

Philly's Algorithmic Rent Ban Furthers Antitrust Policy Trends

By **Edward Rogers, Elizabeth Weissert and Haesun Burris-Lee** (November 12)

Although Pennsylvania does not regulate apartment rental practices or pricing at the state level, the city of Philadelphia is poised to take a major step in that direction.

On Oct. 24, in an effort to combat rising prices for rental housing, the Philadelphia City Council unanimously **passed a bill** banning the use of algorithmic software by landlords and property management companies to set rent prices and manage occupancy rates.

Driving this legislation is the concern that, by collecting their clients' proprietary price, occupancy and inventory information, and generating price and supply strategies, algorithmic pricing software companies enable landlords and property managers to inflate rent above the level that market could naturally sustain.

In the city council's view, the use of algorithmic pricing facilitates agreements among competitors to fix prices that are illegal under the antitrust laws — that is, to work together to raise prices above where the invisible hand of the market would place them given the balance of housing supply and renter demand.

In the words of Councilmember Nicholas O'Rourke of the Working Families Party, who sponsored the bill, "Price-fixing through an algorithm is still price-fixing. It's still illegal and we ain't gonna allow it in the city of Philadelphia." [1]

Philadelphia Bill No. 240823 follows a similar ban enacted in San Francisco, which in July became the first city to pass an ordinance prohibiting algorithmic programs that set multifamily rents and manage occupancy levels. San Francisco's ordinance took effect Oct. 14.

Like the San Francisco legislation, the Philadelphia ordinance would amend the city's landlord and tenant laws by specifically prohibiting agreements not to compete on rental terms, including prices, as well as the use of services or products that involve price coordination or that "otherwise encourage or facilitate" agreements not to compete.

The bill defines "price coordination" to include the following steps: (1) collecting certain nonpublic competitor information, including price, supply and occupancy rates; (2) processing that information through "a computational or algorithmic system, software, or process"; and (3) generating recommendations for rental prices, fees, terms or occupancy levels.

While it remains to be seen whether other cities will follow the lead of San Francisco and Philadelphia, these local bans arise in the context of increasing scrutiny of algorithmic pricing of rental apartments under the federal antitrust laws, and federal antitrust enforcement agencies' skepticism about algorithmic pricing technologies generally.



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A host of federal antitrust cases against leading algorithmic pricing software company [RealPage Inc.](#), and many of its clients in the multifamily housing market, have been pending in Tennessee since early 2023.

And when the [U.S. Department of Justice's](#) Antitrust Division and the attorneys general of several states, Pennsylvania not among them, filed their own action against RealPage in North Carolina, U.S. Attorney General Merrick Garland remarked, "RealPage's pricing algorithm enables landlords to share confidential, competitively sensitive information and align their rents."^[2]

In this case, *In re: Realpage*, the [U.S. District Court for the Middle District of Tennessee](#) **issued a split decision** in January. It dismissed claims alleging so-called horizontal agreements among landlords and property managers to use algorithms to fix prices that would have been per se illegal.

But the court upheld claims alleging vertical agreements between RealPage and each of its property management and landlord clients that may be illegal depending on the facts plaintiffs are able to prove.

Defendant property managers and landlords allegedly understood that RealPage would use their proprietary data as an input to generate price recommendations to them and their competitors. The RealPage plaintiffs further alleged the multifamily defendants had market power in 45 regional submarkets, including Philadelphia.

Similar federal antitrust cases have also been brought in the [U.S. District Court for the District of New Jersey](#) and the [U.S. District Court for the District of Nevada](#) against casino hotel operators in Atlantic City and Las Vegas arising out of the use of algorithmic software programs to price hotel rooms.

However, the district courts dismissed both cases — **[Cornish-Adebiyi v. Caesars Entertainment](#)** in October and **[Gibson v. Cendyn Group LLC](#)** in January — because the plaintiffs had not alleged that proprietary data was pooled or otherwise commingled into a common dataset and, thus, the pricing recommendations offered to each hotel were not based on a set of confidential competitor data.

Plaintiffs have appealed these decisions, which are currently pending in the U.S. Courts of Appeals for the Third and Ninth Circuits.

While the federal litigation winds its way through the courts, the Philadelphia ordinance is expected to become law in early 2025. Philadelphia Mayor Cherelle Parker has signaled her support for Bill No. 240823, which would go into effect 90 days after she signs it.

The ordinance would create both public and private causes of action. This means that both the city itself and classes of private plaintiffs made up of renters could file actions against landlords and property managers using these software programs in the Philadelphia Court of Common Pleas.

Damages and related penalties under the Philadelphia ordinance could be substantial. In cases filed by the city, renters could recover their actual damages or, if the city so elects, statutory damages of \$1,000 per violation; additionally, the court would impose civil penalties of \$2,000 per violation.

Private plaintiffs would be entitled either to three times their actual damages or statutory

damages of \$2,000 per violation. The "per violation" language is critical: Each day of increased rent via algorithms would count as a separate violation for each affected residential unit.

Prevailing plaintiffs would also be entitled to attorney fees, costs and interest on actual damages. For the thousand or so landlords who own more than half of Philadelphia's rental units — and the property managers who manage them — the specter of costly class action litigation is difficult to ignore.

Indeed, even though Pennsylvania is one of the few states without a general antitrust statute, Philadelphia landlords and property managers will be at risk of being sued in Pennsylvania state court under this new local ordinance.

Defendants are unlikely to succeed in avoiding liability by arguing that the federal antitrust laws preempt Philadelphia's ordinance.

As the U.S. Supreme Court explained in its 1982 ruling in *Rice v. Norman Co.*, the ordinance can only be preempted to the extent "it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute." [3]

But nothing in the bill mandates, authorizes or pressures a party to violate existing federal antitrust laws. Rather, the local ordinance seeks to enhance the protections of the federal antitrust laws.

Further, the ordinance would prohibit "recommending or suggesting" rent terms, which is consistent with the position taken by the DOJ, and class action plaintiffs in the federal lawsuits, that merely suggesting a price is sufficient to enable price-fixing, because landlords and property managers will accept the suggestion knowing their competitors are doing the same.

From a broader perspective, algorithmic pricing is a relatively new phenomenon that is not limited to rental housing, but rather is driven by recent improvements in artificial intelligence and machine learning.

Firms spanning the hospitality, ride-sharing, airline, insurance and e-commerce industries have adopted tools for dynamic pricing relying on algorithms. The corresponding decrease in operational costs and increase in responsiveness to competitive forces, among other benefits, make algorithmic pricing an attractive tool.

But the Philadelphia ban on algorithmic pricing also reflects a broader policy trend of adapting and updating traditional antitrust principles to respond to new technology.

Under current law, for example, defendants have asserted that, absent actual evidence of collusion with a competitor, an individual firm's decision to rely on an algorithm for its pricing policies should be considered unilateral conduct that falls outside the reach of the antitrust laws.

While establishing proof of collusion is a common issue in antitrust cases involving the use of information exchanges by competitors, the almost total absence of human intervention in pricing algorithms makes it harder to show that competitors actually agreed to fix prices in violation of federal antitrust law.

The Philadelphia ordinance attempts to address problems of proof by broadly outlawing the use of software that involves, facilitates or encourages algorithmic price coordination.

Landlords and property managers that use or are considering using algorithmic pricing in Philadelphia should understand the potential legal risks associated with this tool, especially the use of proprietary information from competitors to set prices, and should consider the ways in which they are deploying such technologies.

Firms should consider drafting or revising compliance policies, providing clearer direction to employees involved in pricing and competitive analysis, and staying current with legal developments.

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[1] Aaron Moselle, New bill would give Philly the green light to sue landlords for price-fixing rental rates, WHYY (Sep. 26, 2024), <https://whyy.org/articles/philadelphia-landlords-lawsuit-price-fixing/>.

[2] Press Release, U.S. Office of Public Affairs, RealPage's Pricing Algorithm Violates Antitrust Laws (Aug. 23, 2024), <https://www.justice.gov/opa/pr/justice-department-sues-realpage-algorithmic-pricing-scheme-harms-millions-american-renters>.

[3] Rice v. Norman Co., 458 U.S. 654, 661 (1982); see also Fisher v. Berkeley, 475 U.S. 260, 265 (1986).