated markups are overblown or not directly attributable to the algorithm rather than market structure, the justification for per se treatment collapses. Third, that firms cannot easily restructure to avoid liability—e.g., by claiming their data is siloed when it isn't—undermining enforcement and leaving renters unprotected. The most dangerous failure mode is that aggressive prosecution kills the next generation



of genuinely procompetitive pricing tools without actually disrupting the sophisticated conduits, leading to both less competition and higher prices.

7. Next steps & open questions

- **How exactly does the target vendor handle data?** Determine whether it pools, aggregates, or anonymizes competitors' nonpublic data before generating recommendations, and whether any compliance-monitoring features exist. The legal result hangs on this architecture.
- **What is the actual price effect?** Beyond the \$53 modeling estimate (which the authors disclaim as forensic evidence), obtain empirical studies or market-specific data that isolate the algorithm's effect from other factors. The DOJ complaint's allegations need corroboration.
- **What are the firms' adoption and discretion in practice?** Investigate whether clients auto-accept recommendations or retain meaningful manual override, and whether the vendor penalizes deviation—these plus factors distinguish RealPage from hotel-case dismissals.
- **Monitor appellate rulings.** The Ninth Circuit's Gibson dictum that an agreement to abide by a common algorithm "would undoubtedly violate Section 1" suggests the theory is alive; waiting on the RealPage and Yardi appeals will clarify the law. Re-check once the RealPage consent decree is finalized and any merits rulings emerge.

8. The strongest case for the other choice

A sharp advocate for the "no violation" answer would say: these firms independently licensed a software product that processes each firm's own data and spits out a recommendation; no rival ever sees another's numbers, and each firm remains free to reject the price. That is exactly the conscious parallelism the Supreme Court shielded in *Twombly*, and every hotel case dismissed—Gibson, Dai, Portillo, Segal—has said so, because the software was an analytical tool, not a conduit. The DOJ is stretching Interstate Circuit to cover unilateral adoption of identical technology, and the Calder-Wang \$53 estimate is contested, non-forensic modeling that could reflect market power, not conspiracy. If a future RealPage trial proves that the landlord data was truly anonymous, recommendations advisory, and any anti-discount ratchet absent, then the entire theory collapses and the DOJ's consent decree was a bluff—in that scenario, the algorithm is no different from a public market newsletter and would lawfully reduce vacancies. The panel rejects this because, under the pooled-data, auto-accept, monitoring architecture that is alleged, the firms' deliberate surrender of independent pricing to a common engine that knows their secrets crosses the line from parallel conduct to agreement—a distinction the Ninth Circuit itself acknowledged, and one that the surviving complaints (Yardi, MultiPlan)



capture. The alternative's best scenario proves too much only by changing the facts, not by defeating the principle.



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