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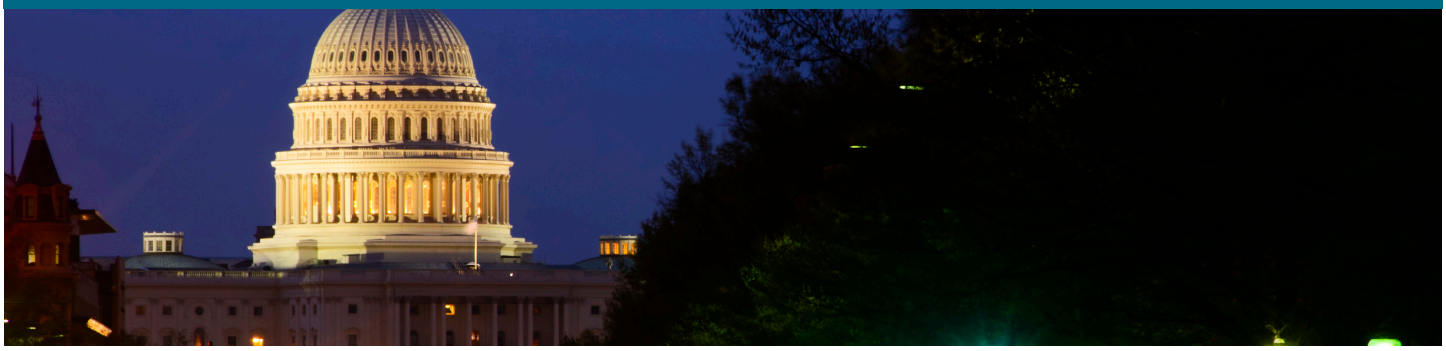

JULY 2017

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TENTH CIRCUIT AFFIRMS DISMISSAL OF ANTITRUST CASE AGAINST HEALTH INSURER

On May 31, the Tenth Circuit Court of Appeals affirmed the dismissal of plaintiff's claims in *Bristow Endeavor Healthcare v. Blue Cross Blue Shield Association et al.*, handing Blue Cross Blue Shield of Oklahoma, and its co-defendants, a significant victory. The action was commenced in 2016 by Bristow Endeavor Healthcare, a northeast Oklahoma health care provider, with Bristow alleging that defendant Health Care Service Corporation (which does business as Blue Cross Blue Shield of Oklahoma) had denied Bristow's request to add an additional Bristow facility to HCSC's provider network pursuant to an unlawful agreement between HCSC and another health care provider, Hillcrest/Ardent. Specifically, Bristow alleged that HCSC and Hillcrest had agreed that HCSC would deny Bristow in-network status to prevent Bristow from competing effectively in northeast Oklahoma, a market in which both Hillcrest and Bristow currently have rival facilities.

At the trial court level, the court ruled that Bristow's claims did not plausibly allege any actionable conspiracy and dismissed Bristow's claims on that basis. On appeal, the Tenth Circuit agreed, explaining that "Hillcrest may have been motivated to undermine Bristow as a direct competitor, but HCSC – a purchaser of healthcare services – would be acting directly against its own interests if it agreed to reduce competition in the healthcare provider market, particularly in light of Bristow's allegation that HCSC pays Hillcrest higher reimbursement rates." In addition, the Court further noted that the complaint "does not identify any benefit that HCSC obtained from Hillcrest as part of the alleged conspiracy." Accordingly, the Court concluded that Bristow had not pled facts that "tended to exclude the possibility of independent action" by HCSC, rendering Bristow's allegations insufficient as a matter of law.

Finally, while Bristow sought to explain HCSC's conduct by arguing on appeal that HCSC was acting at the behest of Hillcrest to maintain Hillcrest's business, the Court rejected that argument, noting that "the complaint does not contain any particularized allegations permitting an inference that Hillcrest possessed market power such that it could compel HCSC to act against its own interest." Accordingly, the Tenth Circuit found that Bristow had failed adequately to allege a conspiracy as between HCSC and Hillcrest, and affirmed the lower court's dismissal of Bristow's complaint. Absent an appeal to the Supreme Court, the Tenth Circuit's ruling likely brings an end to the litigation.

SENIOR LEADERSHIP AT THE DOJ ANTITRUST DIVISION BEGINS TO TAKE SHAPE

While the proposed new head of the Antitrust Division, Makan Delrahim, still awaits Senate confirmation (having received approval from the Senate Judiciary Committee on June 8 by a vote of 19-1), other senior-level positions that do not require Senate approval have slowly begun to be announced.

On June 21, the Antitrust Division announced two new Deputy Assistant Attorneys General – Donald Kempf and Bryson Bachman. Kempf brings many decades of antitrust experience to the position, having practiced antitrust law in a private firm from 1965 – 2000, and then as the chief legal officer for Morgan Stanley. Kempf also served on the Antitrust Modernization Commission (perhaps not coincidentally, with Delrahim) in 2007. Bachman also has previous antitrust experience, having served as chief counsel for Senator Mike Lee (R-UT), who heads the Senate Judiciary Committee's antitrust subcommittee. (Notably, Delrahim held a similar position in the late 1990s under Senator Orrin Hatch.) Both Kempf and Bachman are expected to continue in their new positions after Delrahim's confirmation. Three other Deputy Assistant Attorney General positions remain vacant at this time, but are expected to be filled shortly after Delrahim is confirmed. Those positions, like those that Kempf and Bachman have just filled, do not require Senate approval.

Until Delrahim is confirmed, Kempf and Bachman will report to Acting Assistant Attorney General Andrew Finch, who was named to that position (which also does not require Senate confirmation) on April 10. Finch replaced Brent Snyder, who was the sole senior official that stayed on after the inauguration of President Trump. Finch is expected to continue at the Antitrust Division after Delrahim is confirmed as the Principal Deputy Assistant Attorney General. Notably, Finch served in the Antitrust Division with Delrahim from 2003 – 2005. During that period, Finch was counsel to the Assistant Attorney General for Antitrust (Hewitt Pate), while Delrahim was a Deputy Assistant Attorney General under Pate.

PENNSYLVANIA VISION INSURER ACCUSED OF ANTICOMPETITIVE CONDUCT

A group of independent Pennsylvania optometrists and ophthalmologists recently filed a proposed class action antitrust case against vision insurer Davis Vision, alleging that Davis Vision's in-network contractual provisions impose unreasonable, anticompetitive restrictions on plaintiffs' ability to best serve their patients. The action, *Frank v. Davis Vision et al.*, was filed in the Eastern District of Pennsylvania on June 12.

In the action, the plaintiffs contend that Davis Vision (a subsidiary of health insurer Highmark), requires that the plaintiffs "steer" their patients that need lenses and eyeglass frames to a lab that is affiliated with Davis Vision, notwithstanding that, absent the restriction – at least according to plaintiffs – their patients could get lenses and frames from other, unaffiliated sources for lower prices. Plaintiffs also alleged that Davis Vision provides vision insurance to at least 65 percent of all insured Pennsylvania eye care patients. Plaintiffs also contend that these restrictions are not imposed upon "big box" retailers in Davis Vision's network, including Walmart and Costco, because "presumably they may possess countervailing market or negotiating power – unlike [plaintiffs], who are at Davis Vision's mercy."

Specifically, plaintiffs' complaint includes 11 separate claims, including both per se and rule of reason claims under Section 1 of the Sherman Act, a claim under Section 2 of the Sherman Act for unlawful monopolization/monopsonization, claims under the Pennsylvania common law for both unlawful conspiracy and monopolization/monopsonization, breach of the covenant of good faith and fair dealing, and unjust enrichment.

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Notably, the Pennsylvania action comes less than a year after a ruling in a similar case against Davis Vision that was filed in the Central District of Illinois, *Acuity Optical Labs v Davis Vision*. In that case, in an August 23, 2016 decision, the Court granted Davis Vision summary judgment as to the plaintiffs' per se antitrust claims, finding that the restriction was essentially a vertical restraint, not a horizontal restraint, but refused to dismiss the rule of reason claims until the plaintiffs were afforded an opportunity to take additional discovery. However, shortly thereafter, the case was settled on confidential terms.

The direction that this new case will take is, at least for now, uncertain, with Davis Vision having not even yet responded to plaintiffs' complaint. Stay tuned.

ANTHEM TERMINATES MERGER DEAL WITH CIGNA; LITIGATION CONTINUES IN DELAWARE CHANCERY COURT

On May 12, Anthem announced that it was terminating all efforts to complete its proposed merger with Cigna. The deal, announced back in 2015 and valued at $54 billion, would have combined the country's second and fifth largest commercial health insurers.

Anthem's decision followed both an April 28 decision by the D.C. Circuit Court that affirmed a lower court ruling that enjoined Anthem from completing the merger and a subsequent decision by the Delaware Chancery Court, days later, that denied Anthem's request that Cigna be required to continue to support the proposed merger until Anthem had an opportunity to appeal the adverse D.C. Circuit ruling to the U.S. Supreme Court. Prior to the Delaware court ruling, Anthem had announced an intention to seek Supreme Court review of the D.C. Circuit decision, which was decided by a 2-1 vote.

Notably, while the parties' merger is now over, litigation continues in the Delaware Chancery Court over the "break-up" fee that was contained in the parties' merger agreement. Cigna maintains that it is owed the $1.85 billion break-up fee set forth in the parties' merger agreement, plus damages, for Anthem's failure to complete the merger. Anthem, on the other hand, has publicly stated that "Cigna failed to perform and comply in all material respects with its contractual obligations [under the merger agreement]" and that "as a result, Cigna is not entitled to the termination fee" (nor any damages, one would imagine, at least according to Anthem). Given the significant amount of money in dispute, the Delaware litigation is not likely to end any time soon, and just like the merger litigation before it, the break-up fee litigation is likely to be precedent-setting as well. Stay tuned.