Date of Hearing: May 1, 2025
Fiscal: Yes

ASSEMBLY COMMITTEE ON PRIVACY AND CONSUMER PROTECTION
Rebecca Bauer-Kahan, Chair
AB 325 (Aguiar-Curry) – As Amended April 24, 2025

SUBJECT: Cartwright Act: violations

SYNOPSIS

Antitrust laws have been on the books for over a century and have evolved along with the means of reaching unlawful price-fixing agreements. As smoke-filled backrooms and handshakes gave way to the phone, fax, pager, and email, the law adapted to address new challenges. The new frontier is algorithmic price-fixing, which can attain uncompetitive ends with greater efficiency and scale and yet is even more difficult to detect, let alone prove in court.

This bill seeks to tackle algorithmic collusion by strengthening California's antitrust law, the Cartwright Act. The bill prohibits distributing common pricing algorithms to two or more persons with the intent that it be used to set or recommend prices or commercial terms of the same or similar products in the jurisdiction of the state. The bill also prohibits using common pricing algorithms if the person knows or should know the common pricing algorithm is, was, or will be used by another person for the same or similar products. Violators are subject to joint and several liability. Finally, the bill makes it easier to file cases under the Cartwright Act – by providing that complaints for violations are not subject to heightened pleading standards that have been applied under federal law.

The bill is co-sponsored by American Economic Liberties Project, Economic Security California Action, and TechEquity Action and supported by a broad array of civil society and labor groups. The bill is opposed by a coalition of industry associations led by California Chamber of Commerce.

The Judiciary Committee passed the bill by a vote of 9-3.

THIS BILL:

1) Defines:

   a) "Commercial term" to include level of service, availability, and output, as specified.

   b) "Common pricing algorithm" as any process or rule, including a process derived from machine learning or other artificial intelligence techniques, that processes the same or substantially similar data to recommend or set a price or commercial term using the same, or performing a substantially similar, function.

   c) "Distribute," "distribution," and "distributing" as selling, licensing, providing access to, or otherwise making available by any means, including through a subscription or the sale of a service.

   d) "Person" as defined under Business and Professions Code section 16702, which provides the term includes corporations, firms, partnerships, and associations existing or

authorized under state, federal, or foreign law. "Person" does not include end consumers of a product or service.

e) "Price" as the amount of money or other thing of value, whether tangible or not, expected, required, or given in payment for any product or service, including compensation paid to an employee or independent contractor for services provided.

2) Provides that it is unlawful for a person to use or distribute a common pricing algorithm if either of the following is true:

a) The person distributes the common pricing algorithm to two or more persons with the intent that the common pricing algorithm be used to set or recommend prices or commercial terms of the same or similar products in the jurisdiction of this state.

b) The person uses the common pricing algorithm to set or recommend prices or commercial terms of products or services and knows or should know that the common pricing algorithm is, was, or will be used by another person to set or recommend prices or commercial terms of the same or similar products or services in the jurisdiction of this state.

3) Provides that any person who violates 2) is jointly and severally liable for any such violation.

4) Provides, notwithstanding any other law, that in a complaint for a violation of the Cartwright Act, it is sufficient to contain factual allegations demonstrating that the existence of a contract, combination in the form of a trust, or conspiracy to restrain trade or commerce is plausible, and the complaint shall not be required to allege facts tending to exclude the possibility of independent action.

EXISTING LAW:

1) Under the federal Sherman Antitrust Act of 1890, prohibits any contract, combination in the form of trust or otherwise, or conspiracy, that unreasonably restrains trade. (15 U.S.C. § 1.) Prohibits monopolizing or attempting to monopolize, or conspiring to monopolize, trade or commerce. (15 U.S.C. § 2.)

2) Under California's Cartwright Act, makes every trust unlawful, against public policy, and void. (Bus. & Prof. Code § 16726.) Provides that a trust is a combination of capital, skill or acts by two or more persons for any of the following purposes:

a) To create or carry out restrictions in trade or commerce.

b) To limit or reduce the production, or increase the price of merchandise or of any commodity.

c) To prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity.

d) To fix at any standard or figure, whereby its price to the public or consumer is in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, barter, use or consumption in California.

e) To make or enter into or execute or carry out any contracts, obligations or agreements of any kind or description, by which they do all or any or any combination of any of the following:

i) Bind themselves not to sell, dispose of or transport any article or any commodity or any article of trade, use, merchandise, commerce or consumption below a common standard figure, or fixed value.

ii) Agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure.

iii) Establish or settle the price of any article, commodity or transportation between them or themselves and others, so as directly or indirectly to preclude a free and unrestricted competition among themselves, or any purchasers or consumers in the sale or transportation of any such article or commodity.

iv) Agree to pool, combine or directly or indirectly unite any interests that they may have connected with the sale or transportation of any such article or commodity, that its price might in any manner be affected. (Bus. & Prof. Code § 16720.)

3) Provides that the Attorney General and county district attorneys may bring criminal or civil actions to enforce the Cartwright Act. Corporations are subject to fines of up to $1 million; individuals are subject to fines of up to $250,000 and imprisonment for three years. (Bus. & Prof. Code § 16755.)

4) Grants a private right of action in which plaintiffs may recover treble damages, injunctive relief, costs, attorney's fees, and interest on actual damages. (Bus. & Prof. Code §§ 16750, 16761.)

COMMENTS:

1) **Author's statement**. According to the author:

> It doesn't matter if price fixing happens behind closed doors or through artificial intelligence, its wrong either way. Californians face an affordability crisis, with basic needs like food and housing increasingly priced beyond their means. Unknown to consumers, digital tools are accelerating the "price crisis," resulting in higher costs and fewer choices. AB 325 updates California's antitrust laws to address modern technologies being used for illegal price fixing. This bill makes it clear that using digital pricing algorithms (like computer software and apps) to coordinate prices among competitors is just as illegal as traditional price fixing. AB 325 will help enforce existing laws through common sense guardrails because California shouldn't tolerate practices that exploit working families, the very families that already can't afford the high costs of living.

2) **Antitrust laws.** Two closely related antitrust laws – the federal Sherman Act and the state's Cartwright Act – are implicated by this bill.

Sherman Act. Section 1 of the federal Sherman Act prohibits concerted action that restrains trade, while Section 2 covers concerted action and independent action, but "only when it threatens

actual monopolization," a higher bar than restraint of trade.[1] According to the United States Supreme Court:

> The reason Congress treated concerted behavior more strictly than unilateral behavior is readily appreciated. Concerted activity inherently is fraught with anticompetitive risk. It deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands. In any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit. This not only reduces the diverse directions in which economic power is aimed but suddenly increases the economic power moving in one particular direction. Of course, such mergings of resources may well lead to efficiencies that benefit consumers, but their anticompetitive potential is sufficient to warrant scrutiny even in the absence of incipient monopoly.[2]

"The relevant inquiry" under section 1 "is whether there is a 'contract, combination . . . , or conspiracy' amongst 'separate economic actors pursuing separate economic interests, such that the agreement 'deprives the marketplace of independent centers of decisionmaking,' and therefore of 'diversity of entrepreneurial interests,' and thus of actual or potential competition."[3] In other words, "The 'crucial question' prompting Section 1 liability is 'whether the challenged anticompetitive conduct 'stems from [lawful] independent decision or from an agreement, tacit or express.'"[4]

Cartwright Act. "[B]roader in range and deeper in reach,"[5] than its federal counterpart, California's Cartwright Act (Act) "'generally outlaws any combinations or agreements which restrain trade or competition or which fix or control prices.'"[6] The Act is "premised on the notion that competition yields efficient resource allocation, lower prices, higher quality, and greater social welfare."[7] "'At its heart is a prohibition against agreements that prevent the growth of healthy, competitive markets for goods and services and the establishment of prices through market forces.'"[8] "The [A]ct's principal goal is the preservation of consumer welfare."[9]

Under the Act, a violation requires "a combination of capital, skill or acts by two or more persons" that seeks to achieve an anticompetitive end.[10] A complaint pursuant to the Act must allege: "(1) the formation and operation of the conspiracy, (2) the wrongful act or acts done pursuant thereto, and (3) the damage resulting from such act or acts."[11]

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[1] *Copperweld Corp. v. Independence Tube Corp*. (1984) 467 U.S. 752, 767.
[2] *Id.* at pp. 768-769.
[3] *Am. Needle, Inc. v. NFL* (2010) 560 U.S. 183, 195, citations omitted.
[4] *In re Dynamic Random Access Memory (DRAM) Indirect Purchaser Antitrust Litig.* (9th Cir. 2022) 28 F.4th 42, 46, quoting *Bell Atl. Corp. v. Twombly* (2007) 550 U.S. 544, 553.
[5] In re *Cipro Cases I & II* (2015) 61 Cal.4th 116, 160-161. However, the Cartwright Act does not prohibit unilateral conduct.
[6] *Pacific Gas & Electric Co. v. County of Stanislaus* (1997) 16 Cal.4th 1143, 1147.
[7] *Ahn v. Stewart Title Guaranty Co*. (2023) 93 Cal.App.5th 168, 179.
[8] *Ibid.*
[9] *In re Cipro Cases I & II, supra*, 61 Cal. 4th at p. 136.
[10] Bus. & Prof. Code § 16720.
[11] *Smith v. State Farm Mut. Auto. Ins. Co.* (2001) 93 Cal. App. 4th 700, 722; *Asahi Kasei Pharma Corp. v. CoTherix, Inc.* (2012) 204 Cal.App.4th 1, 8; *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC* (9th Cir. 2022) 31 F.4th 651, 665, fn. 8.

Concerted action. "Two forms of conspiracy may be used to establish a violation of antitrust laws: a *horizontal* restraint, consisting of a collaboration among competitors; or a *vertical* restraint, based upon an agreement between business entities occupying different levels of the marketing chain."[12] A hybrid of horizontal and vertical agreements is sometimes referred to as a "hub-and-spoke" conspiracy, in which a central actor, or hub, enters into vertical agreements with spokes, such as competing manufacturers or distributors. If the spokes have horizontal agreements with each other, the conspiracy is "rimmed" whereas if they do not, it is a "rimless" hub-and-spoke.

Certain types of agreements that restrain trade are illegal *per se* because they almost always undermine competition, while others are subject to a "rule of reason" review, which requires the plaintiff to show that the agreement harms competition more than it helps.[13] Most horizontal agreements are *per se* violations,[14] whereas vertical agreements are usually analyzed under the rule of reason.[15] Price fixing, however, is *per se* illegal regardless of whether it occurs between competitors or businesses at different economic levels.[16]

On the other hand, merely exchanging information, including about prices, is not itself illegal unless it is part of an express or tacit agreement to fix prices.[17] Agreements "may be inferred on the basis of conscious parallelism, when such interdependent conduct is accompanied by circumstantial evidence and plus factors."[18] Plus factors can include "a common motive to conspire, evidence that shows that the parallel acts were against the apparent individual economic self-interest of the alleged conspirators, and evidence of a high level of interfirm communications."[19]

3) **Price fixing algorithms.** Algorithmic collusion is not new. In 1992, the United States Department of Justice (DOJ) filed suit against eight of the nation's largest airlines in connection with an algorithmic pricing system, known as the Airline Tariff Publishing Company (ATP), which they used to increase the cost of airplane tickets by potentially upwards of a billion dollars during a four year period. "By supplying or withdrawing changes in fares, the airlines told each other what fares they wanted to charge in which markets, what competitors' fares were acceptable to them, and what deals they were willing to make." The attorney in charge of DOJ's Antitrust Division stated, 'The airlines used the ATP fare dissemination system to carry on conversations just as direct and detailed as those traditionally conducted, by conspirators over the telephone or in hotel rooms. Although their method was novel, their conduct amounted to price

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[12] *G.H.I.I. v. MTS, Inc*. (1983) 147 Cal.App.3d 256, 267, emphasis in original.
[13] *People v. Bldg. Maint. Contractors' Ass'n* (1957) 41 Cal. 2d 719, 727.
[14] *See Knevelbaard Dairies v. Kraft Foods, Inc.* (9th Cir. 1979) 232 F.3d 979, 986.
[15] *In re Musical Instruments & Equip. Antitrust Litig*. (9th Cir. 2015) 798 F.3d 1186 n.3; *United States v. Joyce* (9th Cir. 2018) 895 F.3d 673, 677.
[16] *Mailand v. Burckle* (1978) 20 Cal.3d 367, 377.
[17] *Aguilar v. Atl. Richfield Co.* (2001) 25 Cal. 4th 826, 862-863 ("'Competition does not become less free merely because the conduct of commercial operations becomes more intelligent through the free distribution of knowledge of all the essential factors entering into the commercial transaction'").
[18] *In re Automobile Antitrust Cases I & II* (2015) 1 Cal.App.5th 127, 169, citations and nested quotation marks omitted.
[19] *Ibid.*

fixing, plain and simple.' Two of the airlines entered a consent decree and the other six entered into a settlement with the DOJ.[20]

The rise of machine-learning pricing algorithms has intensified concerns about anti-competitive behavior, particularly tacit collusion.[21] Unlike older rule-based systems, modern algorithms can rapidly assimilate market data, predict demand fluctuations, and adjust prices based on competitor behavior, often reinforcing strategies that maximize profits in an anticompetitive fashion.[22] In particular, models that use reinforcement learning – a training process that uses rewards and punishments to orient a model's behavior towards attaining a specific goal[23] – and real-time data feedback loops can adapt to function in a manner that sustains high prices, effectively facilitating tacit collusion without explicit human agreement.[24] Moreover, algorithms' faster response times and improved demand predictions may help firms sustain collusive pricing structures by swiftly detecting and punishing deviations, leading to supra-competitive prices.[25]

4) **AI collusion cases**. A number of pending federal cases allege that the use of a common pricing algorithms violates the Sherman Act. Some key examples follow.

RealPage. In October of 2022, ProPublica published an investigation of RealPage's rental housing pricing algorithm. This popular software, used by many of the largest property managers who control thousands of apartments in metropolitan areas throughout the country, collects information from the property managers, including private lease transactions and occupancy data, that is then fed into a common algorithm that recommends optimal rental rates.[26] This led to numerous class-action lawsuits against RealPage, as well as a lawsuit by Attorney General Rob Bonta, along with the DOJ and eight other attorneys general. The litigation is ongoing.[27]

In a filing with the court, the DOJ set forth its view that "[a]s with other actions taken in concert, competitors' joint use of common algorithms can remove independent decision making. . . . Put another way, whether firms effectuate a price-fixing scheme through a software algorithm or through human-to-human interaction should be of no legal significance. Automating an anticompetitive scheme does not make it less anticompetitive." The DOJ continued:

> The question in this case is whether the defendants have violated Section 1 of the Sherman Act by allegedly knowingly combining 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. Although not every use

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[20] "Justice Department Settles Airlines Price Fixing Suit, May Save Consumers Hundreds of Millions of Dollars" (1994), https://www.justice.gov/archive/atr/public/press_releases/1994/211786.htm.
[21] Clark et al, "Pricing Algorithms as Third-Party Facillitators of Collusion" *American Bar Association* (Dec. 2024), p. 3, https://www.americanbar.org/content/dam/aba/publications/antitrust/source/2024/december/pricing-algorithms-third-party-facilitators-collusion.pdf.
[22] *Ibid.*
[23] Mummert et al., "What is reinforcement learning?" *IBM Developer* (September 15, 2022), developer.ibm.com/learningpaths/get-started-automated-ai-for-decision-making-api/what-is-automated-ai-for-decision-making.
[24] "Pricing Algorithms as Third-Party Facillitators of Collusion," *supra*, pp. 3-5.
[25] *Ibid.*
[26] Heath Vogell, "Rent Going Up? One Company's Algorithm Could Be Why," *ProPublica* (Oct. 15, 2022), https://www.propublica.org/article/yieldstar-rent-increase-realpage-rent.
[27] *See In re RealPage, Inc., Rental Software Antitrust Litig*. (No. II) (M.D.Tenn. 2023) 709 F. Supp. 3d 478, 492.

> of an algorithm to set price qualifies as a per se violation of Section 1, taking the allegations set forth in the complaints as true, the alleged scheme meets the legal criteria for per se unlawful price fixing.[28]

RENTmaximizer. Another pending case similarly involves allegations that competing landlords violated section 1 of the Sherman Act by, among other things, unlawfully agreeing to use a centralized pricing algorithm to artificially inflate multifamily rental prices.[29] The DOJ argued that "competitors' jointly delegating key aspects of their decisionmaking to a common algorithm" amounts to *per se* concerted action "because doing so 'joins together separate decisionmakers' and thus 'deprives the marketplace of independent centers of decisionmaking.'"[30] Furthermore, "[w]here, as here, plaintiffs' allegations involve a conspiracy to *centralize* pricing decisions in a third-party algorithm, it is irrelevant to the scheme whether landlords share confidential information among themselves or with only the pricing agent; the alleged scheme is designed to obviate the need for competitors to share information directly with each other."[31]

Cendyn. A federal district court recently dismissed a class action lawsuit alleging that Las Vegas hotel operators engaged in illegal price-fixing by using Cendyn's revenue management software.[32] The court highlighted that the pricing recommendations were not based on nonpublic, competitively sensitive information; rather, it was public information available from online listings and travel agencies. The court also concluded that the plaintiffs failed to allege that hotel operators "agreed to be bound by [Cendyn's] pricing recommendations, much less that they all agreed to charge the same prices."[33] The decision is on appeal to the Ninth Circuit. The DOJ has argued that "an invitation for collective action followed by conduct showing acceptance" such as "joint use" of the pricing algorithm amounts to concerted action, which may be a per se violation if the algorithm sets a "default or starting point price," if it the hotel ultimately charges a different price.[34]

A similar case involving use of Cendyn's pricing software by Atlantic City hotels was also dismissed. Although the DOJ and FTC argued usage of pricing algorithms is unlawful even when co-conspirators retain pricing discretion and do not communicate directly with each other, the court found that the alleged co-conspirators used the pricing algorithm at different points in time, no confidential or otherwise nonpublic information was exchanged, and the alleged co-conspirators were not bound to accept the algorithm's pricing recommendations.[35]

5) **Law Revision Commission working group report**. AR 95 (Cunningham, 2021) called upon the California Law Revision Commission to study whether the Cartwright Act requires updating. To assist in its study, the Commission formed working groups of experts, one of which issued a

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[28] Memorandum of Law in Support of Statement of Interest of the United States, In re RealPage, Case No. 3:23-MD-3071 (M.D. Tenn Nov. 15, 2023), https://www.justice.gov/d9/2023-11/418053.pdf.
[29] *See Duffy v. Yardi Sys., Inc.* (W.D.Wash. Dec. 5, 2024, No. 2:23-cv-01391-RSL) 2024 U.S.Dist.LEXIS 220641.
[30] Statement of Interest (March 1, 2024), in *Yardi, supra*, pp. 2-3, https://www.justice.gov/d9/2024-03/420301.pdf.
[31] *Id.* at p. 7, fn. 4. Emphasis in original.
[32] *Gibson v. Cendyn Grp., LLC* (D.Nev. May 8, 2024, No. 2:23-cv-00140-MMD-DJA) 2024 U.S.Dist.LEXIS 83547.
[33] *Id.* at 6.
[34] Brief for the DOJ as Amicus Curiae, *Gibson v. Cendyn Group LLC,* No. 24-3576 (9th Cir. filed Oct. 24, 2024), Dkt. No. 28.1, pp. 18, 22-24.
[35] *Cornish-Adebiyi, et al. v. Caesars Entertainment, Inc., et al.*, No. 1:23-CV-02536-KMW-EAP (D. N.J. Sept. 30, 2024).

report on "Competition and Artificial Intelligence." Regarding algorithmic collusion, the working group concludes:

> . . . The Cartwright Act generally prohibits any combinations or agreements which unreasonably restrain trade or fix or control prices. As currently interpreted by the courts, the Cartwright Act requires a "combination" or "concerted action" between 2 or more independent economic entities. Given the increasing use of software programs containing or relying on pricing algorithms, the Legislature might consider declaring that the "concerted action" requirement of the Cartwright Act encompasses multiple competitors that knowingly use the same or similar revenue management software programs containing or relying on pricing algorithms that utilize nonpublic competitor information to train or inform any price recommendations.
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> Consistent with the position of the DOJ . . ., the Legislature might also clarify that direct communications are not required to show proof of a "combination" or "concerted action" among competitors, as the Cartwright Act covers tacit *as well as* express agreements. This is in accord with the position of the DOJ . . . that Section 1 of the Sherman Act prohibits "tacit agreements"—that is where one co-conspirator invites participation in an illegal price-fixing scheme and other co-conspirators act in accordance with the scheme, showing acceptance through a course of conduct.
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> Further, the Legislature might make clear that the Act prohibits competitors from "delegating key aspects of pricing decision making to a common entity, even if the competitors never communicate with each other directly." Further, to refute the argument that there can be no actionable claim of price fixing because the algorithm's recommendations are not binding, the Legislature could declare that, under the Cartwright Act, "an agreement among competitors to fix the *starting point* of pricing is per se unlawful, no matter what prices the competitors ultimately charge." [36]

6) **This bill seeks to prevent algorithmic collusion by prohibiting common pricing algorithms used by separate entities.** This bill seeks to strengthen California's ability to tackle algorithmic price-fixing by developers and users of common pricing algorithms intended or used to set or recommend prices or commercial terms. The bill's key provisions are as follows:

Prohibitions on distribution and use of common pricing algorithms. This bill adds a new section to the Cartwright Act that makes it unlawful for a person – defined as a corporation, firm, partnership, or association (but not end consumers of products or services) – to use or distribute a common pricing algorithm if either of the following is true:

- The person distributes the common pricing algorithm to two or more persons with the intent that the common pricing algorithm be used to set or recommend prices or commercial terms of the same or similar products in the jurisdiction of this state.

- The person uses the common pricing algorithm to set or recommend prices or commercial terms of products or services and knows or should know that the common pricing algorithm is, was, or will be used by another person to set or recommend prices or

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[36] "Report to the California Law Review Commission Antitrust Law: Study B-750: Competition and Artificial Intelligence," p. 5, https://clrc.ca.gov/pub/Misc-Report/ExRpt-B750-Grp8.pdf. Emphasis in original.

> commercial terms of the same or similar products or services in the jurisdiction of this state.

The bill defines "common pricing algorithm" as any process or rule, including a process derived from machine learning or other artificial intelligence techniques, that processes the same or substantially similar data to recommend or set a price or commercial term using the same, or performing a substantially similar, function. Unlike an earlier version of the bill, the bill no longer distinguishes between public and nonpublic data.

Supporters argue these provisions "reflect well-established legal findings that price-fixing agreements can be inferred from the use of these algorithmic tools." They also argue that any information – whether public or private – can be used for collusive purposes. Moreover, they assert, any instance of algorithmic price fixing between separate entities is inherently anticompetitive, even if it leads to reasonable prices in the short run. This view finds support in longstanding judicial precedents. The California Supreme Court has stated:

> [T]he United States Supreme Court declared, "[For] over forty years this Court has consistently and without deviation adhered to the principle that price-fixing agreements are unlawful per se under the Sherman Act and that no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense . . . . Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces. The [Sherman] Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference."
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> Nor is it significant that the prices set pursuant to a price-fixing scheme are reasonable, for the "reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow."
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> This court has similarly interpreted the Cartwright Act to prohibit tampering with prices; they must be determined, we have stated, by the "interplay of the economic forces of supply and demand."
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> These rules apply whether the price-fixing scheme is horizontal or vertical; that is, whether the price is fixed among competitors or businesses at different economic levels.[37]

Opponents contend, however, that the "the use of a pricing algorithm does not inherently constitute price *fixing*." As a result, they assert, the bill effectively prohibits commonplace, beneficial uses of pricing algorithms, such as dynamic pricing. Writing about the prior version of the bill, they state:

> Retailers use pricing algorithms to ensure they are offering the most competitive prices to consumers. Realtors use them to help clients set home prices. Banks use them to set terms (e.g. rates and fees) for services. Hospitality, airlines, transportation network companies, utilities, ticket venues, and many others use them for dynamic pricing. The list goes on.

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[37] *Mailand v. Burckle, supra,* 20 Cal.3d at pp. 376-377 (internal citations omitted).

But this bill, as recently amended, would not prohibit use of pricing algorithms that are not shared with another corporation, firm, partnership, or association. The bill applies only when distinct entities use a *common* pricing algorithm to set or recommend prices or commercial terms. As such, the bill is arguably consistent with the longstanding antitrust principle that a contract, combination, or conspiracy amongst separate economic actors "'deprives the marketplace of independent centers of decisionmaking,' and therefore of 'diversity of entrepreneurial interests,' and thus of actual or potential competition."[38] Nevertheless, the author may wish to continue to work with stakeholders to ensure the scope of the bill is consistent with the types of arrangements that have been historically recognized as price fixing.

Strengthens liability. Under existing law, the Attorney General and district attorneys may bring criminal or civil actions to enforce the Cartwright Act. Corporations are subject to fines of up to $1 million; individuals are subject to fines of up to $250,000 and imprisonment for three years. Additionally, the Cartwright Act grants a private right of action in which plaintiffs may recover treble damages (triple the actual damages), injunctive relief, costs, attorney's fees, and interest on actual damages.

The bill provides that violators are jointly and severally liable for violations – meaning that each violator is independently liable for the full extent of the collective damage and that a plaintiff can recover compensation from any violator. This strong remedy further counsels in favor of ensuring the bill's scope is narrowly tailored.

Clarifies the pleading standard under the Cartwright Act. A complaint pursuant to the Act must allege: "(1) the formation and operation of the conspiracy, (2) the wrongful act or acts done pursuant thereto, and (3) the damage resulting from such act or acts."[39] In Cartwright Act complaints, "it is sufficient to state the purpose or effects of the trust or combination, and that the accused is a member of, acted with, or in pursuance of it, or aided or assisted in carrying out its purposes, without giving its name or description, or how, when and where it was created."[40]

However, many antitrust cases are brought in federal court, in which the pleading standard requires greater specificity than state court. Under the United States Supreme Court decision in *Bell Atlantic Corp. v. Twombly*,[41] "mere allegations of parallel conduct – even consciously parallel conduct – are insufficient to state a claim under [the Sherman Act]. Plaintiffs must plead 'something more,' 'some further factual enhancement,' a 'further circumstance pointing toward a meeting of the minds' of the alleged conspirators."[42] Such pleadings must include facts that rule out "independent parallel conduct in an interdependent market."[43]

In Sherman Act cases, courts have required allegations to exclude the possibility of independent conduct, a significant barrier in the context of shared pricing algorithms. To avoid the application of this requirement when a court is applying state law,[44] this bill provides that in a complaint for

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[38] *Am. Needle, Inc. v. NFL, supra,* 560 U.S. at p. 195, citations omitted.
[39] See fn. 11, *supra*.
[40] Bus. & Prof. Code, § 16756.
[41] (2007) 550 U.S. 544 (*Twombly*).
[42] *In re Musical Instruments & Equip. Antitrust Litig., supra,* 798 F.3d at p. 1193.
[43] *Id.* at p. 1195.
[44] "No California state published decision has applied *Twombly* to a Cartwright Act claim, but the Ninth Circuit has embraced this requirement, applying it in federal antitrust cases that also include Cartwright Act claims." (1 CA Antitrust and Unfair Competition Law § 2.02 (2025).)

a violation of the Cartwright Act, it is sufficient to contain factual allegations demonstrating that the existence of a contract, combination in the form of a trust, or conspiracy to restrain trade or commerce is plausible. Courts would not be allowed to require plaintiffs to allege facts tending to exclude the possibility of independent action.

Proponents argue that this change removes "the impractical requirement for 'smoking gun' evidence at the outset of a case, allowing legitimate claims to proceed based on plausible evidence."

7) **Related legislation.** Several related legislative proposals are currently pending, including:

- At the federal level, Senator Amy Klobuchar recently reintroduced her "Preventing Algorithmic Collusion Act" (S. 232) which makes it presumptively unlawful for a person to use or distribute a pricing algorithm that uses, incorporates, or was trained with nonpublic competitor data.

- SB 52 (Renee-Perez, 2025) prohibits a person from offering a rental pricing algorithm with the intent that it be used by two or more persons in the same or a related market, and prohibits a person from knowingly using such an algorithm. The bill also prohibits the use of nonpublic competitor data, as defined, in any rental pricing algorithm.

- SB 295 (Hurtado, 2025) prohibits a person from using or distributing any pricing algorithm that uses, incorporates, or was trained with competitor data; requires a person using a pricing algorithm to recommend or set a price or commercial term to make certain commercial disclosures; and requires a person to provide specified information to the Attorney General relating to the use of pricing algorithms.

- SB 384 (Wahab, 2025) prohibits the use of a pricing algorithm that incorporates competitors' nonpublic, competitively sensitive data, as defined.

ARGUMENTS IN SUPPORT: The bill is co-sponsored by American Economic Liberties Project, Economic Security California Action, and TechEquity Action and supported by a broad array of civil society and labor groups. This coalition writes:

> Price fixing—when two or more competing businesses agree to set prices, output, or other commercial terms—results in increased prices and reduced choice for consumers. Price fixing is anticompetitive, and has long been thought of as the "supreme evil" of fair competition laws.
>
> Currently, price fixing is already illegal, under California and federal antitrust laws. However, it remains difficult to detect, especially as technological advancements enable collusion without direct communication. Algorithmic pricing tools now allow businesses to coordinate prices covertly, using third-party software to drive up prices and reduce competition. Despite the clear illegality of these practices, enforcing against this activity is harder than ever due to current law requiring an extremely high bar to bring a case. This has led to the proliferation of price-fixing algorithms, further undermining fair competition and consumer protections.
>
> AB 325 strengthens California's ability to tackle algorithmic price fixing by:

- **Prohibiting secret agreements**: Ensuring that companies cannot use third-party algorithms to coordinate prices in secrecy.
- **Closing loopholes**: Codifying that price fixing through algorithmic tools is just as illegal as traditional price fixing between competitors, incorporating best legal practices from ongoing enforcement efforts.
- **Strengthening enforcement**: Removing the impractical requirement for "smoking gun" evidence at the outset of a case, allowing legitimate claims to proceed based on plausible evidence.
- **Holding bad actors accountable**: Ensuring that both companies using price-fixing algorithms and the third-party providers of these tools are held liable.
- **Deterring illegal price fixing before it begins**: Creating bright-line standards to prevent the use of pricing algorithms to unlawfully coordinate prices, protecting consumers from unfair price hikes, and enabling small businesses to price their goods and services competitively.

This bill also provides clear guidelines on liability. Under AB 325:

- Developers of pricing algorithms will be held accountable if they create and distribute tools designed to use competitor data—whether public or nonpublic—to generate price recommendations.
- Companies utilizing these algorithms will be liable if they knew or reasonably should have known that the tool was being used by at least one competitor and was developed for the purpose of setting coordinated prices.

These provisions reflect well-established legal findings that price-fixing agreements can be inferred from the use of these algorithmic tools, making enforcement more effective.

By passing AB 325, California will ensure that our antitrust laws keep pace with technological advancements and modern business practices. This legislation is crucial to preventing digital collusion, protecting consumers from artificially inflated prices, and safeguarding fair competition for small businesses. California must act decisively to prevent a regulatory gap that allows illegal price-fixing schemes to flourish.

ARGUMENTS IN OPPOSITION: The bill is opposed by a coalition of industry opponents led by California Chamber of Commerce. Writing about the prior version of the bill, they state:

> [. . .] **AB 325** remains as serious a concern, in part because there are other related bills that would address the liability components of these issues, and existing law imposes significant liability on the misuse of pricing algorithms as well. When combined with the bill's broad and vague standards, **AB 325** would invariably have a chilling effect on the use of such technologies among businesses, particularly smaller ones who rely more heavily on these technologies to be more competitive with larger businesses that have access to far more data.
>
> First and foremost, this bill, like SB 1154 before it, and SB 295 (Hurtado, 2025), appears based on a presumption that pricing algorithms are inherently problematic, if not unlawful. To the contrary, pricing algorithms are, in fact, extremely common tools that enable businesses to save money, improving efficiency by avoiding manual pricing, reducing costs

for consumers, and making prices far more responsive to changes in supply and demand - and they can do so without involving any anti-competitive conduct.

In contrast, price collusion (or price fixing) *is* problematic and is clearly illegal under current federal and state laws. Indeed, existing antitrust laws prohibit competitors from colluding on price in any manner, whether through using a pricing algorithm or otherwise. **In other words, whether a price-fixing conspiracy is hatched by salespeople conspiring or computers running algorithms, collusion is collusion and is already effectively covered by existing law. To be clear, however, the use of a pricing algorithm does not inherently constitute price *fixing*.**

Retailers use pricing algorithms to ensure they are offering the most competitive prices to consumers. Realtors use them to help clients set home prices. Banks use them to set terms (e.g. rates and fees) for services. Hospitality, airlines, transportation network companies, utilities, ticket venues, and many others use them for dynamic pricing. The list goes on.

All this bill does is remove a valuable tool for setting dynamic pricing and imposes significant costs on all businesses that use price algorithms, thereby reducing competition, rather than promoting it. In the end, this bill hurts not only businesses, taking them back to pre-technological times, but it hurts consumers, effectively doing away with price-comparison shopping and competitive/dynamic pricing by businesses seeking to earn their business.

[. . .]

REGISTERED SUPPORT / OPPOSITION:

Support

American Economic Liberties Project (Co-Sponsor)
Economic Security California Action (Co-Sponsor)
Techequity Action (Co-Sponsor)
Aids Healthcare Foundation
Americans for Financial Reform
California Federation of Labor Unions, Afl-cio
California Low-income Consumer Coalition
California Nurses Association
California Public Banking Alliance
California School Employees Association
Cameo Network
Center on Policy Initiatives
Consumer Federation of California
Contra Costa Senior Legal Services
Courage California
Democracy Policy Network
Ella Baker Center for Human Rights
End Poverty in California (EPIC)
Equal Rights Advocates
Fair Housing Advocates of Northern California

Institute for Local Self-reliance
Kapor Center
National Consumer Law Center
Oakland Privacy
Powerswitch Action
Santa Monica Democratic Club
Seiu California
Small Business Majority
Tech Oversight California
Udw/afscme Local 3930
Ufcw - Western States Council
United Latino Voices of Contra Costa County
Warehouse Worker Resource Center
Western Center on Law and Poverty

Opposition

American Property Casualty Insurance Association
Calbroadband
California Business Properties Association
California Chamber of Commerce
California Hospital Association
California Hotel & Lodging Association
California Restaurant Association
California Retailers Association
Chamber of Progress
Civil Justice Association of California (CJAC)
Insights Association
National Association of Mutual Insurance Companies
Personal Insurance Federation of California
Software Information Industry Association

Oppose Unless Amended

California Apartment Association

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