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ANTITRUST ATTORNEYS

James M. Burns, Washington, D.C.
202-659-6945 • jmburns@dickinsonwright.com

Kenneth J. McIntyre, Detroit
313-223-3556 • kmcintyre@dickinsonwright.com

L. Pahl Zinn, Detroit
313-223-3705 • pzinn@dickinsonwright.com

Roger H. Cummings, Troy
248-433-7551 • rcummings@dickinsonwright.com

K. Scott Hamilton, Detroit
313-223-3041 • khamilton@dickinsonwright.com

Martin D. Holmes, Nashville
615-620-1717 • mholmes@dickinsonwright.com

Benjamin M. Sobczak, Troy
313-223-3094 • bsobczak@dickinsonwright.com

Peter H. Webster, Troy
248-433-7513 • pwebster@dickinsonwright.com

Doron Yitzchaki, Ann Arbor
734-623-1947 • dyitzachaki@dickinsonwright.com

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VERISK/EAGLEVIEW TRANSACTION DELAYED BY FTC REVIEW

James M. Burns

In January, Verisk Analytics, a leading supplier of computer software ("Xactimate") used by the property insurance industry to estimate replacement costs for insurance claims, announced its intention to acquire Eagleview Technology, an aerial imagery provider. Eagleview's imagery, which covers over 90% of all U.S. structures, assists insurers in calculating roof measurements when buildings are damaged by hurricanes, tornados and other catastrophic events, and thus its products are expected to enhance Verisk's offerings for insurers. The announced value of the deal was $650 million and, when announced, the parties stated that the transaction was expected to close by July.

However, in April, Verisk announced that the FTC was investigating the potential competitive implications of the deal, and in April the FTC issued a "Second Request" to the parties. The issuance of a Second Request bars merging parties from completing their transaction while the FTC conducts its review, and requires the parties to submit a significant amount of additional information for the FTC's consideration. Accordingly, the transaction was placed on hold pending the resolution of the FTC's investigation.

At the time that the Second Request was announced, Verisk stated that it still intended to complete the transaction by July. Subsequently, the target closing date was pushed back to September 30, as the FTC investigation continued. Most recently, on September 29, Verisk announced that the FTC was still investigating the acquisition, and that the transaction was now targeted for an end of year closing. In announcing the further delay, Verisk's CEO stated that "We continue to believe that aerial imagery is important to our insurance customers and their ability to provide cost-effective solutions to their customers," and that Verisk was "hopeful that [it] could find a satisfactory conclusion to [its] process to acquire Eagleview."

While the FTC's investigation process is confidential, and neither Verisk nor Eagleview has announced the nature or extent of the FTC's concerns about the transaction, the length of the FTC's investigation suggests that it must believe the transaction presents some potential competitive concerns. If so, the FTC and the parties are likely seeking to negotiate some sort of resolution that would address the FTC's concerns while still letting the transaction proceed; alternatively, failing such agreement, it would not be surprising if the FTC filed an action seeking to enjoin the parties from consummating their deal.

(The other alternative, of course, would be a conclusion by the FTC that the deal, as proposed, does not present any competitive concerns.) Given Verisk's claims that 22 of the 25 largest property insurers currently utilize its products, the next steps in the FTC's review could be significant for the property insurance industry as a whole. Stay tuned.

HEALTH INSURERS IN MASSACHUSETTS VOICE OPPOSITION TO PARTNERS HEALTHCARE ACQUISITION OF RIVAL HOSPITALS
James M. Burns

In 2012, Partners Healthcare, the largest health system in Massachusetts, announced its intention to acquire two competing systems – South Shore and Hallmark. The proposed transactions were investigated by both the FTC and the Massachusetts Attorney General's Office, and in July of 2014, the Massachusetts AG's Office filed an action challenging the proposed transactions. However, on the same day, the Massachusetts AG's Office also filed a proposed Consent Judgment that would settle the matter pursuant to an agreement between the parties. While the settlement permitted Partners to consummate the deal, Partners would be required to accept a number of restrictions relating to the rates it could charge for its services for a number of years.

The proposed settlement required court approval, and in July Superior Court Judge Janet Sanders (Suffolk Superior Court), issued a scheduling order that provided an opportunity for potentially impacted parties to file comments about the proposed transaction. The Massachusetts AG's Office was required to respond, in writing, to these comments by September 25.

Not surprisingly, comments were filed on both sides of this issue. The Massachusetts Association of Health Plans (MAHP), a trade group comprised on 17 health insurers in the state, filed comments in opposition to the proposed settlement. While the MAHP did not ask that the transaction be barred, they expressed concern about the transaction potentially raising healthcare costs for consumers, and contended that the pricing restrictions agreed to by Partners might not be sufficient to control rising healthcare rates. The insurers also contended that restrictions on Partners' ability to require insurers to contract with all Partners' facilities were inadequate, and would limit the insurers' ability to create narrow networks that might reduce insurance costs for consumers. Notably, Blue Cross of Massachusetts, which is the largest commercial insurer in the state and not a member of MAHP, did not join in the MAHP comments and has not expressed any opposition to the proposed transaction.

On September 30, Judge Sanders issued an order that extended the comment period through October 25, and set a hearing in the matter for November 10. Judge Sanders is expected to decide the issue at that time. Stay tuned.

PLAINTIFF FILES THIRD AMENDED ANTITRUST CLAIM AGAINST HIGHMARK
James M. Burns

A long running antitrust dispute in Western Pennsylvania continued on October 1, when a Pennsylvania hotel (Cole's Wexford Hotel) filed a third amended antitrust class action complaint against Highmark, the largest commercial health insurer in Western Pennsylvania, and UPMC, the largest health system in the area. The complaint alleges that Highmark and UPMC reached an unlawful agreement to exclude other insurers from entering the market, increasing the cost for health insurance in the region.

The case, *Royal Mile v. UPMC*, has already been pending for over four years in the Western District of Pennsylvania. Prior versions of the complaint have been dismissed by District Judge Joy Flowers Conti on the grounds that the plaintiffs' challenge was barred by the "Filed Rate Doctrine," an antitrust doctrine that prohibits a plaintiff from raising an antitrust challenge to rates that have been approved by a regulator. Judge Conti held that because the rates charged by Highmark were approved by the Pennsylvania Department of Insurance, the plaintiffs' earlier claims for damages were barred as a matter of law.

Based upon these prior rulings, two of the original named plaintiffs that had purchased insurance from Highmark (including named plaintiff Royal Mile) are no longer in the case. However, a third named plaintiff, Cole's Wexford Hotel, purchased its insurance from a for-profit subsidiary of Highmark (Highmark Health Insurance Co.), which Cole's alleges did not file its rates with the Insurance Commissioner prior to 2012. Accordingly, Cole's alleges that the Filed Rate Doctrine is no impediment to its antitrust claims, nor to the claims of a class of similarly situated small employers that purchased insurance from the Highmark for-profit subsidiary. Highmark's response to the new complaint is due on October 31. Stay tuned.

HEALTH INSURER ANTITRUST CLAIM AGAINST DRUG COMPANY REMANDED TO STATE COURT
James M. Burns

Over the last several years, several health insurers have brought antitrust claims against drug companies, contending that they were overcharged for drugs as a result of agreements reached by the drug companies in the settlement of patent infringement lawsuits between branded and generic drug makers. Specifically, the purchasers of these drugs (including but not limited to insurers), have claimed that the terms of these patent infringement lawsuits, which typically resulted in a payment by the patent holding manufacturer to the generic drug maker (which was the alleged infringer), in return for the generic agreeing not to continue making the generic drug for a period of years, were anticompetitive. Because it was the allegedly infringing generic manufacturer (the defendant in the patent infringement suit) that received the payment in the settlement, these settlements have been referred to as "reverse payment" settlements. The FTC has been quite concerned about "reverse payment" patent infringement settlements for several years, contending that a delay in the introduction of generic

alternatives to branded drugs has slowed the reduction in price for the branded drug that increased competition typically brings. After a series of lawsuits by the FTC over this practice resulted in conflicting rulings on the issue of whether these settlements could constitute an antitrust violation, the Supreme Court weighed in on the issue in 2013, ruling in *FTC v. Actavis* that, in some circumstances, such settlements could be found to be anticompetitive.

In light of the *Actavis* decision, purchaser challenges to these settlements have continued all across the country, typically in federal court. However, in a bit of a departure from common practice, earlier this year Time Insurance (doing business as Assurant Health), commenced such an action in *state* court, not federal court, asserting claims under state antitrust laws. By filing its action -- *Time Insurance v. Astrazeneca* -- in the Philadelphia Court of Common Pleas, Time sought to avoid consolidation of its case with a series of similar federal court cases that had already been consolidated before the District Court in Massachusetts (*In re Nexium Antitrust Litigation*).

Astrazeneca removed the case to federal court, arguing that the matter necessarily raised a federal issue under patent law, and thus was required to be heard in federal court (and then consolidated into the Massachusetts proceeding). However, Eastern District of Pennsylvania District Court Judge Gerald McHugh Jr. disagreed. Instead, Judge McHugh held that Time's antitrust claim would *not* necessarily require Time to litigate the validity of the patent, and thus the case did not raise a federal issue. Accordingly, Judge McHugh remanded the case to state court. The decision, if followed by other state courts across the country, has the potential to greatly increase the number of courts grappling with these "reverse payment" claims. And, given that even the small number of federal courts that have interpreted the Supreme Court's ruling in *Actavis* have been unable to reach agreement on the circumstances in which such conduct raises antitrust concerns, increasing the number of courts considering such issues will only add to the confusion. As such, it would not be surprising if the Supreme Court is forced before long to revisit its decision in *Actavis*, and if it does, insurers, being among the largest purchasers of prescription drugs, will be watching with interest.