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Settlement of Blue Cross Blue Shield Litigation Requires Action

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In October 2020 the Blue Cross Blue Shield System (“BCBS”) reached a settlement in a class action antitrust lawsuit (the “Settlement Agreement”). The administrator of the settlement has begun contacting affected plan sponsors and individuals. This Client Alert summarizes the litigation and steps for plan sponsors to take in response to the Settlement Agreement.

Background

The litigation involved a class of BCBS subscribers who alleged that BCBS violated antitrust laws when it engaged in illegal market division. Those subscribers asserted that BCBS divided the United States and Puerto Rico into specifically defined geographic markets (“Service Areas”). BCBS then allocated Service Areas between the individual BCBS Plans, which allowed BCBS Plans to insulate themselves from competition in those markets. The subscribers allege that this practice resulted in higher premiums and allowed BCBS to enjoy market and monopoly power. BCBS denied all allegations of wrongdoing and asserted that the geographic division practice actually resulted in lower healthcare costs and greater access for customers. The proposed Settlement Agreement ends almost eight years of litigation.

The Settlement Agreement provides for the creation of a \$2.7 billion Settlement Fund, making it one of the largest healthcare settlements in United States history. Of the \$2.7 billion, \$1.9 billion is reserved specifically for potential class member claims. The Settlement Agreement explains how the Settlement Fund will be divided. Potential class members include:

- Individual subscribers and insured group health plans covered by a BCBS health insurance policy between February 7, 2008 and October 16, 2020; and
- Self-funded plans (and employees covered by them) subject to a BCBS administrative services agreement between September 1, 2015 and October 16, 2020

Insured and self-funded class members include both the plan sponsor and its covered employees (but excludes non-employee members). Potential class members should receive formal notification of the settlement via mail or email.

How Much Should Plan Sponsors Expect?

While the exact amount a plan sponsor can expect from the settlement is uncertain at this point, the Proposed Plan of Distribution states that any amount paid will be allocated between the plan sponsor and any employees who submit a claim. Thus, it appears that if an employee does not submit a claim, then any amount the employee would have received will be allocated to the plan sponsor. For

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fully insured plans, this amount is generally based on premiums paid. Self-funded plans will have their allocations generally based on administrative fees paid.

If any payment for an authorized claimant is \$5.00 or less, no distribution will be made to the claimant.

What Should Plan Sponsors Do?

Plan sponsors who receive notice may file a claim on the Blue Cross Blue Shield settlement website or via mail. If a plan sponsor believes it should be part of the settlement but does not receive notice, it can contact the administrator of the settlement. All claims must be filed by **November 5, 2021**.

The settlement does not require plan sponsors to provide their own notice to employees, but plan sponsors may want to communicate information about the settlement to employees with their own notices so employees understand that the settlement is legitimate, and they have rights under the settlement.

The terms of the settlement do not obligate plan sponsors to share settlement proceeds with employees. However, the U.S. Department of Labor takes the position that once settlement funds are distributed from a settlement to an ERISA-covered plan, the proceeds become “plan assets.” Once the settlement funds become plan assets, they are subject to ERISA’s fiduciary rules. This means that the settlement funds may not be used for the benefit of employers, fiduciaries, or other parties in interest with respect to the plan. Additionally, ERISA’s fiduciary rules generally require that plan sponsors accept settlement funds; therefore, if eligible, plan sponsors must file a claim and receive such funds. Upon distribution, settlement funds should be held and managed in accordance with ERISA.

Other Settlement Terms

In addition to the Settlement Fund, certain self-funded national employers will be eligible to request a second bid from a national Blue Cross Blue Shield entity in addition to their local Blue Cross Blue Shield entity (a “Second Blue Bid”). The Settlement Agreement provides a list of employers eligible for a Second Blue Bid and the list will be updated every two years. Second Blue Bids will not be available until three months after the settlement is finalized – likely April 2022 at the earliest.

Next Steps

Plan sponsors should:

- Determine whether they are eligible for the Settlement Fund and the Second Blue Bid.
- If eligible, review the terms of the settlement and file a claim by the deadline.
- Work with counsel to determine how Settlement Funds should be held, allocated between employees and the employer, used, and distributed. That process should also be documented.

If you have questions about the Blue Cross Blue Shield Settlement or how to handle Settlement Funds, contact one of the members of the Kutak Rock [Employee Benefits Practice Group](#).

