

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

LAURA BRISCOE, KRISTIN MAGIERSKI, and  
EMILY ADAMS on behalf of themselves and all  
others similarly situated,

Plaintiffs,

V.

HEALTH CARE SERVICE CORPORATION;  
and BLUE CROSS AND BLUE SHIELD OF  
ILLINOIS.

Defendants.

Case No. 1:16-cv-10294

Judge John Robert Blakey

## JURY TRIAL DEMANDED

## **SECOND AMENDED CLASS ACTION COMPLAINT**

Plaintiffs Laura Briscoe, Kristin Magierski, and Emily Adams (collectively, the “Plaintiffs”), on behalf of themselves and all others similarly situated persons (“Classes” or “Class,” defined below), by and through undersigned counsel, submit this Second Amended Class Action Complaint against Health Care Service Corporation (“HCSC”) and its operating division Blue Cross and Blue Shield of Illinois (“BCBSIL”) (collectively referred to as “HCSC” or “Defendants”).

Plaintiffs hereby allege upon personal knowledge as to themselves and their own acts,  
and upon information and belief as to all other matters, based upon, *inter alia*, the investigation  
undertaken by their attorneys, as follows:

## SUMMARY OF THE CASE

1. Defendants provide health benefit plans and policies of health insurance, including individual health benefit plans, employer-sponsored group health plans, and

government-sponsored health benefit plans, and provide benefits administration and third-party claims processing services to numerous employee benefit plans (the “plan” or “plans”).

2. Defendants have wrongfully denied and continue to deny Plaintiffs and the members of the Classes access to and coverage for a vital women’s preventive service – breastfeeding support, supplies and counseling – which coverage is mandated by The Patient Protection and Affordable Care Act (the “ACA”) (as amended by the Health Care and Education Reconciliation Act of 2010 (“HCERA”) and other laws).

3. A key directive of the ACA was that all individual and group health plans would provide access to and coverage for preventive health care benefits.<sup>1</sup> As stated by the U.S. Department of Health & Human Services (“HHS”), prior to the enactment of the ACA “too many Americans did not get the preventive care they need to stay healthy, avoid or delay the onset of disease, and reduce health care costs, [and,] [o]ften because of cost, Americans used preventive services at about half the recommended rate.” See <http://www.hhs.gov/healthcare/facts-and-features/fact-sheets/aca-rules-on-expanding-access-to-preventive-services-for-women/index.html> (last visited 9/7/16).

4. In addition to the policy of promoting preventive health benefits for all, the ACA specifically recognized the need to address the unique preventive health needs of women throughout their lives. *Id.* Building upon the ACA’s women’s preventive health service mandate, on August 1, 2011 HHS adopted its Health Resources and Services Administration’s

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<sup>1</sup> The only exception is health insurance plans that are grandfathered. To be classified as a “Grandfathered Plan” plans must have (1) been in existence prior to March 23, 2010; (2) refrained from making significant changes to the benefits or plan participants’ costs since that time; and (3) had at least one person enrolled in the plan on March 23, 2010 and continually covered at least one individual since that date. While there is no specific termination date for grandfathered status, it is expected that eventually all plans will lose their grandfathered status. As of 2014, only about a quarter of workers with employer sponsored coverage participated in Grandfathered Plans.

(“HRSA”) Health Plan Guidelines for Women’s Preventive Services (“HHS Guidelines”) which require access to and coverage for certain women’s preventive services by most non-grandfathered health plans starting with the first plan or policy year beginning on or after August 1, 2012.

5. The HHS Guidelines, which were recommended by the independent Institute of Medicine (“IOM”) and based on scientific evidence, ensure women’s accessibility to a comprehensive set of preventive services, including health services related to breastfeeding support, supplies and counseling. Under the HHS Guidelines, pregnant and postpartum women must have access to comprehensive lactation support and counseling provided by a trained provider during pregnancy and/or in the postpartum period (“Comprehensive Lactation Benefits”), as well as breastfeeding equipment. *See* HHS Guidelines, <http://hrsa.gov/womensguidelines/> (last visited 5/12/2017).

6. Contrary to the preventive service mandates established by the ACA and incorporated in Defendants’ plans, Defendants (in their capacities as both insurers and third-party administrators of self-insured plans) systemically fail to provide women statutorily and contractually required coverage for Comprehensive Lactation Benefits *i.e.*, breastfeeding support, supplies and counseling—a key preventive health benefit.<sup>2</sup> In stark contrast to Defendants’ identification of in-network providers of every other covered health benefit,

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<sup>2</sup> Comprehensive Lactation Benefits are unlike other preventive services. For example, prior to the ACA’s enactment, medical services such as male prostate exams were typically not covered by insurers even when such services were provided by in-network urologists. After the ACA’s enactment, such services were deemed preventive services that are covered at no cost when provided by in-network providers. For Comprehensive Lactation Benefits, such services were not, prior to the ACA, covered health benefits and there were no established networks of trained providers. Defendants failed to establish and identify networks of trained providers in the wake of the ACA’s mandate thereby circumventing the ACA’s preventive service provisions requiring women access to and coverage for Comprehensive Lactation Benefits.

Defendants do not identify or provide information about in-network trained providers of Comprehensive Lactation Benefits. As a result, women comprising the putative classes either forego or pay out-of-pocket for preventive services, that are critical to their and their children's health and welfare, which services should have been covered at no-cost.

7. Defendants (in their capacities as insurers and/or third-party administrators of self-insured plans) have employed the following scheme to circumvent the preventive service mandates established by the ACA and incorporated in their insureds' plans:

(A) Defendants have not established and have not identified a network of trained providers of Comprehensive Lactation Benefits. As a result, one of three things occurs:

- i. Women forego Comprehensive Lactation Benefits because they are unable to pay out-of-pocket, *ergo*, Defendants never have to administer and pay for the preventive service; or,
- ii. Women pay out-of-pocket for Comprehensive Lactation Benefits, never seek reimbursement from Defendants, *ergo*, Defendants never have to administer or pay for the preventive service; or,
- iii. Women pay out-of-pocket for Comprehensive Lactation Benefits, seek reimbursement, and get either no or partial reimbursement, *ergo*, Defendants minimize their cost related to the preventive service, and force women to pay out-of-pocket.

(B) It is not by Plaintiffs' and the Class members' own choosing to go "out-of-network." It is of Defendants' making. Because of Defendants' failure to provide and identify in-network trained providers, Plaintiffs and the members of the Classes are

forced to either forego the preventive service or go out-of-network to get it. Yet, Defendants exploit their wrongful conduct by cost-shifting and or flatly denying women any reimbursement or coverage for Comprehensive Lactation Benefits, for what was supposed to be a fully covered preventive service.

(C) Contrary to the plans' express claims procedures, Defendants also fail to properly process Plaintiffs and other participants' benefit claims, and appeals for benefit claim denials. The claims "administration" process and violations of law detailed herein reflect a callous disregard for the rights and needs of lactating women, including Plaintiffs, and this behavior is particularly egregious when one considers the fact that these insured individuals are recent mothers confronting the challenges of caring for their newborn children, as well as themselves, during a period that is often emotionally and physically exhausting, during which mothers are emotionally and physically vulnerable and harm from complications to the mother or child can arise quickly and advance rapidly. Plaintiffs and other similarly situated individuals should not be forced to endure the unwarranted denial of critical and needed health insurance coverage, especially during the maternity and postpartum times.

8. Defendants' failure to establish the necessary infrastructure, policy and procedure to administer and provide insureds with Comprehensive Lactation Benefits as a preventive service, as required by the ACA and plan documents, runs afoul of federal law, the ACA and the plan documents. Based on the Defendants' conduct and the claims alleged herein, Plaintiffs, on behalf of themselves and the members of the Classes, seek to put an end to, and secure monetary redress for, Defendants' wrongful and harmful conduct. Such conduct has eviscerated the coverage to which female plan participants are entitled to receive

contractually and as mandated by the ACA. Through this suit, Plaintiffs seek to recover, on behalf of themselves and members of the Classes, out-of-pocket expenses incurred for lactation services that should have been covered by the plans, and enjoin Defendants' improper and illegal practices, and recover other and additional relief as the Court deems appropriate and just.

9. Plaintiffs are enrolled in health care plans insured or administered by Defendants. Defendants insure and/or administer health care plans that are Employee Welfare Benefit Plans, as that term is defined in 29 U.S.C. § 1002(1)(A), as well as individual and family health care plans offered directly by Defendant, or on an insurance exchange pursuant to the applicable provisions of the ACA ("ACA Exchanges").

10. Because Defendants act as "fiduciaries" of the employee benefit plans they administer, as defined in the Employee Retirement Income Security Act of 1974 ("ERISA"), Defendants are obligated to administer plan benefits in accordance with the terms of the plan documents and applicable law. 29 U.S.C. § 1104(a)(1)(D). In administering plan benefits, Defendants must adhere to ERISA's strict duties of loyalty and care, including the obligation to act solely in the interests of the plan participants and the beneficiaries. 29 U.S.C. §§ 1104(a)(1)(A)(i) and 1104(a)(1)(B).

11. Notwithstanding these obligations and upon information and belief, at all relevant times, Defendants have administered claims of the plans and other ERISA plan participants and beneficiaries in a manner contrary to the express terms and purpose of the plans they serve, as well as applicable law.

12. Defendants' conduct with respect to establishing a network and administering benefits and processing claims has denied participants and beneficiaries (collectively,

“participants”) in the plans and other plan participants benefits to which those individuals are entitled under the terms of their respective plans. Moreover, by employing a benefits administration and claims processing system that furthers Defendants’ interests, rather than the interests of plan participants, Defendants have breached their ERISA duties of loyalty and care.

13. As a result of Defendants’ unlawful healthcare benefits administration and claims processing practices, hundreds, if not thousands, of plan participants in the United States, including Plaintiffs, have been: (a) improperly denied lactation and other medical service benefits; (b) forced to pay for lactation and other medical services which should have been approved and paid by the plans issued or administered by Defendants; (c) forced to incur unnecessary time and expense in appealing Defendants’ improper denials of benefits; and/or (d) subjected to credit disparagement and the prospect of being denied future lactation or other medical services due to outstanding, unpaid medical bills.

14. In addition to the ACA, the Pregnancy Discrimination Act of 1978 (“PDA”) requires health plans to cover maternity-related expenses, and the ACA further requires breastfeeding support and supplies with no-cost sharing on the part of the insured. Nevertheless, Defendants have failed to provide covered individuals with access to in-network lactation consultants. Furthermore, Defendants have refused and continue to refuse to reimburse participants in the plans, such as Plaintiffs, for their expenses incurred after being compelled to seek out-of-network lactation services.

15. Such conduct violates: the ACA; the plan documents which incorporate by reference the ACA’s preventive service provisions; and, ERISA. Plaintiffs seek monetary and injunctive relief, disgorgement, restitution, and/or other appropriate equitable relief for

themselves and the members of the Classes to stop and redress the substantial harms inflicted upon them by Defendants.

### **PARTIES**

#### ***Plaintiffs.***

16. Plaintiff Laura Briscoe (“Plaintiff Briscoe”) is an adult individual residing in Bronx, NY. Plaintiff Briscoe was, at all relevant times, a resident of Chicago, IL and insured by a non-grandfathered BCBSIL plan through her then-current employer, The Field Museum. After the birth of her child in November 2014, Plaintiff Briscoe sought coverage from BCBSIL for comprehensive lactation support, supplies and counseling, but was issued only partial reimbursement resulting in an out-of-pocket expenditure of \$40.

17. Plaintiff Kristin Magierski (“Plaintiff Magierski”) is an adult individual residing in Chicago, IL. Plaintiff Magierski is, and was, at all relevant times, insured by a non-grandfathered individual BCBSIL Preferred Gold PPOSM plan that she purchased directly through BCBSIL. After the birth of her child in April 2016, Plaintiff Magierski sought coverage from BCBSIL for comprehensive lactation support, supplies and counseling, but was denied coverage and not issued any reimbursement, resulting in an out-of-pocket expenditure of \$245.

18. Plaintiff Emily Adams (“Plaintiff Adams”) is an adult individual residing in Cook County, Illinois. Plaintiff Adams is, and was, at all relevant times, insured by a non-grandfathered BCBSIL BluePrint Participating Provider Option 80/60 plan through her employer. After the birth of her child in May 2016, Plaintiff Adams sought coverage from BCBSIL for comprehensive lactation support, supplies and counseling, but was issued only partial reimbursement resulting in an out-of-pocket expenditure of \$125.36.



***Defendants.***

19. Defendant Health Care Service Corporation (“HCSC”) is an Illinois Mutual Legal Reserve Company and independent licensee of the Blue Cross and Blue Shield Association with its headquarters located at 300 East Randolph Street, Chicago, Illinois. HCSC states that it is the largest customer-owned health insurer in the United States and fourth largest overall insurer operating through “our Blue Cross and Blue Shield® Plans in Illinois, Montana, New Mexico, Oklahoma and Texas.” See <http://www.hcsc.com/overview.html> (last visited 10/25/2016). HCSC also states that it serves more than 15 million members across five states, Illinois, Montana, New Mexico, Oklahoma and Texas. HCSC’s employer group market segment makes up 12 million of HCSC’s more than 15 million members. <http://www.hcsc.com/leadership.html> (last visited 10/28/2016).

20. Defendant Blue Cross and Blue Shield of Illinois (“BCBSIL”), a division of Defendant HCSC, is a health insurance company with its principal place of business is located at 300 East Randolph Street, Chicago, Illinois. BCBSIL states that it is the largest health insurance company in Illinois with offices statewide including in Downtown Chicago, Rockford, Quincy, Danville, Naperville, Springfield, Jacksonville, Downers Grove and Marion. BCBSIL states that it provides more than 8.1 million members with health plans. <http://www.bcbsil.com/company-info> (last visited 10/28/2016).

21. In addition to Defendant BCBSIL, Defendant HCSC also operates through four other insurance divisions:

- (a) Blue Cross and Blue Shield of Texas (“BCBSTX”), a division of Defendant HCSC, is a health insurance company with its headquarters in Richardson, TX. BCBSTX states that it is Texas’ largest health insurer,

and in addition to its headquarters in Richardson, TX, it maintains regional offices in Houston, Austin and Lubbock and 22 customer service centers throughout TX. *See* <http://www.bcbstx.com/company-info/who-we-are>; <http://www.bcbstx.com/company-info/who-we-are/customer-service> (last visited 10/29/2016). BCBSTX provides more than 5.1 million members with health plans. *See* <http://www.hcsc.com/statistics.html> (last visited 10/29/2016).

(b) Blue Cross and Blue Shield of Montana (“BCBSMT”), a division of Defendant HCSC, is a health insurer and benefits administrator in Montana, with its headquarters at 3645 Alice Street, Helena, MT. BCBSMT states that it is the largest insurer in Montana, provides more than 250,000 members with health plans statewide, and, in addition to its headquarters in Helena, has six regional offices in Billings, Missoula, Bozeman, Great Falls, Butte, and Kalispell. *See* <https://www.bcbsmt.com/company-info/who-we-are> (last visited 10/28/2016).

(c) Blue Cross and Blue Shield of Oklahoma (“BCBSOK”), a division of Defendant HCSC, is a health insurer and benefits administrator in Oklahoma, with its headquarters at 1400 S. Boston, Tulsa, OK. BCBSMT states that it has more than 700,000 members with health plans statewide, and, in addition to its headquarters in Tulsa, it has a regional office in Oklahoma City. *See* <http://www.bcbsok.com/company-info> (last visited 10/29/2016).

(d) Blue Cross and Blue Shield of New Mexico (“BCBSNM”), a division of Defendant HCSC, is a health insurance company in New Mexico with its headquarters at 4373 Alexander Blvd NE, Albuquerque, NM (Mailing Address: 5701 Balloon Fiesta Parkway NE, Albuquerque, NM 87113). *See* <http://www.bcbsnm.com/contact-us> (last visited 10/29/2016). BCBSNM provides more than 462,000 members with health plans. *See* <http://www.hcsc.com/statistics.html> (last visited 10/29/2016).

22. Defendant HCSC, operating through its Blue Cross and Blue Shield® Plans in Illinois, Montana, New Mexico, Oklahoma and Texas (BCBSIL, BCBSTX, BCBSMT, BCBSOK, BCBSNM) provides group and individual health insurance plans that are subject to the ACA.

23. Defendant HCSC, operating through BCBSIL, BCBSTX, BCBSMT, and BCBSOK, also offers and administers health insurance plans directly to individuals through the ACA Exchanges,<sup>3</sup> including the following ACA Exchange Plans in 2016, among others:

(a) Defendant BCBSIL: Blue Choice Preferred Bronze PPO<sup>SM</sup>; Blue Choice Preferred Silver PPO<sup>SM</sup>; Blue Choice Preferred Gold PPO<sup>SM</sup>; Blue Choice Preferred Security PPO<sup>SM</sup>; Blue Cross Blue Shield Basic, a Multi-State

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<sup>3</sup> Under the ACA, starting in 2014, individuals were required to buy health insurance or face penalties. To facilitate that, the ACA requires every state to offer a public marketplace for its residents to research and purchase health insurance, the ACA Exchange. States have a few options: a state may choose to create and run its own exchange; or, if a state decides not to run its own exchange, residents of that state may shop on an exchange that will be run by the federal government; or, a state may partner with the federal government, and the state and federal government share responsibility for operating that state’s exchange. No matter what each state decides to do, an Exchange is available to residents in every state and the health insurance plans that are made available on the Exchange are ACA Exchange Plans. Among other things, the ACA provides tax credits and subsidies for individuals who qualify, to help make insurance more affordable to them, when they purchase insurance on the Exchange.

Plan<sup>SM</sup>; Blue Cross Blue Shield Solution, a Multi-State Plan<sup>SM</sup>; Blue Cross Blue Shield Premier, a Multi-State Plan<sup>SM</sup>; Blue FocusCare Bronze<sup>SM</sup>; Blue FocusCare Silver<sup>SM</sup>; Blue FocusCare Gold<sup>SM</sup>; Blue Precision Bronze HMO<sup>SM</sup>; Blue Precision Silver HMO<sup>SM</sup>; Blue Precision Gold HMO<sup>SM</sup>; Blue Precision Platinum HMO<sup>SM</sup>; BlueCare Direct Bronze<sup>SM</sup>; BlueCare Direct Silver<sup>SM</sup>; BlueCare Direct Gold<sup>SM</sup>

(b) BCBSTX: Blue Advantage Plus Bronze<sup>SM</sup>; Blue Advantage Plus Silver<sup>SM</sup>; Blue Advantage Plus Gold<sup>SM</sup>; Blue Advantage Bronze HMO<sup>SM</sup>; Blue Advantage Silver HMO<sup>SM</sup>; Blue Advantage Gold HMO<sup>SM</sup>

(c) BCBSMT: Blue Preferred Bronze PPO<sup>SM</sup>; Blue Preferred Silver PPO<sup>SM</sup>; Blue Preferred Gold PPO<sup>SM</sup>; Blue Focus Bronze POS<sup>SM</sup>; Blue Focus Silver POS<sup>SM</sup>; Blue Focus Gold POS<sup>SM</sup>

(d) BCBSOK: Blue Preferred Bronze PPO<sup>SM</sup>; Blue Preferred Silver PPO<sup>SM</sup>; Blue Advantage Bronze PPO<sup>SM</sup>; Blue Advantage Silver PPO<sup>SM</sup>; Blue Advantage Gold PPO<sup>SM</sup>

24. Defendant HCSC, operating through BCBSIL and BCBSNM, provides health care plans for the Federal Employees Health Benefits Program (“FEHBP”), including the following plans:

(a) Defendant BCBSIL’s Health Maintenance Organization Plan, provided under BCBSIL’s contract (CS 2929) with the United States Office of Personnel Management (“OPM”). *See* <https://www.opm.gov/healthcare-insurance/healthcare/plan-information/plan-codes/2016/brochures/73869.pdf> (last visited 10/28/2016).

(b) BCBSNM's BlueHMO Preferred (Formerly Lovelace Health Plan administered by BCBSNM), provided under BCBSNM's contract (CS 1911) with OPM.

25. Whenever in this Complaint reference is made to any act, deed or transaction of a Defendant, the allegation is imputed to its officers, directors, agents, employees or representatives.

### **JURISDICTION AND VENUE**

26. This Court has subject matter jurisdiction over this action based on diversity of citizenship under the Class Action Fairness Act and 28 U.S.C. § 1332(d)(2). The amount in controversy, exclusive of interest and costs, exceeds the sum or value of five million dollars (\$5,000,000) and is a class action in which members of the Class are citizens of states different from Defendants.

27. The Court also has federal question subject matter jurisdiction based on the ACA claims asserted herein.

28. In addition, this action is brought under ERISA. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 and ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1). Moreover, ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2), provides for nationwide service of process. All Defendants are residents of the United States and subject to service in the United States, and this Court, therefore, has personal jurisdiction over them. Venue is proper in this District pursuant to ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2) and 28 U.S.C. § 1391(b), because Defendants reside or may be found in this District.

29. This Court also has personal jurisdiction over Defendants pursuant to Fed. R. Civ. P. 4(k)(1)(A) because they would all be subject to the jurisdiction of a court of general

jurisdiction in this District. Each Defendant systematically and continuously conducts business in Illinois and otherwise has minimum contacts with Illinois sufficient to establish personal jurisdiction. Each Defendant is authorized to do business and is conducting business throughout the United States, including in this District, authorized to market and sell, and have in fact marketed and sold health insurance and healthcare products to citizens in this District, has sufficient minimum contacts with the various states of the United States, including this District, and/or sufficiently avails itself of the markets of the various states of the United States, including in this District, through its promotion, sales, and marketing within the United States, including in this District, to render the exercise of personal jurisdiction by this Court permissible.

30. Venue is proper in this District under 28 U.S.C. § 1391(b) because a substantial part of the events giving rise to this action occurred in this District and Defendants regularly conduct and transact business in this District and are therefore subject to personal jurisdiction in this District. Venue is also proper because Defendants are authorized to conduct business in this District and have intentionally availed themselves of the laws and markets within this District through promotion, marketing, and sales in this District.

### **FACTUAL ALLEGATIONS**

#### **A. Breastfeeding is a National Public Health Policy.**

31. The protection, promotion and support of breastfeeding have been a national public policy for over 25 years. In October 2000, former Surgeon General David Satcher, M.D., Ph.D. issued the *HHS Blueprint for Action on Breastfeeding*, then reiterating the commitment of previous Surgeons General to support breastfeeding as a public health goal. See <http://www.pnmc-hsr.org/wp-content/uploads/2011/01/BreastfeedingBlueprint.pdf> (last visited 1/11/2017).

32. Breastfeeding, with its many known health benefits for infants, children, and mothers, is a key strategy to improve public health. According to the Centers for Disease Control and Prevention (“CDC”), “[b]reastfeeding, with its many known health benefits for infants, children, and mothers, is a key strategy to improve public health,” and one of the most effective preventive measures mothers can take to protect their health and that of their children. <http://www.cdc.gov/breastfeeding/pdf/2016breastfeedingreportcard.pdf> (emphasis added); see also CDC, *Strategies to Prevent Obesity and Other Chronic Diseases: The CDC Guide to Strategies to Support Breastfeeding Mothers and Babies*. Atlanta: U.S. Department of Health and Human Services, 2013, available at: <http://www.cdc.gov/breastfeeding/pdf/BF-Guide-508.PDF> (last visited 1/11/2017).

33. In 2011, Regina M. Benjamin, M D., M.B.A. Vice Admiral U.S. Public Health Service Surgeon General and Kathleen Sebelius, the-then HHS Secretary jointly issued the *HHS Call to Action* specifying the society-wide responsibilities to encourage and support breastfeeding (“*HHS Call to Action*”). HHS, *The Surgeon General's Call to Action to Support U.S. Department of Health and Human Services. The Surgeon General's Call to Action to Support Breastfeeding*. 2011, available at: [http://www.ncbi.nlm.nih.gov/books/NBK52682/pdf/Bookshelf\\_NBK52682.pdf](http://www.ncbi.nlm.nih.gov/books/NBK52682/pdf/Bookshelf_NBK52682.pdf) (last visited 9/7/2016).

34. While the protection, promotion and support of breastfeeding have been a national public policy for over 25 years, the CDC, the American Academy of Pediatrics and the enactment of the ACA with its Comprehensive Lactation Benefits coverage have brought breastfeeding to the forefront of women’s health issues.

35. As the then HHS Secretary Kathleen Sebelius announced in July 2012:

Aug. 1, 2012 ushers in a new day for women’s health when, for the first time ever, women will have access to eight new services at no out-of-

pocket cost to keep them healthier.....This benefit will take effect for millions of adult and adolescent women over the course of the next year—and *it's just one of many benefits of the health care law that let women and their doctors, not insurance companies, make decisions about a woman's care.*

.... *Instead of letting insurance companies decide what care women receive, the health care law requires insurers to cover these preventive services* in new plans beginning Aug. 1.

...Women's health decisions shouldn't be made by politicians or insurance companies. Rather than wasting time refighting old political battles, this Administration is moving forward and *putting women in control of their own health care.* If women are going to take care of their families and friends, they have to take care of themselves. The Affordable Care Act is making it easier for women to do that by making health care more accessible and affordable for millions of American women and families.

"Giving Women Control Over Their Health Care," Posted July 31, 2012, By Kathleen Sebelius, Secretary of Health and Human Services, <http://wayback.archive-it.org/3909/20150925141312/http://www.hhs.gov/healthcare/facts/blog/2012/07/prevention073112.html> (last visited 9/7/2016) (emphasis added).

36. Further, numerous prominent medical organizations, including but not limited to, the American Academy of Pediatrics, the American Academy of Family Physicians, the American College of Obstetricians and Gynecologists, the American College of Nurse-Midwives, the American Dietetic Association, and the American Public Health Association, recommend that breastfeeding commence immediately upon birth and continue uninterrupted until the child's first birthday. *HHS Call to Action*, *supra*, p. 4.

37. Therefore, access to and coverage for Comprehensive Lactation Benefits advances the long held public policy goal to improve the health of Americans by increasing access and diminishing the cost barriers to sustained breastfeeding during the first year, at a minimum, of a child's life. As detailed in the *HHS Call to Action*:



(a) The American Academy of Pediatrics stated, “Human milk is species-specific, and all substitute feeding preparations differ markedly from it, making human milk uniquely superior for infant feeding. Exclusive breastfeeding is the reference or normative model against which all alternative feeding methods must be measured with regard to growth, health, development, and all other short- and long-term outcomes.” *HHS Call to Action, supra*, p. 5.

(b) “The health effects of breastfeeding are well recognized and apply to mothers and children in developed nations such as the United States as well as to those in developing countries. Breast milk is uniquely suited to the human infant's nutritional needs and is a live substance with unparalleled immunological and anti-inflammatory properties that protect against a host of illnesses and diseases for both mothers and children.” *Id.* at p. 1.

(c) Quality sustained breastfeeding provides health benefits to the mother, including lowered risk of breast and ovarian cancers, and long term health benefits to the infant, which in turn enhance the health of society and decrease costs due to poor childhood and adult health. Breast-fed babies suffer lower rates of hospitalizations for lower respiratory tract diseases in the first year, gastrointestinal infection, acute ear infection, Sudden Infant Death Syndrome, childhood leukemia, asthma, type 2 diabetes, and childhood obesity. *Id.* at p. 2.

38. The *HHS Call to Action* also cited psychological, economic and environmental benefits attributed to breastfeeding. Specifically that: breastfeeding may reduce the risk of postpartum depression; families who follow optimal breastfeeding practices could save more than \$1,200 to \$1,500 a year in expenditures for infant formula in the first year alone; If 90% of

the U.S. families followed guidelines to breastfeed exclusively for six months, the U.S. would save \$13 billion annually from reduced direct medical and indirect costs<sup>4</sup> and the cost of premature death; if 80% of families followed the guidelines, \$10.5 billion a year would be saved; and, environmentally, breastfeeding requires minimal additional resources (a small amount of additional calories is all that is required) compared to infant formula that requires a significant carbon footprint of energy to produce formula, paper containers to store and ship that largely end up in landfills and fuel to prepare, ship and store. *Id.* at pp. 3-4.

39. In January 2016, *The Lancet*, the preeminent British journal of public health, launched its comprehensive and compelling Breastfeeding Series to evaluate breastfeeding levels, the short- and long-term consequences for both mother and child, trends and inequalities, in addition to the impact breastfeeding has on the global economy. *See* [www.thelancet.com/series/breastfeeding](http://www.thelancet.com/series/breastfeeding). The Series underscores that breastfeeding reduces child morbidity and mortality, cuts treatment costs of common childhood illnesses including, diarrhea and respiratory infections, and protects mothers against ovarian and breast cancer. The Series determined that a 10% increase in breastfeeding rates would translate into at least \$312 million in annual healthcare savings in the U.S., and improving breastfeeding from current levels to 90% for the U.S. would reduce treatment costs by at least \$2.45 billion annually. *See Breastfeeding in the 21st century: epidemiology, mechanisms, and lifelong effect*, Victora, Cesar G et al., *The Lancet*, Volume 387 , Issue 10017 , 475 – 490; *Why invest, and what it will take to improve breastfeeding practices?*, Rollins, Nigel C et al., *The Lancet* , Volume 387 , Issue 10017, 491 – 504.

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<sup>4</sup> Costs related to illnesses reduced or avoided through breast-feeding include: sudden infant death syndrome, hospitalizations for lower respiratory tract infection in infancy, atopic dermatitis, childhood leukemia, childhood obesity, childhood asthma and type 1 diabetes mellitus.

40. In addition, various studies conducted by states in the context of Medicaid coverage of lactation services also demonstrate the need and reason for coverage of Comprehensive Lactation Benefits as a preventive health care benefit. North Carolina estimated that covering lactation consultations would prevent 14-18 infant deaths and save North Carolina Medicaid \$7 million in treating common and sometimes lethal infancy infections, <http://www.ncleg.net/DocumentSites/Committees/NCCFTF/Perinatal%20Health/2014-2015/PHC%20%20Lactation%20Cost%20Benefit%20Estimates.pdf> (last visited 1/12/2017).

41. Furthermore, the importance of education is a central theme in the *HHS Call to Action*:

“Unfortunately, education about breastfeeding is not always readily available to mothers nor easily understood by them. Many women rely on books, leaflets, and other written materials as their only source of information on breastfeeding, but using these sources to gain knowledge about breastfeeding can be ineffective, especially for low income women, who may have more success relying on role models. *The goals for educating mothers include increasing their knowledge and skills relative to breastfeeding and positively influencing their attitudes about it.*”

*HHS Call to Action*, *supra*, p. 11 (emphasis added).

42. The *HHS Call to Action* also highlighted that mothers need “access to trained individuals who have established relationships with members of the health care community, are flexible enough to meet mother’s needs outside of the traditional work hours and locations, and provide consistent information.” *Id.* Yet, outside of the hospital setting, mothers “may have no means of identifying or obtaining the skilled support needed to address their concerns about lactation and breastfeeding; further, there may be barriers to reimbursement for needed lactation care and services.” *HHS, Call to Action*, *supra*, p. 25.

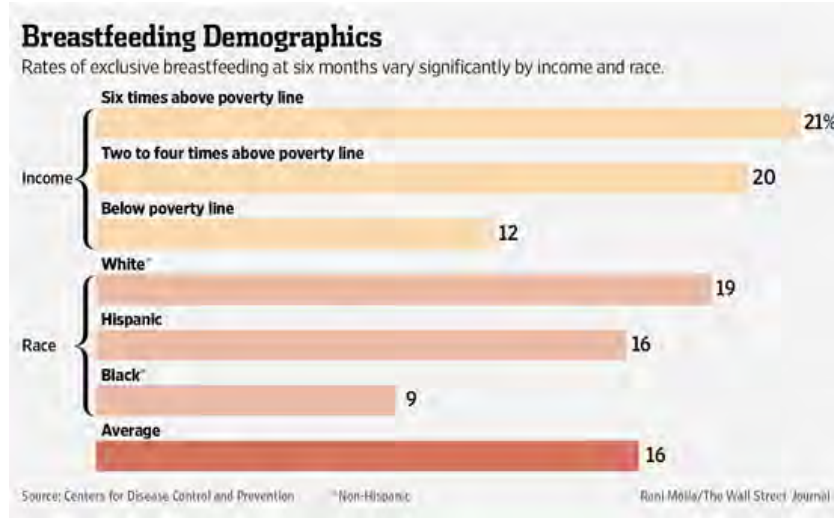
43. According to the *HHS Call to Action*, International Board Certified Lactation Consultants (“IBCLCs”) are credentialed health care professionals specializing in the clinical

management of breastfeeding, are the “only health care professionals certified in lactation management,” and are certificated by the International Board of Lactation Consultant Examiners which operates “under the direction of the U.S. National Commission for Certifying Agencies and maintains rigorous professional standards.” *Id.* at p. 27. IBCLCs work in many health care settings, such as hospitals, birth centers, physicians’ offices, public health clinics, and their own offices. There are over 15,000 certified IBCLCs in the United States; average charges range from \$120 - \$350 per session, based on location.

44. In 2013, the CDC set objectives, illustrated in the chart below, to promote, support, and ultimately increase breastfeeding rates in the United States by 2020. *See CDC, Strategies to Prevent Obesity and Other Chronic Diseases: The CDC Guide to Strategies to Support Breastfeeding Mothers and Babies*. Atlanta: HHS; 2013, available at: <http://www.cdc.gov/breastfeeding/pdf/BF-Guide-508.PDF> (last visited 1/11/2017).

<i>Healthy People 2020 Objectives</i>		
Maternal, Infant, and Child Health (MICH) Objectives	Baseline	Target
MICH 21: Increase the proportion of infants who are breastfed		
Ever	74.0%	81.9%
At 6 months	43.5%	60.6%
At 1 year	22.7%	34.1%
Exclusively through 3 months	33.6%	46.2%
Exclusively through 6 months	14.1%	25.5%

45. Over the past few decades, the rate of breastfeeding has increased, but disparities have persisted. “Research suggests that 1) race and ethnicity are associated with breastfeeding regardless of income, and 2) income is associated with breastfeeding regardless of race or ethnicity.” *Id.* at p. 9.



Wall Street Journal, *5 Reasons American Women Won't Breastfeed*, April 14, 2014, available at: <http://blogs.wsj.com/briefly/2014/04/14/5-reasons-american-women-wont-breastfeed/> (last visited 1/11/2017).

46. As reported on September 3, 2016 by *The New York Times* Editorial Board, in “America’s Shocking Maternal Deaths,” the rate at which women die during pregnancy or shortly after childbirth *has risen* materially in the United States, with the United States having the second-highest maternal mortality rate among 31 members of the Organization for Economic Cooperation and Development; only Mexico had a higher rate. For example, in Texas “the maternal mortality rate doubled from 17.7 per 100,000 live births in 2000 to 35.8 in 2014. Compare that with Germany, which had 4.1 deaths per 100,000 live births in 2014.” As the article asserted: “A big part of the problem is the inequality embedded in America’s health care system. The [ACA] made health insurance more available, but millions of families still cannot afford the care they need.” The inequality of the United States health care system exists directly because of conduct of the type alleged herein: insurers’ bolstering their bottom lines by avoiding costs of mandated women’s health care services and shifting the cost, which is more than just dollars and cents, to women. *See also, Focus On Infants During Childbirth Leaves U.S. Moms In*

*Danger*, NPR, May 12, 2017 (Finding that more American women are dying of pregnancy-related complications than any other developed country with maternal deaths increasing from 2000 to 2014); available at: <http://www.npr.org/2017/05/12/527806002/focus-on-infants-during-childbirth-leaves-u-s-moms-in-danger>.

47. Addressing the pervasive disparities that existed in the American health care system (and continue to) and securing for all women and families the immense health benefits of breastfeeding are the impetuses of the preventive service mandates of the ACA and its inclusion of providing access to and coverage of Comprehensive Lactation Benefits.

**B. Breastfeeding and Comprehensive Lactation Benefits Are Time-Sensitive.**

48. Importantly, and obviously, breastfeeding *is an extremely time-sensitive event*. Initiating breastfeeding within the first hours and days of a newborn's life can significantly impact its success. *HHS Call to Action, supra*, pp. 21-22.

49. Moreover, the need for Comprehensive Lactation Benefits often arises days after birth, when the mother and child are home, and during this postpartum period the provision of Comprehensive Lactation Benefits is essential to the continuation of successful breastfeeding. *Id.* at p. 13.

50. Breastfeeding issues arise days after birth, during which time it is critical for nursing mothers to establish a healthy milk supply. The first milk present at birth is called colostrum which is easily digested by the newborn and essential in boosting an infant's immune system. Colostrum, although present only in small amounts, provides concentrated and sufficient nutrition for a newborn until transition to mature milk occurs beginning between the second and sixth day after birth. This process is characterized by a significant increase in milk production volume occurring over approximately two weeks. During this time, inadequate milk production,

infection and/or breastfeeding problems put mothers and infants at risk indicating that immediate intervention by a trained provider in Comprehensive Lactation Benefits is required to facilitate successful breastfeeding. *See*, <http://www.lalecheleague.org/faq/colostrum.html>; <http://www.llli.org/faq/engorgement.html> (last visited 5/12/2017).

51. Further, continuation of breastfeeding upon illness or a mother's return to work presents another critical milestone; it is at such times that a mother may seek Comprehensive Lactation Benefits, as well as access to breastfeeding pumps. *HHS Call to Action, supra*, pp. 29-32.

52. Lactation support, encouragement, education and counseling must be timely and will occur during pregnancy, at the time of birth and until the child is weaned. Lactation equipment may be necessary immediately following birth, at one or several times during the first year, or continuously during the first year. Immediate access to lactation services and products is critical because the window to address such needs is narrow.

**C. Pregnancy Discrimination.**

53. Since 1978, the PDA has required employers of 15 or more employees that choose to provide their employees with health insurance to cover pregnancy-related expenses.

54. As explained by the United States Equal Employment Opportunity Commission:

The Pregnancy Discrimination Act amended Title VII of the Civil Rights Act of 1964. Discrimination on the basis of pregnancy, childbirth, or related medical conditions constitutes unlawful sex discrimination under Title VII, which covers employers with 15 or more employees, including state and local governments. Title VII also applies to employment agencies and to labor organizations, as well as to the federal government. Women who are pregnant or affected by pregnancy-related conditions must be treated in the same manner as other applicants or employees with similar abilities or limitations.

Title VII's pregnancy-related protections include:

...

- **Health Insurance**

Any health insurance provided by an employer must cover expenses for pregnancy-related conditions on the same basis as costs for other medical conditions. An employer need not provide health insurance for expenses arising from abortion, except where the life of the mother is endangered.

Pregnancy-related expenses should be reimbursed exactly as those incurred for other medical conditions, whether payment is on a fixed basis or a percentage of reasonable-and-customary-charge basis.

The amounts payable by the insurance provider can be limited only to the same extent as amounts payable for other conditions. No additional, increased, or larger deductible can be imposed.

Employers must provide the same level of health benefits for spouses of male employees as they do for spouses of female employees.

The U.S. Equal Employment Opportunity Commission, *Facts About Pregnancy Discrimination*, Sept. 8, 2008, available at: <https://www.eeoc.gov/facts/fs-preg.html> (last visited Sept. 29, 2016).

55. In addition, the U.S. Department of Health & Human Services, Office for Civil Right's (OCR) specifically states that it "recognizes the difficulty many pregnant people experience in accessing certain health care services". The ACA was to remedy and eliminate such difficulties.

**D. Comprehensive Lactation Benefits Are a Preventive Service Required by the ACA.**

56. In 2010, the ACA expanded the maternity-related coverage requirement to all new individual and small group policies. 42 U.S.C. § 18022(b)(1)(D). Thus, beginning August 1, 2012, unless grandfathered, all health insurance plans, including employer-sponsored health plans, must cover, with no charge to the patient for "a copayment, coinsurance or deductible for those services when they are delivered by a network provider," "[c]omprehensive lactation support and counseling, by a trained provider during pregnancy and/or in the postpartum period,



and costs for renting breastfeeding equipment.”<sup>5</sup> U.S. Department of Health and Human Services, Health Resource and Services Administration, *Women’s Preventive Services Guidelines*, available at: <http://www.hrsa.gov/womensguidelines/> (last visited Sept. 29, 2016); 29 C.F.R. 2590.715-2713. Section 715 of ERISA, 29 U.S.C. § 1185d, incorporates the pertinent requirements of the ACA into ERISA.

57. Section § 2713 of the ACA, which is codified at 42 U.S.C. § 300gg-13, requires non-grandfathered group health care plans and health insurers offering group or individual health insurance to provide coverage for a range of preventive services and mandates that the plans, “at a minimum provide coverage for and shall not impose any cost sharing requirements” for such services. Specifically, the ACA provides the following in relevant part:

A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for . . . (4) with respect to women, such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph...

42 U.S.C. § 300gg-13(a)(4).

58. The term “cost-sharing” “in general” includes “deductibles, co-insurance, copayments, or similar charges; and any other expenditure required of an insured individual

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<sup>5</sup> With the expansion of women’s preventive services beginning August 1, 2012, “about 47 million women ***gained guaranteed access to*** additional preventive services ***without paying more at the doctor’s office.***” HHS, *Affordable Care Act Rules on Expanding Access to Preventive Services for Women*, <http://www.hhs.gov/healthcare/facts-and-features/fact-sheets/aca-rules-on-expanding-access-to-preventive-services-for-women/index.html> (last visited 9/7/2016) (emphasis added). And, under the ACA provisions, the nearly 4 million children born annually in the United States and their mothers ***are entitled to timely, comprehensive lactation education and support.*** CDC, *National Vital Statistics Report*, Vol. 4, number 1, at p. 1 (Jan. 1, 2015) (available at: [http://www.cdc.gov/nchs/data/nvsr/nvsr64/nvsr64\\_01.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr64/nvsr64_01.pdf) (last visited 9/7/2016)).

which is a qualified medical expense....with respect to essential health benefits covered under the plan.” 42 U.S.C § 18022(c)(3)(A).

59. The required preventive services derive from recommendations made by four expert medical and scientific bodies – the U.S. Preventive Services Task Force (“USPSTF”), the Advisory Committee on Immunization Practices, the HRSA, and the Institute of Medicine committee on women’s clinical preventive services. The USPSTF is an independent panel of sixteen nationally recognized experts in primary care and prevention who systematically reviews the evidence of effectiveness and develops recommendations for clinical preventive services. The panel is convened by the Agency for Healthcare Research and Quality, which is part of HHS. Recommendations issued by the USPSTF are considered to be the “gold standard” for clinical preventive services. When analyzing a particular preventive service, the USPSTF evaluates the balance of potential benefits against harms, and then assigns a letter grade to the service. A letter grade of “A” or “B” means the service is recommended.<sup>6</sup> In its Final Recommendation Statement issued in October 2008, USPSTF recommended “intervention during pregnancy and after birth to promote and support breastfeeding” with a grade B.<sup>7</sup>

60. On October 25, 2016, an updated Evidence Report and Systematic Review with respect to Primary Care Interventions to Support Breastfeeding was issued updating the 2008 review (<http://jamanetwork.com/journals/jama/fullarticle/2571248> (last visited 11/18/2016)), and the USPSTF again recommended, after reviewing the evidence on the effectiveness of interventions to support breastfeeding, “providing interventions during pregnancy and after birth to support breastfeeding (B recommendation).” <http://jamanetwork.com/journals/>

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<sup>6</sup> See USPSTF, available at: <http://www.uspreventiveservicestaskforce.org/> (last visited 5/11/2016).

<sup>7</sup> See USPSTF, available at: <http://www.uspreventiveservicestaskforce.org/Page/Document/UpdateSummaryFinal/breastfeeding-counseling> (last visited 10/26/2016).

jama/fullarticle /2571249?resultClick=1 (last visited 1/11/2017). The USPSTF reiterated the importance and effectiveness of Comprehensive Lactation Benefits as follows:

There is convincing evidence that breastfeeding provides substantial health benefits for children and adequate evidence that breastfeeding provides moderate health benefits for women. However, nearly half of all mothers in the United States who initially breastfeed stop doing so by 6 months, and there are significant disparities in breastfeeding rates among younger mothers and in disadvantaged communities.

\* \* \*

Adequate evidence indicates that interventions to support breastfeeding increase the duration and rates of breastfeeding, including exclusive breastfeeding.

61. The USPSTF recommendations are specifically incorporated into Section 2713 of the Public Health Service Act (29 CFR 2590.715-2713) as follows:

[Non-grandfathered health plans] must provide coverage for all of the following items and services, and may not impose any cost-sharing requirements...:

(i) Evidenced-based items or services that have in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force with respect to the individual involved...;

\* \* \*

(iv) With respect to women...evidence-informed preventive care and screening provided for in comprehensive guidelines supported by the Health Resources and Services Administration ....

62. The comprehensive HRSA Guidelines, Women's Preventive Services: Required Health Plan Coverage Guidelines, were adopted and released on August 1, 2012, and expanded the previously required intervention to promote and support breastfeeding **by requiring new plans, as of August 1, 2012, to cover comprehensive prenatal and postnatal lactation support and counseling, and breastfeeding equipment and supplies, such as breast pumps, for the duration of breastfeeding without co-payments, deductibles, or co-insurance.**<sup>8</sup>

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<sup>8</sup> See HHS, Women's Preventive Services Guidelines, available at: <http://www.hrsa.gov/womensguidelines/> (last visited 10/26/2016).

63. Section 1001 of the ACA amends § 2713 of the Public Health Services Act to provide that all non-grandfathered group health plans and health insurance issuers offering group or individual coverage are required to cover one hundred percent (100%) of the costs of certain recommended preventive services for women, including “comprehensive lactation support and counseling and costs of renting or purchasing breastfeeding equipment for the duration of breastfeeding.”<sup>9</sup>

64. The ACA requirement mandating comprehensive prenatal and postnatal lactation support, supplies, and counseling applies to *all* private plans – including individual, small group, large group, and self-insured plans in which employers contract administrative services to a third party payer – with the exception of those plans that maintain “grandfathered” status.

65. The DOL, HHS, and the Treasury Department (the “Departments”) are the federal entities specifically charged with establishing regulations and guidelines to implement the ACA. The Departments have jointly prepared Frequently Asked Questions (“FAQs”) regarding the implementation of the ACA, including FAQs regarding preventive services and Comprehensive Lactation Benefits. These FAQs are publicly available, including through the DOL and CMS websites.

66. These FAQs contain specific implementation procedures and clarifications issued by these rule making bodies. In the FAQs Part XXIX, dated October 23, 2015, the Departments reiterated previous guidance and “answer questions from stakeholders to help people understand the laws and benefit from them, as intended.” See <https://www.dol.gov/>

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<sup>9</sup> See FAQs About Affordable Care Act Implementation (Part XII), Q20, which states that “coverage of comprehensive lactation support and counseling and costs of renting or purchasing breastfeeding equipment extends for the duration of breastfeeding,” available at: [www.dol.gov/ebsa/faqs/faq-aca12.html](http://www.dol.gov/ebsa/faqs/faq-aca12.html) and [www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/aca\\_implementation\\_faqs12.html](http://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/aca_implementation_faqs12.html) (last visited 10/10/2016).

sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-xxix.pdf (last visited 10/18/2016).

67. Questions 1 through 5 of the FAQs Part XXIX, which specifically address Comprehensive Lactation Benefits under the ACA are provided here (emphasis added):

**Q1: Are plans and issuers required to provide a list of the lactation counseling providers within the network?**

*Yes.* The HRSA guidelines provide for coverage of comprehensive prenatal and postnatal lactation support, counseling, and equipment rental as part of their preventive service recommendations, including lactation counseling...group health plans subject to the Employee Retirement Income Security Act (ERISA)...must provide a Summary Plan Description (SPD) that describes provisions governing the use of network providers, *the composition of the provider network*, and whether, and under what circumstances, coverage is provided for out-of-network services ...issuers of qualified health plans (QHPs) in the individual market Exchanges and the SHOPS currently *must make their provider directories available online*.

**Q2: My group health plan has a network of providers and covers recommended preventive services without cost sharing when such services are obtained in-network. However, the network does not include lactation counseling providers. Is it permissible for the plan to impose cost sharing with respect to lactation counseling services obtained outside the network?**

*No.* As stated in a previous FAQ, while nothing in the preventive services requirements under section 2713 of the PHS Act or its implementing regulations requires a plan or issuer that has a network of providers to provide benefits for preventive services provided out-of-network, *these requirements are premised on enrollees being able to access the required preventive services from in-network providers*...if a plan or issuer does not have in its network a provider who can provide a particular service, then the plan or issuer must cover the item or service when performed by an out-of-network provider and not impose cost sharing with respect to the item or service. Therefore, if a plan or issuer does not have in its network a provider who can provide lactation counseling services, the plan or issuer must cover the item or service when performed by an out-of-network provider without cost sharing.

**Q3: The State where I live does not license lactation counseling providers and my plan or issuer will only cover services received from providers licensed by the State. Does that mean that I cannot receive coverage of lactation counseling without cost sharing?**

*No.* Subject to reasonable medical management techniques, ***lactation counseling must be covered*** without cost sharing by the plan or issuer when it is performed by any provider acting within the scope of his or her license or certification under applicable State law. Lactation counseling could be provided by another provider type acting within the scope of his or her license or certification (for example, a registered nurse), and the plan or issuer would be required to provide coverage for the services without cost sharing.

**Q4: A plan or issuer provides coverage for lactation counseling without cost sharing only on an inpatient basis. Is it permissible for the plan or issuer to impose cost sharing with respect to lactation counseling received on an outpatient basis?**

*No.* If a recommendation or guideline does not specify the frequency, method, treatment, or setting for the provision of a recommended preventive service, then the plan or issuer may use reasonable medical management techniques to determine any such coverage limitations. However, ***it is not a reasonable medical management technique to limit coverage for lactation counseling to services provided on an in-patient basis.*** Some births are never associated with a hospital admission (e.g., home births assisted by a nurse midwife), and it is not permissible to deny coverage without cost sharing for lactation support services in this case. Moreover, ***coverage for lactation support services without cost sharing must extend for the duration of the breastfeeding which, in many cases, extends beyond the in-patient setting for births that are associated with a hospital admission.***

**Q5: Are plans and issuers permitted to require individuals to obtain breastfeeding equipment within a specified time period (for example, within 6 months of delivery) in order for the breastfeeding equipment to be covered without cost sharing?**

*No.* ***The requirement to cover the rental or purchase of breastfeeding equipment without cost sharing extends for the duration of breastfeeding,*** provided the individual remains continuously enrolled in the plan or coverage.<sup>10</sup>

68. Among other things, the FAQs confirm that:

(a) Defendants are required to provide a list of network lactation consultants.

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<sup>10</sup> See CMS, “FAQs About Affordable Care Act Implementation (Part XXIX) And Mental Health Parity Implementation” (10/23/2015), Q1-5, available at: <https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/FAQs-Part-XXIX.pdf> (last visited 10/14/2016) (emphasis added).

- (b) If a plan does not have in-network lactation consultant providers, the plan may not impose cost sharing for lactation consulting services obtained out of network.
- (c) Plans may not limit lactation counseling services without cost sharing to an inpatient basis.
- (d) Coverage for lactation support services must extend for the duration of breastfeeding.
- (e) Plans may not require individuals to obtain equipment within a specified time period, such as within six months of delivery, in order for it to be covered without cost sharing.

69. Having in-network providers of the required preventive service is key and is highlighted in the following relevant subsections of 29 CFR 2590.715-2713(a)(3) ((titled “Coverage of preventive health services”)(emphasis added)):

(3) *Out-of-network providers* - (i) Subject to paragraph (a)(3)(ii) of this section, nothing in this section requires a plan or issuer ***that has a network of providers to provide benefits for items or services described in paragraph (a)(1) of this section that are delivered by an out-of-network provider.*** Moreover, nothing in this section precludes a plan or issuer ***that has a network of providers from imposing cost-sharing requirements for items or services described in paragraph (a)(1) of this section that are delivered by an out-of-network provider.*** (ii) ***If a plan or issuer does not have in its network a provider*** who can provide an item or service described in paragraph (a)(1) of this section, ***the plan or issuer must cover the item or service when performed by an out-of-network provider, and may not impose cost sharing*** with respect to the item or service.

70. Accordingly, if there is not a network, the insured must be provided the covered service at ***no greater cost*** than if the service had been provided by a network provider. This position is consistent with that taken by the Illinois Department of Insurance, as set out in a July



17, 2015, letter to Breastfeed Chicago, a breastfeeding support and advocacy organization. The then-Acting Director of the Department stated the following concerning provider networks:

Illinois requires HMO and PPO plans to have adequate provider networks. If a provider network does not have the appropriate preferred providers due to insufficient number, type or distance, the administrator must ensure, directly or indirectly, that the beneficiary will be provided the covered service at no greater cost to the beneficiary than if the service had been provided by a preferred provider. This does not apply to someone who willfully uses an out of network provider when network providers are available.

<https://breastfeedchicago.org/wp-content/uploads/2015/09/idoiresponse.pdf> (last visited 05/11/2017).

71. Plainly, if an insurer maintains a network of providers for Comprehensive Lactation Benefits, then an insured who elects or prefers to go to an out-of-network provider may have a cost imposed on her. However, if an insured consulted with an in-network provider there would be zero out-of-pocket cost to her. Plaintiffs and the members of the Classes, however, had no such choice to consult with an in-network provider. Yet, Defendants have forced Plaintiffs and the members of the Classes to either forego the preventive services or go out-of-network and pay the price. That violates the ACA, the terms of the plan documents and ERISA.

**E. Defendants Have Engaged in a Systemic Practice With Respect to Comprehensive Lactation Benefits that Violates the Preventive Service Mandates of the ACA.**

72. Defendants provide, and serve as an administrator for, non-grandfathered health plans that are required to cover certain preventive health services and screenings mandated by the ACA, including Comprehensive Lactation Benefits, as alleged *supra*.

73. Defendants acknowledge that the ACA preventive services are to be provided at no out-of-pocket costs<sup>11</sup>:

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<sup>11</sup> Source: <http://hcsc2015srr.com/online-community-connect/>; [https://connect.bcbsil.com/cfs-file/\\_\\_key/communityserver-blogs-components-weblogfiles/00-00-00-00-04/5008.What-Is-](https://connect.bcbsil.com/cfs-file/__key/communityserver-blogs-components-weblogfiles/00-00-00-00-04/5008.What-Is-)



**HCSC**  
Health Care Service Corporation






2015 Social Responsibility Report

**WHAT IS THE AFFORDABLE CARE ACT?**


The Affordable Care Act (ACA) has changed the way some Americans get health insurance. To get all the benefits of ACA, shop for a plan with Blue Cross and Blue Shield of Texas (BCBSTX).


**Jan 2014**  
**01**

As of Jan. 1, 2014, the Affordable Care Act has new requirements for health insurance plans. This means that all new BCBSTX major medical plans:


-  Offer coverage for all, even if you have a pre-existing condition
-  Provide essential health benefits
-  Accept premium tax credits that help eligible members pay for coverage
-  Provide preventive services with no out-of-pocket costs
-  Guarantee emergency access (without prior approval)

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**Your family's race to better health begins with a single step:  
Taking advantage of preventive health care services**

Preventive check-ups and screenings can help find illnesses and medical problems early and improve the health of you and everyone in your family.

Your health plan covers screenings and services with no out-of-pocket costs like copays or coinsurance as long as you visit a doctor in your plan's provider network. This is true even if you haven't met your deductible.


Some examples of preventive care services covered by your plan include general wellness exams each year, recommended vaccines, and screenings for things like diabetes, cancer or depression. Preventive services are provided for women, men and children of all ages.

For more details on what preventive services are covered at no cost to you, refer to the back of this filer for a listing of services, or see your benefits materials.

Learn more on immunization recommendations and schedules by visiting the Centers for Disease Control and Prevention website at [www.cdc.gov/vaccines](http://www.cdc.gov/vaccines).

**JUST FOR WOMEN**

- ☐ Aspirin for preeclampsia prevention
- ☐ Breast cancer screening, genetic testing and counseling
- ☐ Breastfeeding support, supplies and counseling



74. In addition, HCSC's health plans and plan documents set forth, in substantially the same manner, that non-grandfathered health plans provide preventive care benefits consistent with the provisions of the ACA, including for breastfeeding support, supplies and consultation. For example, BCBSIL's Small Group (1-50) PPO Plan<sup>12</sup>, tracks specifically the ACA Preventive Services mandate, and lists breastfeeding comprehensive support as a preventive care service:

<sup>12</sup> <https://www.bcbsil.com/PDF/policy-forms/ppo-small-group-off-1-50-sample-il.pdf> (last visited 05/09/2017).

**Preventive Care Services**

In addition to the benefits otherwise provided for in this Certificate, (and notwithstanding anything in your Certificate to the contrary), the following benefits for preventive care services will be considered Covered Services and will not be subject to any deductible, Coinsurance, Copayment or dollar maximum when such services are received from a Participating Provider or Participating Pharmacy that is contracted for such service:

- \_\_\_\_\_ • evidence-based items or services that have in effect a rating of "A" or "B" in the current recommendations of the United States Preventive Services Task Force ("USPSTF");
- \_\_\_\_\_ • immunizations recommended by the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention ("CDC") with respect to the individual involved;
- \_\_\_\_\_ • evidenced-informed preventive care and screenings provided for in the comprehensive guidelines supported by the Health Resources and Services Administration ("HRSA") for infants, children, and adolescents; and
- \_\_\_\_\_ • with respect to women, such additional preventive care and screenings, not described above, as provided for in comprehensive guidelines supported by the HRSA.

For purposes of this preventive care services benefit provision, the current recommendations of the USPSTF regarding breast cancer screening and mammography and prevention will be considered the most current (other than those issued in or around November 2009).

The preventive care services described above may change as USPSTF, CDC and HRSA guidelines are modified. For more information, you may access the website at [www.bcbsil.com](http://www.bcbsil.com) or contact Customer Service at the toll-free number on your identification card.

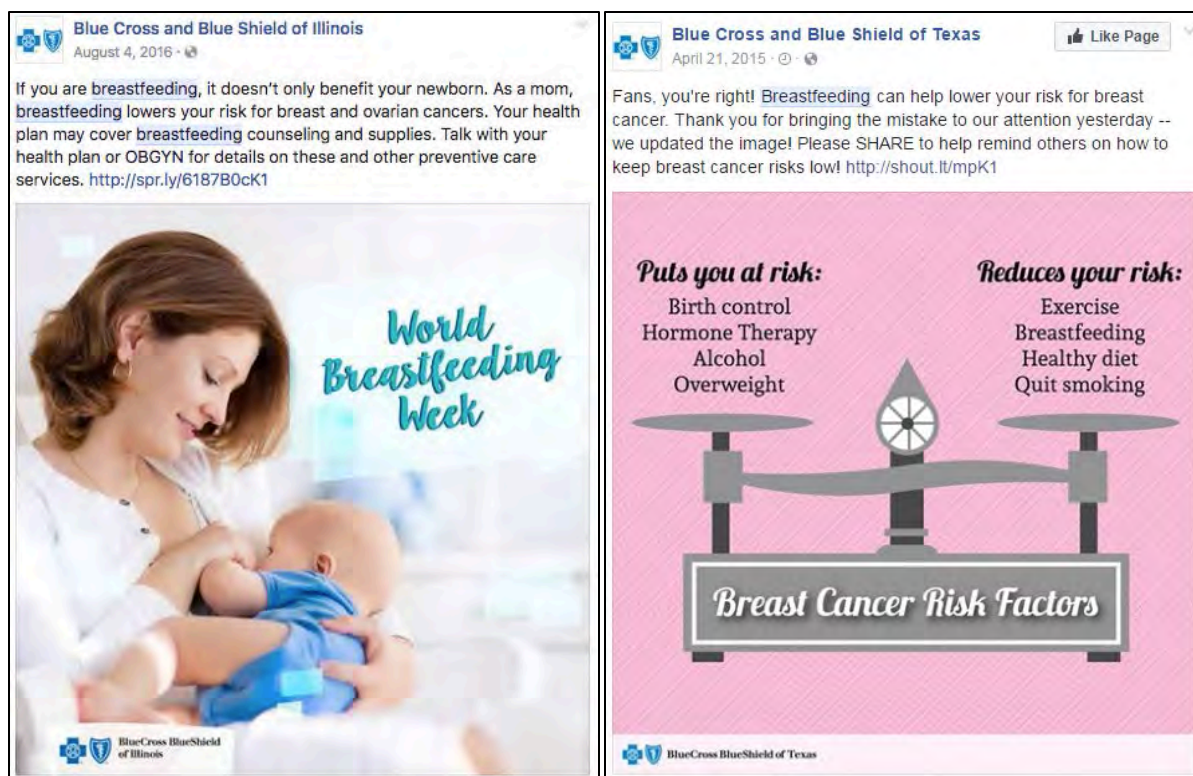
If a recommendation or guideline for a particular preventive health service does not specify the frequency, method, treatment or setting in which it must be provided, the Plan may use reasonable medical management techniques to determine coverage.

**Preventive Care Services for Women (including pregnant women):**

1. Anemia screening on a routine basis for pregnant women
2. Bacteriuria urinary tract screening or other infection screening for pregnant women
3. BRCA counseling about genetic testing for women at higher risk
4. Breast cancer chemoprevention counseling for women at higher risk
5. Breastfeeding comprehensive support and counseling from trained providers, as well as access to breastfeeding supplies, for pregnant and nursing women
6. Cervical cancer screening for sexually active women
7. Chlamydia infection screening for younger women and women at higher risk
8. Contraception: FDA approved contraceptive methods, sterilization procedures, and patient education and counseling, not including abortifacient drugs
9. Domestic and interpersonal violence screening and counseling for all women
10. Folic acid supplements for women who may become pregnant
11. Gestational diabetes screening for women 24 to 28 weeks pregnant and those at high risk of developing gestational diabetes

75. Furthermore, Defendants acknowledge the health benefits of breastfeeding for infants, children, and mothers, and actively promote breastfeeding on each HCSC divisions' Facebook page. The posts, which appear almost uniformly across each HCSC divisions' Facebook page, include the following:





76. Additionally, each HCSC division, with the exception of BCBSNM, maintains a webpage entitled, "3 Reasons Why Women Should Choose Blue." Reason #2 is that the HCSC divisions have the *largest* provider network in each respective state which allows women to select, with ease, providers of women's preventive services and receive such services "with no out-of-pocket costs."<sup>13</sup>

<sup>13</sup> Sources: <https://connect.bcbsil.com/getting-health-insurance/b/weblog/posts/3-reasons-why-women-should-choose-blue>; <https://connect.bcbstx.com/getting-health-insurance/b/weblog/posts/3-reasons-why-women-should-choose-blue>; <https://connect.bcbsok.com/getting-health-insurance/b/weblog/posts/3-reasons-why-women-should-choose-blue>; <https://connect.bcbsmt.com/getting-health-insurance/b/weblog/posts/3-reasons-why-women-should-choose-blue> (last visited 05/11/2017).

*Women's Preventive Services*

Our health plans cover the following types of preventive services for women and recommended screenings with no out-of-pocket costs—as long as you visit a doctor in your health plan's provider network. Finding a doctor that provides these screenings and services should be no problem, since we have the largest network of doctors in the state.



- An annual wellness visit
- Osteoporosis screenings
- Certain cancers and diabetes testing
- Mammograms
- Pap smears
- Gestational diabetes screenings
- Breastfeeding support, counseling and supplies – including manual and electric breast pumps
- Counseling for sexually transmitted infections
- Interpersonal and domestic violence screening and counseling
- Immunizations such as an annual flu shot
- Counseling and screening for HIV—the virus that can cause AIDS
- Testing for Human Papillomavirus (HPV) — the virus that can cause cervical cancer
- FDA-approved contraception methods and counseling

77. However, the foregoing information is a subterfuge and misleading, and has not resulted in women getting access to and coverage for Comprehensive Lactation Benefits. Defendants fail to establish networks of lactation consultants and fail to provide timely, complete and accurate information to women of the identity of in-network lactation consultants. Defendants prevent women from getting access to timely and necessary Comprehensive Lactation Benefits and circumvent the clear requirement that health plans provide, at no-cost, Comprehensive Lactation Benefits as a preventive service, just like all other preventive services.

78. Defendants have also wrongly erected significant administrative barriers that prevent and deter women from obtaining timely Comprehensive Lactation Benefits. Among these barriers, Defendants have failed to establish a network of providers and failed to provide

plan participants with any list or directory that clearly discloses the in-network providers (if any) of Comprehensive Lactation Benefits.<sup>14</sup>

79. Defendants' health plans and plan documents set forth, in substantially the same manner, the availability of provider lists and how plan participants should obtain such information. For example, BCBSIL's Small Group (1-50) PPO Plan, states that "[a]s a participant in the Participating Provider Option a directory of Participating Providers is available" by visiting, "the Blue Cross Blue Shield of Illinois Web site at [www.bcbsil.com](http://www.bcbsil.com) for a list of Participating Providers."<sup>15</sup> (emphasis in original).

#### **THE PARTICIPATING PROVIDER OPTION**

Your employer has chosen Blue Cross and Blue Shield's Participating Provider Option for the administration of your Hospital and Physician benefits and all other Covered Services. The Participating Provider Option is a program of health care benefits designed to provide you with economic incentives for using designated Providers of health care services.

As a participant in the Participating Provider Option a directory of Participating Providers is available to you. You can visit the Blue Cross and Blue Shield of Illinois Web site at [www.bcbsil.com](http://www.bcbsil.com) for a list of Participating Providers. While there may be changes in the directory from time to time, selection of Participating Providers by Blue Cross and Blue Shield will continue to be based upon the range of services, geographic location and cost-effectiveness of care. Notice of changes in the network will be provided to your Group Administrator annually, or as otherwise required, to allow you to make selection within the network. However, you are urged to check with your Provider before undergoing treatment to make certain of its participation status. Although you can go to the Hospital or Professional Provider of your choice, benefits under the Participating Provider Option will be greater when you use the services of a Participating Provider.

80. According to Defendants, HCSC's division websites purportedly give insureds the ability to find providers via an online tool called Provider Finder®. However, Provider Finder® does not offer lactation, breastfeeding, IBCLC or other lactation consultation/breastfeeding

<sup>14</sup> Physicians and clinicians who "are ambivalent about breastfeeding or who feel inadequately trained to assist patients with breastfeeding may be unable to properly counsel their patients on specifics about breastfeeding techniques, current health recommendations on breastfeeding, and strategies to combine breastfeeding and work." *HHS Call to Action, supra*, p. 15. In a recent study of obstetricians' attitudes, 75% admitted they had either inadequate or no training in how to appropriately educate mothers about breastfeeding. The information on breastfeeding included in medical texts is often incomplete, inconsistent, and inaccurate." *Id.* at p. 26.


<sup>15</sup> <https://www.bcbsil.com/PDF/policy-forms/ppo-small-group-off-1-50-sample-il.pdf>



counseling descriptions as a searchable “Provider Type” or “Provider Specialty,” as depicted on the following screenshots:

Search performed at <https://public.hcsc.net/providerfinder/search.do?corpEntCd=IL1&nextPage=networkplan&residencestate=> (last visited 05/11/2017).

What are provider types?	
Need help determining what type of provider to search? Check the guide below for descriptions to help you tailor your search for doctors, hospitals, and other health care providers.	
Provider Type	Provider Type Description
<a href="#">Behavioral Health Facilities</a>	A duly licensed institution specializing in diagnosis and treatment related to behavioral or mental health issues.
<a href="#">Behavioral Health Provider</a>	Psychiatrists are medical doctors (MD or DO) and are included in this group. Also included in this group are non-physician professionals who are trained and licensed in psychotherapy, counseling, or social work services related to the diagnosis and treatment of behavioral or mental health conditions. Examples include licensed clinical psychologists, licensed professional clinical counselors, and licensed independent social workers.
<a href="#">Doctor Or Medical Professional</a>	A 'physician or other qualified medical professional' is an individual who by education, training, licensure /regulation, and facility privileging (when applicable) who performs a professional service within his/her scope of practice
<a href="#">Freestanding Outpatient Facilities</a>	A Freestanding Outpatient Facility offers services diagnostic or surgical services in a non-hospital based setting.
<a href="#">Hospital Or Other Facility</a>	Centers of dialysis, centers for patients terminals, centers surgical and centers of rehabilitation, among others.
<a href="#">Immediate Care Centers</a>	A facility for treatment of non emergency, non urgent illnesses or injuries
<a href="#">Medical Group Or Other Type</a>	An association of physicians, including PCPs and specialists, and other health care providers, that offers services used to support diagnosis and treatment of a patient's condition. Services can include diagnostic services (X-rays), home health services, physical therapy, and occupational therapy.
<a href="#">Other Healthcare Professional</a>	Other licensed health care providers, including but not limited to physical therapists, optometrist, optician, audiologist, nutritionist, occupational therapist, and speech therapists.
<a href="#">Primary Care Physician</a>	Primary Care Physicians (PCPs) are professionals who have either an MD or DO degree and are licensed to practice medicine. PCPs focus on the "whole person" and help you coordinate your health care, including referrals.
<a href="#">Retail Health Clinic</a>	Health care clinics located in retail stores, supermarkets and pharmacies that treat uncomplicated minor illnesses and provide preventative health care services.



**BlueCross BlueShield  
of Illinois**

**Provider Finder®**  
 Last Updated: 05/10/2017  
[Search](#) | [FAQs](#) | [Company Information](#) | [Disclaimer](#) | [Language Assistance](#) | [en Español](#)

### What are specialties?

Need help determining what type of specialist to search? Check the guide below for descriptions to help you tailor your search for physicians and other health care providers.

[A](#) [B](#) [C](#) [D](#) [E](#) [F](#) [G](#) [H](#) [I](#) [J](#) [K](#) [L](#) [M](#) [N](#) [O](#) [P](#) [Q](#) [R](#) [S](#) [T](#) [U](#) [V](#) [W](#) [X](#) [Y](#) [Z](#)

Specialty Text	Specialty Description
<a href="#">Acupuncture</a>	The practice of inserting needles into specific exterior body locations for therapeutic purposes.
<a href="#">Addiction Psychiatry</a>	The psychiatric specialty that deals with the treatment of addiction.
<a href="#">Adolescent Medicine</a>	A family medicine physician with multidisciplinary training in the unique physical, psychological and social characteristics of adolescents and their health care problems and needs.
<a href="#">Allergy/Immunology</a>	The medical specialty concerned with the diagnosis and treatment of allergic conditions and diseases of the immune system.
<a href="#">Ambulance Services</a>	An emergency vehicle used for transporting patients to a health care facility after injury or illness.
<a href="#">Anatomic &amp; Cln Pathology</a>	The medical specialty that is concerned with the diagnosis of disease based on the gross, microscopic, and molecular examination of organs, tissues, and whole bodies as well as diagnosis via laboratory analysis.
<a href="#">Anatomic Pathology</a>	The medical specialty that is concerned with the diagnosis of disease based on the gross, microscopic, and molecular examination of organs, tissues, and whole bodies.
<a href="#">Anesthesiology</a>	The field concerned with providing pain relief during surgery, childbirth, and other procedures.
<a href="#">Audiology</a>	The field concerned with diagnosing hearing disorders. Audiologists are not medical doctors.
<a href="#">Blood Banking &amp; Transfusion Medicine</a>	Blood banking/transfusion medicine is responsible for the maintenance of an adequate blood supply, blood donor and patient-recipient safety and appropriate blood utilization.

...

<a href="#">Home Infusion Therapy</a>	Drug therapy rendered in the home to an individual who is confined to the home.
<a href="#">Hospice &amp; Palliative Medicine</a>	A physician with the special knowledge and skills to prevent and relieve pain and suffering related to terminal illnesses and end-of-life care.
<a href="#">Imaging Center</a>	A facility with the equipment to produce various types of radiologic and electromagnetic images and a professional staff to interpret the images.
<a href="#">Immunization Clinic</a>	a panel of healthcare professionals that provide immunizations at convenient locations, during convenient hours, with no appointments and minimal wait times.
<a href="#">Internal Medicine</a>	The medical specialty concerned with the preventive care, diagnosis, and non-surgical treatment of adults.
<a href="#">Interventional Cardiology</a>	A branch of the medical specialty of cardiology that deals specifically with the catheter based treatment of structural heart diseases.
<a href="#">Lab Tech</a>	A facility for the examination of materials derived from the human body for the purpose of providing information for the diagnosis, prevention, or treatment of any disease or impairment of, human beings.
<a href="#">Licensed Clinical Social Worker</a>	An LCSW is a master's degree level social worker who is licensed by the state to practice independently. The practice of social work requires the application of social work theory, methods, and ethics to restore social, psychosocial, or biopsychosocial functioning of individuals, couples, families, groups, and/or persons who are adversely affected by psychosocial stress or health impairment. Treatment methods include but are not limited to individual, marital, family, and group therapy.
<a href="#">Licensed Genetic Counselor</a>	A professional who has been trained in the science of human genetics and is licensed to provide genetic counseling and guidance.
<a href="#">Licensed Marriage/Family Therapy</a>	A Licensed Marriage and Family Therapist holds a masters degree and is licensed by the state to provide professional therapy services to individuals, families, and couples, singly or in groups, and involves the professional application of family systems theories and techniques. Marriage and family therapy includes the evaluation and remediation of cognitive, affective, behavioral, or relational dysfunction within the context of marriage or family systems.
<a href="#">Maternal &amp; Fetal Medicine</a>	A medical specialty concerned with the diagnosis and treatment of women with complications of pregnancy; pre-existing medical conditions which may be impacted by pregnancy; and medical conditions which impact the pregnancy itself.

Search performed at <https://public.hcsc.net/providerfinder/search.do?corpEntCd=IL1&nextPage=networkplan&residencestate=> (last visited 05/11/2017).



81. In addition, a search on Provider Finder of “all networks and plans” in each state in which each HCSC division operates for, for example, hospitals or obstetrics-gynecology, results in a list of thousands of providers and facilities (5,026 for BCBSIL “obstetrics-gynecology”) but with *no indication of whether or not they are lactation consultants, breastfeeding counselors or IBCLCs, or provide any aspect of the Comprehensive Lactation Benefit ACA mandated preventive service:*

**BlueCross BlueShield of Illinois** **Provider Finder®**  
Last Updated: 05/10/2017

Searched by: IL > Obstetrics-Gynecology

**You've Selected:**  
State: IL  
Specialty: Obstetrics-Gynecology (Remove)

**Narrow your results by:**  
Filter Zip Code  
Filter City  
Filter County  
Filter Hospital Affiliation  
Filter Provider Type  
Filter Network Type  
Filter Essential Community Providers  
Filter Language  
Filter Hospital Safety Score  
Filter Gender  
Filter Extended Hours

**Close Important Notes:**  
Some providers may not be available in the near future. Please view the provider profile to view details.

**Joining Network or Location:**  
This provider will be joining the network and/or location soon. Services provided may not be covered until this provider is active.

**Leaving Network or Location:**  
This provider will be leaving the network and/or location soon. Services provided after departure will be out-of-network.

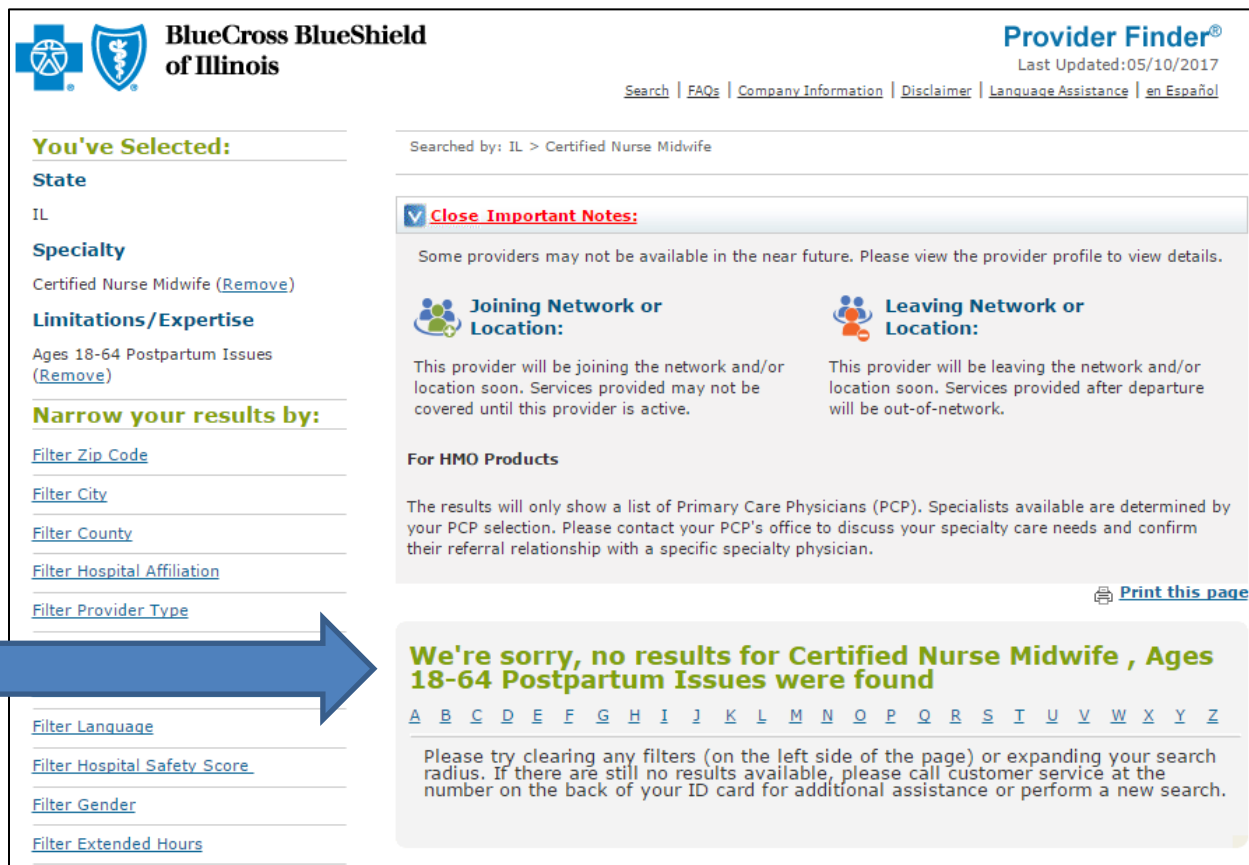
**For HMO Products**  
The results will only show a list of Primary Care Physicians (PCP). Specialists available are determined by your PCP selection. Please contact your PCP's office to discuss your specialty care needs and confirm their referral relationship with a specific specialty physician.

**Results 1 - 50 (of 5,026)**

Name	Specialty	Network Type
<b>Stein, Rebecca S, MD</b> 4480 Utica Ridge Rd Ste 1140 Bettendorf, IA 52722 (563)742-5700	Obstetrics-Gynecology	Participating Provider Organization
<b>Barr, Andria L, DO</b> 4480 Utica Ridge Rd Ste 1140 Bettendorf, IA 52722 (563)742-5700	Obstetrics-Gynecology	Blue Choice PPO <sup>SM</sup> Blue Choice Preferred PPO <sup>SM</sup> Blue Options <sup>SM</sup> /Blue Choice Options <sup>SM</sup> Participating Provider Organization

Search performed at <https://public.hcsc.net/providerfinder/search.do?corpEntCd=IL1&nextPage=networkplan&residencestate=> (last visited 05/11/2017).

82. Even if an insured were to try to focus a search on a possible lactation consultant by searching specialties such as “Certified Nurse Midwife,” “Certified Nurse Practitioner,” or “Certified Nurse Specialist” for “Ages 18-64 Postpartum Issues,” the results show “no results” for the entire state of Illinois, as depicted in the following screenshots.



**BlueCross BlueShield of Illinois** **Provider Finder®**  
Last Updated: 05/10/2017

[Search](#) | [FAQs](#) | [Company Information](#) | [Disclaimer](#) | [Language Assistance](#) | [en Español](#)

Searched by: IL > Certified Nurse Midwife

**You've Selected:**

**State**  
IL

**Specialty**  
Certified Nurse Midwife ([Remove](#))

**Limitations/Expertise**  
Ages 18-64 Postpartum Issues ([Remove](#))

**Narrow your results by:**

[Filter Zip Code](#)

[Filter City](#)

[Filter County](#)

[Filter Hospital Affiliation](#)

[Filter Provider Type](#)

[Filter Language](#)

[Filter Hospital Safety Score](#)

[Filter Gender](#)

[Filter Extended Hours](#)

☒ **Close Important Notes:**

Some providers may not be available in the near future. Please view the provider profile to view details.

**Joining Network or Location:**  
This provider will be joining the network and/or location soon. Services provided may not be covered until this provider is active.

**Leaving Network or Location:**  
This provider will be leaving the network and/or location soon. Services provided after departure will be out-of-network.

**For HMO Products**

The results will only show a list of Primary Care Physicians (PCP). Specialists available are determined by your PCP selection. Please contact your PCP's office to discuss your specialty care needs and confirm their referral relationship with a specific specialty physician.


[Print this page](#)

**We're sorry, no results for Certified Nurse Midwife , Ages 18-64 Postpartum Issues were found**

[A](#) [B](#) [C](#) [D](#) [E](#) [F](#) [G](#) [H](#) [I](#) [J](#) [K](#) [L](#) [M](#) [N](#) [O](#) [P](#) [Q](#) [R](#) [S](#) [T](#) [U](#) [V](#) [W](#) [X](#) [Y](#) [Z](#)

Please try clearing any filters (on the left side of the page) or expanding your search radius. If there are still no results available, please call customer service at the number on the back of your ID card for additional assistance or perform a new search.

Search performed at <https://public.hcsc.net/providerfinder/search.do?corpEntCd=IL1> (last visited 05/11/2017).



**BlueCross BlueShield  
of Illinois**

**Provider Finder®**  
 Last Updated: 05/10/2017  
[Search](#) | [FAQs](#) | [Company Information](#) | [Disclaimer](#) | [Language Assistance](#) | [en Español](#)

Searched by: IL > Certified Nurse Practitioner

**You've Selected:**

**State**  
IL

**Specialty**  
Certified Nurse Practitioner ([Remove](#))

**Limitations/Expertise**  
Ages 18-64 Postpartum Issues ([Remove](#))

**Narrow your results by:**

[Filter Zip Code](#)

[Filter City](#)

[Filter County](#)

[Filter Hospital Affiliation](#)

[Filter Provider Type](#)

[Filter Language](#)

[Filter Hospital Safety Score](#)

[Filter Gender](#)

[Filter Extended Hours](#)

**Close Important Notes:**

Some providers may not be available in the near future. Please view the provider profile to view details.

**Joining Network or Location:**

This provider will be joining the network and/or location soon. Services provided may not be covered until this provider is active.

**Leaving Network or Location:**

This provider will be leaving the network and/or location soon. Services provided after departure will be out-of-network.

**For HMO Products**

The results will only show a list of Primary Care Physicians (PCP). Specialists available are determined by your PCP selection. Please contact your PCP's office to discuss your specialty care needs and confirm their referral relationship with a specific specialty physician.

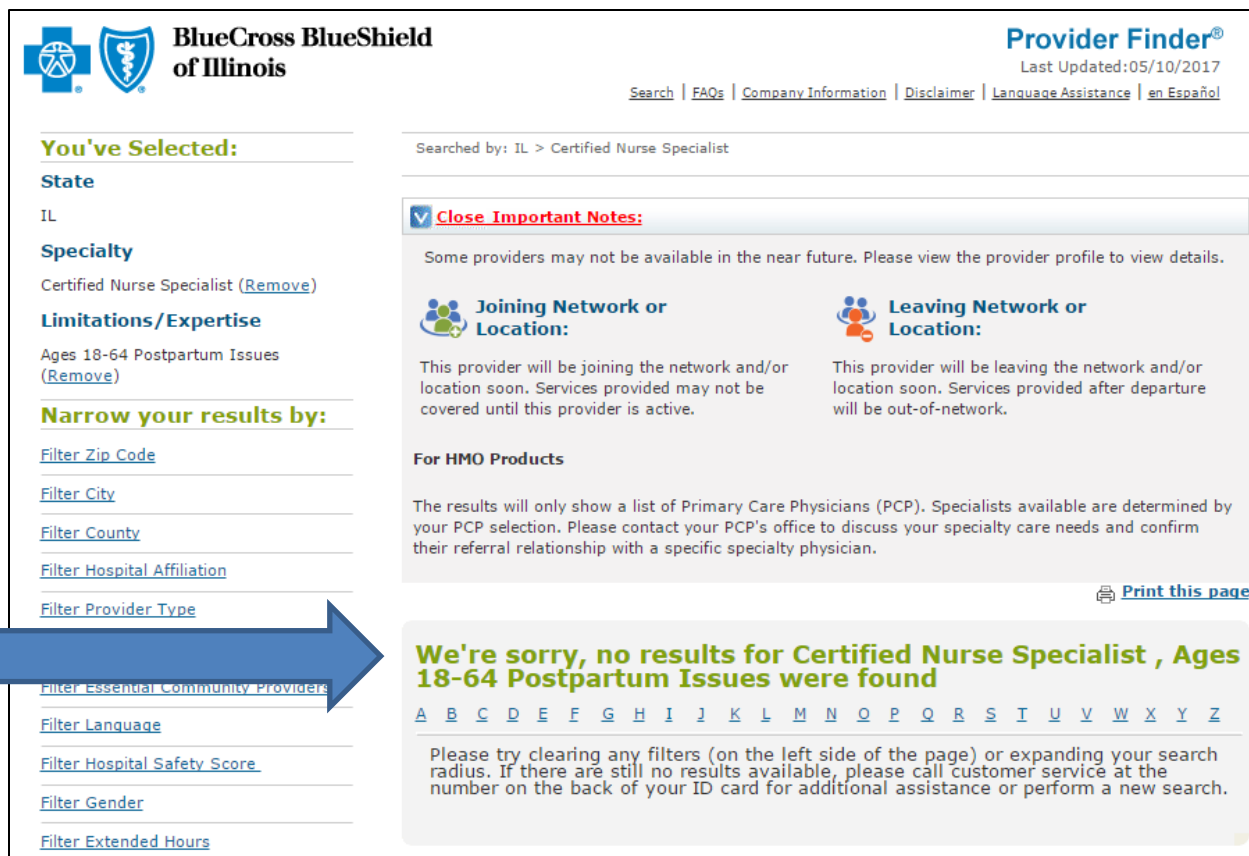
[Print this page](#)

**We're sorry, no results for Certified Nurse Practitioner , Ages 18-64 Postpartum Issues were found**

A B C D E F G H I J K L M N O P Q R S T U V W X Y Z

Please try clearing any filters (on the left side of the page) or expanding your search radius. If there are still no results available, please call customer service at the number on the back of your ID card for additional assistance or perform a new search.

Search performed at <https://public.hcsc.net/providerfinder/search.do?corpEntCd=IL1> (last visited 05/11/2017).



**BlueCross BlueShield of Illinois**

**Provider Finder®**  
Last Updated: 05/10/2017

[Search](#) | [FAQs](#) | [Company Information](#) | [Disclaimer](#) | [Language Assistance](#) | [en Español](#)

Searched by: IL > Certified Nurse Specialist

**You've Selected:**

**State**  
IL

**Specialty**  
Certified Nurse Specialist ([Remove](#))

**Limitations/Expertise**  
Ages 18-64 Postpartum Issues ([Remove](#))

**Narrow your results by:**

[Filter Zip Code](#)

[Filter City](#)

[Filter County](#)

[Filter Hospital Affiliation](#)

[Filter Provider Type](#)

[Filter Essential Community Providers](#)

[Filter Language](#)

[Filter Hospital Safety Score](#)

[Filter Gender](#)

[Filter Extended Hours](#)

**Close Important Notes:**

Some providers may not be available in the near future. Please view the provider profile to view details.

**Joining Network or Location:**  
This provider will be joining the network and/or location soon. Services provided may not be covered until this provider is active.

**Leaving Network or Location:**  
This provider will be leaving the network and/or location soon. Services provided after departure will be out-of-network.

**For HMO Products**  
The results will only show a list of Primary Care Physicians (PCP). Specialists available are determined by your PCP selection. Please contact your PCP's office to discuss your specialty care needs and confirm their referral relationship with a specific specialty physician.

[Print this page](#)

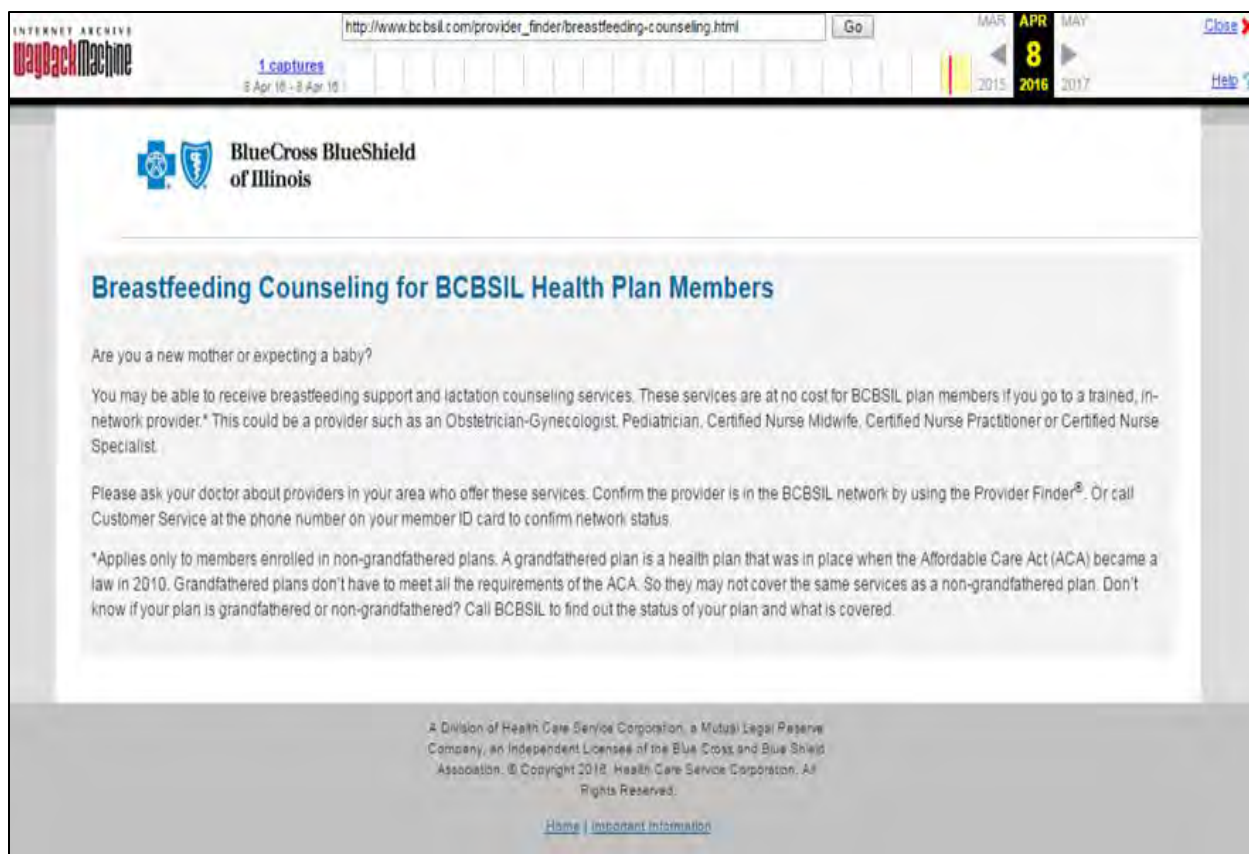
**We're sorry, no results for Certified Nurse Specialist, Ages 18-64 Postpartum Issues were found**

[A](#) [B](#) [C](#) [D](#) [E](#) [F](#) [G](#) [H](#) [I](#) [J](#) [K](#) [L](#) [M](#) [N](#) [O](#) [P](#) [Q](#) [R](#) [S](#) [T](#) [U](#) [V](#) [W](#) [X](#) [Y](#) [Z](#)

Please try clearing any filters (on the left side of the page) or expanding your search radius. If there are still no results available, please call customer service at the number on the back of your ID card for additional assistance or perform a new search.

Search performed at <https://public.hcsc.net/providerfinder/search.do?corpEntCd=IL1> (last visited 05/11/2017).

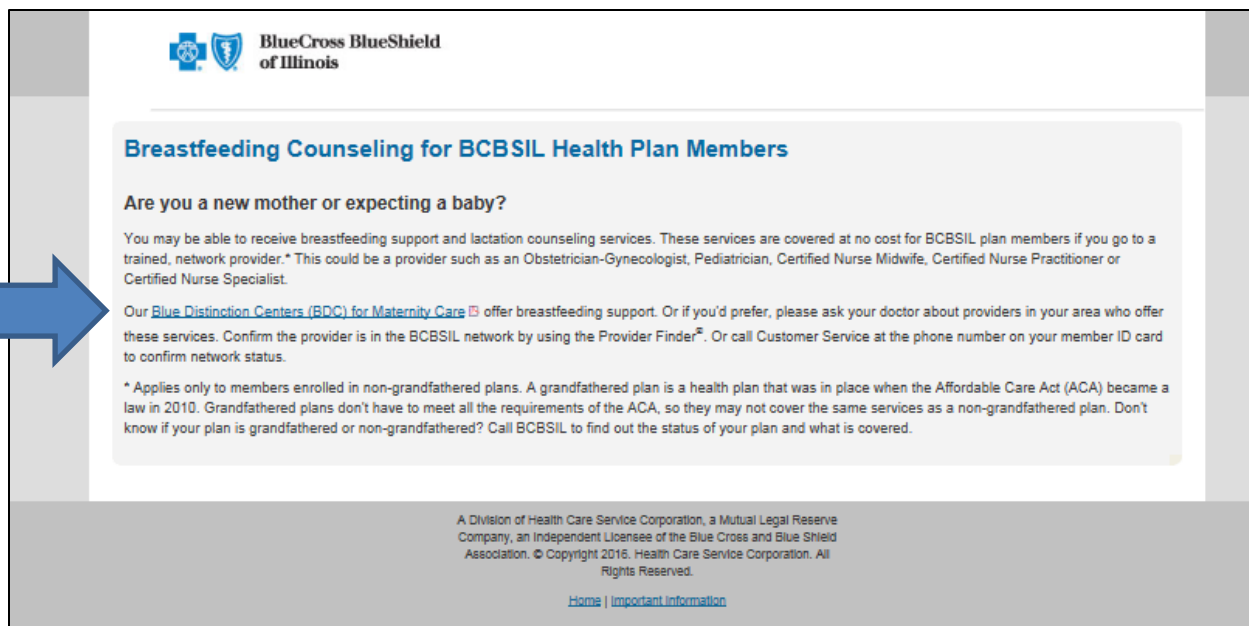
83. On information and belief, on or around April 8, 2016, Defendant HCSC put the below information on its divisions' websites for the first time:



84. In effect, women are told by Defendants that they may be able to receive breastfeeding support and lactation counseling services but only if, like a needle in a haystack, they are successful in sifting through and evaluating the thousands of providers listed under the enumerated categories of providers. As alleged *supra*, and as experienced by the Plaintiffs and members of the Classes, that task is impossible, and places an unrealistic burden on new mothers in need of a highly time sensitive medical service. Such information is a mere artifice.

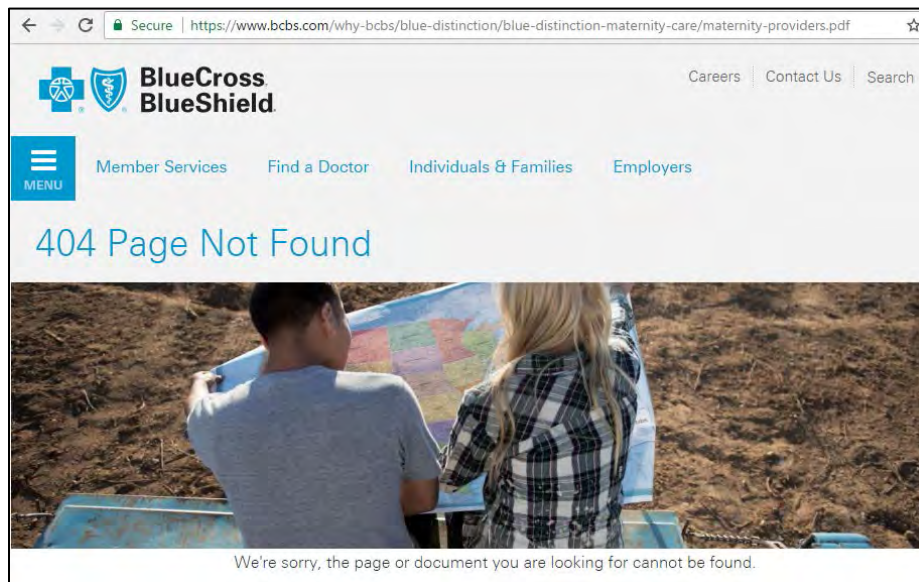
85. On information and belief, on or around May 10, 2016, the message was revised in one respect: women are now told that the “Blue Distinction Centers (BDC) for Maternity Care offer breastfeeding support.”





[http://www.bcbsil.com/provider\\_finder/breastfeeding-counseling.html](http://www.bcbsil.com/provider_finder/breastfeeding-counseling.html) (last visited 05/09/2017).

86. However, as of May 9, 2017, the Blue Distinction Centers (BDC) for Maternity Care hyperlink on each HCSC divisions' website<sup>16</sup> was inactive, generating the below web page:



<sup>16</sup> The websites for each of Defendant HCSC's divisions are identical in this regard. See BCBSTX: [http://www.bcbstx.com/provider\\_finder/breastfeeding-counseling.html](http://www.bcbstx.com/provider_finder/breastfeeding-counseling.html); BCBSMT: [https://www.bcbsmt.com/provider\\_finder/breastfeeding-counseling.html](https://www.bcbsmt.com/provider_finder/breastfeeding-counseling.html); BCBSOK: [http://www.bcbsok.com/provider\\_finder/breastfeeding-counseling.html](http://www.bcbsok.com/provider_finder/breastfeeding-counseling.html); BCBSNM: [http://www.bcbsnm.com/provider\\_finder/breastfeeding-counseling.html](http://www.bcbsnm.com/provider_finder/breastfeeding-counseling.html) (All last visited 05/11/2017).

87. Previously, the hyperlink led users to an 80-page manual from BlueCross Blue Shield Association described to be a “guide to facilities that have been designated as Blue Distinction Centers or Blue Distinction Centers+”:



<https://web.archive.org/web/20160623004751/http://www.bcbs.com/why-bcbs/blue-distinction/blue-distinction-maternity-care/maternity-providers.pdf> (last visited 05/10/2017).

88. Following a 1-2 sentence description of the two Blue Distinction Center designations, the purported Directory of Providers merely lists, by State and City, the names of Maternity Care Facilities (hospitals and centers) in every state in the United States; it lists over 60 Facilities for Illinois, including 13 for Chicago (sample portion of chart appears below). There is no mention of the services provided by any of the facilities listed, and there is no mention of the words lactation, breastfeeding or breastfeeding consultation in the Directory of Providers. No one can identify from the Directory of Providers the identity of a single in-network (or even out-of-network) lactation counselor. As alleged *supra* and as experienced by the Plaintiffs and members of the Classes, identification of in-network providers of Comprehensive Lactation Benefits is rendered impossible by the failure of Defendants to provide any information.

STATE/FACILITY NAME	CITY	DESIGNATED BLUE DISTINCTION CENTER+	DESIGNATED BLUE DISTINCTION CENTER
<b>ILLINOIS (cont'd)</b>			
Elmhurst Memorial Hospital Main Campus	Elmhurst	✓	
Gottlieb Memorial Hospital	Melrose Park	✓	
Greenville Regional Hospital	Greenville		✓
Heartland Regional Medical Ctr	Marion		✓
Highland Park Hospital*	Highland Park	✓	
Holy Cross Hospital	Chicago		✓
Ingalls Memorial Hospital	Harvey	✓	
Loyola University Medical Center*	Maywood	✓	

89. It appears that BCBSMT (but not BCBSIL, BCBSTX, BCBSNM or BCBSOK), has the following additional limited, yet still uninformative, statement about getting “assistance with breast feeding”:

The screenshot shows the BlueCross BlueShield of Montana website. The header includes the company logo, the text "BlueCross BlueShield of Montana", and a search bar. Below the header is a navigation bar with links: "Insurance Basics", "Shop Plans & Products", "Find a Doctor or Hospital", "Member Services", and "Log In". The main content area is divided into two columns. The left column is titled "MEMBER SERVICES" and includes links for "Why Choose Us?", "Prescription Drug Plan Information", and "Managing Your Health Plan". The right column is titled "NEW AND EXPECTING MOTHERS" and contains text about reimbursement for breast pumps and assistance with breast feeding. The text states that BCBSMT may reimburse a new mother for the purchase of a breast pump and provides a list of steps to follow: contact a BCBSMT Customer Service Representative at 800-447-7828, use an In-Network provider, complete all fields of the form and attach the receipt, and mail the completed form and receipt to the address listed. Below this, there is a section titled "ASSISTANCE WITH BREAST FEEDING" which explains that benefits for assistance with breast feeding may be available under the health plan and that reimbursement for services to support breast feeding may be available when provided by a certified lactation consultant.

<https://www.bcbsmt.com/member/advantages-of-membership/new-mothers> (last visited 05/11/2017).



90. Defendants wrongful conduct with respect to the failure to establish and identify in-network providers of Comprehensive Lactation Benefits have prevented women from getting the guaranteed access to timely Comprehensive Lactation Benefits by circumventing the clear requirement that health plans provide, at no cost, Comprehensive Lactation Benefits as a preventive service, just like all other preventive services.

91. As evidenced by the below exchange that occurred on April 27-28, 2016 on BCBSIL's Facebook page, BCBSIL had not established a network of lactation consultations and was not covering out-of-network lactation services at no-cost. In response to a frustrated insured's post concerning the absence of a provider network for lactation services and BCBSIL's reimbursement of only a "reasonable and customary amount," the BCBSIL representative stated, **"You are correct that there is not a network of Lactation Consultants."** The representative then suggested that the insured contact the hospital where she delivered to see if there was a lactation consultant on staff because that would be "covered as part of [her] in network hospital claim."

**Blue Cross and Blue Shield of Illinois**  
April 27, 2016 · 📧

**SHAME ON BCBSIL**

I called bcbsil to find out who my local in network lactation consultant would be. I was told that they have NO in network LC's, but they will cover any LC at the in network benefit level of 100%...but only up to the amount that bcbsil deems "reasonable and customary" and I would have to pay the remaining balance out of pocket.

I can't control what any LC charges for her services! My understanding was that The Affordable Care Act requires them to cover a Lactation Consultant at 100%. Not up to 100% of what they think it should cost when they have NO CONTRACTED LCs that have agreed to their reasonable and customary rate. Even more fun was finding out that they can't tell me how much the amount that they deem reasonable and customary actually is. Their customer service team is usually quite helpful, but when I mentioned that I thought this was illegal and that the Affordable Care Act requires them to cover LCs at 100%, John (from customer service) informed me in an extremely condescending tone that they only have to pay 100% up to what bcbsil deems reasonable and customary. His tone was awful. It was as if he delighted in telling me this. Way to treat your customers bcbsil. I really find it difficult to believe that they are correctly following the ACA and I will be looking into this further. What's the point of the ACA requiring 100% coverage of Lactation Consultants for new moms if insurance companies can skate their way out of actually paying 100% by coming up with an arbitrary cap of the amount covered that no one but them has agreed to?

**Blue Cross and Blue Shield of Illinois** Hi [REDACTED]. I am sorry for any tone that John had while on the phone with you. We would like to help answer questions about Lactation Consultants. You are correct that there is not a network of Lactation Consultants. We attempted to set up a network of providers but due to a lack of participation, we were unable to do so. If you would like us to look further into the coverage on your plan, please send us a private message. Make sure to include your Identification Number and Phone Number so we can get in touch with you. - Renee

Like · Reply · April 28, 2016 at 9:55am

[REDACTED] The "lack of participation" would indicate that the amounts BCBSIL has deemed "reasonable and customary" are far too low. If you couldn't find a single LC to contract for that amount, then obviously it is not enough and what I will be charged will be much higher than what you will reimburse.

Like · Reply · April 28, 2016 at 2:34pm

**Blue Cross and Blue Shield of Illinois** I would recommend speaking with the hospital you are delivering at to see if there is a lactation consultant on staff that they use. Although we do not have a network of Lactation Consultants, other hospital employees, including nurses, may provide these services. The services would then be billed under the in network hospital and be covered as part of your in network hospital claim. - Renee

Like · Reply · April 28, 2016 at 3:55pm

92. Such guidance makes at least two erroneous assumptions; that hospital-based maternity personnel will provide outpatient services after a patient is discharged, and that the insured gave birth in a hospital.

93. In contravention of the ACA's preventive health services mandate and the Defendants' plan documents, Defendants have failed to provide mandated preventive benefits coverage for Comprehensive Lactation Benefits to the detriment of plan members including by (among other things):

(a) failing to establish a network of trained providers of Comprehensive Lactation Benefits;

(b) failing to construct a list of in-network providers of Comprehensive Lactation Benefits;

(c) failing to provide any list of in-network providers of Comprehensive Lactation Benefits including failing to provide such list either by mail, through customer representatives that provide phone consultation to members, or through the Defendants' websites; and

(d) imposing major administrative barriers to insureds seeking to receive information about and access to Comprehensive Lactation Benefits;

(e) improperly attributing an out-of-network characterization to Comprehensive Lactation Benefits in response to insureds' inquiries and when such benefits are sought; and

(f) providing inaccurate information to insureds, including through the Explanation of Benefits ("EOBs"), with respect to the cost of Comprehensive Lactation Benefits, stating a denial of coverage for 100% of the cost of Comprehensive Lactation Benefits, treating lactation as an out-of-network benefit, and advising the member that the provider may balance bill the

member for the difference between (i) the cost charged by the provider and (ii) the amount allowed by the out of network benefit.

94. In addition to general administrative burdens, Defendants have exhibited a pattern of conduct intentionally designed to: (1) frustrate women's exercise of the appeal rights and to encourage women to give up seeking reimbursement and (2) deny providers guidance that would aid other plan beneficiaries in seeking coverage or reimbursement. Such abuses include: inconsistent guidance from Defendants' representatives, lack of timely responsiveness for pre-authorization or provider requests, and changing purportedly applicable billing codes for Comprehensive Lactation Benefits.

95. Defendants have, contrary to the plain intent and purpose of the ACA's imposition of no-cost preventive services and the inclusion of Comprehensive Lactation Benefits as a preventive service, improperly shifted costs to the insured by failing to establish a network of providers of Comprehensive Lactation Benefits and adjudicating claims for Comprehensive Lactation Benefits in violation of the no-cost mandate.

96. Time is of the essence with respect to breastfeeding. Mothers who seek out and need guaranteed no-cost women's preventive services pursuant to the ACA, are victims of Defendants' barriers. Defendants have erected these barriers to prevent their insureds from timely receiving, if they receive it at all, Comprehensive Lactation Benefits. Defendants then illegally force their insureds, who obtain such support, to pay for it, by failing to provide full reimbursement.

**F. Plaintiffs' Experiences.**

97. Each named Plaintiff, like the members of the Classes, has been denied through Defendants' wrongful conduct the women's preventive service benefit for Comprehensive Lactation Benefits that is required by the ACA and their insurance contracts.

**Plaintiff Briscoe**

98. Plaintiff Briscoe delivered her child at home on November 20, 2014, which left her on bedrest. The day after the home birth Plaintiff Briscoe's midwives evaluated and assessed her breastfeeding and noticed that she was sustaining nipple damage. Concerned, the midwives advised Plaintiff Briscoe to seek the assistance of an IBCLC if she began experiencing increased discomfort.

99. Prior to receiving the recommended services, Plaintiff Briscoe contacted BCBSIL by phone to identify in-network lactation consultants, including but not limited to IBCLCs. The BCBSIL representative informed Plaintiff Briscoe that BCBSIL had no network of providers for lactation services. Plaintiff Briscoe then accessed BCBSIL's online tool called Provider Finder® in an attempt to find in-network providers for Comprehensive Lactation Benefits. However, Plaintiff Briscoe was unsuccessful in identifying such providers using postpartum-related search options which were the only relevant search options since the Provider Finder® did not give lactation, breastfeeding, IBCLC or any other lactation consultation/breastfeeding counseling description as a searchable "Provider Type" or "Provider Specialty".

100. Thereafter, Plaintiff Briscoe identified and contacted Alison Velasco, IBCLC to schedule an in-home lactation consultation. It was absolutely critical that Plaintiff Briscoe receive the required care at home because obtaining the service outside her home presented nearly unsurmountable obstacles given her circumstances, as she lived in a third floor walk-up

apartment and had sustained second-degree tears that left her on bedrest. Furthermore, aside from Plaintiff Briscoe's postpartum physical limitations, traveling any distance with her newborn would have been daunting as she did not own a personal vehicle.

101. To address Plaintiff Briscoe and her child's immediate needs, Ms. Velasco provided a comprehensive two-hour in-home lactation consultation on Sunday, November 23, 2014 and followed up by phone to ensure the initiation and continuation of successful breastfeeding.

102. Plaintiff Briscoe paid \$200 out-of-pocket at the time of the lactation consultation. With the assistance of Ms. Velasco, Plaintiff Briscoe submitted a superbill for her lactation consultation claim to BCBSIL for coverage and reimbursement. On or around January 9, 2015, Plaintiff Briscoe received an EOB from BCBSIL which stated that the lactation consultation was an excluded service under her plan, therefore the claim was denied and she was responsible for the full \$200 service fee.

103. Plaintiff Briscoe submitted a written appeal contesting the denial of her claim. On or around February 6, 2015, Plaintiff Briscoe received another EOB from BCBSIL that now reflected that of the \$200 lactation service fee, only \$160 was considered "covered" and the remaining \$40 was applied to coinsurance which resulted in BCBSIL issuing Plaintiff Briscoe a check for \$160 which held her responsible for \$40.

104. Plaintiff Briscoe estimates that she spent approximately 6-8 hours trying to have her claim for lactation support processed and paid for by BCBSIL, only to be reimbursed \$160, resulting in an out-of-pocket expenditure of \$40. Accordingly, because of Defendants' wrongdoing, Plaintiff Briscoe was denied the no-cost ACA preventive service to which she was entitled.

**Plaintiff Magierski**

105. While still admitted to Northwest Community Hospital following the birth of her child on April 8, 2016, Plaintiff Magierski received lactation consultation services from the hospital RN. The RN determined that Plaintiff Magierski and her child were experiencing a latching issue, but could not successfully resolve it. Instead, the hospital RN suggested that Plaintiff Magierski seek additional help from a trained provider once she returned home.

106. Upon returning home and prior to receiving the services, Plaintiff Magierski contacted BCBSIL twice to ask about coverage for lactation services and to obtain a list of in-network providers. Both BCBSIL representatives confirmed that BCBSIL did not have any in-network providers for lactation services, in-home or otherwise. The BCBSIL representatives informed Plaintiff Magierski that since there were no “in-network” providers, she could seek the service from any provider and it would be covered as “in-network”; however, one representative said that BCBSIL would cover up to 15 home visits, while the other representative said that BCBSIL would cover up to 3-4 home visits.

107. As a result of the conflicting information conveyed by the BCBSIL representatives, Plaintiff Magierski decided to consult BCBSIL’s Provider Finder® before proceeding to obtain the service from an out-of-network provider. Plaintiff Magierski attempted to run several searches to identify in-network providers for Comprehensive Lactation Benefits, but Plaintiff Magierski was unsuccessful in identifying such providers because the Provider Finder® did not give lactation, breastfeeding, IBCLC or any other lactation consultation/breastfeeding counseling description as a searchable “Provider Type” or “Provider Specialty”.



108. Frustrated and without any other practical options to identify BCBSIL providers of lactation services, Plaintiff Magierski independently searched for trained lactation providers, per the hospital RN's recommendation, who performed in-home consultations. An at-home consultation was necessary because, among other obvious reasons related to caring for a newborn, Plaintiff Magierski had significant physical restrictions resulting from an episiotomy. Plaintiff Magierski located Barbara Hardin, RN, IBCLC of Mother's Milk Company<sup>sm</sup> who provided an in-home comprehensive lactation consultation on April 13, 2016. Plaintiff Magierski paid \$235 for the consultation and \$10.20 for a breast shield for a total out-of-pocket expenditure of \$245.20.

109. Plaintiff Magierski submitted the lactation consultation and supplies claim for coverage to BCBSIL. Plaintiff Magierski received an EOB from BCBSIL which indicated that of the \$235 lactation service fee, only \$137.59 was considered "covered". The EOB did not offer any explanation as how the covered amount was calculated. Furthermore, the EOB applied the covered amount to Plaintiff Magierski's out-of-network deductible because she had not reached her annual deductible.

110. Plaintiff Magierski submitted a written appeal contesting the denial of her claim. Plaintiff Magierski received another EOB from BCBSIL dated May 11, 2016, which, like the first EOB, reflected that \$137.59 was "covered" and applied that amount to Plaintiff Magierski's out-of-network deductible because she had not reached her annual deductible. Therefore, Plaintiff Magierski was responsible for the entire \$245.20 lactation services fee.

111. Plaintiff Magierski estimates that she spent approximately 5 hours trying to have her claim for lactation support and supplies processed and paid for by BCBSIL, only to be fully denied reimbursement, resulting in an outstanding out-of-pocket expenditure of \$245.20.



Accordingly, because of Defendants' wrongful conduct, Plaintiff Magierski was denied the no-cost ACA preventive service to which she was entitled.

**Plaintiff Adams**

112. Plaintiff Adams delivered her daughter five-weeks premature at West Suburban Medical Center, a designated Blue Distinction Center+, on May 10, 2016. The premature delivery of Plaintiff Adams' daughter required that the newborn spend ten days in the hospital nursery. During this time and while still admitted to the hospital, Plaintiff Adams initiated breastfeeding, which required some modifications to meet the needs of her daughter, and she received lactation consultations from the hospital-based consultants.

113. Upon discharge and returning home with her daughter, Plaintiff Adams' pediatrician recommended that she receive an individual evaluation from a trained lactation provider to help support her successful breastfeeding efforts. Plaintiff Adams was referred to Barbara Hardin, RN, IBCLC of Mother's Milk Company<sup>sm</sup>, but prior to contacting her, Plaintiff Adams consulted BCBSIL's Provider Finder®. Plaintiff Adams attempted to run several searches to identify in-network providers for Comprehensive Lactation Benefits, but just like Plaintiffs Briscoe and Magierski, Plaintiff Adams was unsuccessful in identifying such providers because the Provider Finder® did not give lactation, breastfeeding, IBCLC or any other lactation consultation/breastfeeding counseling description as a searchable "Provider Type" or "Provider Specialty".

114. Before proceeding to obtain the service from an out-of-network provider, Plaintiff Adams then called BCBSIL to inquire about in-network providers. The BCBSIL representative confirmed that BCBSIL had no network of providers for lactation services. As a result, the BCBSIL representative informed Plaintiff Adams that she could submit a claim for out-of-

network lactation services and receive reimbursement for an allowed amount; however, the BCBSIL representative was not willing to disclose the allowed amount.

115. Absent other feasible alternatives to locate additional information about BCBSIL's coverage for Comprehensive Lactation Benefits, Plaintiff Adams contacted Ms. Hardin and received an at-home lactation consultation for which Plaintiff Adams paid \$235.

116. Plaintiff Adams submitted the lactation consultation claim to BCBSIL for coverage and reimbursement. Plaintiff Adams received an EOB from BCBSIL dated August 10, 2016 which indicated that of the \$235 lactation service fee, only \$137.04 was considered "covered". The EOB did not offer any explanation as how the covered amount was calculated. Furthermore, the EOB applied \$27.40 to coinsurance which resulted in the issuance of a reimbursement check in the amount of \$109.64.

117. Plaintiff Adams initiated an appeal contesting the processing of her claims. BCBSIL issued a final Appeal Decision on October 24, 2016, denying Plaintiff Adams' appeal request and upholding the initial decision that the "[c]harges exceed PPO allowance." To support this determination the Appeal Decision stated that following concerning eligible charges:

"ELIGIBLE CHARGE.....means (a) in the case of a Provider, other than a Professional Provider, which has a written agreement with Blue Cross and Blue Shield of Illinois or another Blue Cross and/or Blue Shield Plan to provide care to you at the time Covered Services are rendered, such Provider's Claim Charge for Covered Services and (b) in the case of a Provider, other than a Professional Provider, which does not have a written agreement with Blue Cross and Blue Shield of Illinois or another Blue Cross and/or Blue Shield Plan to provide care to you at the time Covered Services are rendered, will be the lesser of:  
(i) the Provider's billed charges, or;  
(ii) Blue Cross and Blue Shield of Illinois non-contracting Eligible Charge. Except as otherwise provided in this section, the non-contracting Eligible Charge is developed from base Medicare reimbursements and represents approximately 100% of the base Medicare reimbursement rate and will exclude any Medicare adjustment(s) which is/are based on information on the Claim."

118. BCBSIL provided the following justification for the manner in which Plaintiff Adams' claim was processed which resulted in the issuance of a reimbursement computed from "the base Medicare reimbursement rate":

You requested in-network benefits for out-of-network services received on May 26, 2016. The provider used does not have a contract with BCBSIL. Based on your appeal request, and further review of your benefit book and claim, it has been determined that additional benefits are not available for this service.

Although we cannot protect our members from fee overages when services are received from out of network providers, our members may negotiate fee overages with their out of network providers.

119. Plaintiff Adams estimates that she spent approximately 3 hours trying to have her claim for lactation support processed and paid for by BCBSIL, only to be reimbursed \$109.64. As a result of Defendants' wrongful conduct, Plaintiff Adams was denied the no-cost ACA preventive service to which she was entitled, resulting in an outstanding out-of-pocket expenditure of \$125.36.

**G. Defendants' Status as, and Duties of, ERISA Fiduciaries.**

120. ERISA fiduciaries include not only parties explicitly named as fiduciaries in the governing plan documents or those to whom there has been a formal delegation of fiduciary responsibility, but also any other parties who in fact performs fiduciary functions. Under ERISA, a person is a fiduciary "to the extent . . . he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets. . . .," ERISA § 3(21)(A)(i), 29 U.S.C. § 1002(21)(A)(i), or "he has any discretionary authority or discretionary responsibility in the administration of such plan." ERISA § 3(21)(A)(iii), 29 U.S.C. § 1002(21)(A)(iii). Thus, if a Defendant exercises discretionary authority or control in managing or administering the plan, or, if it exercises any authority or control (discretionary or not) with respect to management or disposition of plan assets, it is an ERISA fiduciary.

121. At all relevant times, Defendants have been fiduciaries of the Defendants' health plans because: (a) they had the authority with respect to the Defendants' health plans' compliance with the ACA requirements; (b) they exercised discretionary authority and/or

discretionary control with respect to the Defendants' compliance with the ACA requirements for their health plans; (c) they had the authority to establish a network of providers for Comprehensive Lactation Benefits for the Defendants' health plans; (d) they exercised discretionary authority and/or discretionary control with regard to establishing a network of providers for Comprehensive Lactation Benefits for Defendants' health plans; (e) they had the authority and/or discretionary responsibility over the management and administration of preventive services as required by the ACA for the Defendants' health plans; and/or, (f) they exercised discretion over provider lists for Defendants' plans with respect to providers of Comprehensive Lactation Benefits, and, on information and belief, failed to establish a network of providers in order to maximize their profits and minimize their costs of coverage for Comprehensive Lactation Benefits as a no-cost preventive service.

122. ERISA §§ 404(a)(1)(A) and (B), 29 U.S.C. §§ 1104(a)(1)(A) and (B), provide, in pertinent part, that a fiduciary shall discharge its duties with respect to a plan solely in the interest of the participants and beneficiaries, for the exclusive purpose of providing benefits to participants and their beneficiaries, and with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims. These fiduciary duties under ERISA §§ 404(a)(1), 404(a)(1)(A), and (B) are referred to as the duties of loyalty and prudence and are the "highest known to the law." *Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir. 1982).

123. In addition, a fiduciary that appoints another person to fulfill all or part of its duties, by formal or informal hiring, subcontracting, or delegation, assumes the duty to monitor that appointee to protect the interests of the ERISA plans and their participants. An appointing

fiduciary must take prudent and reasonable action to determine whether the appointees are fulfilling their fiduciary obligations.

124. ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), authorizes individual participants and fiduciaries to bring suit “(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.” The remedies set forth in § 502(a)(3) include remedies for breaches of the fiduciary duties set forth in ERISA § 404, 29 U.S.C. §1104.

125. In addition, Plaintiffs and the members of the Classes were not required to exhaust their administrative remedies and any pursuit, or further pursuit, of any administrative remedies would be futile. Futility here is clear because pursuit of administrative remedies could not address Defendants’ failure to establish in-network providers of Comprehensive Lactation Benefits nationwide, and to provide, cover, and administer Comprehensive Lactation Benefits as a no-cost preventive service in accordance with the ACA. Defendants’ health plans fail to comply with the provisions of the ACA with respect to preventive services, the redress for which could not be accomplished by pursuit of administrative remedies. Since the action concerns Defendants’ violations with respect to the fundamental constructs of Defendants’ plans and networks, and does not evoke Defendants’ discretion with respect to the payment of an individual claim, any effort to exhaust administrative remedies would be futile and is not required as a matter of law.

126. Plaintiffs therefore bring this action under the authority of ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), for appropriate equitable relief from Defendants as fiduciaries (and, in the alternative, from Defendants as knowing participants in breaches of any of ERISA’s fiduciary

responsibility provisions), including without limitation, injunctive relief and, as available under applicable law, imposition of a constructive trust, equitable surcharge, and restitution.

### **CLASS ACTION ALLEGATIONS**

127. Plaintiffs bring this action on behalf of themselves and the proposed Classes pursuant to FED. R. CIV. P. 23(a), 23(b)(2), and/or 23(b)(3). Specifically, Plaintiffs seek to represent the following Classes:

**ACA Class:** All persons who, on or after August 1, 2012, are or were participants in or beneficiaries of any non-grandfathered health plan and non-federal employee health plan, sold, underwritten or administered by Defendants in their capacity as insurer or administrator, who did not receive full coverage and/or reimbursement for Comprehensive Lactation Benefits.

**Lactation Services Class:** All participants and beneficiaries in one or more of the ERISA employee health benefit plans administered by Defendants in the United States who did not receive full coverage and for which Defendants fail and refuse to provide payment or reimbursement for Comprehensive Lactation Benefits without cost to such participants and beneficiaries.

128. Excluded from the Classes are Defendants, their subsidiaries or affiliate companies, their legal representatives, assigns, successors, and employees.

129. Numerosity/Impracticability of Joinder: The members of the Classes are so numerous that joinder of all members is impracticable. The exact number of the members of the Classes is unknown to Plaintiffs at this time, and can only be ascertained through appropriate discovery, but Plaintiffs are informed and believe that there are at least thousands of members of the Classes throughout the United States.

130. Commonality and Predominance: This action is properly brought as a class action because of the existence of questions of law and fact common to the Classes. Common questions of law and fact include, but are not limited to, the following:

- (a) For the ACA Class, whether Defendants utilize a system that administers claims from participants and beneficiaries of any non-grandfathered health plan and non-federal employee health plan in contravention of the express terms and conditions of the ACA and plans' documents by failing to provide timely and substantive responses to requests for out-of-network benefits and/or appeals to denials of requests for out-of-network benefits.
- (b) For the ACA Class, whether Defendants violate the express terms and conditions of the ACA and plans' documents by: failing to offer in-network lactation service providers; failing to identify in-network lactation service providers; failing to offer and/or identify in-network lactation service providers within a reasonable distance of the plan participants and/or beneficiaries; and/or failing to provide full coverage of out-of-network lactation service providers for plan participants and/or beneficiaries for whom Defendants did not have and/or did not identify in-network lactation service providers (including but not limited to in-network service providers within a reasonable distance).
- (c) For the Lactation Services Class, whether Defendants utilize a system that administers claims from ERISA plan participants and beneficiaries in contravention of the express terms and conditions of the ERISA plans' documents by failing to provide timely and substantive responses to requests for out-of-network benefits and/or appeals to denials of requests for out-of-network benefits.
- (d) For the Lactation Services Class, whether Defendants utilize a system that administers claims from ERISA plan participants and beneficiaries that violates ERISA by failing to provide timely and substantive responses to requests for out-

of-network benefits and/or appeals to denials of requests for out-of-network benefits.

- (e) For the Lactation Services Class, whether Defendants violate the express terms and conditions of the ERISA plans' documents by: failing to offer in-network lactation service providers; failing to identify in-network lactation service providers; failing to offer and/or identify in-network lactation service providers within a reasonable distance of the plan participants and/or beneficiaries; and/or failing to provide full coverage of out-of-network lactation service providers for plan participants and/or beneficiaries for whom Defendants did not have and/or did not identify in-network lactation service providers (including but not limited to in-network service providers within a reasonable distance).
- (f) For the Lactation Services Class, whether Defendants breached their fiduciary duties under ERISA by: failing to offer in-network lactation service providers; failing to identify in-network lactation service providers; failing to offer and/or identify in-network lactation service providers within a reasonable distance of the plan participants and/or beneficiaries; and/or failing to provide full coverage of out-of-network lactation service providers for plan participants and/or beneficiaries for whom Defendants did not have and/or did not identify in-network lactation service providers (including but not limited to in-network service providers within a reasonable distance).
- (g) Whether the ERISA plans and/or their beneficiaries and participants are entitled to declaratory and injunctive relief.



- (h) Whether the ERISA plans and/or their beneficiaries and participants are entitled to an accounting, disgorgement, restitution, and/or other appropriate equitable relief.
- (i) Whether Defendants are violating the ACA's mandate of providing access to and coverage for Comprehensive Lactation Benefits to the members of the Lactation Services Class and the ACA Class.
- (j) Whether Plaintiffs and the members of the Lactation Services Class and the ACA Class are entitled to a declaration regarding their rights under the ACA.
- (k) Whether Plaintiffs and the members of the Lactation Services Class and the ACA Class are entitled to an Order enjoining Defendants from violating the ACA requirements related to Comprehensive Lactation Benefits and compelling compliance with the ACA.
- (l) The extent and measurement of damages to the Class members for out-of-pocket payments for Comprehensive Lactation Benefits and the nature of other appropriate relief.

131. Typicality: Plaintiffs' claims are typical of the claims of the members of the Classes because, *inter alia*, Plaintiffs and all members of the Lactation Services and ACA Classes, have been injured and damaged in the same way as a result of Defendants' systematic process for handling claims and appeals for Comprehensive Lactation Benefits. Plaintiffs and all members of the Lactation Services and ACA Classes have been injured and damaged in the same way as a result of Defendants' failing to: offer in-network lactation service providers; identify in-network lactation service providers; offer and/or identify in-network lactation service providers within a reasonable distance of the plan participants and/or beneficiaries;

and/or provide full coverage of out-of-network lactation service providers for plan participants and/or beneficiaries for whom Defendants did not have and/or did not identify in-network lactation service providers (including but not limited to in-network service providers within a reasonable distance).

132. Adequacy of Representation: Plaintiffs will fairly and adequately protect the interests of the members of the Classes because their interests are aligned and do not conflict with the interests of the members of the Classes they seek to represent. Plaintiffs have retained attorneys experienced in the prosecution of class actions, including healthcare, antitrust, and consumer protection matters, and Plaintiffs and their counsel intend to prosecute this action vigorously.

133. Superiority: A collective action is superior to all other available means for the fair and efficient adjudication of this controversy. Most of the members of the Classes would not be likely to file individual lawsuits because the damages suffered by individual members of the Classes may be relatively small, they lack adequate financial resources, access to attorneys or knowledge of their claims, and the expense and burden of individual litigation would make it impossible for such persons to individually to redress the wrongs done to them. Individualized litigation presents a potential for inconsistent or contradictory judgments, and increases the delay and expense to all parties and to the court system presented by the complex legal and factual issues raised by Defendants' conduct.

134. Moreover, Plaintiffs' claims for equitable relief are based on actions, and refusals to act, by Defendants that are generally applicable to Plaintiffs and all other members of the Classes, making final injunctive relief or other relief appropriate with respect to the Classes as a whole. Class treatment is also appropriate because Defendants engaged in a

uniform and common practice, and all Class Members have the same legal right to, and interest in, redress for relief associated with violations of the ACA's lactation coverage requirements.

135. Plaintiffs know of no difficulty which will be encountered in the management of this litigation that would preclude its maintenance as a class action.

**EXHAUSTION/FUTILITY OF ADMINISTRATIVE REMEDIES**

136. As detailed above, Plaintiff Briscoe's claim for lactation support was erroneously processed and not fully covered because a portion of the service fee was applied to coinsurance. Initially, her claim was fully denied as an excluded service under her plan which Plaintiff Briscoe appealed. In response to Plaintiff Briscoe's written appeal, BCBSIL re-processed her claim which resulted in BCBSIL covering only \$160 of the \$200 lactation service fee, and applying the outstanding \$40 to coinsurance for which Plaintiff Briscoe was held responsible. Plaintiff Briscoe exhausted the administrative remedies available to her and/or further pursuit of the administrative remedies would be futile.

137. As detailed above, Plaintiff Magierski's claim for lactation support and supplies was fully denied by BCBSIL which applied only a "covered" portion of the service fee to Plaintiff Magierski's out-of-network deductible. Plaintiff Magierski submitted a written appeal contesting the denial of her claim, but notwithstanding her efforts, BCBSIL upheld the original processing determination which categorized \$137.58 of the \$245.20 lactation service fee as covered and applied it to her out-of-network deductible, resulting in no reimbursement to Plaintiff Magierski. Plaintiff Magierski has exhausted the administrative remedies available to her and/or further pursuit of the administrative remedies would be futile.

138. Also as detailed above, Plaintiff Adams' claim for lactation services was erroneously processed and not fully covered because a portion of the service fee was applied to

coinsurance. Plaintiff Adams initiated an appeal contesting BCBSIL's reimbursement of only \$109.64 of the \$235 lactation service fee which was the result of BCBSIL processing only \$137.04 as "covered" and then reducing that amount by \$27.40 which was applied to coinsurance. In the final Appeal Decision, BCBSIL upheld the original processing determination stating that Plaintiff Adams was not entitled to receive "in-network benefits for out-of-network services." Therefore, Plaintiff Adams was held responsible for \$125.36. Plaintiff Adams exhausted the administrative remedies available to her and/or further pursuit of the administrative remedies would be futile.

139. Futility is also particularly clear since Plaintiffs have sufficiently alleged breaches of fiduciary duty by Defendants, and the existence of an inherent conflict of interest between Defendants' obligation as fiduciaries for ERISA plan participants and their business incentives, as alleged above.

140. Plaintiffs allege that Defendants fail to provide either in-network lactation service providers within a reasonable distance of the plan participants and/or beneficiaries, or full coverage of out-of-network lactation service providers for plan participants and/or beneficiaries who do not have in-network lactation service providers within a reasonable distance. Since Plaintiffs are challenging systematic processes, rather than an exercise of discretion with respect to an individual claim, any further effort to exhaust administrative remedies would be a futile act that is not required as a matter of law.

141. Moreover, Plaintiffs allege that, contrary to the plans' documents and ERISA, Defendants use an administrative system that fails to provide timely responses to requests for out-of-network benefits and/or appeals to denials of requests for out-of-network coverage, which is another systematic process rather than an exercise of discretion with respect to an

individual claim. As such, any further effort to exhaust administrative remedies in this regard would be a futile act that is not required as a matter of law.

## **CLAIMS FOR RELIEF**

### **COUNT I**

#### **Declaratory and Injunctive Relief for Defendants' Breaches of Fiduciary Duty in Violation of 29 U.S.C. §§ 1104(a)(1)(A)(I), 1104(a)(1)(B), and 1104(a)(1)(D) and for Other Appropriate Equitable Relief (On Behalf of the Lactation Services Class)**

142. Plaintiff Briscoe re-alleges and incorporates the preceding paragraphs as if fully set forth herein.

143. Pursuant to 29 U.S.C. 1132(a), Plaintiff Briscoe brings this Count individually and on behalf of the Lactation Services Class under ERISA, 29 U.S.C. §1101, *et seq.* By having been given and/or assumed discretionary authority and responsibilities for administering healthcare benefits under employee benefit plans, Defendants are fiduciaries as defined in 29 U.S.C. §1102(21)(A).

144. As the plans' fiduciaries, Defendants are obligated to discharge their duties "solely in the interest of the participants and beneficiaries" and exclusively for the purpose of providing and administering benefits to plan participants and beneficiaries. 29 U.S.C. §§ 1104(a)(1) and 1104(a)(1)(A)(I).

145. In carrying out these fiduciary duties, Defendants are obligated to exercise ordinary care and must seek to administer plan benefits in strict accordance with the terms of the underlying plan documents. 29 U.S.C. §§ 1104(a)(1)(B) and 1104(a)(1)(D).

146. By failing to provide either in-network lactation service providers within a reasonable distance of the plan participants and/or beneficiaries or full coverage of out-of-network lactation service providers for plan participants and/or beneficiaries who do not have

in-network lactation service providers within a reasonable distance, Defendants have breached their fiduciary duty to discharge their duties “solely in the interest of the participants and beneficiaries,” and exclusively for the purpose of providing and administering benefits to plan participants and beneficiaries, exercise ordinary care, and/or administer the plans’ benefits in strict accordance with the terms of the underlying plan documents.

## **COUNT II**

### **Violation of the Patient Protection and Affordable Care Act through Incorporation by Reference in HSCS Plan Documents Against Defendants (On Behalf of the ACA Class)**

147. Plaintiffs Magierski and Adams incorporate by reference each of the preceding paragraphs as if fully set forth herein.

148. Plaintiffs Magierski’s and Adams’ and the ACA Class members’ plan documents describe the plan’s terms and conditions related to the operation and administration of the plans.

149. The plan documents incorporate by reference the provisions of the ACA, including the women’s preventive care provisions set forth in 42 U.S.C. § 300gg-13(a)(4).

150. Accordingly, as plan participants, Plaintiffs Magierski and Adams have the right to seek to enforce the provisions of the ACA, and in particular, as alleged herein, the provisions of the ACA requiring the provision of Comprehensive Lactation Benefits as a no cost women’s preventive service.

151. As a result of Defendants’ failure to provide Comprehensive Lactation Benefits to Plaintiffs and the members of the ACA Class, Plaintiffs and the members of the ACA Class have sustained monetary damages and, if Defendants’ conduct is not stopped, continue to be harmed by Defendants’ misconduct.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs, individually, and on behalf of the members of the Classes, pray for relief as follows as applicable for the particular cause of action:

A. An order certifying this action to proceed on behalf of the Classes, and appointing Plaintiffs and their counsel to represent the Classes;

B. An order finding that Defendants violated their fiduciary duties to the members of the Classes and awarding Plaintiffs and members of the Classes such relief as the Court deems proper;

C. An order finding that Defendants violated the preventive services provisions of the ACA, and awarding Plaintiffs and members of the Classes such relief as the Court deems proper;

D. Declaratory and injunctive relief as necessary and appropriate, including enjoining Defendants from further violating the duties, responsibilities, and obligations imposed on it by the ACA and ERISA with respect to Comprehensive Lactation Benefits;

E. An order awarding, declaring or otherwise providing Plaintiffs and members of the Lactation Services Class all relief under ERISA, that the Court deems proper and such appropriate equitable relief as the Court may order, including damages, an accounting, equitable surcharge, disgorgement of profits, equitable lien, constructive trust, or other remedy;

F. An order awarding Plaintiffs and the members of the Classes other appropriate equitable and injunctive relief to the extent permitted by the above claims;

G. An order awarding Plaintiffs' counsel attorneys' fees, litigation expenses, expert witness fees and other costs pursuant to ERISA § 502(g)(1), 29 U.S.C. 1132(g)(1), and/or the common fund doctrine; and



H. Such other and further relief as may be just and proper.

**JURY DEMAND**

Plaintiffs demand a trial by jury for all claims asserted in this Complaint so triable.

Dated: January 10, 2018

**CHIMICLES & TIKELLIS LLP**

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***Attorneys for Plaintiffs and the proposed Classes***

**CERTIFICATE OF SERVICE**

I, Kimberly M. Donaldson Smith, hereby certify that on January 10, 2018, I electronically filed a true and correct copy of the foregoing SECOND AMENDED CLASS ACTION COMPLAINT with the Clerk of the Court using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

/s/ Kimberly M. Donaldson Smith

Kimberly M. Donaldson Smith