Client Alert

Antitrust

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Antitrust Concerns with Network Rental Agreements

How a common practice for healthcare payers can turn from negotiation tactic to anticompetitive collusion

WHAT IS A NETWORK RENTAL AGREEMENT?

Network rental agreements, also known as “network leasing” or “network sharing,” refers to arrangements in which a payer allows another payer to access its provider network. These arrangements may also allow payers to access each other’s negotiated fee schedules. Network rentals frequently pose problems for providers by circumventing existing contracts and subjecting providers to unfavorable fee schedules instead of what they negotiated. Recent antitrust cases demonstrate a tool for providers to protect themselves and their negotiated deals from these improper tactics.

A provider typically encounters a payor anticompetitive network rental agreement scheme in one of two scenarios:

In **scenario one**, the provider is only contracted with one of the payers, Payer A, prior to the network rental agreement, in exchange for the benefits of being treated in-network by Payor A, which brings potentially greater patient volumes through scheduled patients, easier authorizations, quicker payment, etc. When Payer A rents its network to Payer B, patients with coverage from Payer B start getting paid by Payer B at the rates in the contract with Payer A. Payer B seeks to hold the provider to the fee schedule negotiated with Payer A but the rental to Provider B was not foreseeable and Provider B is not agreeing to give the provider the same benefits of being in-network such as the potential for greater scheduled patient volumes, etc.

In **scenario two**, the provider is already contracted with both Payer A and Payer B. The provider has negotiated fee schedules with both payers. However, when Payer A rents its network to Payer B, if Payer A has negotiated lower rates with the provider, Payer B now contends that it can pay Payor A's lower rates, skirting the better rates that Payor B negotiated and agreed to pay the provider. This scenario results in no additional patients being steered toward the provider, and the provider receiving smaller payments for its services from Payer B than what it promised.

Both scenarios raise various contracting and legal issues that can be contract language specific or depend on state law, separate and apart from antitrust implications. But payor growth and consolidation also has heightened antitrust implications. This article addresses the growing antitrust aspects:

ANTITRUST IMPLICATIONS

Section 1 of the Sherman Act prohibits agreements that unreasonably harm competition. The reasonableness of a restraint is examined under two main frameworks: the rule of reason, and the per se rule. Under the per se rule, certain arrangements are deemed to be always anticompetitive without a court or arbitrator needing to do a lengthy analysis of the market or competitive effects. One such agreement is an agreement between horizontal competitors to fix prices, which has been described as a "paradigm" of an unlawful restraint. *NCAA v. Board of Regents of University of Oklahoma*, 468 U. S. 85,100 (1984). The federal antitrust laws provide a statutory right for successful plaintiffs to recover treble (triple) monetary damages, plus attorney's fees and costs of litigation. 15 U.S.C.A. § 15(a).

Network rental agreements are unreasonable restraints of trade where two otherwise competing payers agree to use each other's fee schedules. Rather than using the fee schedules that each payer individually negotiated with providers, the payers are entering into an agreement, with a competitor, to use the same fee schedule to pay providers for their services. As horizontal agreements between competitors to fix prices, network rental agreements can fit under the courts' archetypal example of an unlawful restraint, subject to the per se rule.

REAL WORLD EXAMPLES

In January 2025, the AIDS Health Foundation ("AHF") was awarded over $10 million in damages and a permanent injunction after an arbitrator concluded that a network rental agreement between pharmacy benefit managers Prime Therapeutics ("Prime") and Express Scripts, Inc ("ESI") constituted illegal price-fixing. The case stems from a 2020 collaboration between Prime and ESI, two large PBMs, where Prime agreed to use ESI's lower reimbursement rates and fee schedules. AHF, which provides pharmacy services for AIDS/HIV patients, alleged that Prime's agreement to adopt ESI's rates impeded price competition, harming patients and pharmacies and violating the federal and state antitrust laws. AHF originally brought the lawsuit against Prime in federal court in 2021 but ultimately ended up in arbitration due to a clause in the pharmacy participation agreement between the parties.

The arbitrator decided in favor of AHF, holding that AHF "has proven its two antitrust claims, because: (i) they are subject to a per se analysis since Prime has not shown that the procompetitive benefits are material enough to offset the substantial anticompetitive impacts of the Collaboration; (ii) AHF has shown that the Collaboration was and is an unreasonable restraint of trade; and (iii) AHF has proven its antitrust injury in the form of reduced revenues, as well as antitrust injury to the market." In his decision, the arbitrator concluded that "whether viewed from the perspective of just AHF, other impacted pharmacies, or PBMs, the Collaboration caused antitrust injuries to AHF as well as to the overall markets." Although the arbitration award is not binding on other cases, it serves as an example of a successful antitrust challenge to a network rental agreement.

Similarly, in March 2024, Osterhaus Pharmacy Inc., along with a group of other pharmacies, filed a class action against ESI in a Washington federal court, attacking the same network rental agreement between Prime and ESI. In February 2025, the district court denied ESI's motion to dismiss the antitrust claims, allowing the case to move forward to discovery. In his decision, Judge Jones held that Osterhaus plausibly alleged antitrust injury, and that the conduct should be analyzed as an agreement between horizontal competitors to fix prices under the per se rule. The court thus concluded that "[t]he Complaint plausibly alleges that the network rental agreements are a horizontal price-fixing scheme. The Complaint demonstrates that ESI and Co-Conspirators matched their rates and fees after they entered into the network rental agreements and ESI and Co-Conspirators provide the same services to pharmacies. These allegations, taken as true, plausibly indicate a price-fixing scheme that is an unreasonable restraint of trade that antitrust laws forbid." Although the case is ongoing, it represents yet another victory for providers challenging network rental agreements as unlawful restraints on trade.

PROPOSED LEGISLATION

In addition to private plaintiffs, some state legislators targeted these anticompetitive network rental agreements. Senator Gollihare, a Republican member of the Oklahoma Senate, recently proposed Oklahoma SB789 which would prohibit PBMs from "leas[ing], rent[ing], or otherwise mak[ing] its provide network available to another PBM," including through "any form of leasing or renting agreement." If enacted, the bill would become effective in November 2025.[i]

King & Spalding has experience litigating on behalf of providers against payers engaging in anticompetitive network rental agreements. As a firm with strong provider-side relationships, we are uniquely situated to take on these network rental agreements and ensure that providers are being paid at competitive rates—the rates that they contract with payers, not the rates forced upon them via anticompetitive agreements between payers.

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[i] Some states also have laws governing conditions and requirements for rental agreements for one payor to extend a provider contract to another payor. *See, e.g.,* Cal. Health & Safety C. §§1395.6 & 1375.7. These laws are in addition to the need for rental agreements not to violate the antitrust laws addressed in this article.