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

HEALTH CARE SERVICE CORPORATION'S
REPLY IN SUPPORT OF ITS NOTICE OF SUPPLEMENTAL AUTHORITY

Plaintiffs' response to HCSC's Notice of Supplemental Authority demonstrates why this Court should follow the *Condry* court's ruling and deny class certification. (*See* Dkt. 132.)

First, HCSC's written policy mirrors the ACA in stating explicitly that members are covered so long as they utilize a provider in the plan's network. (*See* Dkt. 95 at 7 (HCSC's Clinical Payment and Coding Policy for Preventive Services stating that "[t]here is no copay, deductible or coinsurance . . . as long as the member utilizes a provider in the plan's network.").) As the *Condry* court recognized, the rule that in-network services are presumptively covered, but that out-of-network services are not necessarily so, simply states "the default rule under the Affordable Care Act." (Condry Class Cert. Hrg. Tr. at 6, attached here as Exhibit A at 6:14-17; *see also id.* at 6:11-13 (United's policy language stating that "[o]ut-of-network preventive care services are not part of the [Affordable Care Act] requirement").)

In rejecting plaintiffs' argument that a plan's statement regarding the presumptive limitation of cost-share-free coverage to in-network claims constitutes a "uniform policy" that

would warrant class certification, the *Condry* court explained that such language cannot eliminate the need for individual inquiry in cases involving out-of-network services. (*Id.* at 88:3-6 ("really where the rubber hits the road is what happened with these claims").) Specifically, the *Condry* court observed that United's claims data demonstrated that United fully paid 12% of out-of-network claims, and that this data undermined the plaintiffs' argument that its purported policy had been applied uniformly to the out-of-network class. (Dkt. 131-1 (*Condry* Order Denying Class Certification) at 5.) The court questioned how United could have fully paid 12% of out-of-network claims if the "uniform policy was to deny out-of-network claims without regard to the availability of in-network services . . . ." (*Id.*) Similarly, here, HCSC's claims data reflects that 75% of members received cost-share-free coverage, including for out-of-network claims, demonstrating that its policy was not uniformly applied to deny coverage to members who obtained out-of-network services, and that individualized inquiries would be required to determine why HCSC denied any given out-of-network claim or imposed a cost-share.[1]

Notably, Plaintiffs here purport to include in the putative classes members who received lactation services from in-network providers – a litigation tactic that the *Condry* court rejected in its first class certification order because the tactic only compounds the number of individualized inquiries required to resolve this case on a class-wide basis. Although the *Condry* plaintiffs then

[1] In what amounts to a supplemental brief that goes far beyond merely responding to the new *Condry* authority, Plaintiffs cite manufacturing defect cases in support of their argument. (Dkt. 132 at 2.) Those cases simply do not apply here. In those cases, the plaintiffs alleged the existence of a defect in all of the products at issue, which uniformly injured all of the putative class members under the applicable substantive law, regardless of whether those defects had manifested on an individual level or not. (*See id.* at 2-3 (citing *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168 (9th Cir. 2010) and *Pella Corp. v. Saltzman*, 606 F.3d 391 (7th Cir. 2010).) Here, Plaintiffs have not identified any "defect" in HCSC's coverage for lactation support and counseling service that would uniformly injure all class members, particularly given that in-network claims are included in the putative class and given that the underlying substantive law (ACA) requires, by its very terms, an individualized examination of each class member's circumstances.

dropped in-network claimants from their proposed class, Plaintiffs in this case continue to include this *obviously* non-certifiable group in their proposed class here.

Second, Plaintiffs fail to meaningfully distinguish the *Condry* court's other findings, offering only their own disappointment at the *Condry* court's order. For example, Plaintiffs assert that they can represent putative class members who never submitted a claim to HCSC for reimbursement because such "claims arise from the same practice and course of conduct, and are grounded in the same legal theory" as the named Plaintiffs' claims. (Dkt. 132 at 3.) Plaintiffs offer no support for this bald statement and do not explain why this Court should accept that argument when the *Condry* court expressly rejected it. The *Condry* court found that it "makes no sense" to include such class members because the "purpose of class certification is to obtain reprocessing of those claims." (Dkt. 131-1 (*Condry* Order Denying Class Certification) at 4.) The *Condry* court further noted that the questions facing those who had never submitted claims were fundamentally different than those facing members who – like all of the Plaintiffs here – submitted claims for reimbursement, raising typicality and adequacy issues. (*Id.*)

Similarly, Plaintiffs fail to grapple with the *Condry* court's finding that none of the named plaintiffs in that case, nor the proposed intervenor, had standing to bring claims for injunctive relief. In the instant case, Plaintiffs apparently concede that Briscoe and Adams lack standing to seek injunctive relief. With respect to Plaintiff Magierski – the only named plaintiff who is currently a member of an HCSC-related plan – Plaintiffs contend that she refrained from seeking lactation services at some point in the past, purportedly because of her negative experience with HCSC. (*See* Dkt. 132 at 4.) However, Plaintiffs do not offer any evidence that Magierski plans to seek such services in the future. (*Id.*) As the *Condry* court explained, Supreme Court precedent requires Plaintiffs to show a likelihood of future, not past, injury to establish

standing for purposes of injunctive relief. (*See* Dkt. 131-2 (*Condry* Order Denying Motion to Intervene) at 1-2.) Plaintiffs' failure to do so is another independent reason why this Court should deny class certification.

For the foregoing reasons and those set forth in HCSC's Notice of Supplemental Authority, HCSC respectfully requests this Court take the *Condry* Order into account in deciding Plaintiffs' motion for class certification and grant such other relief as the Court deems just and proper.

Dated: January 7, 2020

Respectfully submitted,

By: */s/ Rebecca R. Hanson*

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CERTIFICATE OF SERVICE

I, Rebecca R. Hanson, an attorney, hereby certify that on January 7, 2020, I caused a true and correct copy of the foregoing document to be filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all counsel of record.

/s/ Rebecca R. Hanson