ANTITRUST GUIDELINES FOR POST-ACUTE CARE (PAC) AND LONG TERM CARE (LTC) CENTERS IN A MANAGED CARE ENVIRONMENT

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Introduction

The recent and rapid expansion of managed care payers into post-acute care (PAC) and Long Term Care (LTC) delivery systems means that skilled nursing centers and assisted living communities must become familiar with a topic they may not have considered previously — antitrust laws.

"I don't want to worry about antitrust laws. Why should I care?"

Antitrust laws are designed to protect the interests of the American consumer, by preserving a "competitive" marketplace. They are the reason, for example, that car dealerships in your state cannot get together and agree to charge a minimum of $40,000 for a new car. This type of agreement might make the car dealers rich, but it would be considered illegal "price fixing," outlawed under antitrust laws. Car dealers have to compete with one another on price, not collude with one another to raise prices.

"But we're different. We provide health care!"

It doesn't matter what service or product you furnish. Theoretically at least, it is in the health care consumers' best interest for health plans to get the lowest possible rate. This keeps consumer health insurance premiums (or taxes, in the Medicaid context) low. So, just like car dealerships, PAC and LTC providers cannot band together to agree on what they will charge a payer. In fact, as a general rule, they cannot take joint action in any way to improve their payment rates.

"We're not competitors, we're friends. We're members of the same state association!"

The term "competitor" is broadly defined under the law. Any provider that furnishes the same or similar services is generally your "competitor," unless you are jointly owned. The other members of your state association, for example, are your competitors. Federal enforcement authorities are particularly wary of the collegiality that takes place in trade associations.

"I don't care. I have enough to do keeping track of all the other laws we have to deal with!"

You should care. Running afoul of federal or state antitrust laws can cost you dearly. Penalties can include large fines (in excess of $100 million for corporations) and imprisonment for up to 10 years for the individuals involved. Companies also can be exposed to civil lawsuits and any monetary award is automatically tripled. Did you read that? Imprisonment and monetary awards are automatically tripled. What's more, typically penalties are not covered by liability insurance.

PROHIBITED CONDUCT

"O.K. — just teach me the basics of what is prohibited under the antitrust laws?"

Certain types of arrangements among competitors are automatically illegal ("illegal per se") under the antitrust laws. There is no defense to a "per se" violation. If you engage in this conduct, you have broken the law, period. There are three significant "per se" violations in our context:

1. PRICE-FIXING: Don't make agreements (written or unwritten) with actual or potential competitors about your prices or payment rates. Seriously! This includes agreeing to seek minimum or target payment levels from payers (including managed care organizations), coordinating the timing of price or reimbursement rate increases or agreeing on any other aspects of payment, such as discounts, margins, rebates, credit terms, advance payments, etc. Members should not reach any agreement with other members or organizations on these topics. Don't even discuss them with each other.

This may seem ridiculously unfair (the payers have more power), but think of it from the standpoint of the health care consumer, who is getting beat up by health care costs. The antitrust laws say that each center has to determine its own prices, discounts and all other terms and conditions of payer agreements independently, in competition with other centers. This way, the managed care organization gets better prices, and the consumer wins. With that in mind, here are some examples of illegal price fixing among nursing centers and assisted living community members:

- "Let's make sure we both get at least 2% of the savings."
- "If we all increase our reimbursement rates effective July 31, the reimbursement rates should hold and we'll all be better off."
- "Let's all demand the same base rate from HappyHealthSolutions HMO. If they refuse to pay it, we'll all refuse to sign their contracts."

Antitrust laws are the reason that your State Association cannot negotiate with managed care payers on your behalf. Neither AHCA/NCAL nor its state affiliates can share specific pricing or reimbursement information about a member's MLTSS contract with another member.

2. MARKET-SHARING: Second, an agreement to allocate particular customers or geographic areas to individual competitors is market-sharing and is illegal. When you do that, you're no longer competing with each other. For example, say Apple Grove Health Center promises to refrain from soliciting or marketing to patients in Whispering Brook's territory; and Whispering Brook Nursing Center promises to refrain from soliciting or marketing to patients in Apple Grove's territory. The two centers are no longer competing with each other for patients/customers and competition is extinguished. Without competition, the centers rates can increase freely. This is not legal. Don't do it.

3. GROUP BOYCOTTS: Third, an agreement among competitors not to do business with targeted individuals or businesses may be an illegal boycott, especially if the group of competitors working together has market power. For instance, a group boycott may be used to implement an illegal price-fixing agreement. In this scenario, the competitors agree not to do business with others except on agreed-upon terms, typically with the result of raising prices (see the third bullet above). An independent decision not to offer services at prevailing prices does not raise antitrust concerns, but an agreement among competitors not to offer services at prevailing prices as a means of achieving an agreed-upon (and typically higher) price does raise antitrust concerns.

OTHER FORMS OF COOPERATION:

"You've got my attention now — besides price fixing and market-sharing, what else do I need to be aware of?"

Antitrust law is fiendishly complex. Obviously competing nursing centers and assisted living communities who are members of the same state association will be dealing with each other in connection with association activities. Not all joint activities or forms of cooperation will violate antitrust laws. There are exceptions and "safety zones" for properly structured arrangements, but this is not an area to guess at. If you're considering an arrangement with your competitor(s), which affects or could affect what you are paid for your services, we strongly recommend consulting with legal counsel. This is especially true in the joint ventures and joint conduct. In an abundance of caution, always speak to experienced antitrust counsel before entering into any of the following:

- Joint negotiating and joint purchasing arrangements.
- Specialization agreements (where competitors agree to specialize in providing certain types of services).
- Joint advertising.
- Any other form of joint venture or arrangement with a competitor.

Each of the above arrangements may be permissible if, for example, there are consumer/patient benefits that outweigh any anticompetitive effect; but never guess – it's not worth the risk.

If you become aware that anyone at AHCA/NCAL, any state affiliates, or state affiliate members are involved in any of the activities described above, or you are approached by a state affiliate member to participate in or lead such activities, in accordance with AHCA/NCAL's Antitrust Policy, you should immediately contact Dianne De La Mare at AHCA/NCAL, at ddmare@ahca.org or 202-898-2830.