by Michael Gentile, J.D.

Hoteliers must be cognizant of the antitrust pitfalls they face everyday

Suppose a group of hotel managers get together for dinner every month and during the course of the dinner discussion on one such occasion the topic turns to the economic viability of some of the hotel properties in the area. As a result of the discussion, the managers decide to agree to a common rate each will charge for their guestrooms to assure revenue for some of their struggling properties or to set a low rate to force struggling lodging properties out of business. Or perhaps this same group of managers decides to start a hotel association and requires all of their suppliers to join and pay dues to support it. To compel compliance by the suppliers, the group agrees not to purchase from suppliers who do not pay these "dues". Are these examples of local hoteliers working together to make the local lodging industry stronger? Or are these examples of businesses engaged in unlawful practices designed to stifle free enterprise? If you guessed the latter, you would be right.

It has been the Federal law since 1890 that a rule of trade in the United States is that there should be free competition. To that end, the Sherman Antitrust Act and later, in 1914, the Clayton Antitrust Act was passed.

It may seem hard to believe today, especially in light of increased government involvement in corporate bailouts and proposed economic reforms, but the premise for antitrust legislation is that unrestrained competition will result in the best allocation of resources, the lowest prices for consumers, the best quality of products and services, and progress in industry; thus ensuring long-term (though not necessarily short-term) economic stability for the nation. In short, it is the essence of the free-enterprise system.

Built into the law are two types of analysis. The first analytical test is to examine activities that will always be considered violations of antitrust law regardless of the reason or result. These are referred to as ***per se violations*** of antitrust law. Per se violations that are most likely to occur in the lodging industry include the following activities:

- *Price-fixing agreements*: Where common or agreed upon rates are set by and amongst competing hotels in collusion with each other.
- *Vertical price-fixing*: Where minimum prices are established by competing hotels in collusion with each other.
- *Territorial division agreements*: Where competing hotels collude not to compete in certain areas against each other.
- *Group boycotts*: Where competing hotels agree not to do business with a particular company, supplier, or service-provider.

The second analytical test is for activities subject to a ***rule of reason*** where a court will balance the positive benefits of the purported antitrust activity on the economy against the effect the measure may have on competition. This review requires the plaintiff to prove that the agreement caused economic harm, in addition to proving that the defendant acted as charged.

Penalties for hotels that violate antitrust laws, both civil and criminal, can range as follows:

- *Dissolution* – Where the hotel must terminate its operation entirely.
- *Divestiture* – Where the hotel must terminate a part of its operation.
- *Treble damages* – Where the hotel must pay damages at a rate of three times the actual damages suffered by the injured party.
- *Criminal penalties* – These could include significant fines and possible jail for owners and/or top management.

With this in mind, let us look at the hypothetical scenarios described at the outset. The situation where the competing owners or managers determine, either in advance or with the knowledge of each other, the rates each will charge is an example of price-fixing. While it is easy to understand why this would be unlawful if a property is forced out of business, it may seem that if this is done in an effort to stabilize the market, it should fall within the rule of reason. But the simple fact is there was collusion among at least some competitors to artificially set the price. While this may be a benefit to the local lodging industry, it will always have

a detrimental effect on the consumer's ability to find a lower price. In this case, the properties agreed to charge the same rate and such action will always be considered unlawful.

The second scenario where these property operators will require suppliers to join their association or lose their business is an example of a group boycott. All members of the group or the association have agreed not to purchase from suppliers or service providers who do not support their association. This situation was the fact pattern in the case of *United States v. Hilton Hotels Corp.* (1972) for an antitrust challenge against a hotel association where the activity was considered a violation of antitrust law and criminal convictions against these corporate entities were upheld. But this case also applied a fundamental concept of master servant law to antitrust which states that corporations are responsible for the actions and statements of their agents that are made in the course and scope of their employment. This means that a corporation, owner or the general management of a hotel property may have a policy specifically prohibiting the type of conduct outlined here. They may even have given specific instructions to their onsite managers, purchasing agents and anyone dealing with these issues not to act in certain ways. But antitrust statutes as interpreted by the courts have noted that antitrust laws protect such important public interests that they are willing to impose criminal liability on the corporate entity and ownership for violations of these laws.

Five Cardinal Rules to Avoid Antitrust Violations

1. Never discuss prices, rates, marketing strategies, or operational intentions with any competitor. This mistake is most commonly made at association meetings, charity outings, or social functions. Any such discussion could be interpreted by others as possible collusion or an invitation of such. If such discussion occurs, politely remind others about antitrust rules and disassociate yourself from the conversation by leaving the area.
2. Always set all prices and rates for goods and services autonomous of what the competition may plan.
3. Do not discuss nor enter into any agreements to not compete with other hotels for market share or within certain geographic boundaries.
4. Never agree to refuse to deal with any supplier or service provider based upon that companyís dealings with others or if such action is suggested by your competitor or their competitor. To avoid perceptions of possible collusion, never discuss supplier arrangements or agreements with any competitors.
5. Adopt, publish and enforce a zero-tolerance policy for antitrust violations within the business organization. This will require an ongoing education effort to all managers about the legality, intent, and purpose of antitrust laws. Document all training and retain training records. Monitor employee compliance with antitrust laws. Take immediate disciplinary action where warranted.

Due to the seriousness of antitrust violations and the interests they protect, it is important for property owners and managers to not only have stated policies prohibiting activities considered antitrust violations but also to educate their employees as to these activities and monitor their compliance with them. ✧

(Michael Gentile, J.D. is an attorney and associate professor in the College of Hospitality and Tourism Management at Niagara University. Previously, he was the corporate counsel for the city of Sandusky, OH. E-mail: mgentile@niagara.edu.)