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# brief

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# Antitrust Concerns Surrounding Senior Living Providers

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# Antitrust Concerns Surrounding Senior Living Providers

## I. Introduction

Antitrust concerns apply to senior living communities; highlighted by a recent investigation by the Ohio Attorney General into alleged price fixing by assisted living operators in that state. It is critical that providers be proactive in educating staff and understand the possible breadth of the antitrust laws related to price fixing. Although providers and staff may be well informed not to explicitly agree with competitors regarding actions like price-setting, the Supreme Court has issued rulings supporting a broad interpretation of actions constituting price fixing amongst competitors, including actions where no actual agreement to fix prices is shown, but information on pricing was exchanged.

Due to the high likelihood of participation in industry meetings, and because individuals often move from company to company in this sector, it is very likely that personnel have an opportunity to discuss prices with friends or acquaintances who work for competitors. There could be a temptation to discuss rates, community fees, discounts and the like among those attending industry functions or personnel at an outing with friends. While providers may focus antitrust education on those who set or are closer to the setting of prices, it should also be noted that marketing personnel are likely aware of prices and may have friends working for competitors. It is therefore important for providers to educate their personnel regarding antitrust laws and implement clear policies that forbid staff, including marketing staff, from engaging in any discussion regarding pricing with any competitor. This can be especially important in markets where only a few senior communities operate.

## II. Antitrust Laws: Overview & Application

### A. Overview

The antitrust laws are designed to promote competition for the benefit of consumers. The Federal Sherman Antitrust Act is of paramount importance and the focus of this article. Most states also have their own antitrust laws that tend to be similar to Federal antitrust laws. For example, in California, the Cartwright Act contains prohibitions that are consistent with Section 1 of the Sherman Act. *See* Cal. Bus & Prof. Code §§ 16700, *et seq.*

Section 1 of the Sherman Act makes illegal any contract, combination or conspiracy in restraint of trade. *See* 15 U.S.C. § 1. This is a very broad, open-ended statute that has been subject to much interpretation by the courts over many decades. In short, for conduct to be illegal under that section, there must be concerted activity — that is, activity that involves competitors. And there need not be

an explicit agreement as long as there is a "unity of purpose or a common design and understanding, or a meeting of the minds. . . ." *American Tobacco Co.* v. *United States,* 328 U.S. 781, 810 (1946).

There are two main tests under which a court may analyze a potential antitrust violation — the rule of reason and the per se rule. In most situations, courts will apply the rule of reason and balance and alleged antitrust violation by weighing the anti-competitive effects against the legitimate business justifications. *See, e.g., State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997). There are certain practices, however, that the Supreme Court has ruled are so inherently anti-competitive that they are "per se" illegal. *See, e.g., United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150, 225 n.59 (1940). This generally means there is no opportunity to defend the practice — it is automatically illegal. *See, e.g., Northern Pacific Railroad Co. v. United* States, 356 U.S. 1, 5 (1958). Foremost among the activities that have been condemned over time as per se illegal by the courts is price fixing (agreements to control, raise, lower, or stabilize prices). *See, e.g., Arizona v. Maricopa County Medical Soc.,* 457 U.S. 332, 347 (1982) (*quoting Socony-Vacuum Oil Co.,* 310 U.S. at 213).

It is important to note, however, that while price fixing is a serious concern, a single company can set prices for all of its communities without violating the antitrust laws. A single company includes all commonly controlled entities — i.e., parent and subsidiaries.

## B. Traditional Price Fixing

One example of price fixing is where two or more competitors explicitly agree on what prices they will charge. For example, if Assisted Living Community #1 and Assisted Living Community #2 each agree that they will charge a base monthly fee of $3,000, that would be price fixing in its most obvious incarnation. Other examples of price fixing would include an agreement between AL #1 and AL #2 that they will:

1. Not charge less than a $3,000 base fee.
2. Not discount from their base fees.
3. Not discount their community fee.
4. Increase their current prices by a fixed percent (e.g., 5%) — even if their current fees are vastly different from the other's.
5. Not charge more than an agreed upon amount or raise fees by more than an agreed upon percentage.

In cases of traditional price fixing agreements, courts use the per se test.

## C. Inferred Price Fixing

While it is clear that price fixing is prohibited by the Sherman Act, not all situations fall under the per se rule discussed above. In cases of parallel conduct (companies acting in the same manner as other companies with regard to pricing) where no explicit agreement is shown, courts tend to examine all of the facts using the rule of reason analysis. *See, e.g., United States v. Citizens & Southern Nat'l Bank,* 422 U.S. 86, 113 (1975); *Container Corp.,* 393 U.S. at 338 (concurring opinion); *Apex Oil Co. v. Di Mauro*, 822 F.2d 246, 253-55 (2d Cir. N.Y. 1987). Because companies often engage in parallel conduct, especially in smaller markets, these cases are of special concern.

### 1. Parallel conduct

Parallel conduct or "conscious parallelism" (copying what a competitor does), in and of itself, is not illegal. *See, e.g., In re Medical X-Ray Film Antitrust Litig.,* 946 F. Supp. 209, 217 (E.D.N.Y. 1996). That is why we often see, for example, airlines setting their prices based on what a competitor does (as shown through public prices for flights, etc.), as long as the pricing decision is made unilaterally — and not through an agreement with a competitor, it is legal. Parallel conduct, by itself, is not enough to prove an antitrust violation under the Sherman Act. Parallel conduct, however, does provide a solid foundation to build claims of an antitrust violation. *See, e.g., Apex Oil Co. v. Di Mauro,* 822 F.2d 246, 253-54 (2d Cir. N.Y. 1987).

### 2. Parallel Conduct Plus Price Information Exchange

In cases involving parallel conduct, the Supreme Court has found antitrust violations where there may be no express agreement to fix prices, but rather a tacit or inferred agreement. In one well known case, manufacturers of corrugated containers (i.e., cardboard boxes) had a reciprocal agreement to exchange pricing information when asked. *United States v. Container Corp. of America*, 393 U.S. 333, 335 (1969). The box industry was relatively small and the competition in the industry — due to the products similar nature — revolved around pricing. *Id.* at 337. The competitors did not have an agreement regarding the use of the exchanged pricing information. *Id.* at 335. The exchanges were not frequent or regular and the information might have been found through public sources. *Id.* But the Court found this action sufficient to establish a combination under Section 1 because of a simultaneous stabilization in box prices. *Id.* at 336-37. *See also United States v. United States Gypsum Co.,* 438 U.S. 422, 446 (U.S. 1978) (discussing *Container Corp.* and noting it indicated "that proof of an anti-competitive effect is a sufficient predicate for liability"); *Great Atlantic & Pacific Tea Co. v. Federal Trade Comm'n*, 440 U.S. 69, 80 (U.S. 1979) ("Because of the evils of collusive action, the Court has held that the

exchange of price information by competitors violates the Sherman Act."). The Court essentially ruled that a price fixing agreement could be inferred due to the fact that there was an exchange of price information coupled with some parallel behavior. *Id.* at 336-39.

## 3. Parallel Conduct with "Plus Factors"

Today, the type of case above might be referred to as parallel conduct with "plus factors." A "plus factor" is simply additional evidence that the competitors had an agreement. Plus factors vary by court and factual situation, but include facts such as pricing discussions among high-level executives, high levels of communication between competitors, membership in a trade association where pricing is discussed, and the lack of a business justification for conduct.

In one more recent case, *In re Text Messaging Antitrust Litigation*, 630 F.3d 622 (7th Cir. 2010), the court allowed an antitrust claim related to text message pricing based on parallel conduct and plus factors. In that case, like *Container Corp.,* there was no explicit evidence of an agreement. Also like *Container Corp.,* the defendants controlled a majority of the market for these services (which could make it easier to secretly set prices). *Id.* at 628. The court found the following additional plus factors, among others, made the antitrust claim plausible: the competitors exchanged price information during trade association meetings, the competitors raised prices while costs for business fell, the competitors changed their varying pricing systems to a less complex, more similar system. *Id.* at 628-29. Parallel conduct, along with these factors, was enough to keep the companies in court over antitrust claims. Basically, the plus factors were enough to show that the competitors were probably not engaging in independent business conduct.

It is important to note, however, that sharing some types of information — especially information compiled by an independent third party — generally will not subject those who purchase the information to antitrust liability. For example, surveys of competitor pricing purchased by a senior living community should not present an antitrust issue when the survey: (1) is managed by a third party (such as a trade association); (2) the information is more than 3 months old; and (3) the statistics are based on information reported from at least 5 providers, no single provider's data represents more than a weighted 25% of any statistic, and the information is combined such that purchasers cannot pinpoint the information to a particular provider. *See, e.g., Statement of Department of Justice and Federal Trade Commission Enforcement Policy on Provider Participation in Exchanges of Price and Cost Information, available at* http://www.ftc.gov/bc/healthcare/industryguide/policy/statement6.htm. In addition, the third party must not disclose uncombined data from any of the respondents.

## D. Implications Of Parallelism & Plus Factors

Return to the setting where your marketing director is out for lunch with a few friends. His or her friends also work for an assisted living community — a competitor. There are few competitors in the area. During lunch, in order to help with a marketing project they are working on, the friends exchange pricing information. Or consider the situation where pricing, discounting or entrance fees are discussed at a trade association function amongst competitors. In neither situation is an agreement to use the information made or discussed. Assume that over the next few months the competing communities raise or lower their prices in tandem, offer a similar discount from their base fees, and/ or similarly change the discount on their community fees. Under *Consolidated Container* this scenario could be enough to establish a price fixing violation under Section 1. Consider further the above factual situation, but in addition the provider raised its fees (along with other providers) when costs of services were stable or worse yet going down. Even if the provider had a carefully considered business reason for this action, it will provide another factor toward liability for an antitrust violation if that business reason is not facially obvious. It is important to note, however, that the decision in any particular case will depend on the facts of that case, jurisdiction, and procedural posture. For example, at least one court has held that discussions among marketing personnel are not sufficient to maintain a case for an antitrust violation. *See, e.g., In re Babyfood Antitrust Litig.*, 166 F.3d 112, 125 (3d Cir. 1999) (internal citations omitted) ("sporadic exchanges of shop talk among field sales representatives" who did not have "pricing authority" was insufficient to survive summary judgment, in part, because there was nothing to show these conversations affected pricing.); *cf Precision Assocs. v. Panalpina World Transp. (Holding) Ltd.*, 2011 U.S. Dist. LEXIS 51330 (E.D.N.Y. Jan. 4, 2011) (where employee was a member of mailing list through which co-conspirators confirmed their pricing agreements, this was sufficient to survive a motion to dismiss).

Providers, especially those in smaller markets where parallel conduct is more likely, must be conscious of their actions related to pricing. While it is not logical for all senior living providers to decline to attend lunches with acquaintances at other communities, providers must be conscious of the pitfalls and avoid certain behaviors. Providers should not discuss pricing with competitors — no matter the setting — and where a community operates in a smaller market area where parallel behavior may be common, providers should consider minimizing contacts with competitors that could be seen as opportunities to conspire. The fact remains that any discussion of pricing, particularly in a small market, increases the potential for antitrust liability.

## III. Conduct Among Joint Ventures

Because some senior living providers are engaged in joint ventures, it may also be useful to consider the price fixing liability potential amongst participants in a joint venture. Under, *Copperweld Co. v. Independence Tube Co.*, 467 U.S. 752, 771 (1984), the Supreme Court addressed the issue of corporations and conspiracy, focusing on the fact that a corporation cannot conspire with its wholly owned subsidiary. Since that time, courts have addressed more complicated corporate structures, and the rules surrounding less-than-wholly owned subsidiaries. Joint ventures, however, have been treated differently since, at least, *Copperweld.* The Court has noted that joint ventures may allow for more effective competition and should be judged under the rule of reason. *See, e.g.,* 467 U.S. at 768; *Texaco Inc. v. Dagher*, 547 U.S. 1, 5-7, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006); *In re Sulfuric Acid Antitrust Litig.,* 743 F. Supp. 2d 827, 864 (N.D. Ill. 2010).

The rules on whether and how a joint venture may conspire under Section 1, however, remain subject to dispute based on current caselaw and may vary based on jurisdiction. Typically, however, where competitors form a joint venture it will be subject to antitrust scrutiny — as will its actions — especially where evidence suggests the venture is a scam or pretext for price fixing conduct. *See, e.g., American Needle, Inc. v. National Football League,* 560 U.S. 183 (2010); *In re Fresh & Process Potatoes Antitrust Litig.,* 2012 U.S. Dist. LEXIS 106666 (D. Idaho July 27, 2012).

The type of joint venture entered by many senior living providers — a RIDEA structure — should generally not raise antitrust concerns because the two parties entering the venture are not what would typically be considered competitor-corporations; however, both entities must be mindful not to share information from other joint ventures — including pricing information. Because joint ventures are considered differently than corporate subsidiaries, it is best to consider another joint venture entered by one of the parties as a separate corporate entity altogether and not share any information with that venture — even though one of the corporate participants is the same. Sharing of pricing information from other projects, ventures, or management projects amongst the parties to the joint venture could subject the joint venture to potential liability as discussed above. Also, it should be noted that a joint venture and its actions are subject to antitrust scrutiny and parties should proceed accordingly.

## IV. Penalties

Why should the senior living industry be concerned with the broad reaches of the antitrust laws related to price fixing? The penalties for price fixing can be severe. Any plaintiff that has been injured by an antitrust violation is entitled to recover "treble damages," that is, damages equal to three times the amount of the actual harm, plus attorneys' fees and costs for Sherman Act violations. 15 U.S.C. § 15(a). In addition, there are severe criminal penalties — $100,000,000 fine and up to 10 years in jail. 15 U.S.C. § 1. In California, the Cartwright Act also allows for treble damages in civil suits and provides for a criminal fine of up to $1 million or double the amount of gain or loss caused by the violation — whichever is greater. Cal. Bus. & Prof. Code §§ 16750 & 16755. In addition, statutory penalties of up to $2,500 may be imposed for each violation. Cal. Bus. & Prof. Code § 17206.

## V. Conclusion

In light of the above, it is important for providers to set very clear guidelines regarding prohibited communications related to charges, pricing strategy, or anything related to fee structure. This is especially critical in markets where few assisted living communities operate and parallel conduct may occur. Below are some recommended best practices:

1. Under no circumstances should competitors agree on the prices they will charge, or agree on pricing strategy, whether or not to give discounts and the like.
2. Under no circumstances should competitors discuss future prices. For example, no one should ever ask or answer a question about intentions to raise fees.
3. While discussion of current prices is not per se illegal, it is advisable not to engage in ANY discussion with a competitor regarding prices. Price information is readily available without having discussions with competitors. If you discuss prices with a competitor and you then coincidentally raise rates by the same amount, a court may infer that there was a price fixing agreement depending on the circumstances.
4. Do not exchange current pricing information with a competitor.
5. Do not ask how much a competitor is charging. However, there is nothing wrong with determining how much a competitor is charging through perusing its website or secret shopping (whether over the phone or in person).

In addition, because parallel conduct can lead to a case of inferred price fixing, it is imperative providers in markets where this is necessary or common be vigilant about communications and pricing conduct.

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