

compliance ALERT

What to Do if Your Organization Receives a Notice about the \$2.67 Billion Blue Cross Blue Shield Antitrust Settlement

March 8, 2021

Recently, your organization may have received notices about a settlement resolving antitrust claims against the Blue Cross Blue Shield Association and its member plans. The Settlement results from class action lawsuits alleging that the Blue Cross Plans' 36 domestic organizations conspired for many years to divide the country into service areas and then limited competition among the Blue Cross Plans themselves, and with their competitor insurers.

Your organization is likely receiving the notice about the Settlement because it was a policyholder of a Blue Cross Plan policy, or your organization sponsored a self-insured plan with Blue Cross as the insurance carrier for the plan during the relevant class period (February 7, 2008, through October 16, 2020, for fully-insured businesses and individuals; September 1, 2015, through October 16, 2020, for those with self-insured plans).

The notice is likely explaining your organization's right to approve or object to the Settlement before the final approval hearing, as well as providing information about the potential opportunity to collect from the \$2.67 billion of Settlement proceeds. Employers (plan sponsors) and employees (including former employees) are qualified to recover Settlement funds. However, Taft-Hartley plans, certain government accounts, Medicare accounts and stand-alone vision and dental plans are excluded from the Settlement.

Court-authorized Notice and Claims Administrator JND Legal Administration LLC ("JND") has set up an [official case website](#) where potential claimants can obtain additional information about the case and learn more about filing a claim to recover the Settlement Funds. JND's deadline to provide notice to eligible class members is May 31, 2021, and the claims filing deadline is November 5, 2021.

Please ensure that you are only engaging with JND and exercise caution when working with any third-party entity that was not appointed by the court. If you are ever unsure or suspicious, consult legal counsel. ■

Action Required:

- If you received a Settlement notice, visit the [official case website](#) where potential claimants can obtain additional information about the case and learn more about filing a claim to recover the Settlement Funds.

↓ Full Explanation Follows ↓

What to Do if Your Organization Receives a Notice about the \$2.67 Billion Blue Cross Blue Shield Antitrust Settlement

On November 30, 2020, the U.S. District Court for the District of Alabama [granted preliminary approval](#) of a broad-reaching settlement (the “Settlement”) resolving antitrust claims against the Blue Cross Blue Shield Association and its member plans (collectively, the “Blue Cross Plans”). In the months following this court order for preliminary approval of the Settlement, many of our clients have received notices about this Settlement and have asked us what this is about and what they should do next. This eAlert answers our most frequently asked questions.

What is this Settlement About? Why is my Organization Receiving a Notice about this Settlement?

The Settlement results from class action lawsuits alleging that the Blue Cross Plans’ 36 domestic organizations conspired for many years to divide the country into service areas and then limited competition among the Blue Cross Plans themselves, and with their competitor insurers. The class allegations affect insurance policies covering tens of millions of Americans. Specifically, the Blue Cross Plans were accused of: (1) allocating geographic territories; (2) limiting the member plans from competing against each other, even when not using a Blue name, by mandating a minimum percentage of business that each member plan must do under that name, both inside and outside each member plan’s territory; (3) restricting the right of any member plan to be sold to a company that is not a member of the Blue Cross Blue Shield Association; and (4) agreeing to other ancillary restraints on competition.

While the court’s preliminary approval of the Settlement is an important step toward final resolution of these class actions (*i.e.*, a final settlement), class members must still be notified and given the opportunity to object before the final approval hearing, which is scheduled to begin on October 20, 2021. Additionally, it should be noted that while a court order granting preliminary approval means it is possible that the final settlement may be subject to some changes, the proposed Settlement and the court order granting preliminary approval of it give considerable insight into the likely final terms of the Settlement.

In light of these developments, your organization is likely receiving the notice about the Settlement because it was a policyholder of a Blue Cross Plan policy, or your organization sponsored a self-insured plan with Blue Cross as the insurance carrier for the plan during the relevant periods of time when the Blue Cross Plans were alleged to have engaged in these anti-

competitive actions (the “class period”), and the notice is likely explaining your organization’s right to approve or object to the Settlement before the final approval hearing, as well as providing information about the potential opportunity to collect from the \$2.67 billion of Settlement proceeds.

Which Types of Organizations are Qualified to Recover Settlement Funds?

Employers (plan sponsors) and employees (including former employees) are qualified to recover Settlement funds. However, Taft-Hartley plans, certain government accounts, Medicare accounts and stand-alone vision and dental plans are excluded from the Settlement.

What are the Periods of Time that are Relevant for Determining if Our Organization may be Entitled to Recover from the Settlement?

The Settlement class period for fully-insured businesses and individuals is February 7, 2008, through October 16, 2020, while the class period for those with self-insured plans is September 1, 2015, through October 16, 2020.

What Kind of Recovery Can our Organization Expect to Receive from the Settlements?

The Settlement includes both substantial monetary relief (money damages) and injunctive relief. The injunctive relief requires the Blue Cross Plans to take certain actions on a going-forward basis in order to enhance competition in the health insurance market. Notably, there was no admission of wrongdoing in the Settlement.

With regard to the monetary relief in the Settlement, the Blue Cross Plans have agreed to pay \$2.67 billion in this case. Plaintiffs’ counsel will receive a portion of this for legal and administrative fees (not to exceed 25%), and the remaining Settlement funds will be allocated among the class members, with 93.5% to be distributed among fully-insured class members and 6.5% to be distributed among the self-insured class members. The majority of the Settlement’s funds are expected to be distributed within 30 days of the court’s entry of Final Judgement, which is tentatively scheduled for October 21, 2021.

More specifically, although the amount of the monetary settlement was clearly significant, the prospective and far-reaching injunctive relief was also quite substantial, and considered to be of great importance to the class plaintiffs in

ensuring that the Blue Cross Plans would change the way that they conduct business in the future.

The injunctive relief in the Settlement includes:

- Elimination of the Blue Cross Plans' national revenue cap on competition when they are not using the "Blue"-branded names and marks. This revenue cap is referred to as the "National Best Efforts" provision, and it requires that two-thirds of each member plan's national healthcare-related revenue come from Blue-branded products as opposed to non-Blue business. The Settlement also eliminates limits on a corresponding local revenue cap known as the "Local Best Efforts" provision;
- The ability for certain Qualified National Accounts who could only seek one Blue Cross Plan bid, to now seek bids from two Blue Plans;
- Limits on the Blue Cross Plans' restraints on acquisitions;
- Guidelines to permit direct contracting between non-provider vendors and self-insured accounts;
- Limits on the use of Most Favored Nations Clauses and Differentials; and
- A five-year monitoring period during which a Monitoring Committee and the court must review new rules or regulations submitted by the Blue Cross Plans and mediate disputes related to the injunctive relief.

The Settlement administrator will determine how the funds are allocated to each of the respective classes. The current Settlement distribution plan provides for a proposed pro-rata allocation of the Settlement funds between employers and employees at the following rates:

Fully insured claimants with single coverage > 85% to employers // 15% to employees

Fully insured claimants with family coverage > 66% to employers // 34% to employees

Self-funded claimants with single coverage > 82% to employers // 18% to employees

Self-funded claimants with family coverage > 75% to employers // 25% to employees

Employers and employees will also have the opportunity to appeal this allocation by submitting evidence demonstrating

that their actual percentages differed, or that other damages were higher.

My Organization Appears to be Able to Recover Settlement Funds – How do we File our Claim to Recover these Funds? What Should We Do Next?

The court that issued the preliminary approval of the Settlement also authorized JND Legal Administration LLC ("JND") to serve as the Notice and Claims Administrator for the Settlement, and they have set up an [official case website](#) where potential claimants can obtain additional information about the case and learn more about filing a claim to recover the Settlement Funds. JND's deadline to provide notice to eligible class members is May 31, 2021, and the claims filing deadline is November 5, 2021.

When attempting to recover Settlement funds in this case, it's important for your organization to exercise caution when working with any third-party entity that was not appointed by the court. Many employers and plan sponsors across the country have been notified of this case by organizations seeking to collect Settlement proceeds on their behalf, and have even purported to be official claims administrators in the case, but in reality, they were never court-appointed and are only seeking to collect Settlement proceeds at an extremely high cost.

While the court's final approval of the Settlement isn't scheduled until October of 2021, we will continue to monitor this case and update you on important developments as they become available.

If you have any additional questions, please call your Corporate Synergies Account Manager or 866.CSG.1719.

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