No. 19-1705

In the United States Court of Appeals
for the Eighth Circuit

JILLIAN YORK and JODY BAILEY on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

WELLMARK, INC. d/b/a WELLMARK BLUE CROSS AND BLUE SHIELD OF IOWA, and WELLMARK HEALTH PLAN OF IOWA, INC.

Defendants-Appellees.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

Civ. No. 16-cv-627 (RGE/CFB),
Hon. Rebecca Goodgame Ebinger

APPELLANT'S REPLY BRIEF

Nicholas E. Chimicles
Kimberly Donaldson-Smith
Stephanie E. Saunders
CHIMICLES SCHWARTZ KRINER & DONALDSON-SMITH LLP
361 W. Lancaster Avenue
Haverford, PA 19041
(610) 642-8500

J. Barton Goplerud
Brandon McCaull Bohlman
SHINDLER, ANDERSON, GOPLERUD & WEESE P.C.
5015 Grand Ridge Drive, Suite 100
West Des Moines, IA 50265
(515) 223-4567

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I. INTRODUCTION

The District Court erred in dismissing claims in the Action and ultimately in granting Summary Judgment to Wellmark based on a purported plain text reading of the ACA[1] and implementing regulations, and on the record before the District Court.

The District Court's holdings do not accomplish a "plain text reading" of the ACA. The ACA expressly requires "coverage": plans "must provide coverage for all of the following items and services, and may not impose any cost sharing requirements…" (42 U.S.C. § 300gg-13, Appellant Br. at 8-10). The express, enumerated purposes and goals of the ACA's expanded coverage for preventive services, including comprehensive breastfeeding / lactation support and counseling ("CLS") (JA1448-49, JA00003; JA00473; Appellant Br. at 10-11) are: (i) so that "access and utilization of these services [would] increase" (JA01289 (75 FR 41726 at 41730, Table 1)); (ii) to address "underutilization of preventive services"; (JA01290 (75 FR 41726 at 41731)); JA00027 at ¶59) and (iii) "eliminate cost-sharing requirements, thereby removing a barrier that could otherwise lead an individual to not obtain such services." (*Id.*). Relatedly, the ACA expressly recognized that insurers were only relieved of their financial responsibility to cover out-of-network preventive services if the insurer "has a network of providers" (29

[1] The abbreviations herein shall have the same meanings as those used in Appellant's opening Brief.

C.F.R. § 2590.715-2713(a)(3)(i)-(ii)). This was presumably an obvious, but still expressly stated directive, to ensure that insurers could not circumvent the ACA's preventive service coverage mandate by refusing to establish adequate networks of providers for the enumerated preventive services.

Yet, Wellmark's conduct and litigation position, as adopted by the District Court in the Motion to Dismiss Order, that Wellmark did not have to identify by name network CLS providers to effectuate coverage, renders illusory and meaningless Wellmark's coverage for CLS as a preventive service. It defies the immutable purposes and functions of (i) health insurance coverage generally, and (ii) the ACA's preventive services coverage mandate specifically. The District Court erred in dismissing Plaintiffs' information and disclosures claims on Defendants' Motion to Dismiss.

Further, Wellmark admitted that CLS was to be provided by a certified lactation counselor and expressly stated that it was not expanding its networks to include lactation consultants as an eligible provider type (*see* Appellant Br. at 12-13). Wellmark misstates the circumstances of each of Plaintiff's experiences in trying to obtain information about in-network lactation providers from Wellmark (*id.* at 16-17), an effort to try to distract from the obvious failure to provide the mandated coverage. Before the District Court, Wellmark made after-the-fact, hindsight-based arguments, reiterated here, that ignore such key facts and the ACA

and implementing regulations. Wellmark points to the existence of **one** network hospital-based provider purportedly "available" to the two Plaintiffs (*see, e.g.,* Appellees Br. at i, 2), but that provider was not "available" (*see* Appellant Br. at 37-42). Whether Plaintiffs' arguments are termed information failures, administrative barriers or otherwise, having made the determination to not expand its network and not informing insureds of post-discharge lactation consultants (*id.* at 16-17, 31-34), Wellmark cannot be held to have provided the ACA mandated coverage. It was not permitted to deny coverage for out-of-network CLS claims or impose cost-sharing on such claims. The District Court erred in reaching a contrary conclusion and granting Wellmark's motion for summary judgment.

Additionally, the District Court incorrectly held that Appellant Bailey failed to exhaust her claim under ERISA, ignoring the large swath of apposite Circuit Court cases finding that statutory exhaustion is not a requirement where, as here, plaintiffs seek to enforce statutory ERISA rights rather than contractual rights created by the terms of a benefit plan.

Accordingly, the decisions of the District Court should be reversed.

II. REPLY ARGUMENT

A. The District Court Erred in Dismissing Plaintiffs' Claims by Misapplying the ACA's Information and Disclosure Requirements

Plaintiffs did not fail to address the ACA's text and implementing regulations in contesting the District Court's dismissal of their claims. To the contrary, Plaintiffs explain in great detail how the District Court erred in applying an unsupported, implausible interpretation of the ACA's coverage mandate as read against the Complaint's allegations, the ACA, and Wellmark's contractual duties under ERISA and plan documents.

i. Wellmark's Conduct Violates the ACA's Coverage Mandate

Wellmark argues at length that the statutory terms of the ACA should be interpreted in accordance with their ordinary meaning, stressing that the terms of the statute are unambiguous. (Appellee Br. at 30-33). Plaintiffs have not argued that the statutory text of the ACA is ambiguous. Plaintiffs do not encourage a reading of the ACA that is inconsistent with the plain meaning of the language in the statute or the supporting HRSA Guidelines. To the contrary, Plaintiffs criticize the District Court's and Wellmark's failure to give meaning to the term "coverage" by holding that the ACA only requires insurers to "make available comprehensive lactation benefits without cost sharing" but does not require "procedural requirements … to ensure easy access to those benefits, even if the effect would

ultimately further the law's apparent objective." (JA448-449). The District Court's conclusion, then, begs the question: ***how can CLS benefits be covered, or even "available", if insureds cannot identify and access them as intended by the ACA*?**

Wellmark erroneously argues that the District Court was correct in ignoring the statutory purpose behind the ACA in interpreting its plain meaning (Appellee Br. at 37-41). But the "plain meaning" or "plain language" rule of statutory interpretation "requires examining the text of the statute as a whole by considering its context, object, and policy." *Harmon Indus. v. Browner*, 191 F.3d 894, 899 (8th Cir. 1999) (internal quotations omitted); *Medafor, Inc. v. CryoLife, Inc.*, No. 11-cv-1920, 2012 U.S. Dist. LEXIS 44947, at *7 (D. Minn. Mar. 30, 2012)(recognizing that "[a]s with any question of statutory interpretation, the central mission is to uncover Congress' intent" and "considering the statute's text, legislative history, and purpose" in interpreting the statute). The District Court had a "judicial responsibility to find that interpretation which can most fairly be said to be embedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested." *NLRB v. Lion Oil Co.*, 352 U.S. 282, 297 (1957) (Frankfurter, J., concurring in part). The District Court's interpretation flies in the face of Congressional intent in enacting the ACA's preventive health care mandate to ensure that Americans had access to and coverage for CLS.

To be sure, Plaintiffs are not trying to "overcome the force of the plain text" nor are they attempting to add duties on the part of Wellmark beyond those proscribed by the ACA. (Appellee Br. at 31). Rather, Plaintiffs rely on the text of the ACA (*see* Appellant Br. at 8-9). In addition, the HRSA Guidelines confirm that, particularly apt in the context of the ACA's preventive services mandate, coverage is intended to provide women with *access to* comprehensive lactation support and counseling provided by a trained provider during pregnancy and/or in the postpartum period. (JA1448-1450; JA1438-1443). *Grabein v. 1-800-Flowers.com, Inc*, No. 07-cv-22235, 2008 U.S. Dist. LEXIS 11757, at *6 (S.D. Fla. 2008) (the "plain-meaning rule should not be applied to produce a result which is actually inconsistent with the policies underlying the statute") (citation omitted). Plaintiffs' Benefit Booklets issued by Wellmark even confirm reliance on the HRSA Health Plan Guidelines as setting forth the requirements about women's preventive services under the ACA. (JA00278).

Of course, the ACA need not expressly forbid Wellmark from imposing "administrative barriers" on insureds in obtaining CLS or prohibit Wellmark from issuing "misleading and wrong guidance" because the plain text of the statute, as confirmed by the HRSA Guidelines, makes clear insurers' duties under the ACA to provide coverage and to ensure access to CLS. *See Common Ground Healthcare Coop. v. United States,* 142 Fed. Cl. 38, 47 (2019) ("Congress's failure to include

any appropriating language in the Affordable Care Act does not reflect congressional intent to preclude liability for cost-sharing reduction payments."). Also, the term "Access," which by definition constitutes an "ability to obtain or make use of something" ("*Access," Merriam-Webster's collegiate dictionary* (2019), available at: https://www.merriam-webster.com/dictionary/access), is not being "read" into the plain language of the statute. It is synonymous with the term "coverage", as well as repeatedly referenced in the implementing regulations specific to the ACA's preventive services (*e.g.* "access and utilization", and "removing a barrier", JA01289 (75 FR 41726 at 41730, Table 1), and JA01290 (75 FR 41726 at 41731)). As such, Wellmark was statutorily required to ensure that insureds could obtain coverage, which inherently necessitates providing information or removing barriers to obtaining such services and information, to effectuate the intent and purpose of the mandate. The District Court's holding constituted an unsupported interpretation of the ACA and the preventive services coverage requirements imposed on insurers.

The District Court's conclusion that the ACA did not require Wellmark to provide insureds with a list of its in-network providers fails for the same reasons. (Appellee Br. at 46-50). The contention that Wellmark can somehow be compliant with the ACA's preventive coverage mandate, yet not provide its insureds with details as to the identity of which of its providers offer such covered services in-

network flies in the face of logic. (Appellee Br. at 47-49). Under Wellmark's interpretation, as adopted by the District Court, insureds should have to guess which of Wellmark's providers offer CLS, which of those services are covered in-network, and where such providers are located. The ACA cannot reasonably be read to expect insureds to have to engage in such investigative gymnastics to obtain access to comprehensive breastfeeding support and counseling that Congress found too many Americans lacked access to.

To counter Plaintiffs' position, Wellmark turns to the District Court's treatment of a frequently asked question ("FAQ") issued by the Departments of Labor, Health and Human Services, and Treasury (Appellee Br. at 34-36), with respect to the provision of a list of lactation providers. Again, Wellmark's argument ignores, as did the District Court (JA455), that the FAQ's simple answer was "yes"; the FAQ did not attempt to "rewrite clear statutory terms to suit its own sense of how the statute should operate." Appellee Br. at 35.[2] Curiously, while

[2] Wellmark's reliance on *Gonzales v. Oregon*, 546 U.S. 243, 269, 272 (2006) and *Kai v. Ross*, 336 F.3d 650, 655 (8th Cir. 2003) in support of its position that the FAQs seek to impose a duty "that is inconsistent with the statute's text" is misplaced. Appellee Br. at 32. In *Gonzales*, the deference was tempered by the "Attorney General's lack of expertise in this area and the apparent absence of any consultation with anyone outside the Department of Justice who might aid in a reasoned judgment." 546 U.S. at 269. In *Kai*, a letter from an associate administrator, that was not a regulation of HHS, nor part of generally available published advice, was not given deference. 336 F.3d at 655. Both situations stand in marked contrast to the import and persuasion of the FAQs here.

raising it affirmatively and then contesting the application of the FAQ (a straw man tactic), Wellmark stresses that the FAQ does not require that plans and issuers create a *separate* list, but rather simply indicates that plans and issuers should provide a list of all in-network providers, and include in the list any providers who offer lactation counseling. (Appellee Br. at 36). Wellmark's interpretation of the FAQ as only requiring network lists to include all providers untethered to the provision of any service is contrary to the ACA's coverage mandate. In fact, other than the after-the-fact identification of the UIHC lactation consultants, Wellmark has never identified *by name* its network providers who supposedly provide comprehensive breastfeeding support and counseling. (JA00433; JA01181; JA1217; Appellant Br. at 16-17). Indeed, Wellmark's customer service representatives were tellingly silent as to which Wellmark providers offer CLS in-network.[3] Wellmark rests its compliance with the ACA coverage mandate on speculation as to whether unknown, unidentified providers are network CLS providers.

Finally, contrary to Wellmark's position (Appellee Br. at 34-35), even if the agencies' interpretation lacks the force of law, "courts may afford some deference

[3] Wellmark's assertion that Plaintiff failed to address the court's analysis of the ACA text and its implementing regulations or its reasoning for finding the FAQ to be unpersuasive are belied by Wellmark's own arguments countering Plaintiffs' contentions in support of their position that the District Court erred in reaching its conclusion. Appellee Br. at 37. Any arguments concerning waiver are thus unfounded and must be rejected.

to a non-binding agency interpretation of its guiding statute to the extent the interpretation has the 'power to persuade.'" *Pharm. Research & Mfrs. of Am. v. United States HHS*, 43 F. Supp. 3d 28, 36-37 (D.D.C. 2014) (citing *Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1944) ("We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."). Courts may appropriately consider agency FAQs when engaged in statutory interpretation. *Morning Star Packing Co. v. S.K. Foods, L.P.*, No. 2:09-cv-00208, 2015 U.S. Dist. LEXIS 80034, at *19-20 (E.D. Cal. June 18, 2015) (citing *Ellenberg v. New Mexico Military Inst.*, 572 F.3d 815, 822 (10th Cir. 2009) (noting Department of Education FAQ supports court's reading of the regulation defining "qualified handicapped person" for purposes of eligibility under Section 504 of the Rehabilitation Act); *Peterson v. Islamic Republic of Iran*, No. 10 4518, 2013 U.S. Dist. LEXIS 40470, 2013 WL 1155576, at *9 (S.D.N.Y. Mar. 13, 2013) (referencing Treasury Department FAQ in determining requirements of Executive Order issued subject to International Emergency Economic Powers Act), *aff'd*, 758 F.3d 185 (2d Cir. 2014)). Even as persuasive authority, the FAQ confirms the necessity of either identifying in-network

providers of CLS in order to provide coverage and access to such covered services, or, covering out-of-network providers without cost-sharing.

Wellmark's legal versus factual allegation dichotomy tries to distort Plaintiffs' position. (Appellee Br. at 37-40). Plaintiffs' primary contentions are that the District Court ignored or did not account for the factual allegations in Plaintiffs' complaint about the ACA and Wellmark's conduct, which the District Court must accept as true on a motion to dismiss, in reaching its legal conclusions on the statutory interpretation. Plaintiffs do not advocate adopting a position that is contrary to the plain terms of the ACA's CLS mandate. Plaintiffs' recitation of the purpose and motivation in drafting the ACA confirms that the plain language of the ACA means what the HRSA Guidelines say it means: ***access to and coverage for preventive health services.***

Wellmark contends that the District Court correctly held that "[t]he text of the ACA requires insurers ***make available*** comprehensive lactation benefits without cost sharing" but does not require that insures "ensure ***easy access*** to those benefits." Appellee Br. at 41 (citing JA448-449) (emphasis added). But what Wellmark and the District Court fail to realize is the illogic of their proposed interpretation of the ACA: merely making benefits ***available*** to insureds does not give full effect to the express coverage requirement and the access mandate. Wellmark and the District Court's contrary reading is antithetical to the purpose of

enacting the preventive service mandate in the first place and defies common sense. *Ibrahim v. Comm'r*, 788 F.3d 834, 837 (8th Cir. 2015) ("Common sense should play a part in all court decisions, including those involving the construction of [ ] statutes."). Under Wellmark's interpretation of the ACA, women should not be expected to rely on their own insurance companies to supply them with information about the identity of the in-network providers from whom they would prefer to access no-cost, covered lactation services. Rather, Wellmark would instead place the onus on these new mothers, such as Plaintiffs, to search for, investigate, and inquire from a whole host of in-network providers about covered lactation services independently or be forced to shoulder the burden of the cost of the services, including cost-sharing, for being forced to go out-of-network. Wellmark's own customer service representatives could not even confirm whether Wellmark had *any* lactation consultants in-network, let alone where Plaintiff York—or any insured—could access such information. (Appellant Br. at 16-17). Wellmark's narrow and unsupported interpretation of the ACA as adopted by the District Court cannot be squared with the plain language of the ACA or Congressional intent in effectuating the preventive mandate and must be overturned.

ii. ERISA and Plan Documents Mandate Coverage Consistent with the ACA

Further, aside from and in addition to the ACA, Wellmark's plan documents specifically include and contractually provide for coverage of CLS, a requirement that Wellmark violated by failing to adhere to ERISA and plan documents' coverage requirements. Wellmark contends that the plan documents track the ACA's requirements. (Appellee Br. at 42). Wellmark's health plans and plan documents set forth, in substantially the same manner as the HRSA Guidelines, that each health plan is supposed to provide preventive care benefits for CLS. As Wellmark admits, the Coverage Manual states that the plan covers "[p]reventive care … provided for in guidelines supported by the HRSA [guidelines referenced in the ACA]." Appellee Br. at 42 (citing JA114). Wellmark's failure to provide for and identify in-network lactation consultants has the direct and immediate consequence of denying women no-cost preventive benefit coverage in contravention of ERISA and plan documents, in the same way that it violates the ACA. Broadly, by Wellmark's policies and conduct, Wellmark's plans erroneously limit coverage for preventive services to in-network providers, contrary to the ACA-mandate.

Further, Plaintiffs are not seeking to impose obligations on Wellmark "over and above" what is required by the ACA (Appellee Br. at 42); Plaintiffs' arguments concerning Wellmark's violation of the ACA apply with equal force to

Wellmark's violation of ERISA and the plan documents, and Wellmark's counter arguments fail for much the same reasons. Wellmark argues that nothing about the statement in Plaintiffs' Benefit Booklets supports the specific information and disclosure requirements that Plaintiffs allege, which is ironic considering Wellmark's citation to the explicit language in the Benefit Booklets stating: "To determine if a provider participates with this medical benefits plan, ask your provider, ***refer to our online provider directory at Wellmark.com***, or ***call the Customer Service number*** on your ID card." Appellee Br. at 43 (quoting JA125, JA218 (emphasis added)). When Plaintiffs attempted to determine if a provider participated with Wellmark's benefits plan in accordance with the Benefits Booklet by, *inter alia*, referring to Wellmark's online provider directory or contacting Customer Service directly, they hit a dead end, unable to locate any information online about in-network providers of CLS and having no more success in communicating with a competent Customer Service representative who could provide accurate information about in-network providers, to the extent any such providers could even be discerned from Wellmark's own systems. *See* JA1371-1378. It is unfathomable how Wellmark can contend that its complete lack of providing any information whatsoever on covered services in any way comports with the plan documents.

Wellmark's footnoted argument concerning ERISA's fiduciary duty of loyalty is equally without merit. Appellee Br. at 44, n. 14. First, Wellmark's waiver argument ignores the allegations in the Complaint (JA36-40), pages of argument in Plaintiffs' opposition to the motion to dismiss (JA284-286) and Plaintiffs' opening appellate brief (Appellant Br., at 33-34) that discuss at length Wellmark's duties under ERISA, including the duty of loyalty. Nevertheless, Plaintiffs adequately pleaded and argued that Wellmark breached its fiduciary duties by failing to act in the best interests of the beneficiaries by such conduct of not providing for and identifying in-network no-cost CLS providers, consistent with their obligations under the ACA and its implementing regulations. (JA00036-40; JA00043-45; JA00284-286; Appellant Br. at 31-34)

B. The District Court Erred in Granting Wellmark's Motion for Summary Judgment Because Wellmark Failed to Provide CLS as Required by the ACA

The District Court reached the erroneous conclusion that Wellmark satisfied its CLS coverage obligations by having ***one*** in-network provider who was purportedly available to provide CLS without cost-sharing, by ignoring record evidence that refuted Wellmark's contention that the UIHC hospital-based lactation consultants, who were not readily identifiable, accessible, or capable of providing a full complement of CLS, sufficed to provide post-partum services as required under the ACA's mandate. (JA01725-1731). The District Court further

gave short shrift to record evidence that Wellmark expressly admitted that it did not expand its networks to include lactation consultants as eligible provider types, which was confirmed and demonstrated by Wellmark's own documents and statements, including its website, customer service representatives and Plaintiffs' own experiences. (JA01727-1730; Appellant Br. at 12-13).

Wellmark's argument that it "decided" to not list lactation consultants as a new, separate provider type because lactation consultants are not licensed providers under Iowa state law (Appellee Br. at 47-48) is not supported by the record, and, in any event, is a red-herring. Wellmark's Gynecology and Maternity Section of Wellmark's Practitioner Guides acknowledges that "[l]actation counseling services should be provided by a certified lactation counselor" (Appellee Br. at 47)[4] and that Wellmark "would not be expanding our networks to include Lactation Consultants." (JA1569). With such policy now being challenged by this Lawsuit as non-compliant, meaningless and illusory, Wellmark now argues that it already did have in-network providers of lactation consultants, including IBCLCs, so therefore it did not need to expand its network further. In either event,

[4] Wellmark's footnoted argument that Plaintiffs' arguments are "fatally undeveloped" is meritless. Appellee Br. at 47. Plaintiffs explicitly cite to their Statement of the Case wherein they laid out their arguments concerning Wellmark's lack of network expansion in cogent detail with supporting authority. *See* Appellant Br. at 12-13.

neither justification suffices to render Wellmark's conduct as constituting ACA-compliant.

The record demonstrates that in no way does UIHC suffice to hold that Wellmark provided ACA-compliant coverage to the Plaintiffs or any insured. (Appellant Br. at 37-42). Wellmark points to Deborah Hubbard, Mary Johnson and Dr. Temitope Awelewa as evidence of Wellmark's available "network of providers" of CLS. However, record evidence demonstrates that, in practice, these lactation professionals were actually not "available" at all.

Ms. Hubbard was unreachable by phone or by appointment and the UIHC clinic was closed when she was not available (JA1309-10, Tr. at 78:23-82:2; 1313-1314, 94:10-99:17; JA1353, Tr. 141:1-11; 1355, 143:10-14; JA1345-46, Tr. 57:11-58:3; 1348-50, 60:6-17, 65:15-19, 79:16-24).[5] Ms. Hubbard even testified that she is not a contracted, in-network provider with Wellmark and did not know whether UIHC was an in-network facility or if UIHC doctors were in-network providers with Wellmark. (JA1215 (citing Tr. 126:25-127:17, 149:20-150:1)). Ms. Johnson, an IBCLC RN in the mother-baby unit at UIHC, instructed Plaintiff York to "seek help elsewhere" when Plaintiff York reached out for assistance when her baby was

[5] The counter-arguments about Ms. Hubbard's ability to conduct phone consults or redirecting patients to the mother-baby unit for "postpartum discharge services" hardly suffices to refute Plaintiffs' claims about Ms. Hubbard's lack of availability. *See* Appellee Br. at 18.

not transferring milk properly, referring her to a pediatric dentist for her son's tongue-tie revision. Following her son's surgery, this provider then referred Plaintiff York to an IBCLC, Jen Pitkin, who could provide the comprehensive lactation consultation that Plaintiff York needed to address her son's latch because the breastfeeding services offered at UIHC did not include breastfeeding support and lactation consultants for mothers and children post-frenectomy.[6] (JA1216, 1331, 1370, 1460; Tr. 61:1-21, 97:23-98:9, 100:2-13). Moreover, Ms. Johnson testified that, like Ms. Hubbard, she was also unaware of her status as a network provider with Wellmark, and she never received a contract from Wellmark or tried to become an in-network provider with Wellmark.[7] (JA1216 (citing Johnson Dep. Tr. at 102:8-15, 117:11-118:22)).

[6] Wellmark contests that the provider who performed the frenectomy referred Ms. Pitkin by name, arguing that "the provider merely provided York with a list of 'Recommendations in the Dubuque, IA and Tri-State are' that included Pitkin's name, among other." Appellee Br. at 14, n. 5. Tellingly absent from Wellmark's argument is that any of the *other* lactation consultants on that list were in-network and thus Plaintiff York could have received such post-frenectomy lactation consulting services without cost-sharing. Further, any suggestion that Plaintiff York could have seen an in-network pediatric **dentist** to address comprehensive breastfeeding issues post-frenectomy is nothing short of absurd.

[7] Wellmark's assertion that Plaintiffs falsified the testimony of Ms. Johnson concerning her provision of CLS is frivolous. Appellee Br. at 50, n. 18. Ms. Johnson's availability—or lack thereof—to see patients in the clinic is self-evident from her testimony, and leaves little room for disagreement that Ms. Johnson rarely, if ever, consults with breastfeeding patients at the clinic. *See* JA1581-1584.

As for Dr. Awelewa, a pediatrician, she testified that she does "not see patients solely for breastfeeding" but rather only provides ancillary breastfeeding support as part of pediatric visits, and the breastfeeding evaluation sometimes "goes outside of [her] time allotment" so she will often refer patients to other people. (JA1334-1335, Tr. 77:321-78:25). Further, Dr. Awelewa's IBCLC certification or lactation training are not even referenced on Wellmark's Provider Finder search, thus there is no way for insureds to know that Dr. Awelewa even has the capability of providing CLS (which she does not do outside the context of routine patient assessments anyway). (JA1336-1337, Tr. 116:12-122:1; JA1339-1343).

Accordingly, Plaintiffs did not choose to go out-of-network to obtain the comprehensive breastfeeding consultation and support they needed: Wellmark could not provide them with the name of other in-network providers. Plaintiff Bailey could either continue to wait indefinitely for a call-back from Ms. Hubbard who may or may not have had availability to see her during the critical time period in which Plaintiff Bailey needed professional services to control her milk supply and feed her baby, or she could go out-of-network and timely get the help she needed. Plaintiff York was forced to go out-of-network because an in-network provider explicitly told her that she could not receive the post-frenectomy lactation consulting necessary to maintain a healthy breastfeeding relationship with her child

post-surgery in-network. (Appellant Br. at 15-18).[8] Wellmark even admits that when Plaintiff York called to inquire whether her preferred lactation consultant was in-network, Wellmark shifted the responsibility back onto Plaintiff York to try to decipher the billing practices of Ms. Pitkin's facility. Appellee Br. at 52.

Erroneously, Wellmark, as did the District Court, downplays the significance of the customer service calls, calling Plaintiffs' interactions with those representatives "irrelevant" to Plaintiffs' claims. *Id.* at 51. But that is only because Wellmark cannot provide any sensible explanation as to why, if such a "network" of lactation consultants exists, as Wellmark claims it does, Wellmark's own customer service representatives do not even know about it.[9]

Wellmark's argument that Plaintiffs did, in fact, receive "postpartum lactation support and counseling" based on the routine care each Plaintiff received while in-patients at the hospital is contrary to the record (Appellant Br. at 14-15)

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[8] Wellmark's attempts to shift onto the hospital the onus of disseminating information concerning the availability of lactation support and counseling services are disingenuous and do not absolve Wellmark of its obligations to ensure that its insureds have ***access to*** comprehensive lactation support and services which, by definition, includes identification of such services ***by Wellmark***. *See* Appellee Br. at 10.

[9] To the extent that Wellmark argues that Plaintiffs are seeking to establish the lack of a network based on the claims of absent class members, Wellmark misstates Plaintiffs' allegations. Appellee Br. at 50. Plaintiffs are not seeking to "avoid summary judgment based on the hypothetical claims of unnamed class members;" (*id.*) Plaintiffs' own experiences support their claims about the lack of in-network providers and are indicative of the treatment of the class as a whole.

and ignores the ACA mandate and HRSA Guidelines that comprehensive lactation services for breastfeeding mothers is to be covered post-partum after discharge from the hospital. (JA1448-49, JA00003; JA00473). Breastfeeding issues arise after discharge from the hospital, as did the Plaintiffs' (Appellant Br. at 15-18; JA00031-34). Obviously, had Plaintiffs secured the breastfeeding support and counsel they needed in the hospital, they would not have needed to seek coverage for CLS services rendered after discharge.

Further, Wellmark's argument that they did not charge Plaintiffs for the services that they received from UIHC (Appellee Br. at 52-53) does not address their denial of CLS claims for post-partum, out-patient or non-hospital facility lactation consultations.

Based on the record and the disputed facts as to the "availability" of the UIHC providers, it was erroneous for the District Court to find that Wellmark's ***one*** in-network provider *sufficed* to satisfy the ACA's mandate of providing ACA-compliant coverage.

C. The District Court Erred in Ruling that Plaintiff Bailey Failed to Satisfy ERISA's Exhaustion Requirement

The District Court mistakenly concluded that Plaintiff Bailey failed to exhaust her claim under ERISA, and thus her claim was barred in federal court.

Bailey did not file her claim with Wellmark before initiating this action. However, where a plaintiff, such as Plaintiff Bailey, seeks to enforce *statutory*

ERISA rights rather than contractual rights created under a benefit plan, exhaustion is not a requirement before filing suit, a position adopted by seven circuit courts. *See e.g. Hitchcock v. Cumberland Univ. 403(b) DC Plan*, 851 F.3d 552 (6th Cir. 2017); *Stevens v. PBGC*, 755 F.3d 959, 965 (D.C. Cir. 2014); *see also* JA1731-32. Wellmark tries to recast Plaintiffs' claims as a mere denial of benefits. But Plaintiffs' allegations go beyond the simple claims adjudication process and are aimed directly at the heart of Wellmark's compliance with and statutory interpretation of the ACA with respect to CLS coverage.

In that regard, the principles espoused in *Galman v. Prudential Ins. Co. of Am.*, 254 F.3d 768, 770 (8th Cir. 2001), which the District Court and Wellmark incorrectly rely on—i.e. giving claims administrators an opportunity to correct errors, promoting consistent treatment of claims, providing a non-adversarial dispute resolution process, decreasing the cost and time of claims resolution, assembling a fact record that will assist the court if judicial review is necessary, and minimizing the likelihood of frivolous lawsuits (JA1732 (quoting *Galman*, 254 F.3d at 770))—are wholly inapplicable because giving Wellmark an opportunity to address the claim will not resolve Plaintiffs' dispute.

For the same reasons, the case law that Wellmark cites as relying on the *Galman* principles in applying the exhaustion requirement is inapposite. *See Lindemann v. Mobil Oil Corp.*, 79 F.3d 647, 649-50 (7th Cir. 1996) (applying

exhaustion for individual statutory claims where plaintiff's claim sought only reinstatement and back pay and thus she had structured her claim "to seek the actual benefits allegedly interfered with, or to seek other remedies such as reinstatement"); *Mason v. Cont'l Group, Inc.*, 763 F.2d 1219, 1227 (11th Cir. 1985) (construing language referred to in the pension plan provisions of a collective bargaining agreement concerning steps and instructions for pursuing a grievance and applying exhaustion requirement for a statutory claim where plaintiffs' first iteration of the complaint *only* stated a cause of action for wrongful termination).

Additionally, the District Court erred in concluding that Plaintiff Bailey's claim was not statutory, but rather was one involving a denial of benefits. This conclusion ignores the crux of the allegations in Plaintiffs' complaint which challenge Wellmark's interpretation and application of the ACA and ERISA in failing to provide comprehensive lactation services as required by the preventive mandate. Plaintiff Bailey's goal is not one of simply seeking a "reimbursement for the amount she was charged for her out-of-network services." Appellee Br. at 58. Plaintiff Bailey seeks equitable relief and a clear pronouncement that Wellmark violated the terms of the ACA and ERISA by misinterpreting and misapplying the federal statutes in denying access to and coverage for a federally-mandated preventive benefit. This is further evidenced by the fact that Plaintiffs seek not

only equitable and compensatory relief for Wellmark's *past* conduct, but also injunctive relief to preclude Wellmark from continuing to employ the same practices going forward.

The fact that Plaintiffs may receive monetary compensation as a remedial component of Wellmark's breach of its obligations under ERISA in no way converts Plaintiffs' claim to a sheer denial of benefits action. As recognized by the Fourth Circuit in *Smith v. Sydnnor*, 184 F.3d 356, 365 (4th Cir. 1999), cited by Wellmark (Appellee Br. at 58), "[u]nlike a claim for benefits under a plan, which implicates the expertise of a plan fiduciary, adjudication of a clam for a violation of an ERISA statutory provision involves the interpretation and application of a federal statute, which is within the expertise of the judiciary." Accordingly, in this instance, "one of the primary justifications for an exhaustion requirement in other contexts, deference to administrative expertise, is simply absent." *Id.* The judicially created exhaustion requirement does not apply to Plaintiff's claims for breach of fiduciary duty as defined in ERISA. *See id.*

Moreover, even if Plaintiff Bailey were required to exhaust her claims, which she was not, this is a quintessential example of when the "narrow" exception to the exhaustion-of-remedies requirement should apply. To date, Wellmark has argued in over 175 pages of briefing and pleadings before both the District Court and this Circuit, as well as oral argument before the District Court, that it did not

violate the ACA and that its coverage was ACA compliant. This is not a matter of an insured-specific issue. Wellmark would have had to violate its own policy to have treated Plaintiff Bailey's claim any differently than Plaintiff York's. The argument that Plaintiff Bailey's failure to file a claim "deprived Wellmark of notice of her concerns and the opportunity to resolve them" (Appellee Br. at 59) rings hollow because Wellmark still has not, to date, argued that it would have interpreted its obligations under the ACA or ERISA differently had Plaintiff Bailey brought her dispute to Wellmark's attention sooner, through an administrative exhaustion procedure or otherwise.[10]

Accordingly, any exhaustion attempts would have been futile and the District Court erred in rejecting Plaintiff Bailey's futility argument and granting summary judgment on her claim.

III. CONCLUSION

For the foregoing reasons, and those set forth in Plaintiffs' opening brief, Plaintiffs respectfully request that this Court reverse the holdings in the District Court's Motion to Dismiss Order on Plaintiffs' information and disclosures claims and reverse the District Court's holding in the Motion for Summary Judgment order in its entirety.

[10] Indeed, Wellmark's treatment in denying Plaintiff York's claim is the proverbial nail in the coffin foreclosing any suggestion that Wellmark would have reached a contrary result with regard to Plaintiff Bailey's appeal for precisely the same out-of-network services.

Dated: August 6, 2019

Respectfully submitted,

By:*/s/ Kimberly Donaldson-Smith*

Nicholas E. Chimicles
Kimberly Donaldson Smith
Stephanie E. Saunders
CHIMICLES SCHWARTZ KRINER & DONALDSON-SMITH LLP
361 W. Lancaster Avenue
Haverford, PA 19041
(610) 642-8500
NEC@Chimicles.com
KMD@Chimicles.com
SES@Chimicles.com

J. Barton Goplerud
Brandon McCaull Bohlman
SHINDLER, ANDERSON, GOPLERUD & WEESE P.C.
5015 Grand Ridge Drive, Suite 100
West Des Moines, IA 50265
(515) 223-4567
goplerud@sagwlaw.com
bohlman@sagwlaw.com

Attorneys for Plaintiffs and the Proposed Class

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CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2019, I electronically filed the foregoing brief and addendum with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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Kimberly M. Donaldson- Smith